NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 80

1 APRIL 1986

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20 MAY 1986

RALEIGH
1987

CITE THIS VOLUME

80 N.C. App.

TABLE OF CONTENTS

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CASES REPORTED WITHOUT PUBLISHED OPINION

GENERAL STATUTES CITED AND CONSTRUED

G.S.	
1-15(a)	Long v. Fink, 482
1-46	Long v. Fink, 482
1-52(5)	Long v. Fink, 482
1-75.4	Park Avenue Partners v. Johnson, 537
1-277	B. F. Goodrich Co. v. Tire King and Smith v. Hill, 129
1-289	Backer v. Gomez, 228
1-292	Backer v. Gomez, 228
1-296	Backer v. Gomez, 228
1-507.7	Council v. Balfour Products Group, 157
1-567.12	Turner v. Nicholson Properties, Inc., 208
1A-1	See Rules of Civil Procedure infra
6-20	Ensley v. Nationwide Mut. Ins. Co., 512
7A-27	Appert v. Appert, 27
8-50.2(a)	State v. Jenkins, 491
8-53	State v. Miller, 425
8C-1	See Rules of Evidence infra
14-27.5	State v. Britt, 147
14-51	State v. Brewer, 195
14-72(b)(1)	State v. Brewer, 195
14-87	State v. Alston, 540
14-120	State v. Forte, 701
14-415.1	State v. Shea, 705
15A-926(b)	State v. Fie, 577
15A-943	State v. McCabe, 556
15A-1232	State v. Taylor, 500
15A-1235	State v. Johnson, 311
15A-1240	State v. Costner, 666
15A-1335	State v. Ransom, 711
15A-1340.4(a)(1)f	State v. Vaught, 486
15A-1340.4(a)(1)j	State v. Vaught, 486
15A-1340.4(a)(1)m	State v. Bryant, 63
15A-1340.4(a)(2)g	State v. David, 327

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

Rule No.	
4(j)(1)a	Bowers v. Billings, 330
12(b)(7)	Mize v. County of Mecklenburg, 279
13(a)	Basinger v. Basinger, 554
13(a) and (b)	E & E Industries, Inc. v. Crown Textiles, Inc., 508
41	Long v. Fink, 482
50(a)	Mobley v. Hill and Darden v. Hill, 79
53	Vick v. Vick, 697
58	Vick v. Vick, 697
60B	Talbert v. Mauney, 477

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

VI Amendment	State v. Miller, 425
XIV Amendment	State v. Miller, 425

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

Art. V, § 5	State v. Rippy, 232

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

Rule No.	
2	Long v. Fink, 482
10(a)	In re Will of King, 471
10(b)(2)	In re Will of King, 471
	Mobley v. Hill and Darden v. Hill, 79
	State v. Taylor, 500
28(a)	State v. Brewington and State v. Norris, 42

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF: THE APPEAL FROM THE ENVIRONMENTAL MANAGEMENT COMMISSION FINAL ORDER GRANTING A CERTIFICATE OF AUTHORITY TO THE ORANGE WATER AND SEWER AUTHORITY PURSUANT TO G.S. SEC. 162A-7

No. 8510SC694

(Filed 1 April 1986)

1. Administrative Law § 8— agency decision supported by substantial evidence—whole record test applicable

The whole record test applies only with respect to section 5 of N.C.G.S. § 150A-51 (1973), that is, whether an agency decision is supported by substantial evidence in view of the entire record as submitted, and it does not apply to the other five sections of the statute.

2. Waters and Watercourses § 4— certification issued for water project—consideration of water quality proper

Though water quality is not one of the factors specifically listed in N.C.G.S. § 162A-7(c) to be considered by the Environmental Management Commission in issuing certification for a water project, it is not only a permissible consideration but also one that is important if not essential to the responsible exercise of the police power, and authority for considering that factor and any other which will produce the maximum beneficial use of water is given by N.C.G.S. § 162A-7(c)(7).

3. Waters and Watercourses § 4— proposed water project—paramount consideration to statewide effect—consideration of local factors not precluded

The fact that the Environmental Management Commission is required to give paramount consideration to the statewide effect of a proposed water project does not preclude consideration by the Commission of local or regional factors.

4. Waters and Watercourses § 4— construction of reservoir—consideration of federal and state water quality standards

In an administrative proceeding for a certificate of authority to acquire certain lands by eminent domain for construction of a reservoir, there was no merit to appellants' contention that the Environmental Management Commission erred because it failed to consider federal and state water quality standards in making its findings but instead merely compared the alternatives, since the Final Environmental Impact Statements prepared by the Army Corps of Engineers and the Division of Environmental Management indicated clearly that the feasible alternatives were thoroughly evaluated in terms of the applicable standards and in accordance with the methods prescribed in applicable regulations.

5. Waters and Watercourses § 4— construction of reservoir—findings as to water quality—statement of evidentiary basis unnecessary

In its decision issuing a certificate of authority to proceed with construction of a water project, the Environmental Management Commission was not required to state the evidentiary basis for its ultimate findings regarding water quality, since N.C.G.S. § 162A-7, which lists the factors the Commission is specifically directed to consider, makes no provision regarding how extensive the findings on any one factor are required to be or what evidence is required to support the findings made with regard to them.

6. Waters and Watercourses § 4— construction of reservoir—water quality findings—sufficiency of evidence

In a proceeding for a certificate of authority to acquire certain lands by eminent domain for construction of a reservoir, water quality findings were amply supported by the evidence where state and federal agencies conducted numerous tests in the course of preparing the Environmental Impact Statement; several university and government sponsored surveys and studies on the quality of water in the drainage areas had been conducted; area water quality had been more or less continuously monitored pursuant to various government programs; and more than 66,000 individual water quality observations had been made of the creek in question and other alternatives since 1966.

7. Administrative Law § 4— ultimate finding based on sound evidentiary foundation

There was no merit to appellants' contention that a particular finding of fact by the Environmental Management Commission was a conclusory finding based on unsupported assumptions, since the challenged finding was actually an ultimate finding based on a sound evidentiary foundation.

8. Waters and Watercourses § 4— proposed reservoir—cost of alternatives—determination proper

In determining the cost of alternatives to respondent's proposed water project, the Environmental Management Commission did not err in including the cost of granular activated carbon treatment to control taste and odor and the level of synthetic organic chemicals, though such treatment was not legally required and was not required to render water from the alternative sources potable, and though such treatment significantly increased the cost of the

alternatives, since public health concerns warranted the inclusion of the cost of the carbon treatment as a component of the total cost of the alternatives.

9. Evidence § 47.1— proposed reservoir—expert testimony—evidentiary basis

In a proceeding for a certificate of authority for construction of a water project, there was no merit to appellants' contention that much of the expert testimony presented by respondent was incompetent because it was speculative and lacked a proper evidentiary foundation, since the experts were not required to base their opinions on facts within their personal knowledge or on evidence in the record before the court.

10. Waters and Watercourses § 4— construction of water project—factors specifically considered before issuance of certificate

N.C.G.S. § 162A-7(c) requires only that the Environmental Management Commission "specifically consider" the listed factors in determining whether a certificate for construction of a water project should be issued, and nothing requires the Commission to make findings regarding each factor. The findings in this case reflected adequate consideration by the Commission of the factors listed in the statute.

11. Waters and Watercourses § 4— construction of reservoir—little detriment to area water users—sufficiency of findings to support conclusion

There was no merit to appellants' contention that findings regarding the closing of state roads and removal of one family from their home did not support the Commission's conclusion that the water project in question would cause little detriment to present or potential beneficial users of water in the area, since the fact that some detriment would result from the project was not inconsistent with the conclusion that the detriment would be minor; the hearing examiner's remarks regarding the Commission's responsibility to consider the State's interests indicated a proper understanding of the Commission's function as well as the policy of N.C.G.S. § 162A-7(c) that the interests of the State be paramount to local concerns; and while some Commission members expressed a desire to issue a resolution to the county commissioners or take other action regarding the inundation of the roads, no request was made for an investigation into this possibility.

APPEAL by petitioners Cane Creek Conservation Authority and Teer Farms, Inc. from *Barnette, Judge*. Judgment entered 25 January 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 6 January 1986.

This is a review of an administrative proceeding in which respondent Orange Water and Sewer Authority (OWASA) seeks a certificate of authority to acquire certain lands by eminent domain for construction of a reservoir. The proceeding was initiated when OWASA filed its petition for the certificate with the Environmental Management Commission (EMC) on 21 December 1977. The circumstances prompting OWASA to take that action

are more fully described in this Court's earlier opinion in the same case. *See In re Appeal from Environmental Management Commission*, 53 N.C. App. 135, 280 S.E. 2d 520 (1981). The Cane Creek Conservation Authority (CCCA) and several other individuals intervened in opposition to the petition and the matter progressed through the administrative channels.

On appeal from a Superior Court judgment upholding the EMC's order granting OWASA's petition, this Court remanded the cause to the EMC with directions that it consider an Environmental Impact Statement (EIS) as required by G.S. 113A-1 through 113A-10. Accordingly, an EIS was prepared by the State Department of Natural Resources and Community Development, Division of Environmental Management. Because the proposed project also would require a federal permit under section 404 of the Clean Water Act, 33 U.S.C. 1344, and EIS was prepared by the U. S. Army Corps of Engineers. A second evidentiary hearing was held on 29 November to 3 December 1982. The EMC adopted the recommendation of the hearing officer and issued a Final Order of Certification on 26 March 1983.

The opponents of the project again petitioned for judicial review. The Superior Court found the EMC's order insufficient to support a judicial review under G.S. 150A-51 and remanded the matter for further proceedings. Accordingly, the EMC ordered a reconsideration of OWASA's petition. No additional evidence was taken but the parties were allowed to submit proposed findings of fact and conclusions of law to the EMC. The hearing officer thereafter prepared a recommended decision and submitted it to the full Commission along with the written objections and exceptions of the parties. The Commission reconsidered OWASA's petition and issued a Final Order of Certification on 24 October 1983.

The opponents of the project again petitioned for judicial review of the EMC's order. After a hearing on 7 September 1984, the Wake County Superior Court found the EMC's final order to be supported by competent material and substantial evidence in view of the whole record as submitted. The order was accordingly affirmed and CCCA and Teer Farms, Inc. appealed.

Corvette & Hassell, by Ted E. Corvette, Jr., for petitioner appellants.

Thomas S. Erwin and Moore, Van Allen, Allen & Thigpen, by Charles D. Case, for respondent appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel C. Oakley, for the Environmental Management Commission.

MARTIN, Judge.

I.

Appellants have appealed from a judgment of the Superior Court upholding the order of the EMC granting a certificate of authority to OWASA to institute eminent domain proceedings to acquire lands along Cane Creek for the purpose of constructing an impoundment reservoir. The scope of judicial review of this administrative proceeding is not in dispute. Since this matter was initiated prior to the effective date of the new Administrative Procedure Act, N.C. Sess. Laws (2d Sess., 1985) c. 746, s. 19, codified at G.S. Chapter 150B, the provisions of the Administrative Procedure Act of 1973 (APA), G.S. Chapter 150A, apply to this case. Section 51 of the APA provides in part 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.

Under the whole record test embodied in subsection (5), agency findings of fact are conclusive if, upon review of the whole record, they are supported by evidence which is competent, material, and substantial. *In re Faulkner*, 38 N.C. App. 222, 247 S.E. 2d 668 (1978). While the reviewing court is required to consider evidence that supports and detracts from the agency ruling, it may not substitute its judgment for the agency's and may not find facts. *Community Savings and Loan v. N. C. Savings & Loan Comm'n*, 43 N.C. App. 493, 259 S.E. 2d 373 (1979); *In re Faulkner, supra.* Substantial evidence is relevant evidence that a reasonable person would consider adequate to support a finding of fact. *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 293 S.E. 2d 171 (1982). *See also Coastal Ready Mix Concrete Co. v. Bd. of Commissioners of the Town of Nags Head*, 299 N.C. 620, 265 S.E. 2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980).

[1] Appellants contend that when the whole record test is applied to each of the six factors listed under G.S. 150A-51, the order of the EMC fails to satisfy all but the third one. Though neither OWASA nor the EMC addresses the point, we note at the outset that appellants' argument is based on an apparent misapprehension of the law. By the very terms of the statute, the whole record test applies only with respect to the fifth listed consideration, whether the agency decision is supported by substantial evidence in view of the entire record as submitted. This interpretation is supported by the opinion of our Supreme Court in *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1980), and by this Court's decision in the earlier appeal in this case. In both cases, the whole record test was stated with specific reference to G.S. 150A-51(5):

> 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. . . . 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*, . . . 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.

Thompson v. Wake County Board of Education, supra, at 410, 233 S.E. 2d at 541 (citations omitted). *See In re EMC, supra,* at 146, 280 S.E. 2d at 527-28.

The other five factors involve different questions entirely. Depending on the facts of a particular case, consideration of these factors can involve scrutiny of the entire record. None of them, however, *requires* an evidentiary review of the same nature as that which the reviewing court is required to apply with respect to subsection (5).

II.

[2] G.S. 162A-7 provides that water authorities seeking to acquire property by eminent domain must receive authorization from "the Board," and sets forth the procedures for doing so. "The Board" as used in the statute originally referred to the Board of Water Commissioners, G.S. 162A-2(2), whose function was succeeded to by the EMC. G.S. Secs. 143-211, 143B-282. G.S. 162A-7(c) provides that the certification may only be issued for projects that are "consistent with the maximum beneficial use of the water resources in the State and shall give paramount consideration to the statewide effect of the proposed project rather than its purely local or regional effect." The statute lists seven factors that the EMC must "specifically consider" in making its determination:

> (1) The necessity of the proposed project;
>
> (2) Whether the proposed project will promote and increase the storage and conservation of water;
>
> (3) The extent of the probable detriment to be caused by the proposed project to the present beneficial use of water in the affected watershed and resulting damages to present beneficial users;

(4) The extent of the probable detriment to be caused by the proposed project to the potential beneficial use of water on the affected watershed;

(5) The feasibility of alternative sources of supply to the petitioning authority and comparative cost thereof;

(6) The extent of the probable detriment to be caused by the use of alternative sources of supply to present and potential beneficial use of water on the watershed or watersheds affected by such alternative sources of supply;

(7) All other factors as will, in the Board's opinion, produce the maximum beneficial use of water for all in all areas of the State affected by the proposed project or alternatives thereto.

G.S. 162A-7(c). Appellants contend that the EMC based its decision on an erroneous interpretation of this statute with the result that the overall goal of maximum beneficial use of the State's water resources was not achieved and the statewide effect of the project was ignored. They argue that the EMC placed too much emphasis on water quality, a consideration not listed in the statute, and failed to consider the listed factors sufficiently to effect the policy of the statute. Appellants rely on this Court's earlier decision in this case for the proposition that the policy of the statute requires the EMC to consider more than the exploitation and development of water resources. Appellants argue that the language of the statute leaves the EMC no choice or discretion as to which factors to consider and that giving due consideration to the interests of the State precludes consideration of such local concerns as water quality. Referring to the EMC's findings of fact dealing with water quality, and specifically to findings 19, 38, and 52, appellants contend that the EMC's decision reflects a disregard for the statutory mandate. We disagree.

To contend, as appellants apparently do, that water quality is of limited or no relevance to EMC decisions regarding sources of proposed water supplies ignores one of the primary purposes of the N. C. Water and Sewer Authorities Act. G.S. 162A-1 through 162A-19. The authorities created under this Act are public instrumentalities charged with the delivery of water and sewer services to the public in a manner consistent with the objectives

of the police power, including the public health and welfare. *See* G.S. 162A-6. Viewed in this context, we think that water quality is not only a permissible consideration for the EMC, but also one that is important if not essential to the responsible exercise of the police power. *See Valevais v. City of New Bern*, 10 N.C. App. 215, 178 S.E. 2d 109 (1970); G.S. 160A-311. *See generally* 29A C.J.S. *Eminent Domain* Sec. 45 (1965 and Supp. 1985). By arguing that the EMC may consider only the factors specifically listed in the statute, appellants advocate a more restrictive reading than the legislature, in our view, intended. The seventh listed factor is a "catch all" provision that allows the EMC to consider "all other factors as will, in the Board's opinion, produce the maximum beneficial use of water" for affected areas of the State. While directing that the EMC "shall specifically consider" the listed factors, the statute contains no language limiting the EMC's consideration to those factors. Clearly, the EMC has some latitude and discretion as to the factors to consider in each situation and the weight to be given them in reaching a decision. The only limitation is that the EMC's consideration of any factor relate to the maximum beneficial use of the State's water resources. When the alternatives proposed involve differences in water quality, then clearly water quality can be one of the "other factors" that may be considered.

[3] As appellants point out, the EMC is required to give "paramount consideration to the statewide effect" of the proposed project. This does not, as appellants contend, preclude consideration by the EMC of local or regional factors. On the contrary, the language of the statute assumes that some consideration will be given to local and regional concerns but requires that the larger interest of the State be of "paramount" concern. Support for this interpretation may be found in Article 2 of Chapter 162A, the Regional Water Supply Planning Act of 1971, G.S. 162A-20 through 162A-25, a companion to Article 1, the Water and Sewer Authorities Act. The preamble of the Act reflects the legislative intent as regards the interaction of local and State interests. The need for regional planning and development of water systems is emphasized as "necessary in order to provide an adequate supply of high quality water to the State's citizens." G.S. 162A-21(3). The obvious purpose of the Act is to incorporate the many small water supply systems in North Carolina into a coordinated regional

and statewide network. It is in this sense that statewide interests are paramount to local concerns. There is nothing in the Act that requires local concerns to be disregarded. *See generally* Fuller, N. C. Dept. of Water Resources Planning Report (1964).

We note finally that findings 19, 38 and 52, which appellants contend are "the heart of the EMC's decision," are only three nonconsecutive findings out of a total of fifty-four. Given the important objective of providing safe drinking water to the State's population, this can hardly be called overemphasis. In light of the principles discussed above, we think that the statutory interpretation urged by appellants is too restrictive and based on erroneous assumptions regarding legislative intent. In our opinion, the fact that the EMC made findings regarding water quality reflects an accurate interpretation of G.S. 162A-7 and is neither offensive to nor inconsistent with the policy of the Act.

III.

By its language, G.S. 162A-7 contemplates the consideration of one or more alternatives to the project for which the certificate of authority is sought. Accordingly, several alternatives to the Cane Creek project were proposed. Among these alternatives were three proposals which involved piping water from three different sections of Jordan Lake, then being developed by the Corps of Engineers, to the OWASA filtration plant; three which involved piping water from Jordan Lake to University Lake; two proposals that called for pumping water from the Haw River at Bynum to University Lake or the OWASA filtration plant; and one that involved increasing the capacity of University Lake. Other proposals, such as purchasing water from Durham, were disregarded as not feasible.

a.

[4] In their second substantive argument, appellants contend that the EMC erred because it failed to consider federal and state water quality standards in making its findings. This contention appears to be in direct conflict with appellants' position in the previous argument that water quality does not enter into the EMC's decision at all. Referring specifically to findings of fact 19 and 20, appellants contend that the EMC's consideration of water quality consisted merely of a comparison of the alternatives and

not an objective evaluation based on the absolute standards contained in state and federal laws and regulations. Appellants argue that the comparison method is misleading and inaccurate and that its use by the EMC constitutes a reversible error of law. In support of this argument, appellants cite us to G.S. 143-214.1, which directs the EMC to develop a system for evaluating and classifying the water resources of the state in a manner that promotes the prudent utilization of them. The primary framework for classification under this statute is water quality and the criteria to be applied are to be drawn up in accordance with federal water quality standards.

As OWASA points out, however, appellants have completely ignored the North Carolina Drinking Water Act, G.S. 130A-311 through 130A-327, and its predecessor, G.S. 130-166.39 through 130-166.61, the stated purpose of which is "to regulate water systems within the State which supply drinking water to the public that may affect the public health." G.S. 130A-312. The Drinking Water Act directs the State Department of Human Resources, G.S. 130A-2(2), to "examine all waters and their sources and surroundings which are used as, or *proposed to be used as*, sources of public water supply." G.S. 130A-316 (emphasis added). With this in mind, the Department of Human Resources is directed to establish minimum standards for contaminants in drinking water and the treatment available for reducing the level of the contaminants. G.S. 130A-315. The law also provides for the amendment of the standards "as necessary in accordance with required federal regulations." G.S. 130A-315(c).

The section of the North Carolina Administrative Code that contains the water quality standards is 10D-1600 through 10D-1625. The statutory authority for these regulations is given as the North Carolina Drinking Water Act, *supra*, the Federal Safe Drinking Water Act, Pub. L. 93-523, *codified at* 42 U.S.C. Sec. 300f-300j(9), and 40 CFR 141, the federal regulations promulgated under the Safe Drinking Water Act. A comparative reading of the federal and state statutes and the regulations promulgated under each discloses that the state standards are patterned on the federal model. For instance, the maximum permissible levels of all listed contaminants—inorganic chemicals, organic chemicals, and coliform bacteria—are the same. *Compare* N.C.A.C. 10D-1613-

10D-1616 *with* 40 CFR 141.11-141.14. The language of the State regulations is virtually identical to the federal regulations. *Id.*

The Final Environmental Impact Statements prepared by the Corps of Engineers and the Division of Environmental Management indicate clearly that the feasible alternatives were thoroughly evaluated in terms of the applicable standards and in accordance with the methods prescribed in the regulations. Other than generalized assertions that the EMC failed to consider this information in making its findings, appellants have not attempted to show how the data accumulated and reported in the Environmental Impact Statements is inaccurate or was incorrectly gathered. It is clear that adequate data existed for the EMC to make a comparison based on water quality.

b.

[5] Appellants seem to contend that the EMC's findings as to water quality do not reflect adequate consideration of the available data and amount to an *ad hoc* determination based on unspecified data, speculative and arbitrary criteria, and subjective aesthetic notions of water quality. Appellants' argument presupposes that the EMC is procedurally required in its decision to state the evidentiary basis for its ultimate findings regarding water quality. Otherwise, appellants argue, there is no assurance that the findings are based on competent record evidence or that the EMC considered the proper factors. We disagree.

The factors that the EMC is specifically directed to consider in determining whether to issue a certificate authorizing the exercise of eminent domain power are set forth in G.S. 162A-7, as noted above. While water quality is not one of them, we have already discussed how water quality is clearly an appropriate consideration. The statute makes no provision regarding how extensive the findings on any one factor are required to be or what evidence is required to support the findings made with regard to them. Any requirement that the factors be given equal weight or that specific supporting evidence exist in each situation would be impossible to satisfy and obviously was not intended by the legislature. The EMC's proceedings under G.S. 162A-7 are governed by the APA; the evidentiary standards set forth therein apply equally to any findings made by the agency. G.S. 150A-36, 150A-51. That standard, previously stated in part I, is that any finding

must be supported by substantial, competent, and relevant evidence in view of the entire record as submitted. *Thompson v. Board of Education, supra.* If the EMC in its discretion deems water quality to be of such importance that specific findings are necessary to a sound decision, those findings must be supported accordingly. There is no statutory or other requirement that the EMC's findings regarding water quality or any other factor contain references to prescribe water quality standards, though one could easily have been imposed. Absent a clear legislative mandate, we will not require more than the APA demands. We perceive nothing about the EMC's findings regarding water quality that would render them inadequate as a matter of law to support the conclusions. Appellants' contention in this regard is without merit.

c.

[6] It is difficult to determine from appellants' argument whether they challenge the water quality findings on the grounds that they are not supported by the evidence. Because we deem the resolution of this question important to a thorough and sound judicial review, we will treat the question as having been properly raised. We hold that the findings are amply supported.

In finding 19, the EMC found that Cane Creek was the safest and best water source of the available water sources, that it would provide water of a consistently high quality, and that it presented fewer risks than the Haw River or Jordan Lake alternatives. The data base for this finding is enormous. State and federal agencies conducted numerous tests in the course of preparing the EIS. In addition, several University and government sponsored surveys and studies on the quality of water in the drainage areas have been conducted. *See* U.S. Army Corps of Engineers, *Final Environmental Impact Statement* (1981) 38-44. Area water quality has been more or less continuously monitored pursuant to various government programs. In all, more than 66,000 individual water quality observations have been made of Cane Creek and the other alternatives since 1966. Division of Environmental Management, *Final Cane Creek EIS* (1982) at 55. The amount of material and the volume of raw data on water quality defies adequate summary in this opinion; such a summary would add little to the extensive and thorough analyses contained in the

state and federal EIS. Those analyses set forth clearly the data used, the methods employed, the criteria involved, and the assumptions made. The alternatives were evaluated in the four broad areas of contaminants listed in federal and state regulations: nutrients, synthetic organic chemicals, metals, and bacteria. They were also evaluated in terms of point source discharges and effectiveness of available treatment. Based on these evaluations, the findings of fact show the Cane Creek and University Lake alternatives to be the best sources; University Lake actually had a lower bacterial content than Cane Creek. Of these two, only Cane Creek could provide the desired yield of 10 million gallons per day. While significant improvement was noted in the water quality of Haw River and improvement was anticipated in the quality of Jordan Lake, the existence of numerous pollution discharge point sources and the presence within their drainage areas of significant amounts of urban land, developed areas, and major highways, as well as the difficulty of controlling discharges and monitoring quality in such a large area, were factors perceived as making those sources more susceptible to water quality degradation and thus not as safe. We are satisfied that the Corps of Engineers and the Division of Environmental Management evaluated the alternatives in a scientifically acceptable empirical manner. Any speculation occurred only because it was impossible with the Cane Creek and Jordan Lake alternatives to determine the quality of water in reservoirs that did not yet exist. When assumptions had to be made, they were limited. It is clear from the findings and from the record that careful attention was paid to federal and state water quality standards. Appellants' contention that these standards were ignored is without merit.

d.

[7] As the finder of fact, the EMC is responsible under the APA for deducing the facts from raw evidence. *See* G.S. 150A-36. Within our judiciary it has long been recognized that there are two kinds of fact, evidentiary and ultimate facts. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). An ultimate fact is the result reached by processes of logical reasoning from the evidentiary facts, *Farmers Bank v. Michael T. Brown Distributors, Inc.*, 307 N.C. 342, 298 S.E. 2d 357 (1983), and is often difficult to distinguish from a legal conclusion. *Id.* When a trial court sits as a finder of fact, it is required under G.S. 1A-1,

Rule 52, to find facts and state separately its conclusions of law. Our Supreme Court has held that the court must find only the ultimate facts on which its conclusions are based; a recitation of the evidence is not required. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982); *Farmers Bank v. Michael T. Brown Distributors, Inc., supra.* Though the Rules of Civil Procedure, G.S. 1A-1, Rules 1-84, do not govern proceedings under the APA, the same principles regarding ultimate and evidentiary facts apply regarding the findings the agency is required to make. With this in mind, it is clear that finding of fact 19, which appellants challenge as a conclusory finding based on unsupported assumptions, is actually an ultimate finding based on a sound evidentiary foundation. It contains a reference to other sections of the EMC's decision which include findings on the issue of water quality that are far more detailed and have a specific and identifiable evidentiary basis. Assuming *arguendo* that appellants are correct in their assertion that the EMC was required to state the evidentiary basis for its findings, their contention that the requirement was not satisfied is without merit.

e.

Appellants' final argument under this section appears to be that in making finding 19 the EMC established and applied standards not authorized by the State, amounting essentially to an *ultra vires* act. This argument is inconsistent with the position taken by appellants throughout most of their argument that the EMC either applied the wrong standards or used none at all. We have already noted that water quality was an appropriate consideration for the EMC and determined that the correct standards were applied. Further discussion of these points would be unnecessarily repetitive. For reasons already stated, appellants' contention that the EMC exceeded its authority is without merit.

IV.

[8] Appellants purportedly bring finding of fact No. 20 within their third argument and challenge it on all of the same grounds. That finding involves the costs of the various alternatives and reads as follows:

> 20. The reasonable estimated cost and relative ranking of the Cane Creek Reservoir and its alternatives, based on 1978

cost estimates with built-in costs for GAC (Granular Activated Carbon) filtration added to all alternatives except Cane Creek and University Lake, are set out below. The comparative costs are similar and do not provide a basis for ranking one project over the others.

ESTIMATED COSTS AND RANKINGS OF ALTERNATIVES

Alternative	NET PRESENT WORTH ANALYSIS	
	Relative Ranking	Total Costs
1. Cane Creek to UL	1	$16.3 Million
2. Seg 1 Jordan L to UL	7	$19.8 Million
3. Seg 1 Jordan L to FP	9	$21.3 Million
4. Seg 2 Jordan L to UL	8	$20.1 Million
5. Seg 2 Jordan L to FP	10	$21.6 Million
6. Seg 3 Jordan L to UL	5	$18.9 Million
7. Seg 3 Jordan L to FP	6	$19.1 Million
8. Haw River to UL	2	$17.0 Million
9. Haw River to FP	4	$18.5 Million
10. University L Expansion	3	$17.2 Million

UL = University Lake
FP = OWASA Filter Plant

No specific reference is made to finding of fact No. 20 in appellants' third argument, which appears to be concerned entirely with finding No. 19. Under Rule 28 of the Rules of Appellate Procedure, appellants' argument regarding finding No. 20 may be deemed to be abandoned. We have nevertheless reviewed the entire record and find therein substantial competent evidence to support the finding. Indeed, there is little about the finding that appellants could reasonably take issue with. Elsewhere in their brief, appellants object to the inclusion by the EMC of the $6 million cost of Granular Activated Carbon (GAC) treatment to the total cost of all but the Haw River and Jordan Lake alternatives. Since GAC treatment is not legally required and is not necessary to render the Haw River and Jordan Lake sources potable, appellants argue that its cost should not be reflected in the total cost. We disagree.

GAC treatment helps control algae growth in water with high concentrations of nutrients, a condition that can cause taste and odor problems. Final Cane Creek EIS, *supra*, at 73-75. It also

helps reduce the level of synthetic organic chemicals (SOC). *Id.* At the time of the EMC's decision, GAC treatment was not required. The Environmental Protection Agency had, however, proposed a regulation that would have required GAC treatment for the Haw River and Jordan Lake alternatives. U. S. Army Corps of Engineers, Final Environmental Impact Statement (Cane Creek) (1981) Appendix F-21. Nevertheless, because the levels of nutrients and SOC in the Jordan Lake and Haw River sources were significantly higher than in Cane Creek or University Lake, OWASA stipulated that GAC treatment would be used with these alternatives to control taste and odor and to reduce the SOC level. Final Cane Creek EIS, *supra.*

In view of the public health risks associated with contaminated water, *see* Final Cane Creek EIS, *supra* at 60, OWASA obviously viewed the GAC treatment of water from Jordan Lake or the Haw River as necessary to provide its service population with water as free of contaminants as possible. While not statutorily required, the GAC treatment is clearly a means for OWASA to satisfy its police power responsibility. We agree that public health concerns warranted the inclusion of the cost of GAC treatment as a component of the total cost of the alternatives with which it would be used. Appellants argue that this artificially inflates the cost of those projects and has the effect of making them less desirable alternatives. It is true that Cane Creek is the least expensive alternative only when GAC treatment is added to the Jordan Lake and Haw River alternatives. We note, however, that cost is only one of the factors that the EMC must consider and that whatever cost advantage might be gained by using one of the Jordan Lake or Haw River alternatives would have to be weighed against the consequent degradation of water quality. The cheapest alternative may not be the best one.

Appellants' contention that including the cost of the GAC treatment with some of the alternatives was an error of law is without merit; the cost of GAC treatment was properly included in the cost of the Jordan Lake and Haw River alternatives. Appellants do not otherwise seriously challenge this finding and our review of the record shows clearly that it is supported by competent and substantial evidence. Assuming *arguendo* that the finding was somehow erroneous, appellants have not established how

it was prejudicial to them. Their contention in this regard is without merit.

V.

a.

Appellants next contend that 32 of the EMC's 54 findings of fact are not supported by substantial evidence based on the entire record as submitted. Appellants purport to bring forward under this single argument 81 exceptions and 27 assignments of error. In a related argument, appellants contend that the EMC erred in failing to find certain facts which they contend are supported by the record. This argument is based on a single assignment of error and 43 exceptions. In support of this argument, appellants set out the findings which they contend should have been made followed by a parenthetical reference to the place in the record where supporting evidence appears.

None of the 28 assignments of error or the 124 exceptions encompassed within these two arguments are addressed specifically in appellants' brief. Appellants instead take a broadened approach, arguing that all of the challenged findings are based on evidence which is either incompetent or so weak and speculative as to have no probative value. While the assignments and exceptions are specific enough, appellants' general argument amounts to no more than a broadside request for this Court to wade through the voluminous record to determine whether any of the assignments of error has merit or whether any of the exceptions has a legal basis. This is ineffectual to present a question for our review. Rule 28 of the Rules of Appellate Procedure provides that "[e]xceptions . . . in support of which no reason or argument is stated or authority cited, will be taken as abandoned." This has been interpreted by our Courts to require that a question purportedly raised by an assignment of error or exception be presented *and argued* in the brief in order to obtain appellate review. *Stanley v. Stanley*, 51 N.C. App. 172, 275 S.E. 2d 546, *disc. rev. denied*, 303 N.C. 182, 280 S.E. 2d 454, *app. dismissed*, 454 U.S. 959, 70 L.Ed. 2d 374, 102 S.Ct. 496 (1981); *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). Appellants' nonspecific arguments merely reiterate the assignments of error and are not effective to present them for review by this Court. *See*

State v. McMorris, 290 N.C. 286, 225 S.E. 2d 553 (1976); *State v. Brothers*, 33 N.C. App. 233, 234 S.E. 2d 652, *disc. rev. denied*, 293 N.C. 160, 236 S.E. 2d 704 (1977).

b.

[9] In the interest of a thorough review, we have considered appellants' arguments which raise the single question of whether the EMC's findings are supported by competent and substantial evidence based on the whole record as submitted. We find appellants' arguments to be without merit. Appellants contend that much of the expert testimony presented by OWASA is incompetent because it is speculative and lacks a proper evidentiary foundation. This argument is premised on appellants' assertion that North Carolina law requires an expert to base his opinion on facts within his personal knowledge or on evidence in the record before the court. As authority for their arguments, appellants rely on the 1967 case of *Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967), and Stansbury, N.C. Evidence Sec. 136 (rev. ed. 1973). Those authorities state the rule formerly applicable in this jurisdiction that the facts on which an expert bases his opinion must be recited in a hypothetical question. G.S. 150A-29 provides that contested cases heard under the APA be conducted in accordance with the same rules of evidence that apply in the judicial courts. The requirement that a hypothetical question be used to elicit expert testimony was abolished by G.S. 8-58.12 (effective 1 October 1981), which was the rule in effect when the EMC heard evidence in this case in November and December of 1982. G.S. 8-58.14 provides: "Upon trial, the expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of the underlying facts or data, unless an adverse party requests, [sic] otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or *voir dire*." This rule, which has since been repealed, N.C. Sess. Laws (Regular Sess. 1984) c. 1037, s. 9, is essentially the same as G.S. 8C-1, Rule 705, which superseded it in 1984. 1 Brandis N.C. Evidence Sec. 136 (Supp. 1983). Regarding the new rule, this Court has recently said, "[a]n expert need not testify from personal knowledge as long as the basis for his or her opinion is available in the record or upon demand." *Thompson v. Lenoir Transfer Co.*, 72 N.C. App. 348, 350, 324 S.E. 2d 619, 620-21 (1985). *See generally* Blakey, *Examination of Expert Witnesses in North*

Carolina, 61 N.C. L. Rev. 1 (1982) (discussing the evolution and application of G.S. 8-58.14). Prior disclosure of the facts supporting the opinions of the experts was not required by hypothetical question or otherwise, except upon appellants' demand. Appellants do not argue that their requests for disclosure of these facts were denied nor do they demonstrate how, with respect to any of the assignments of error or related exceptions, the expert testimony on which the challenged findings were based is not founded on facts or data in the record. Though appellants do not specifically raise the question, we note for purposes of clarification that, under the law then in effect, expert testimony was not objectionable because it contained an opinion on the ultimate issue. *State v. Sparks*, 297 N.C. 314, 255 S.E. 2d 373 (1979). *See generally*, 1 Brandis, N.C. Evidence Sec. 126 (1982). We note further that G.S. 150A-29(a) permits the admission of reliable hearsay evidence in certain circumstances which, in our opinion, are present in this case. Appellants' argument that the evidence is not competent is without merit.

c.

Having established that the evidence supporting the challenged findings is competent, we now consider whether it is sufficient to support the findings. The whole record test requires that the reviewing court consider not only evidence which supports the findings made, but that which detracts from them as well. *Boehm v. N.C. Bd. of Podiatry Examiners*, 41 N.C. App. 567, 255 S.E. 2d 328, *cert. denied*, 298 N.C. 294, 259 S.E. 2d 298 (1979). It is with this principle and those discussed in part I of this opinion in mind that we consider the findings that appellants contend should have been made. Based on our review of the record, unaided by appellants' bare assertions, these proposed findings and the evidence on which they were based are for the most part reflected in the findings that actually were made; to the extent that they are not thus reflected, they do not conflict with the findings made. Where the evidence which supports the proposed findings conflicts with the evidence that supports the EMC's findings, it does not detract from the EMC's findings sufficiently, in our opinion, to compel the conclusion that any of the EMC's findings lack adequate support. The EMC's findings are comprehensive and show every indication that all of the relevant, competent, and substantial evidence was considered, as discussed more fully

in part VI. The Superior Court order affirming the EMC's decision indicates clearly that its review of this question was in accordance with the mandate of *In re EMC, supra.*

Aided by OWASA's brief, our own review of the whole record in this case reveals that the challenged findings have adequate support. When the EMC's findings were based on expert opinion, the opinion was supported by information in the record. The opinions were elicited from qualified experts in accordance with the rules of evidence and appellants were allowed sufficient opportunity for cross-examination. Otherwise, the findings are based on data that is beyond serious dispute or evidence that is manifestly credible. Appellants have not attempted to demonstrate, except in the most general sense, how the challenged findings lack sufficient evidentiary support. In the interest of a thorough review, we have considered appellants' vague and nonspecific arguments more thoroughly than either the law requires or their brief warrants. Their arguments are unpersuasive and we find the assignments of error purportedly brought forward thereunder to be totally lacking in merit.

VI.

[10] Appellants next contend the findings are legally insufficient to support the EMC's conclusions of law. They argue essentially that the EMC is required to make findings on each of the seven factors listed under G.S. 162A-7(c) and that those findings must support a conclusion that the proposed project is "consistent with the maximum beneficial use of the water resources of the State giving paramount consideration to the statewide effect of the proposed project rather than its purely local effect." Appellants claim that the findings on three of those factors—

(1) The necessity of the proposed project;

(2) The extent of the probable detriment to be caused by the proposed project to the present beneficial use of water in the affected watershed and resulting damages to present beneficial users;

. . . .

(5) The feasibility of alternative sources of supply to the petitioning authority and the comparative cost thereof;

—are insufficient to support the conclusion that Cane Creek is the best project. We disagree.

G.S. 162A-7(c) requires only that the EMC "specifically consider" the listed factors. Neither the statute nor our earlier decision in this case requires the EMC to make findings regarding each factor. *See In re EMC, supra.* Nevertheless, making those findings is a means of insuring that each factor is specifically considered and we endorse this approach, though we do not require that it be followed. Appellants' argument consists in part of a contention that the findings do not accurately reflect the picture presented by the evidence. We have already considered this contention and have already determined in part V, above, that the findings are adequately supported in the record. Further discussion of this issue would serve no useful purpose.

With regard to whether the findings reflect adequate consideration by the EMC of the factors listed in G.S. 162A-7(c), our review of the record shows affirmatively that they do. We previously discussed, in part II, how water quality, though not a listed factor, had obvious importance and noted, in part III, that it was thoroughly considered by the EMC. In part IV, we noted that the factor of cost received a similarly thorough consideration. With regard to the remaining factors, we hold that the EMC's decision reflects adequate consideration.

Findings 5 through 11 are contained in a section of the decision designated "Necessity of Project." Those findings discuss the history of the water shortage problem in OWASA's service area and note the projected demand. Clearly they support the conclusion that an additional water supply is needed. There is no requirement that the EMC find with regard to this factor that the proposed project is the only one that will meet this need, as appellants seem to argue. Rather, this factor appears to be designed to insure that a need exists and that the proposed project is capable of meeting it. The EMC's findings reflect the correct interpretation of that factor.

Paralleling the statute, the next section of the decision is entitled "Storage and Conservation of Water." It contains 3 findings. In essence, these findings state that the Cane Creek reservoir will have a storage capacity of 3 billion gallons with a safe daily yield of 10 million gallons that would not otherwise be uti-

lized; and further that the Cane Creek reservoir would provide water of a quality that could not be matched by Haw River or Jordan Lake. Clearly, these findings address G.S. 162A-7(c)(2).

Regarding the detriment of the proposed project to present and potential beneficial uses of water in the watershed and danger to users, the EMC made 3 findings to the effect that the relatively insignificant detriment would be offset by the benefits that would result. Appellants argue that these findings give insufficient consideration to the socio-economic impacts on the Cane Creek community, directly disregarding the previous mandate of this Court in *In re EMC, supra.* While not contained in this section, the EMC did make findings regarding the socio-economic impact and included them under the section entitled "Other Factors Producing Maximum Beneficial Use." Those findings note that there will be unavoidable losses of forested land and land presently given over to farming activities; that portions of several farms will be inundated; that one family will have to move; and that the closing of state roads would inconvenience some of the affected people. The EMC further found, consistent with appellants' argument, that the other alternatives have a lesser likelihood of community disruptions or relocations. In our opinion, these findings reflect a consideration of the evidence on these points adequate to satisfy the statute and the mandate of *In re EMC, supra.* This question is discussed further in part VII, *infra.*

The EMC's findings regarding the feasibility of alternatives and the comparative costs were thoroughly discussed in part IV. They require no further discussion here except to reiterate that the cost of GAC treatment was viewed by OWASA as necessary for any of the Haw River or Jordan Lake alternatives to be feasible.

The section of the EMC's decision entitled "Detriment From Use of Alternatives to Present and Potential Beneficial Uses of Water in Their Watershed" contains 8 findings. These findings address primarily the differences in water quality among the feasible alternatives, an issue that was thoroughly discussed in part III above. We note here only that the use of any of the Jordan Lake or Haw River alternatives would have a detrimental effect on the quality of OWASA's raw water supply. Additionally, the EMC found that none of the other alternatives would create

an additional supply of water of the volume of the proposed Cane Creek reservoir.

Under the "Other Factors Contributing to Maximum Beneficial Use" section, which contains 24 findings, the EMC discusses the socio-economic and environmental impact of the Cane Creek reservoir project. On the basis of the record, these were clearly the most thoroughly debated points and were the focus of much attention from all sides. We remanded this case when it was first appealed in part for more thorough consideration of these issues. The essence of the EMC's findings is that there will be some unavoidable impacts associated with the project that would not be associated with the others. The socio-economic displacement was viewed as minor and the project was found to have an effective package for mitigating environmental damage. The overall benefits to be gained from the use of Cane Creek to meet OWASA's water supply needs were found to outweigh the negative impacts of the project.

The final two factual sections of the EMC's decision include two findings, more properly labeled conclusions, (1) that the Cane Creek project in adding 3 billion gallons to the State's water supply would be consistent with the maximum beneficial use of State water resources, and (2) that the proposal was consistent with the State water resources planning policy.

We think that the EMC's findings indicate that all of the factors listed under G.S. 162A-7(c) received the "specific consideration" that the EMC was required to give them. In addition, the EMC gave thorough consideration to factors that were not specifically listed, but were nevertheless of great importance to a sound determination. Appellants' contention is without merit.

VII.

Based on its findings, the EMC made the following substantive conclusions of law:

> 3. The project proposed by OWASA is necessary to address its water needs and will promote the storage and conservation of water by means of its impoundment.
>
> 4. The project proposed by OWASA will cause little detriment to present or potential beneficial uses of water in the

Cane Creek watershed area, and will cause little resulting damage to present beneficial users.

5. There are several alternatives to the project proposed by OWASA which may feasibly be implemented and these projects all have comparable costs.

6. The principal alternative sources of supply—Haw River and Lake Jordan—would not increase the storage and conservation of water, would eliminate the addition of the Cane Creek supply source to the resources of the State, and would subject the OWASA service area to increased pollution potentials and risks from pollution inputs. The University Lake expansion alternative will not meet the water supply needs of OWASA.

7. The project proposed by OWASA will preserve and utilize a well-protected water supply resource, and will promote the beneficial use of those waters, consistent with the water use policies of the State.

8. The project proposed by OWASA is consistent with the maximum beneficial use of the water resources in the State giving paramount consideration to the statewide effects of the project, rather than to its purely local or regional effect.

9. OWASA is entitled to the certificate pursuant to N.C.G.S. 162A-7 authorizing it to institute proceedings in the nature of eminent domain to acquire water, water rights or lands having water rights attached thereto.

[11] With one exception, appellants' argument that these conclusions are not supported by the findings is vague and unsupported by legal authority. That exception is appellants' final argument, in which they contend that the findings regarding the closing of the state roads and resulting inconvenience do not support the EMC's fourth conclusion. They argue essentially that the EMC, or several members of it, misunderstood the EMC's fact finding function and its ability to take steps to mitigate the negative impacts of the project. Appellants support this argument by reference to a discussion which occurred just before voting on the motion to adopt the hearing examiner's recommended decision, as amended. Several EMC members, including the chairman and the hearing

examiner, made remarks indicating their concern over the closing of two state roads that would apparently result from the project. The members discussed among themselves and with the attorneys the steps that the EMC could take to mitigate this damage or to insure further inquiry and appropriate action by the Orange County Commissioners. Appellants contend that these remarks indicate (1) that the EMC misconstrued *In re EMC, supra,* to the end that local socio-economic and environmental impacts were inadequately addressed and (2) that the EMC was misinformed as to its ability to condition issuance of the certificate of authority on further action. We disagree.

As already noted, the record indicates that ample opportunity was allowed for presentation of evidence on these issues and the EMC's findings indicate a thorough consideration of that evidence. That the findings reflect that some detriment, including inundation of two roads and displacement of one family, will result from the project is not inconsistent with the conclusion that that detriment would be relatively minor.

We further think that the hearing examiner's remarks regarding the EMC's responsibility to consider the State's interests, far from being a misapprehension of the law, indicate a proper understanding of the EMC's function as well as the policy of G.S. 162A-7(c) that the interests of the State be "paramount" to local concerns. Finally, while some Commission members expressed a desire to issue a resolution to the county commissioners or take other action regarding the inundation of the roads, no request was made for an investigation into this possibility. The motion before the EMC was unambiguous. Had the individual members' reservations on any point been strong enough, they could have voted against the motion. G.S. 162A-7(c) allowed the EMC to grant a certificate in whole or in part or to deny it altogether. Appellants' contention on this point is without merit.

Appellants contend briefly and without authority that the EMC acted outside of its statutory authority in issuing the certificate and thereby violated the United States and North Carolina Constitutions. This purported argument is merely a reiteration of appellants' similarly phrased assignment of error and does not effectively present the constitutional question for review. N.C. App. R. 28(a); *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.

2d 665 (1970); *Sykes v. Clayton, Comr. of Revenue*, 274 N.C. 398, 163 S.E. 2d 775 (1968). We therefore decline to consider it.

As to the remainder of appellants' argument that the facts do not support the legal conclusions, we find it unpersuasive. Our careful review of the record shows that the EMC's decision parallels G.S. 162A-7(c) in its consideration of relevant factors. We think that the conclusions drawn from the findings were proper and that the EMC's decision is supported by competent, substantial evidence in view of the entire record as submitted. Appellants' contention in this regard is without merit.

The order of the Superior Court affirming the order granting OWASA's request for the certificate of authority and dismissing the appeal of petitioners CCCA and Teer Farms, Inc. is

Affirmed.

Chief Judge HEDRICK and Judge JOHNSON concur.

JENNIFER J. APPERT v. ROBERT A. APPERT

No. 857DC1115

(Filed 1 April 1986)

1. Appeal and Error § 6.2— child support conditioned upon visitation—order immediately appealable

An interlocutory order requiring that child support paid by defendant father be placed in escrow if either of the minor children failed or refused to abide by the visitation privileges allowed defendant affected a substantial right of plaintiff and was thus immediately appealable. N.C.G.S. §§ 1-277 and 7A-27.

2. Divorce and Alimony § 24— child support—no authority to condition upon visitation

Trial judges do not have authority to condition the receipt or payment of child support upon compliance with court-ordered visitation. Therefore, the trial court erred in ordering that child support paid by defendant father be placed in escrow if either of the minor children failed or refused to abide by the visitation privilege allowed defendant.

Appert v. Appert

APPEAL by plaintiff from *Sumner, Judge.* Judgment entered 20 June 1985 in WILSON County District Court. Heard in the Court of Appeals 13 February 1986.

This is an appeal by the plaintiff mother from an order directing that support paid by the defendant father for the parties' children be placed in escrow in the event the minor children fail or refuse except for medical reasons to abide by the visitation privileges allowed defendant. The parties were married in 1967 and separated in December 1982. They are now divorced. Three children were born of the marriage: Amy Elizabeth Appert, born on 31 August 1969; Betsy Lynn Appert, born on 19 November 1971; and Gregory Cameron Appert, born on 10 December 1974. In July 1983, a consent judgment was entered based on a separation agreement and property settlement entered into by the parties. Pursuant to that agreement and the judgment entered thereon, plaintiff was awarded custody of the minor children, defendant was afforded certain visitation rights and defendant was directed to pay as support for the children $2,000 per month with such payments to continue until the youngest child reaches the age of eighteen.

Thereafter several orders were entered concerning defendant's visitation rights. In November 1983, an order was entered on a motion made by defendant to determine his visitation rights and to have plaintiff held in contempt of court for interfering with his visitation privileges. The court found that on several occasions since the consent judgment had been entered, the parties' children had refused to visit with defendant on weekends which he had selected for visitation pursuant to the consent judgment; that plaintiff had done nothing to interfere with defendant's visitation privileges and had in fact actively encouraged the children to visit with their father; and that the children have a strong and loving relationship with their mother which might be damaged if they are forced by her to visit with their father. The court concluded that plaintiff was not in contempt of any court order and that the consent judgment afforded defendant reasonable visitation privileges.

Subsequently, defendant filed another motion to determine his visitation rights. Three orders were entered with respect to that motion in each of which the court set forth specific dates on

which defendant was to have visitation with the children. In September 1984, the matter came again before the court on a motion by defendant to enforce his visitation rights and on a motion by plaintiff to have defendant found in contempt of court for his failure to make payments for the children's medical treatment and tuition. The court denied plaintiff's motion, respecified the visitation rights afforded defendant and struck a provision in the parties' separation agreement whereby each child upon reaching the age of thirteen was given the right to determine whether he or she wanted to visit with defendant.

In April 1985, defendant filed a motion for an order terminating or substantially decreasing his child support obligation on the grounds the $2,000 per month payment was excessive and because he was not getting the full visitation which he had bargained for in agreeing to such amount as child support. Defendant also filed a motion to have his child support payments held in escrow "until the [p]laintiff insures his children to visit with him during his scheduled periods of visitation. . . ."

A hearing was held on defendant's motions and on a motion by plaintiff to have defendant held in contempt for his alleged failure to pay a tuition bill. The court heard testimony from both parties, the three children and other witnesses. By order entered 20 June 1985, the court found as follows in pertinent part:

> 7. That since about February 1985, the Defendant has not had the minor children visit with him, and there has been very little contact or communication between the Defendant and his children; that the Defendant on numerous occasions since that date has attempted to exercise his visitation rights . . ., but the children have failed and refused to visit with their father.
>
> . . .
>
> 10. That the minor children refused to go with their father after he filed the motion to stop support payments now pending in this Court and stated that he was taking them to Court and therefore, they were not going to visit him.
>
> . . .

13. That . . . the children testified that the Plaintiff . . . had encouraged them to visit with their father by telling them that they were free to call him any time they wanted as well as free to see him when they wanted, but that she had not ordered or directed them to do either of these.

. . .

17. The oldest child, Amy Appert, testified that she did not want to have any future relationship with her father. She appeared to be very anxious.

18. The middle child, Betsy Appert, testified that she was an obedient child and that she would visit her father if her mother insisted. . . . She testified she had a good time on the occasions she was with her father.

19. The youngest child, Gregory Appert, testified that he loved his father, and he liked being with his father, and he had never had any problems on the times he has been with his father on visitation.

20. . . . that the visitation afforded the Defendant in the original Separation Agreement and Consent Judgment and as amended by the September 25, 1984, order is fair and reasonable and affords the Defendant visitation . . . that he should have and is in best interest of the minor children.

21. That the Defendant presented evidence to show that he has a very good relationship with his children when they are with him; . . . and that [he] is a very loving and caring father who wants to spend as much time as possible with his minor children.

22. That the Plaintiff . . . testified that she has done everything possible to encourage the minor children to want to be with and visit their father, but the Court finds . . . that the children appear not to want to do anything to displease their mother. . . . Plaintiff has attempted to allow the minor children to decide if they wanted to have a relationship with the father. The Court finds that the attitude of the Plaintiff is harmful and detrimental to the minor children, and that she should take positive steps to encourage and insist that they have a relationship with their father.

23. . . . the Court feels the child support specified in the Consent Judgment is fair and reasonable and should not be reduced . . . . [N]o evidence was presented to show the defendant is in contempt of [c]ourt . . . .

24. That . . . the paramount issue in this action is the welfare of the minor children and to that extent, the minor children must have a good relationship with their father and the father have a good and loving relationship with his children, and that this Court must exercise its power to accomplish this end, and the prior orders in this action have attempted to create this better relationship, but have not accomplished same, and the Court is of the opinion that it must insist that both Plaintiff and Defendant do everything within their power to encourage and insist that the children have a good and loving relationship with both Plaintiff and Defendant and that as to the support payments, the Court finds . . . that the following is in the best interest of the minor children:

(a) The amount . . . that the Defendant is paying for the support of his minor children . . . should not be reduced.

(b) The support payments shall continue as set out in the prior orders, but in the event that the minor children fail or refuse to abide by the visitation privileges allowed the Defendant, then the future payments for the support and maintenance of the minor children will be placed in escrow with the Clerk of Superior Court and will remain there until further orders of the Court.

. . . .

25. That the purpose of the escrow provision as set out above is to advise both Plaintiff and Defendant that the children do not have the option to decide on visitation privileges but that both parties have a duty to actively encourage and insist on the exercising of the visitation privileges between the children and Defendant.

. . .

28. That the Court does find as a fact that the Plaintiff has not made a reasonable effort to improve the relationship

between the Defendant and his minor children, and this has had a direct effect on the childrens' [sic] failure to follow Court orders as to visitation privileges, and due to the above, the Defendant has had difficulty in establishing a parent-child relationship with his children.

. . .

32. That if any of the minor children refuse to allow Defendant to exercise [his] visitation privileges . . ., this will be grounds to escrow the support funds . . . .

The court concluded that defendant was not in contempt of court and denied plaintiff's motion, concluded that the amount of child support being paid by defendant should not be reduced and denied defendant's motion to reduce or terminate such payments and allowed defendant's motion to place the child support payments in escrow subject to the following terms:

a. The support payments shall continue as set out in the prior orders, but in the event that the minor children fail or refuse except for medical reasons to abide by the visitation privileges allowed the Defendant, the next monthly payment for the support and maintenance of the minor children will be placed in the escrow with the Clerk of Superior Court for Wilson County and remain there until further orders of this Court.

b. In the event of an emergency, if the monies are placed in escrow, the Plaintiff may apply to the undersigned Judge for disbursement of all or some of the funds to be used for the benefit of the minor children.

c. In the event the monies are placed in escrow, this process of placing money in escrow shall continue for a period of six months from the date of this order, at which time this Court will have a hearing as to the situation at that time.

The court noted that the references in its order to the "minor children" were meant to include only Betsy and Gregory Appert and not the oldest child, Amy. From the order entered 20 June 1985, plaintiff appealed.

Rose, Jones, Rand & Orcutt, P.A., by Naomi E. Morris, Bobby F. Jones and William R. Rand, for plaintiff-appellant.

Connor, Bunn, Rogerson & Woodard, P.A., by James F. Rogerson and Allen G. Thomas, for defendant-appellee.

WELLS, Judge.

[1] We must first determine whether plaintiff's appeal is premature. N.C. Gen. Stat. §§ 1-277 (1983) and 7A-27 (1981), taken together, provide that no appeal lies to an appellate court from an interlocutory order or ruling of the trial judge unless the ruling or order affects a substantial right claimed in the proceeding. *See Bailey v. Gooding*, 301 N.C. 205, 270 S.E. 2d 431 (1980); *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). It is not disputed that the order in question is interlocutory; therefore, we need only determine whether it affects a substantial right so as to be immediately appealable. As our Supreme Court has recognized on more than one occasion, "the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied." *Waters v. Personnel, Inc., supra; see also Bernick v. Jurden*, 306 N.C. 435, 293 S.E. 2d 405 (1982). "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Bernick, supra.*

The order from which plaintiff has appealed clearly affects the right of the plaintiff to receive support on behalf of the minor children from the defendant on a monthly basis as needed and in the amount which has been found reasonably necessary for the support and maintenance of the children. We conclude that such right is a substantial one and that therefore the order in question is immediately appealable.

[2] The primary issue presented by this appeal is whether a trial judge has authority to condition a minor child's receipt of support paid by the noncustodial parent on compliance with court-ordered visitation allowed the noncustodial parent. By ordering that child support paid by defendant be placed in escrow if either of the minor children fail or refuse to abide by the visitation privileges allowed defendant, the court made the children's receipt of the support conditional upon compliance with the visitation ordered.

Under the 20 June 1985 order, if the children do not comply with the orders granting defendant visitation privileges by visiting with defendant at the times and places directed by the court, defendant's child support payments will be placed in escrow and thereby withheld from plaintiff and the children until such time as the court might decide to distribute it. The obvious purpose of this arrangement is to force the children and the plaintiff to comply with the orders granting defendant visitation rights. We conclude that trial judges in this State do not have authority to condition the receipt or payment of child support upon compliance with court-ordered visitation as done by the trial judge here and that therefore the order appealed from must be vacated to the extent the trial judge purported to exercise such authority.

It is well established that trial judges are vested with wide discretion in determining matters concerning child custody and support. *See, e.g., Griffin v. Griffin,* 237 N.C. 404, 75 S.E. 2d 133 (1953); *Warner v. Latimer,* 68 N.C. App. 170, 314 S.E. 2d 789 (1984); *Evans v. Craddock,* 61 N.C. App. 438, 300 S.E. 2d 908 (1983). The trial judge's discretion, however, can extend no further than the bounds of the authority vested in the trial judge. In proceedings involving the custody and support of a minor child, the trial judge is authorized to determine the party or parties to whom custody of the child shall be awarded, N.C. Gen. Stat. § 50-13.2 (1984), whether and to what extent a noncustodial person shall be allowed visitation privileges, G.S. § 50-13.2 and N.C. Gen. Stat. § 50-13.5 (1984), the amount of support necessary to meet the reasonable needs of the child, N.C. Gen. Stat. § 50-13.4 (1984), the extent to which the father and mother of the child shall be liable for such support, *id.*, whether attorney's fees shall be awarded to a party, N.C. Gen. Stat. § 50-13.6 (1984), whether an order for child custody or support shall be modified or vacated based on a change in circumstances, N.C. Gen. Stat. § 50-13.7 (1984), and certain other related matters. *See generally* N.C. Gen. Stat. §§ 50-13.1 through 50-13.9 (1984). In addition, trial judges have authority to enforce orders concerning child custody and support by the methods set forth in G.S. § 50-13.3 (custody orders) and G.S. § 50-13.4 (support orders).

By the order entered 20 June 1985, the trial judge here did not purport to modify or vacate the prior orders concerning the support or custody of the minor children based on a change in cir-

cumstances; rather, the judge sought to enforce the prior orders as they related to defendant's visitation rights by conditioning the children's receipt of the support paid by defendant on compliance with the visitation orders. The precise issue presented by this appeal has not previously been decided by the courts of this State. In *Laughridge v. Lovejoy*, 234 N.C. 663, 68 S.E. 2d 403 (1951), however, our Supreme Court stated that the general rule at that time seemed to be that:

> [W]here the wife is awarded the custody of the child and the father is given the right to visit it, and the order requires him to make periodic payments for the support of the child, the order for such support will not be construed as being conditioned on the father's right of visitation which he may claim has been denied him.

In so stating, the Court recognized with apparent approval that it was the general rule that the right to receive child support was independent of the noncustodial parent's right to visitation. For this reason, we find the Court's statement significant even though it was not essential to determination of the case.

Defendant cites *Mather v. Mather*, 70 N.C. App. 106, 318 S.E. 2d 548 (1984), as clear authority for the enforcement of visitation rights by the escrow arrangement utilized by the trial judge here. In *Mather*, the plaintiff mother, who had custody of the parties' minor children, allegedly removed the children surreptitiously from this State and concealed their location thereby willfully disobeying a court order which granted the defendant father visitation rights. Pursuant to a motion made by the defendant, an order was issued directing the plaintiff to appear and show cause why she should not be held in contempt of court. When the plaintiff failed to appear at the show cause hearing, the court issued an order for her arrest and relieved the defendant of his duty to make child support payments until a hearing could be held on the show cause order. The plaintiff appealed. This Court held that the plaintiff's surreptitious removal of the children from North Carolina and the effective proscription of the defendant's right to see his children constituted a sufficient change in circumstances to allow the court to temporarily relieve the defendant of his child support obligation as it did.

Mather is clearly distinguishable from the present case and is not controlling. The present case does not involve a temporary reduction of a parent's child support obligation based on a change in circumstances, nor does it involve the surreptitious removal of minor children from this State in alleged violation of a court order. We believe the holding in *Mather* is a limited one and find no basis for expanding that holding beyond the narrow circumstances presented in that case.

Currently, other jurisdictions are split on whether child support and visitation rights are interdependent and may be conditioned upon each other. *See* Annot., 95 A.L.R. 2d 118 (1964 and Later Case Service 1983 and Supp. 1985); Note, *Making Parents Behave: The Conditioning of Child Support and Visitation Rights*, 84 Colum. L. Rev. 1059 (1984). In some jurisdictions it has been held that these rights are interdependent and that courts may reduce, suspend or terminate the noncustodial parent's obligation to pay child support if or while the visitation rights of that parent are being wrongfully denied. *See, e.g., Richardson v. Richardson*, 122 Mich. App. 531, 332 N.W. 2d 524 (1983); *Giacopelli v. Giacopelli*, 82 A.D. 2d 806, 439 N.Y.S. 2d 211 (1981). *See also Cooper v. Cooper*, 59 Ill. App. 3d 457, 375 N.E. 2d 925 (1978); Annot., 95 A.L.R. 2d 118, *supra*; 24 Am. Jur. 2d, *Divorce and Separation* § 1080 (1983). Many of these jurisdictions only allow this if it appears that the welfare of the minor children will not be adversely or seriously affected by the reduction, suspension or termination of the support. *See, e.g., Richardson, supra. See also* Annot., 95 A.L.R. 2d 118, *supra* at § 7. At least two jurisdictions have enacted statutory provisions authorizing the termination or modification of the noncustodial parent's obligation to pay child support in the event visitation rights are denied. *See* Ohio Rev. Code Ann. § 3109.05 (Page Supp. 1984); Or. Rev. Stat. § 107.431 (1985).

In the vast majority of cases addressing whether a noncustodial parent is entitled to any relief from the obligation to pay child support because of the denial of the parent's visitation rights, the visitation rights were being denied or frustrated by the actions of the custodial parent. *See* Annot., 95 A.L.R. 2d 118, *supra*. Those jurisdictions which have allowed trial courts to alter the noncustodial parent's obligation to pay child support because of the denial of the parent's visitation rights or allowed trial courts to otherwise condition the receipt of child support upon

compliance with an order granting visitation rights have generally done so on a ground which reflects the fact that it is the custodial parent that is preventing visitation from taking place. *See, e.g., Giacopelli v. Giacopelli, supra.* Grounds frequently asserted by these courts as a basis for allowing such relief include the following: (1) that the custodial parent should not be allowed to enjoy the benefits of the support order while denying the visitation rights of the other parent, (2) that the obligation to pay child support and the obligation to permit visitation are dependent obligations and (3) that such measure is necessary to coerce the custodial parent's compliance with the visitation order. *Id. See also* Note, 84 Colum. L. Rev. 1059 (1984), *supra,* and the cases cited therein.

In other jurisdictions it has been held improper to suspend, reduce or terminate the obligation to pay child support based on the custodial parent's denial of the visitation rights of the noncustodial parent. *See, e.g., Siegel v. Siegel,* 80 Ill. App. 3d 583, 400 N.E. 2d 6 (1979). *See also* Annot., 95 A.L.R. 2d 118, *supra.* Courts so holding have reasoned that the welfare of the children is paramount and the children should not be deprived of support simply because of the misconduct of the custodial parent. *See, e.g., Siegel v. Siegel, supra.* Similar holdings have been based on the ground that the duty to pay child support is independent of the duty to permit visitation. *See, e.g., People ex rel. Winger v. Young,* 78 Ill. App. 3d 512, 397 N.E. 2d 253 (1979). Courts have noted that the appropriate means for enforcing visitation rights is by contempt proceedings. *See, e.g., Winger v. Young, supra.*

Our research has disclosed only a few cases in which the denial of the visitation rights was due to the refusal of the minor child or children to visit with the noncustodial parent. Courts addressing this situation have also reached contrary results. *See* Annot., 32 A.L.R. 3d 1055 (1970 and Supp. 1985). Some courts have held that a noncustodial parent's obligation to pay child support may be suspended so long as the minor child or children refuse, without justification, to visit the supporting parent. *See, e.g., Snellings v. Snellings,* 272 Ala. 254, 130 So. 2d 363 (1961); *Putnam v. Putnam,* 136 Fla. 220, 186 So. 517 (1939). The suspension of the child support payments was viewed by these courts as a permissible device to compel the children to obey the decree providing for visitation. *See Snellings, supra; Putnam, supra.* In

one case it was held that where the child unjustifiably refused to visit, call, write or even see the noncustodial parent, the child forfeited his right to support from that parent. *Barbara M. v. Harry M.*, 117 Misc. 2d 142, 458 N.Y.S. 2d 136 (1982). In other cases it was held that under the particular facts presented the minor child's refusal to visit or live with the divorced parent did not relieve the parent of his obligation to support the child. *Straver v. Straver*, 26 N.J. Misc. 218, 59 A. 2d 39 (1948); *Yarborough v. Yarborough*, 168 S.C. 46, 166 S.E. 877 (1932), *reversed on other grounds*, 290 U.S. 202, 78 L.Ed. 269, 54 S.Ct. 181 (1933).

In at least two jurisdictions, however, it has been held that a noncustodial parent's obligation to pay child support may not be modified or terminated based on the denial of the parent's visitation rights regardless of whether the denial resulted from the actions of the custodial parent or the minor child. *See Hester v. Hester*, 663 P. 2d 727 (Okla. 1983); *Dooley v. Dooley*, 30 Or. App. 989, 569 P. 2d 627 (1977). In both *Hester* and *Dooley*, the appellate court asserted as grounds for its holding that the welfare of the children is paramount and that the duty of a noncustodial parent to support his or her children is not dependent upon the opportunity of the parent to exercise visitation privileges. As further support for its holding, the court in *Hester* stated:

> Whether the children refuse to see the non-custodial parent, either on their own volition or as a result of the explicit or implicit urging of the custodial parent, there is no justification in subjecting the children to possible hardship because of the interference of the custodial parent. . . . The duties of support and visitation are not interdependent and should be separately enforced.
>
> . . . The custodial parent's misconduct cannot destroy the child's right to support, nor may child support payments be used as a weapon to force a child's visitation with a noncustodial parent. The duty to support one's minor child is a continuing obligation. Entitlement to child support is not contingent upon visitation rights.

We find *Hester* and *Dooley* particularly on point with the present case. In those cases, the denial of the noncustodial parent's visitation rights resulted from the refusal of the children to visit the noncustodial parent; however, it appeared the chil-

dren's refusal may have been due to the influence or conduct of the custodial parent. Similarly, in the present case, the denial of defendant's visitation rights resulted directly from the refusal of the minor children to visit defendant; however, it is clear the trial judge believed the children's refusal resulted at least in part from the influence and conduct of their mother.

Those jurisdictions which have chosen to view child support and visitation rights as interdependent and sanctioned the termination or suspension of child support payments based on the denial of the noncustodial parent's visitation rights have been criticized. *See* Note, 84 Colum. L. Rev. 1059 (1984), *supra.* It has been argued that conditioning the receipt of child support upon compliance with an order providing for visitation fails to take into account adequately the relevant interests at stake, particularly the interest of the child involved; that it may be injurious to the interests of the child and the State; that it may be ineffectual in bringing about compliance; and that there are alternative sanctions available to courts which are more desirable and appropriate to remedy the problem of wrongful denial of visitation rights. *Id.*

In determining which view is most consonant with the law of this State, we find the following well-established law particularly instructive: It has long been the law of this State that the welfare or best interest of the child is the paramount consideration which guides our courts in determining matters concerning the custody of a minor child. *See* 3 Lee, *N.C. Family Law* § 224 (1981). All other factors, including visitation rights of a parent, will be deferred or subordinated to this consideration. *Griffith v. Griffith,* 240 N.C. 271, 81 S.E. 2d 918 (1954); *see also In re Custody of Stancil,* 10 N.C. App. 545, 179 S.E. 2d 844 (1971). Visitation rights should not be permitted to jeopardize the best interest and welfare of the child. *Swicegood v. Swicegood,* 270 N.C. 278, 154 S.E. 2d 324 (1967); *In re Custody of Stancil, supra.* As this Court stated in *Stancil, supra, quoting* 2 Nelson, *Divorce and Annulment,* § 15.26 (2d ed. 1961): "The right of visitation is an important, natural and legal right, although it is not an absolute right, but is one which must yield to the good of the child."

After considering the arguments on both sides of this issue, the case law in this State and in other jurisdictions, we conclude

that conditioning the payment or receipt of child support upon compliance with an order granting the noncustodial parent visitation privileges as a means of enforcing the visitation order is inherently detrimental to the best interest of the minor child and is therefore contrary to the law of this State. It must be remembered that the primary reason for visitation is the benefit to be derived by the child from associating with the noncustodial parent. *See Porter v. Porter*, 25 Ohio St. 2d 123, 267 N.E. 2d 299 (1971); *Block v. Block*, 15 Wis. 2d 291, 112 N.W. 2d 923 (1961). When visitation does not occur, it is the child that suffers the injury, as well, of course, as the noncustodial parent. Withholding support payments from the child because visitation has not taken place as ordered can only exacerbate the child's confusion, uncertainty and tension. Since it has been determined that the support payments are necessary to provide for the child's needs, the withholding of the payments is necessarily harmful to the child. Note, *Visitation Rights: Providing Adequate Protection for the Noncustodial Parent*, 3 Cardozo L. Rev. 431 (1982). Withholding support payments for this reason may not only threaten the child's financial security, it may also damage the child's relationship with the custodial parent and may have significant psychological repercussions for the child. Note, 84 Colum. L. Rev. 1059 (1984), *supra*. As one example of the latter, conditioning the receipt of child support upon compliance with court-ordered visitation, referred to by one court as a "money-for-visits solution," may lead to an unfortunate mental association. *Id.* That is, the child will realize that visitation with the noncustodial parent is merely a way to ensure that the support payments keep coming and may come to believe that his or her relationship with that parent is financially rather than emotionally based. *Id.*

We believe the child has suffered injury enough by the fact of the parents' divorce and by the failure of visitation to take place. We find no justification for further compounding the child's injury by withholding support payments from the child.

Withholding support payments results in injury to the minor child regardless of whether visitation does not take place because of the refusal of the child to visit with the noncustodial parent or because of the interference of the custodial parent. It is because of this unjustifiable injury to the child that we find the escrow arrangement ordered by the trial judge objectionable. This type of

arrangement is even more objectionable, however, when visitation does not take place because of the misconduct of the custodial parent. In that situation, the child is penalized even though he or she is not the wrongdoing party. As one court stated in addressing this situation: "[T]here is no moral justification in subjecting innocent children to hardships because of the misdeeds of their parents." *Dooley v. Dooley, supra.* We agree. Child support payments are for the maintenance of the children's welfare and are not a lever upon which divorced adults can be made to resolve their differences over visitation. *Rathmall v. Gardner*, 105 Ill. App. 3d 986, 434 N.E. 2d 1156 (1982). In this State, the duty of a parent to support his or her children is not dependent upon the granting of visitation rights, nor is it dependent upon the parent's opportunity to exercise visitation rights. We conclude that visitation and child support rights are independent rights accruing primarily to the benefit of the minor child and that one is not, and may not be made, contingent upon the other.

Not only do we find the escrow arrangement ordered by the trial judge to be inherently detrimental to the best interest of the children, but also that the effectiveness of this remedy in coercing compliance with visitation orders is questionable. We do not believe the threat of economic deprivation will achieve the result ultimately desired by the noncustodial parent—to obtain the love and respect of the children. As one court stated in criticism of the use of support payments as a means of forcing a child's visitation: "Affection is bestowed, not bought. . . . Obviously, any coerced companionship the defendant might compel by a cutoff of child support would be utterly devoid of the sentiments of filial love and respect whose encouragement furnished the only admissible ground for visitation in the first place." *Henshaw v. Henshaw*, 83 Mich. App. 68, 268 N.W. 2d 289 (1978).

Lastly, we note that there are other means available to trial judges to enforce visitation rights which have been sanctioned by our Legislature and which provide an appropriate remedy for the problem presented. Trial judges in this State have authority to enforce orders providing for visitation by the methods set forth in G.S. § 50-13.3, that is, by contempt proceedings and by injunction. *See Clark v. Clark*, 294 N.C. 554, 243 S.E. 2d 129 (1978) ("Visitation privileges are but a lesser degree of custody."). Of these two methods, contempt proceedings are the means most

likely to be useful in enforcing visitation rights. Although contempt proceedings may not provide an adequate remedy in every case, they are an appropriate remedy and one which our trial judges are statutorily authorized to use, unlike the escrow arrangement utilized by the trial judge in the present case.

We conclude that the trial judge here acted beyond the bounds of his authority and contrary to the law of this State when he ordered that child support paid by defendant be placed in escrow in the event the minor children fail or refuse to abide by the visitation privileges allowed defendant. Accordingly, we vacate the 20 June 1985 order to the extent it allows defendant's motion to hold the child support payments in escrow. The remainder of the 20 June 1985 order is affirmed.

Vacated in part; affirmed in part.

Judges WHICHARD and COZORT concur.

STATE OF NORTH CAROLINA v. LARRY D. BREWINGTON

STATE OF NORTH CAROLINA v. DONNIS E. NORRIS, JR.

No. 8512SC741

(Filed 1 April 1986)

1. Constitutional Law § 48— codefendants—represented by same attorney—not ineffective assistance of counsel

Defendant Brewington was not denied effective assistance of counsel in a prosecution for conspiracy and armed robbery because the same counsel represented both defendants where counsel was privately employed by each defendant; the court conducted a *voir dire* hearing in which it examined both defendants and inquired of their counsel and the prosecutor as to the existence of any potential conflict between the defendants; the court explained to each defendant his right to representation by separate counsel; neither defendant requested separate counsel nor objected to the joint representation; defendant Brewington made no showing of any actual conflict of interest between himself and defendant Norris during the trial or sentencing hearing or that his counsel's performance was adversely affected by the joint representation; the defenses presented by each defendant were not antagonistic; and the fact that the codefendant was identified by the victim while the evidence against defendant Brewington was circumstantial did not indicate a conflict.

2. Conspiracy § 5.1— conspiracy to commit armed robbery—statements of codefendant—admissible

The trial court did not err in a prosecution for conspiracy and armed robbery by admitting testimony that a codefendant offered a witness $100 to transport him to Fayetteville on the evening of the robbery. The State presented sufficient independent proof to support a reasonable inference that a conspiracy existed between the defendants at the time of the conversation to rob the victim and the codefendant's statements were admissible against both defendants as having been made during the pendency of the conspiracy and in furtherance of its purpose.

3. Criminal Law § 161.2— assignments of error in brief—no argument—assignments of error deemed abandoned

Where assignments of error were placed in defendant's brief with the statement that they were not abandoned but no argument was presented, those assignments of error were deemed abandoned. App. Rule 28(a).

4. Criminal Law § 102.5— cross-examination concerning victim's identification of defendant—objections sustained—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for conspiracy and armed robbery by sustaining the State's objections to cross-examination of the victim concerning the victim's identification of a photograph of someone other than defendant Norris as the perpetrator of the robbery. Defendant's exceptions related to questions asked on recross-examination, the objections were sustained after the victim had already been extensively cross-examined, and the questions were repetitive and argumentative.

5. Criminal Law § 128.2— improper question to codefendant—mistrial denied—no error

There was no error in the denial of defendant Norris's motion for a mistrial after the prosecution asked defendant Brewington if he had been fired from his job because he had stolen from his employer. The trial court immediately sustained defendants' objection to the question and instructed the jury to disregard it.

6. Robbery § 3— codefendant's knowledge that the victim carried money—objection overruled—no error

The trial court did not err in a prosecution for conspiracy and robbery by overruling defendants' objection to the prosecutor asking the victim if defendant Brewington knew the victim was carrying money in a folder. Evidence that Brewington knew that the victim was carrying a substantial sum of money in a folder would be relevant as evidence of motive; although the response was that "it's possible," there was nothing in the record to indicate that anything other than a response based on personal knowledge was being sought; and defendants made no motion to strike the answer.

7. Criminal Law § 73.1— origin of collect telephone calls—hearsay—admission not prejudicial

There was no prejudice in a prosecution arising from a robbery in Fayetteville from the erroneous admission of evidence that collect calls were made to

one defendant's house from pay telephones in Fayetteville. The evidence was relevant in that the number to which the calls were made was the number which defendant Brewington gave to police as his telephone and the address on the telephone company records was defendant Brewington's, but the portions of the telephone records indicating the origin of the call were inadmissible hearsay because there was no way for the telephone operator to verify the number given by the caller. However, the evidence of the specific numbers from which the calls were made was insignificant and could not have resulted in prejudice for defendants. N.C.G.S. 8C-1, Rule 803(6).

8. Robbery § 4.3— armed robbery—inconsistent identification—evidence sufficient

There was sufficient evidence to defeat defendant Norris's motions to dismiss charges of armed robbery where the evidence tended to show that defendant Norris took money from the person of the victim without the victim's consent while armed with a shotgun and threatening its use. Any inconsistencies in the victim's identification of Norris were for the jury to resolve.

APPEAL by defendants from *Allsbrook, Judge.* Judgment entered 8 March 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 2 December 1985.

Each defendant was indicted for conspiring with the other to commit the felony of robbery with a firearm against William B. Faircloth and for the commission of the robbery of Mr. Faircloth with the use of a shotgun. Both defendants entered pleas of not guilty and the cases were consolidated for trial. A jury returned verdicts finding each defendant guilty as charged. Defendant Brewington was sentenced to an active 14 year term of imprisonment upon his conviction of robbery with a firearm and a consecutive 3 year sentence, which was suspended, upon his conviction of conspiracy to commit robbery with a firearm. Defendant Norris was sentenced to an active 20 year term of imprisonment upon his conviction of robbery with a firearm and a consecutive 5 year sentence, which was suspended, upon his conviction of conspiracy. Both defendants appeal.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Michael Rivers Morgan, for the State.

Jay Trehy for defendant appellant Larry D. Brewington.

D. K. Stewart for defendant appellant Donnis E. Norris, Jr.

MARTIN, Judge.

Both defendants assign error to certain of the trial court's evidentiary rulings and to its denial of their motions to dismiss the charges. In addition, defendant Brewington separately contends that the court inadequately investigated potential conflicts which may have existed by reason of defendants' joint representation by the same counsel. Defendant Norris separately assigns error to the denial of his motion for mistrial made during the State's cross-examination of his co-defendant, Brewington. We have examined each of the defendants' joint and several contentions and conclude that each defendant received a fair trial free of prejudicial error.

At trial the State offered evidence tending to show that the victim, William Faircloth, and defendant Brewington had made plans to drive to Florida so that Faircloth could pick up a camper and bring it to North Carolina on Brewington's pickup truck. According to Faircloth's testimony, they had planned to leave approximately three days before 4 September 1984 but defendant Brewington had delayed their departure several times. On 4 September, while Faircloth and Brewington were at Brewington's house in Dunn making preparations to begin the trip, Brewington received a telephone call during which Faircloth overheard him tell the other party "We're getting ready to leave." A few minutes later, Brewington received a collect telephone call, but Faircloth was unable to overhear anything that was said. Shortly thereafter, Brewington and Faircloth left the house, with Brewington driving.

Faircloth was carrying more than $1,200.00 because he still owed money for the camper. He was carrying some of the money in a money clip and some of it in a folder, along with his driver's license and other papers. After Faircloth purchased gas for Brewington's truck, the two men drove south on I-95 until they reached a rest area in Cumberland County near Fayetteville, where Brewington stopped to use the restroom. While Brewington was in the restroom, a man (later identified by Faircloth as defendant Norris) approached the truck and asked Faircloth for a cigarette. The man was carrying a bag which appeared to contain a gun. After giving the man a cigarette, Faircloth went to meet Brewington and told him about the man at the truck. Brewington

and Faircloth returned to the truck and, as Brewington was entering the driver's side, the man pointed a shotgun at Faircloth, instructed both men to remove their clothing and told Faircloth to give him the folder. Faircloth complied. After Faircloth removed his trousers, the man demanded his money clip, which had fallen out of his pocket and onto the floorboard of the truck. Faircloth threw the money clip to him and the man left. Faircloth then gave Brewington some coins and instructed him to call the sheriff's department from a pay telephone. Brewington attempted to make the call but told Faircloth that the telephone would not work. However, an attendant at the rest area was able to call the sheriff's department from the same telephone. Faircloth provided a description of the robber to law enforcement officers and, after reviewing approximately a thousand photographs, identified one photograph as appearing similar to the man who robbed him. The person depicted by the photograph was not defendant Norris.

On the day following the robbery, Faircloth went to defendant Brewington's house. He observed Brewington, Brewington's wife and another couple arrive at the house in Brewington's truck. He was unable to see the other man's face, but noticed that the back of the man's head resembled that of the person who had robbed him the night before.

On 7 September 1984, Detective Sgt. Wiggs of the Cumberland County Sheriff's Department showed Faircloth another photographic lineup consisting of six photographs. After looking at the photographs for less than fifteen seconds, Faircloth picked out a photograph of defendant Norris and identified him as the person who had robbed him on 4 September.

The State also offered the testimony of Ronnie Brewington, a distant relative of defendant Brewington. He testified that on the afternoon of 4 September, defendants Brewington and Norris had come to his place of employment in defendant Brewington's truck. While both defendants were sitting in the truck, Norris offered Ronnie Brewington $100.00 to drive him to a place about a mile from Fayetteville on that evening at approximately seven o'clock. According to Ronnie Brewington, Norris stated that he wanted to go to Fayetteville "because of something about he was going to set up, had a set up, or something." Ronnie Brewington declined the offer because he would not be through with his work by that

time. The State also offered testimony of a representative of Carolina Telephone and Telegraph Co. tending to show that two collect calls to defendant Brewington's address had been made from pay telephone stations in Fayetteville on the evening of 4 September 1984.

Defendant Norris did not testify but offered evidence through family members and neighbors tending to show that he was at his home on the evening of the robbery. Defendant Brewington testified and denied having any discussion with Norris about the trip to Florida. He also testified that defendant Norris was not the man who robbed Faircloth at the rest area. He denied having been with Norris for several weeks before the robbery and for several days thereafter, and testified that he had not seen Ronnie Brewington on 4 September 1984.

[1] Both defendants were represented at trial by the same counsel. When the cases were called for trial, the court conducted a voir dire hearing in which it examined both defendants and inquired of their counsel and the prosecutor as to the existence of any potential conflict between the defendants. The court explained to each defendant his right to representation by separate counsel. Each defendant represented that he had privately employed Mr. Stewart as counsel and knew of no potential conflict with the other defendant. Although neither defendant requested separate counsel nor objected to the joint representation, defendant Brewington now assigns error, contending that the court's inquiry was insufficient and that he was denied his sixth amendment right to effective assistance of counsel because of the joint representation.

"In order to establish a conflict of interest violation of the constitutional right to effective assistance of counsel, 'a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.' " *State v. Howard*, 56 N.C. App. 41, 46, 286 S.E. 2d 853, 857, *disc. rev. denied*, 305 N.C. 305, 290 S.E. 2d 706 (1982) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 64 L.Ed. 2d 333, 346-47, 100 S.Ct. 1708, 1718 (1980)). *See also State v. Summerford*, 65 N.C. App. 519, 309 S.E. 2d 553 (1983), *disc. rev. denied*, 310 N.C. 311, 312 S.E. 2d 654 (1984). Defendant Brewington has made no showing of any actual conflict of interest between himself and defendant Norris during

the trial or sentencing hearing or that his counsel's performance was adversely affected by the joint representation. Nor are we persuaded by his argument that a conflict existed because his co-defendant was identified by the victim, while the evidence against him was only circumstantial. "Multiple defendants, almost by definition, will produce disparities, qualitatively and quantitatively, as to proof against each. It is a *non sequitur* to say that such disparity *ipso facto* results in disparity of effort devoted to such defendants if they have the same attorney." *State v. Summerford, supra* at 523, 309 S.E. 2d at 556 (quoting *People v. Smith*, 19 Ill. App. 3d 138, 144, 310 N.E. 2d 818, 823 (1974)). The defenses presented by each defendant were not antagonistic; Norris presented evidence of alibi, Brewington denied any complicity and testified affirmatively that Norris was not the perpetrator of the robbery. This assignment of error is overruled.

[2] By another separate assignment of error, defendant Brewington contends that the court erred in permitting the State's witness Ronnie Brewington to testify about defendant Norris' offer to pay him $100.00 for transportation to Fayetteville on the evening of the robbery. Citing *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), defendant Brewington argues that, as to him, Norris' statements were inadmissible hearsay and that their admission into evidence violated his right of confrontation.

In our view, the *Bruton* rule is inapplicable to this case. Where declarations are made by a party to a conspiracy during its existence and relating to its purposes, the statements are admissible as evidence against co-conspirators without violating the "right to confrontation" rule of *Bruton*. *State v. Conrad*, 275 N.C. 342, 168 S.E. 2d 39 (1969).

> [T]he general rule in North Carolina is that when the State establishes a *prima facie* case of conspiracy, the acts and declarations of each party to the conspiracy in furtherance of its purposes is admissible against other conspirators when made or done after the conspiracy was formed and before it terminated.

State v. Martin, 309 N.C. 465, 478, 308 S.E. 2d 277, 285 (1983). Considerable latitude is permitted in the order in which evidence may be offered to prove the formation and existence of the con-

spiracy, and the proof may consist of evidence of a number of facts and circumstances pointing to the existence of the conspiracy. *State v. Conrad, supra.* While the existence of the conspiracy must be established independently of the statements sought to be admitted, it is not always required that the State first establish a *prima facie* case before offering the statements. *State v. Tilley*, 292 N.C. 132, 232 S.E. 2d 433 (1977). "Sometimes for the sake of convenience the *acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy . . . .*" *Id.* at 138-39, 232 S.E. 2d at 438 (quoting *State v. Jackson*, 82 N.C. 565, 568 (1880)). "[I]f at the close of the evidence every constituent of the offense charged is proved the verdict rested thereon will not be disturbed . . . ." *Id.* at 139, 232 S.E. 2d at 439 (quoting *State v. Conrad, supra* at 347, 168 S.E. 2d at 43).

Applying the foregoing principles to the evidence in the present case, which we see no need to repeat, we conclude that the State presented sufficient proof, independent of the challenged statements of Norris, to support a reasonable inference that, at the time of Norris' conversation with Ronnie Brewington, a conspiracy existed between the defendants to rob William Faircloth. Norris' statements, having been made during the pendency of the conspiracy and in furtherance of its purpose, were admissible against both defendants.

[3] Defendant Brewington has attempted to bring forward three assignments of error by stating them in his brief, together with the statement that he does not abandon the assignment but presents no argument. We deem the assignments abandoned and decline to review them. "Questions raised by assignments of error in appeals from trial tribunals but not then presented *and discussed* in a party's brief, are deemed abandoned." N.C. R. App. P. 28(a). (Emphasis added.)

[4] Defendant Norris contends, by separate assignment of error, that the trial court erred by sustaining the State's objection to his cross-examination of William Faircloth concerning Faircloth's identification, on the night of the robbery, of a photograph of someone other than defendant Norris as the perpetrator of the robbery. We note that defendant's exceptions relate to questions asked on re-cross examination of Faircloth, and the objections were sustained after Faircloth had already been extensively

cross-examined about the initial photographic identification. The scope of permissible cross-examination is within the sound discretion of the trial judge and cross-examination which is merely repetitive and argumentative is properly disallowed; the trial court's ruling will not be disturbed in the absence of prejudicial abuse of discretion. *State v. Cox*, 296 N.C. 388, 250 S.E. 2d 259 (1979). The record indicates that the questions to which objections were sustained were both repetitive and argumentative; we find no abuse of discretion.

[5] Defendant Norris also contends that the court erred in denying his motion for mistrial, made after the prosecutor sought to impeach defendant Brewington by asking him if he had been fired from his job because he had stolen goods from his employer. Assuming, without deciding, that the question was improper, *see* G.S. 8C-1, Rule 608(b), as not probative of untruthfulness, we cannot conceive how defendant Norris has been prejudiced by the question directed to defendant Brewington, who has not assigned error to the denial of the motion. At any rate, the trial court immediately sustained defendants' objection to the question and instructed the jury to disregard it. Consequently, we find no error in the denial of the motion for mistrial.

[6] During the State's direct examination of the victim, William Faircloth, the prosecutor asked Faircloth, "Did Larry [Brewington] know that you carried money in that folder?" Defendants' objection to the question was overruled after a cautionary instruction by the court to the prosecutor not to lead the witness. Faircloth answered, "It's possible." Both defendants assign error to the court's ruling.

Evidence that defendant Brewington knew that Faircloth was carrying a substantial sum of money in a folder would be relevant as evidence of motive. "The existence of a motive is . . . a circumstance tending to make it more probable that the person in question did the act, hence evidence of motive is always admissible where the doing of the act is in dispute." 1 Brandis, North Carolina Evidence § 83, at 304 (2d rev. ed. 1982).

Defendants contend, however, that Faircloth's answer demonstrated that he had no personal knowledge of Brewington's awareness of the existence of the money, and amounted to no more than impermissible speculation. We agree with defendants

that Faircloth was competent to testify only as to matters within his personal knowledge. See *State v. Adcock*, 310 N.C. 1, 310 S.E. 2d 587 (1984). But, there is nothing on the face of the prosecutor's question to indicate that anything other than a response based on Faircloth's personal knowledge was being sought. From the record, it appears that the trial court interpreted defendant's general objection as being directed to the form of the question, and overruled the objection in the exercise of discretion. *See State v. Rankin*, 304 N.C. 577, 284 S.E. 2d 319 (1981) (it is within sound discretion of trial court to determine whether leading questions will be permitted). "[I]t is well settled that '[a] general objection, if overruled, is ordinarily no good, unless, on the face of the evidence, there is no purpose whatever for which it could have been admissible.'" *State v. Adcock, supra* at 18, 310 S.E. 2d at 597 (quoting 1 Brandis, *supra* § 27 at 105).

Assuming that Faircloth's response was beyond the realm of his personal knowledge and was speculative, defendants made no motion to strike the objectionable answer. "When the question does not indicate the inadmissibility of the answer, defendant should move to strike as soon as the inadmissibility becomes known. Failure to do so constitutes a waiver." *Id.* at 19, 310 S.E. 2d at 598. This assignment of error is overruled.

[7] Both defendants also assign error to the admission into evidence of various records of Carolina Telephone and Telegraph Co. They contend that the evidence was irrelevant because the telephone records related to a telephone number issued to James C. Brewington and that the State did not show any nexus between James C. Brewington or his telephone and either of the defendants. We disagree. The telephone number, although listed on the records of the company as being issued to James C. Brewington, was the same number which defendant Larry Brewington gave law enforcement officers as being his own telephone number. Moreover, the address listed on the telephone company records was the same as defendant Brewington's address. The records were duly authenticated by the company's custodian for billing records and, if otherwise competent, were admissible under the business records exception to the hearsay rule. G.S. 8C-1, Rule 803(6); *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907, 53 L.Ed. 2d 1091, 97 S.Ct. 2971 (1977).

The records indicated that two collect telephone calls were made to defendant Brewington's residence from pay telephone stations in Fayetteville on the evening of the robbery. They were offered in corroboration of William Faircloth's testimony with respect to the telephone calls received by defendant Brewington shortly before the two men departed from Brewington's home to begin their trip. However, the telephone company official testified that when a collect call is placed from a pay telephone station, there is no way for the operator to verify the number given by the caller as the number of the pay telephone station from which the call is placed. Defendants, therefore, contend that the numbers appearing in the telephone records, indicating the telephone numbers of the stations from which the calls were placed, were inadmissible hearsay. Because the accuracy of those numbers necessarily depends on the trustworthiness of the unknown person providing them to the operator, we are inclined to agree with defendants that it was error to permit the State to introduce into evidence those portions of the telephone records indicating the telephone numbers of the pay stations from which the collect calls were made.

We do not, however, view the admission of these telephone numbers as sufficiently harmful to defendants as to necessitate a new trial. The indication in the telephone records that the calls originated from Fayetteville was properly admitted as part of the business records exception. The evidence of the specific telephone numbers of the pay telephone stations from which the calls were made was insignificant and could not have resulted in prejudice to defendants. Further testimony of the telephone company official indicated that one of the numbers was fictitious and the other was not that of any pay telephone station located near the place where the robbery occurred. This assignment of error is overruled.

Finally, both defendants assign as error the denial of their respective motions to dismiss the charges due to the insufficiency of the evidence. We have necessarily considered their contentions with respect to the charge of conspiracy in connection with an earlier assignment of error and have answered it adversely to defendants' position.

In ruling upon a defendant's motion to dismiss, the question for the court is whether the State has produced substantial evidence as to each element of the offense, and that the defendant was the perpetrator. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982). The question of the sufficiency of the evidence is the same whether the evidence is direct, circumstantial or both. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980).

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion. [Citations omitted.]

Id. at 99, 261 S.E. 2d at 117.

In his brief, defendant Brewington concedes that the evidence admitted by the trial court was sufficient to withstand his motions to dismiss; he only preserves his exceptions to the denial of the motions in the event that we sustain his exceptions and assignments of error to the admission of that evidence. In making this concession, defendant Brewington necessarily concedes that his motions to dismiss were properly denied, since all of the evidence, whether competent or not, is to be considered in ruling on the motion. Even so, we have previously determined that the trial court did not commit prejudicial error with respect to the admission of evidence. Defendant Brewington's assignments of error are overruled.

[8] We also conclude that there was ample evidence before the trial court to defeat defendant Norris' motions to dismiss. The evidence, taken in the light most favorable to the State, tends to show that defendant Norris, while armed with a shotgun and threatening its use, took money from the person of William Faircloth without Faircloth's voluntary consent. Any inconsistencies concerning Faircloth's identification of Norris as the perpetrator were for the jury to resolve. We find no error in the denial of the motions to dismiss.

The defendants received a fair trial, free of prejudicial error.

No error.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. RICKY DEAN WORTHAM

No. 8512SC806

(Filed 1 April 1986)

1. **Criminal Law § 146.2— lesser included offense—sufficiency of indictment—failure to object at trial—consideration on appeal**

Whether assault on a female is charged as a lesser included offense by an indictment charging attempted rape questions the sufficiency of the indictment, and the issue may therefore be raised on appeal even in the absence of timely objection at trial.

2. **Rape and Allied Offenses § 3.1— attempted rape charged—assault on female as lesser offense**

An indictment charging attempted rape necessarily includes assault on a female as a lesser offense.

3. **Burglary and Unlawful Breakings § 5.6— first degree burglary—target felony thwarted—sufficiency of evidence**

There was no merit to defendant's contention that evidence of first degree burglary was insufficient to be submitted to the jury because the State failed to show the requisite felonious intent to commit rape and larceny where the evidence tended to show that the male defendant broke into the sleeping female victim's home; while the victim slept, defendant slit open her underpants; the victim testified that, when she awoke, the intruder was leaning over her "getting ready to crawl on top" of her; it was no defense that defendant abandoned his felonious intent and fled when the victim screamed; and evidence of defendant's unauthorized entry at night and flight upon discovery, in the absence of any other explanation, would support an inference of larcenous intent.

4. **Criminal Law § 34.5; Rape and Allied Offenses § 4.1— evidence of defendant's prior similar conduct—admissibility**

In a prosecution of defendant for first degree burglary and attempted rape where the evidence tended to show that defendant entered the home of a sleeping female and slit her underpants, the trial court did not err in admitting evidence that defendant had committed similar conduct two or three years earlier. N.C.G.S. 8C-1, Rule 404(b).

State v. Wortham

APPEAL by defendant from *Johnson (E. Lynn), Judge.* Judgment entered 14 March 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 December 1985.

This is a criminal action involving convictions for first-degree burglary and assault on a female.

Defendant was tried upon indictments proper in form for first degree burglary, larceny and attempted rape. The State's evidence tended to show the following: On a hot August evening, the victim fell asleep on a sofa underneath an open window. One of her children slept at the other end of the sofa, while another slept on the floor in the same room. The victim awoke to find a man, whom she positively identified as defendant, leaning over her through the window "getting ready to crawl on top" of her. The victim jumped up and screamed, and the intruder jumped back outside. The two children testified that they woke up and saw the man, whom they identified as defendant (who lived nearby and was known to the family), in the yard. The screen in the window had been bent and pulled out. The victim's panties, which were intact and fit properly when she went to sleep, had been slit open. In addition a child's watch was missing.

The State also presented evidence that two or three years earlier, another woman had been awakened in her home by defendant. Defendant had slit her pants open and had his hand between her legs. She resisted his sexual advances and defendant fled.

Defendant presented alibi evidence. The jury acquitted defendant of larceny and attempted rape, but found him guilty of the lesser charge of assault on a female and guilty of first degree burglary. At the sentencing stage the trial court found that defendant had prior convictions and sentenced him to serve a term in excess of the presumptive. He appeals.

Attorney General Thornburg, by Assistant Attorney General Henry T. Rosser, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Robin E. Hudson, for the defendant-appellant.

EAGLES, Judge.

I

[1] Defendant first assigns error to the court's sentencing him for assault on a female, on the grounds that assault on a female is not a lesser included offense of attempted rape. We note that defendant did not object to the submission of the offense to the jury. Failure to object at trial ordinarily waives the right to assert error on appeal. App. R. 10(b)(2). However, the sufficiency of a criminal charge may be challenged without any exceptions or assignment of error having been made. App. R. 10(a). It is well established that an indictment for a greater offense is a sufficient charge of all lesser included offenses. G.S. 15-170; *State v. Young*, 305 N.C. 391, 289 S.E. 2d 374 (1982). By analogy, whether assault on a female is charged as a lesser included offense by an indictment charging attempted rape questions the sufficiency of the indictment. Accordingly, the issue may be raised on appeal, even in the absence of timely objection at trial. App. R. 10(a). *Compare State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) (absent plain error, which did not occur, must be timely objection to lack of instruction on proper lesser included offense).

A

In *State v. Weaver*, 306 N.C. 629, 295 S.E. 2d 375 (1982), our Supreme Court definitively held that the determination of whether one crime is a lesser included offense of another is made on a definitional, not a factual, basis. The Court expressly rejected the contention that under certain factual circumstances one offense might become a lesser included offense of another. Rather, all essential elements of the lesser offense must be completely covered by the essential elements of the greater offense. *Id.* at 635, 295 S.E. 2d at 378-79. *Followed State v. Roberts*, 310 N.C. 428, 312 S.E. 2d 477 (1984); *State v. Odom, supra.* Defendant relies heavily on the *Weaver* definitional test.

B

Defendant was indicted for attempted rape, not rape itself. While both attempted rape and assault on a female are lesser included offenses of rape, as recognized by G.S. 15-144.1 and G.S. 15-169, it does not necessarily follow from that fact alone that assault on a female is a lesser included offense of attempted rape.

C

The two essential elements of attempted rape are: (1) the *intent* to commit the rape and (2) an *overt act* done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983); *followed State v. Bell*, 311 N.C. 131, 316 S.E. 2d 611 (1984). *Compare* 65 Am. Jur. 2d, Rape, Section 26 (1972) (force necessary element). By the sexual acts involved, rape and attempted rape necessarily require a male perpetrator and a female victim. *See State v. Barnes*, 307 N.C. 104, 296 S.E. 2d 291 (1982). Although the statute prescribing penalties, G.S. 14-27.6, distinguishes between attempts to commit first-degree rape and attempts to commit second-degree rape, the above definition of the crime does not. Nevertheless the definition applies to both levels of the crime of attempted rape. *Freeman, supra* (second-degree), *Bell, supra* (first-degree).

The distinction between "mere preparation" and "attempt" cannot always be drawn with precision. The overt act necessary for an attempt must be some step in a direct movement toward the commission of the offense after the preparations are made, which act in the ordinary course of things would result in consummation of the crime. *State v. Addor*, 183 N.C. 687, 110 S.E. 650 (1922); *see State v. Jones*, 227 N.C. 402, 42 S.E. 2d 465 (1947); *see also United States v. Jackson*, 560 F. 2d 112 (2d Cir.) ("substantial step" required), *cert. denied sub nom. Jackson v. United States*, 434 U.S. 941, 54 L.Ed. 2d 301, 98 S.Ct. 434 (1977), *cert. denied sub nom. Allen v. United States*, 434 U.S. 1017, 54 L.Ed. 2d 762, 98 S.Ct. 736 (1978).

D

The essential elements of assault on a female, G.S. 14-33(b)(2), are (1) assault (2) upon a female person (3) by a male person. *State v. Craig*, 35 N.C. App. 547, 241 S.E. 2d 704 (1978). Age is not an essential element of the offense. *Id.* An assault is an overt act or an attempt, with force and violence, to do some immediate physical injury to the person of another, which show of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm. *State v. Jeffries*, 57 N.C. App. 416, 291 S.E. 2d 859, *disc. rev. denied and appeal dismissed*, 306 N.C. 561, 294 S.E. 2d 374 (1982). While the civil

tort of assault requires proof of actual apprehension of harmful contact on the part of the victim, *McCraney v. Flanagan*, 47 N.C. App. 498, 267 S.E. 2d 404 (1980), criminal assault does not require proof of actual apprehension, so long as there is evidence of some overt act sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. *State v. Musselwhite*, 59 N.C. App. 477, 297 S.E. 2d 181 (1982).

E

Whether the overt act involved in attempted rape necessarily includes the overt act in assault on a female is the determinative question here. Our decision in *State v. Rick*, 54 N.C. App. 104, 282 S.E. 2d 497 (1981), while helpful, does not control. In *Rick* we considered an indictment which charged attempted rape of the victim "by force and against her will by overcoming her resistance and procuring her submission by the use of a deadly weapon," holding that this charge included assault on a female as a lesser offense. *Id.* at 109, 282 S.E. 2d at 500-1. The *Rick* indictment's language did not charge attempted rape in general terms, as in the instant case, but instead specifically charged attempted first-degree rape with the use of a deadly weapon. G.S. 14-27.2(a).

F

[2] Applying the definitional test established in *Weaver*, we conclude that the definition of attempted rape necessarily includes assault on a female. Rape is, after all, a crime of violence. Force sufficient to accomplish the act of intercourse can constitute sufficient force to support a conviction. *State v. Aiken*, 73 N.C. App. 487, 326 S.E. 2d 919 (victim helpless), *disc. rev. denied and appeal dismissed*, 313 N.C. 604, 332 S.E. 2d 180 (1985). The victim of rape has obviously suffered "immediate bodily harm" simply by the act of non-consensual intercourse. Since assault has always been a lesser included offense of rape, both before and after *Weaver*, G.S. 15-144.1, it follows under *Weaver* that the same force and harm can suffice to support a conviction for either offense. As a practical matter, we cannot conceive of any act which would constitute a step in a direct movement toward a rape and which would in the ordinary course of events result in a consummated rape which would not put a person of reasonable firmness in apprehension of such immediate bodily harm. *See State v. Addor, supra; State v. Musselwhite, supra.* Accordingly, we hold that an

indictment charging "attempted rape" necessarily includes assault on a female as a lesser offense.

In reaching this result we rely in part on *State v. Freeman, supra.* There, without discussing the *Weaver* definitional test, the Supreme Court held that defendant was properly convicted of assault on a female under an indictment charging "attempted rape." Because defendant in *Freeman* did not challenge the sufficiency of the charge or assign error to the submission of the lesser offense, Records & Briefs, N.C. Supreme Court, *State v. Freeman*, No. 514A82 (1982), the question before us here was not squarely presented there. We presume, however, that the *Freeman* court reached its decision in full awareness of its decision in *Weaver. See Cole v. Cole*, 229 N.C. 757, 51 S.E. 2d 491 (1949) (overruling by implication not favored). Accordingly, we overrule defendant's first assignment of error.

II

[3] Defendant's second assignment of error attacks the sufficiency of the evidence of first-degree burglary on the grounds that the State failed to show the requisite felonious intent. The indictment charged that the burglary was committed with the intent to commit rape and larceny. As to this assignment, we consider the evidence in the light most favorable to the State, with every reasonable and favorable inference therefrom. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). We note that the evidence clearly establishes, and that defendant does not dispute, that a breaking and entering took place. *See State v. Yarborough*, 55 N.C. App. 52, 284 S.E. 2d 550 (1981) (defendant cut screen and stuck arm through hole; sufficient).

A

Our court recently reversed a conviction for first-degree burglary where the only evidence of intent to rape was that defendant entered the room of a sleeping woman and threatened her with a gun. *State v. Rushing*, 61 N.C. App. 62, 300 S.E. 2d 445, *aff'd*, 308 N.C. 804, 303 S.E. 2d 822 (1983). We held there that in the absence of "some overt manifestation of an intended forcible sexual gratification," *Id.* at 66, 300 S.E. 2d at 449, the conviction could not stand. *See also State v. Freeman, supra* (no overt sexual conduct; only evidence of intent ambiguous statement; re-

versed); *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982) (defendant's unusual clothing not sufficient evidence of intent).

Here, however, there was evidence of an overt manifestation of intended sexual gratification: that while the victim slept defendant slit open the crotch of the panties she was wearing. This constituted overt "sexual behavior" from which a rational trier of fact could find an intent to commit rape. *State v. Powell*, 74 N.C. App. 584, 328 S.E. 2d 613 (1985) (defendant entered bedroom, undressed, and fondled his private parts; conviction upheld); *see also State v. Norman*, 14 N.C. App. 394, 188 S.E. 2d 667 (1972) (physical assault, but no evidence of sexual conduct other than touching breast; conviction upheld); *State v. Boon*, 35 N.C. (13 Ired.) 244 (1852) (grasped ankle; conviction upheld). Indeed, we can think of no purpose, other than a sexual purpose, for an adult male to slit open the crotch of the panties worn by a sleeping adult female. In addition, the victim testified that the intruder was leaning over her, "getting ready to crawl on top" of her. Taken together this evidence adequately supported a finding of intent to rape.

B

Defendant makes much of the fact that as soon as the victim screamed, he fled. The requisite felonious intent need exist only at the time of the breaking and entering. It is no defense that the defendant later abandoned his intent because of unexpected or startling resistance or outcry. *See State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976); *State v. Hooper*, 227 N.C. 633, 44 S.E. 2d 42 (1947).

C

The indictment charged first-degree burglary with intent to commit the felonies of rape and larceny. It is well established that evidence of unauthorized entry at night and flight upon discovery, in the absence of any other explanation, will support an inference of larcenous intent. *State v. Goodman*, 71 N.C. App. 343, 322 S.E. 2d 408 (1984), *disc. rev. denied*, 313 N.C. 333, 327 S.E. 2d 894 (1985), *following State v. Sweezy, supra, and State v. McBryde*, 97 N.C. 393, 1 S.E. 925 (1887). The fact that the jury found that defendant did not accomplish the larceny does not negate the inference, since it is the intent at the time of the breaking and entering that is determinative. Cases such as *State v. Lamson*, 75

N.C. App. 132, 330 S.E. 2d 68, *disc. rev. denied*, 314 N.C. 545, 335 S.E. 2d 318 (1985) are distinguishable, because those cases, unlike the instant case, involved some evidence tending to rebut the inference. In *Lamson*, the defendant presented evidence that he mistook the prosecuting witness' house for that of a friend who lived next door. In *State v. Moore*, 62 N.C. App. 431, 303 S.E. 2d 230 (1983), there was evidence of entry under duress. In both cases we held that the State could not rely solely on the inference of larcenous intent to go to the jury on a charge of first-degree burglary in the face of explanatory evidence. Evidence of intent to commit other crimes, however, does not negate the inference of larcenous intent. *See State v. Davis*, 64 N.C. App. 186, 306 S.E. 2d 829 (1983) (sexual intent), *disc. rev. denied*, 310 N.C. 478, 312 S.E. 2d 887 (1984). Defendant offered no explanation for his presence in the victim's home, nor did the circumstances disclose any legitimate explanation. We conclude that the charge of first-degree burglary was properly submitted to the jury.

III

[4] Finally, defendant assigns error to the admission of the evidence of defendant's involvement in the other incident. As noted above, the other incident also involved unauthorized entry into the home of a sleeping female and the surreptitious slitting open of her pants or panties preparatory to a sexual assault. Defendant argues that this evidence was not admissible under G.S. 8C-1, R. Ev. 404.

A

Such evidence of other crimes may be admissible *inter alia* as proof of intent, plan or identity. G.S. 8C-1, R. Ev. 404(b). Rule 404 is consistent with prior North Carolina practice. *Id.*, Commentary; *see* 1 H. Brandis, N.C. Evidence, Section 92 at 352 n. 19 (Supp. 1983). Under North Carolina practice, evidence of similar sex crimes has historically been more readily admitted. *See State v. Greene*, 294 N.C. 418, 241 S.E. 2d 662 (1978).

Rule 404 is virtually identical to Federal Rule of Evidence 404, the legislative history of which tends to favor admissibility. 10 J. Moore, Moore's Federal Practice 404.01 [3] (2d ed. 1985). Under the federal rule, evidence of other "signature" crimes, committed in a similar unusual manner, has generally been held ad-

missible. *See United States v. Engleman*, 648 F. 2d 473 (8th Cir. 1981) (complicated murder and mail fraud schemes); *United States v. Woods*, 613 F. 2d 629 (6th Cir. 1980) (use of ski masks, goggles and jumpsuits in armed robberies). Evidence may be admitted even though remote in time, if its "signature" value is high. *Engleman* (thirteen years between crimes). The decision to admit the evidence rests in the discretion of the court upon consideration of the facts supporting relevancy. *Id.* The same rule applies in North Carolina. G.S. 8C-1, R. Ev. 104(a). Under these standards, in light of the unusual *modus operandi* involved in both incidents, the court did not abuse its discretion in admitting this evidence.

B

Our Supreme Court has only recently reached the same result, although without discussing Rule 404(b). *State v. Riddick*, 316 N.C. 127, 340 S.E. 2d 422 (1986). In *Riddick* the Court considered evidence of defendant's commission of similar break-ins and assaults six years earlier in Connecticut. The Court held that this evidence was admissible to show defendant's identity as the perpetrator since it included "unusual facts" also present in the North Carolina crime under consideration. The perpetrator in each instance cut off telephone or power lines and attempted ineptly to handcuff the victim. In each break-in the perpetrator stole fresh fruit from the premises, a circumstance the Court found "most telling." *Id.* The Court rejected defendant's contention that remoteness in time required exclusion of the other crimes evidence:

> Remoteness in time is less important when the other crime is admitted because its *modus operandi* is so strikingly similar to the *modus operandi* of the crime being tried as to permit a reasonable inference that the same person committed both crimes. It is reasonable to think that a criminal who has adopted a particular *modus operandi* will continue to use it notwithstanding a long lapse of time between crimes.

Id. at 134, 340 S.E. 2d at 427. *Compare State v. Shane*, 304 N.C. 643, 285 S.E. 2d 813 (1982) (evidence not admissible for any purpose, despite "striking similarity" of *modus operandi*, where seven month interval between occurrences). Under *Riddick*, the evidence of the other incident, involving the identical unusual *modus operandi*, was relevant to prove defendant's identity and

hence admissible in this case. Defendant does not contend that the evidence, even if relevant, was so unfairly prejudicial that it should have been excluded anyway, nor does the record so reflect. This assignment is overruled.

IV

We have carefully considered each of defendant's assignments and found them all without merit. No reversible error appears on the face of the record. Defendant received a fair trial.

No error.

Judges MARTIN and COZORT concur.

STATE OF NORTH CAROLINA v. WALTER BRYANT, JR.

No. 856SC386

(Filed 1 April 1986)

1. **Assault and Battery § 15.7— assault with firearm—instruction on self-defense refused—no error**

The trial court did not err by denying defendant's request for a self-defense instruction as to the charge of assault with a deadly weapon with intent to kill inflicting serious injury on defendant's former wife where the only evidence supporting the request was that defendant's former wife owned a gun which defendant had seen on two prior occasions and that defendant did not believe the gun held by his wife's companion was his wife's gun. Defendant never saw his former wife holding any weapon and she never made any advance toward him.

2. **Criminal Law § 138.26— aggravating factor—great monetary loss—lost wages from assault—no error**

The trial court did not err by finding as an aggravating factor when sentencing defendant for assault with a deadly weapon with intent to kill inflicting serious injury that the offense involved great monetary loss based on the victim's medical expenses and lost wages. This factor was not intended to apply only to property damage, and it was not error to consider the result of the assault as an aggravating factor because in this case the evidence of hospital costs and loss of income was not necessary to prove the serious injury element, and monetary loss made the crime worse than it would otherwise have been. N.C.G.S. 15A-1340.4(a)(1)m.

Judge EAGLES dissenting in part.

APPEAL by defendant from *Allsbrook, Judge.* Judgment entered 17 August 1984 in Superior Court, HALIFAX County. Heard in the Court of Appeals 18 October 1985.

Attorney General Lacy H. Thornburg by Associate Attorney Dolores O. Nesnow for the State.

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

COZORT, Judge.

The defendant was tried upon indictments, proper in form, charging him with assault with a deadly weapon with intent to kill Marvin Hardy, his former wife's boyfriend; assault with a deadly weapon with intent to kill inflicting serious injury on Margie Bryant, his former wife; and discharging a firearm into an occupied vehicle. He was acquitted of the assault on Hardy and convicted of assault with a deadly weapon inflicting serious injury upon Margie Bryant and discharging a firearm into an occupied vehicle. On appeal he contends he was entitled to an instruction on self-defense as to Margie Bryant even though there was no evidence that she committed any overt act of aggression at the time of the alleged assault. He also contends the trial court erred by finding as an aggravating factor that the offense involved damage causing great monetary loss. We find no error.

The State's evidence tended to show the following: Margie Bryant and defendant Walter Bryant, Jr., were divorced in 1982. Mrs. Bryant had custody of the two children born of the marriage. In March of 1984, she began dating Marvin Hardy. In the early evening hours of 18 May 1984, around 6:30 or 7:00, Mrs. Bryant's sister dropped Mrs. Bryant off at Hardy's house at Route 2, Enfield, in Halifax County. Her children had been left at a friend's home for the evening. Hardy and Mrs. Bryant went for a walk and visited Hardy's uncle, returning to Hardy's house around 10:00 p.m. Sometime after 1:00 a.m., Hardy and Mrs. Bryant were preparing to leave in Hardy's automobile when the defendant pulled up in his car directly in front of Hardy's car. The defendant ran up to the passenger side of Hardy's car where Mrs. Bryant was sitting, yelled something at Mrs. Bryant, and began shooting a pistol. Mrs. Bryant was shot in the back. The defendant went to the front of the car and fired another shot into the

windshield. While defendant was approaching the Hardy auto, Mrs. Bryant pulled a pistol from her purse and placed it on the console between the front seats. After defendant shot Mrs. Bryant, and while defendant was shooting into the windshield, Hardy picked up the pistol and tried to shoot the defendant, but the gun misfired. Mrs. Bryant never touched the pistol after she put it on the console. Hardy opened the car door, "rolled out," and ran to a neighbor's house to call the police. Defendant drove away in his car.

Defendant testified that he went to Hardy's house looking for Mrs. Bryant to talk to her about the children. He approached Hardy's car with his hand in his pocket which contained a pistol. According to the defendant, Hardy pulled his gun first, and the defendant shot at Hardy to keep from being shot, never intending to shoot Mrs. Bryant. After the shooting, Hardy ran away. Defendant drove straight to the police station, stopping only to throw his pistol in a creek on the way. The defendant also presented testimony that on two prior occasions, Mrs. Bryant had a gun in her possession while she was having a discussion with the defendant. On one of those occasions she was also carrying a knife.

[1] At trial, on the offense of assault with a deadly weapon with intent to kill Marvin Hardy, the trial court instructed the jury that if the defendant acted in self-defense, his actions were excused and defendant was not guilty. The trial court denied the defendant's request for a self-defense instruction as to the charge of assault with a deadly weapon with intent to kill inflicting serious injury on Margie Bryant. Defendant argues that under *State v. Spaulding*, 298 N.C. 149, 257 S.E. 2d 391 (1979), he is entitled to an instruction on self-defense as to his former wife because the evidence, taken in the light most favorable to the defendant, would tend to show (1) that defendant was not the aggressor, and (2) it reasonably appeared to be necessary to shoot Mrs. Bryant to protect himself from death or great bodily harm.

In *Spaulding*, our Supreme Court held the trial court erred in refusing to instruct on self-defense where defendant, a Central Prison inmate, offered evidence tending to show he did not provoke the affray, he was not the aggressor, and even though the victim had no weapon on his body and made no show of deadly

force toward the defendant, the victim had threatened him in the past, and on this occasion, backed the defendant up to a fence with his hand jammed into his pocket.

Spaulding is distinguishable. In the instant case, there is no evidence to support defendant's theory that he had a reasonable basis for believing he needed to defend himself against Margie Bryant. The evidence is clear that defendant never saw Mrs. Bryant holding any weapon while she was seated in the car. She never made any advance toward defendant. The only evidence supporting defendant's request is his evidence that his former wife owned a gun which he saw on two prior occasions, and his evidence that he did not believe the gun held by Hardy was Mrs. Bryant's gun. We hold that evidence to be insufficient to form a reasonable basis for apparent necessity for self-defense. Where the defendant fails to present "some evidence" indicating that he acted in self-defense, he is not entitled to a jury instruction on that defense. *State v. Brooks*, 37 N.C. App. 206, 245 S.E. 2d 564 (1978).

[2] Defendant's next assignment of error alleges that the trial court erred by finding as a statutory aggravating factor in the assault of Margie Bryant that the "offense involved damage causing great monetary loss." At the sentencing hearing, Mrs. Bryant testified that as a result of the injuries she received, she was hospitalized, incurring medical expenses of approximately $5,000.00, which had not yet been paid by her insurance. She was out of work seven or eight weeks, losing approximately $1,000.00 in salary. Her gross income is about $134.00 a week.

Defendant first argues that the trial court erred because the statutory aggravating factor found by the court was intended to apply to cases where *property* had been taken or damaged. The statutory aggravating factor in question reads as follows:

> The offense involved an attempted or actual taking of property of great monetary value *or* damage causing great monetary loss, or the offense involved an unusually large quantity of contraband.

G.S. 15A-1340.4(a)(1)m (emphasis added). We do not agree that the factor applies only to property. The use of the word "or" clearly creates two separate situations: The first is an offense involving

the attempted or actual taking of property of great monetary value; the second is *damage* causing great monetary loss. The "damage" in the second situation is not modified by and therefore not restricted to the "property" in the first. We hold that "damage causing great monetary loss" as an aggravating factor is not restricted to damage to property.

Defendant's second and more important argument concerning this aggravating factor is his contention, citing *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983), that it is improper to consider the nature and results of injuries as an aggravating factor. In *Medlin*, this Court held the trial court erred by finding, in a case of assault with a deadly weapon with intent to kill inflicting serious injury, as a non-statutory aggravating factor, " 'that the victim suffered very severe physical disability.' " *Id.* at 255-56, 302 S.E. 2d at 485. The court reasoned that "the 'resulting disability to the victim' factor . . . does not relate to the character or conduct of the defendant." *Id.* at 255-56, 302 S.E. 2d at 486.

In *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983), decided after *Medlin*, the Supreme Court discussed the "impact" of the crime on the victim:

> Also relevant to the question of sentencing and properly considered under G.S. 15A-1340.4(a)(1) is the impact of the crime on the victim. Where the physical or emotional injury is *in excess* of that normally present in the offense, multiple injuries would be an important consideration *either* as an additional factor in aggravation *or* as proof that the offense was especially heinous, atrocious, or cruel.

Id. at 413, n. 1, 306 S.E. 2d at 786, n. 1 (emphasis in original).

Similar reasoning was applied in *State v. Nichols*, 66 N.C. App. 318, 311 S.E. 2d 38, *disc. rev. denied*, 311 N.C. 406, 319 S.E. 2d 278 (1984), where this Court, in a common law robbery case upheld as an aggravating factor the finding that the defendant inflicted serious bodily injury upon the victim, and stated the following:

> Serious injury is not an element of common law robbery. We believe the fact that the victim suffered serious injury in this case *makes it a worse crime than it would otherwise*

> *have been*, and it is reasonably related to the purposes of sentencing. We hold that Judge Brown properly found this aggravating factor.

Id. at 321, 311 S.E. 2d at 39-40 (emphasis added).

Following that line of reasoning, we hold that it is proper to find as an aggravating factor in cases of assault inflicting serious injury that the offense involved damage causing great monetary loss, because the evidence of the great monetary loss is not an element of the offense itself and makes the crime worse than it would otherwise have been. In the instant case, Margie Bryant was shot in the back by defendant. The evidence of the resulting serious injury was uncontradicted. Thus, the question before us is whether the evidence of the costs of her hospitalization and the evidence of her loss of income from her absence from work are beyond that necessary to prove the serious injury element of the assault crime and sufficient to make the offense worse than it would otherwise have been. Our review of the record shows the evidence of hospitalization costs and loss of income were not necessary to prove the serious injury element of the assault charge against defendant. That evidence was offered during the sentencing phase, not at the trial phase. At trial, Mrs. Bryant described being shot, the severe pain, the hospitalization, and her staying out of work as a result. Dr. F. G. Jarman, Jr., the attending physician, testified about the seriousness of the wound, the surgery, and Mrs. Bryant's recovery. Neither gave evidence at trial of the economic impact of the injury. We find the evidence of the costs of hospitalization and loss of income were not necessary to prove the serious injury element of the offense.

We now consider whether the economic impact made the crime worse than it would otherwise have been. In *State v. Rotenberry*, 54 N.C. App. 504, 284 S.E. 2d 197 (1981), we held that " '[s]erious injury' . . . means physical or bodily injury resulting from an assault with a deadly weapon. The injury must be serious, but evidence of hospitalization is not required." *Id.* at 511, 284 S.E. 2d at 201. Since it is not necessary to prove hospitalization to show a serious injury, an assault resulting in serious injury becomes a worse crime if the injury does result in hospitalization and absence from work which has a serious economic impact, a great monetary loss, to the victim. Here, the victim was

supporting two minor children on a gross income of about $134.00 a week. A hospital bill of $5,000.00 and lost wages of $1,000.00 is a great monetary loss in this case, making the crime worse than it would otherwise have been. We hold the trial court correctly found as an aggravating factor that the offense involved damages causing great monetary loss.

No error.

Judge WHICHARD concurs.

Judge EAGLES concurs in part and dissents in part.

Judge EAGLES dissenting in part.

I dissent from the portions of the majority opinion which sanction the use of the statutory aggravating factor in G.S. 15A-1340.4(a)(1)m in this assault with a deadly weapon inflicting serious bodily injury case.

G.S. 15A-1340.4(a)(1)m reads: "The offense involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or the offense involved an unusually large quantity of contraband."

The language relied on by the majority is the "[t]he offense involved . . . damage causing great monetary loss, ..." The evidence which they contend supports this finding is the $5,000 hospital and medical expenses and approximately $1,100 in lost wages suffered by the victim.

Their logic is flawed in several respects. First, the statutory element deals with property taken or attempted to be taken, large amounts of contraband (again property) and "*damage* causing great monetary loss." [Emphasis added.] The language chosen by the General Assembly was not "injury" or "personal injury" but "damage," a term usually associated with harm to property rather than injury to people. The word "damage" is linked amid a series of other property-oriented criteria.

My research discloses no prior decisions of our appellate courts which sanction the use of the statutory aggravating factor at G.S. 15A-1340.4(a)(1)m when its only support is evidence of

hospitalization and medical expenses and lost wages of the victim or even evidence of serious bodily injury. On the contrary, in *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983), we held that the trial court erred in finding as a non-statutory aggravating factor "that the victim suffered very severe physical disability," where the charge was, as in the instant case, assault with a deadly weapon with intent to kill inflicting serious injury.

The majority relies on *State v. Nichols*, 66 N.C. App. 318, 311 S.E. 2d 38, *cert. denied*, 311 N.C. 406, 319 S.E. 2d 278 (1984) but it was a common law robbery case where serious injury to the victim was not an element of the offense, unlike the charge before us here.

Secondly, the evidence relied upon to justify the statutory aggravating factor chosen (15A-1340.4(a)(1)m) is also some of the evidence necessary to prove an element of the offense, infliction of serious injury.

Where the charge is assault with a deadly weapon inflicting serious injury, evidence of the gravity of the injury is important to establish an essential element, serious injury.

The sentencing statute expressly forbids the use of evidence necessary for proof of an element of the offense to also support a finding that an aggravating factor exists: "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . . ." G.S. 15A-1340.4(a)(1).

While the absence of evidence of hospitalization is not fatal to proof of serious injury, *State v. Rotenberry*, 54 N.C. App. 504, 284 S.E. 2d 197 (1981), *cert. denied*, 305 N.C. 306, 290 S.E. 2d 705 (1982), its presence in a case like this is highly probative of the existence of *serious* injury.

For these reasons I respectfully dissent from the majority's endorsement of a finding of a G.S. 15A-1340.4(a)(1)m aggravating factor based solely upon evidence of lost wages and substantial hospital and medical expenses.

ERLICH FOODS INTERNATIONAL v. 321 EQUIPMENT COMPANY

No. 8527SC826

(Filed 1 April 1986)

Constitutional Law § 26.1— full faith and credit—foreign judgment obtained without jurisdiction

Defendant did not have sufficient contacts with the State of California to allow a court of that state to exercise personal jurisdiction over defendant, and the superior court properly refused to give full faith and credit to the default judgment entered against defendant in California, where the California court struck defendant's special appearance to contest jurisdiction over it and thus did not litigate defendant's assertion that it had insufficient contacts with California to permit the courts of that state to exercise personal jurisdiction over it, and where the evidence supported findings by the trial court that plaintiff's action arose from a contract defendant made in North Carolina with a Missouri corporation to deliver poultry from Mississippi to Massachusetts, that defendant has no employees or agents in California and does not advertise or solicit business in that state, that defendant was not licensed to do business in California, and that defendant has not done business in California in the past.

APPEAL by plaintiff from *Saunders, Chase B., Judge.* Judgment entered 21 February 1985 in Superior Court, GASTON County. Heard in the Court of Appeals 6 December 1985.

On 9 April 1984, plaintiff, Erlich Foods International, instituted this action in North Carolina with the filing of a complaint alleging, *inter alia,* that it was entitled to have the Gaston County Superior Court of North Carolina give full faith and credit to a default judgment entered in a superior court of the state of California against defendant, 321 Equipment Company. Plaintiff's California complaint alleged four causes of action (1) breach of contract, (2) negligence, (3) an account stated in writing, and (4) an open book account. Attached to plaintiff's complaint filed in North Carolina was a duly certified, attested and exemplified copy of the California judgment against defendant in the sum of $17,668.69 plus costs in the amount of fifty-one dollars ($51.00). (*Erlich Foods International v. 321 Equipment Company,* Los Angeles County Superior Court Case No. 270250.)

Plaintiff, Erlich Foods International, is a California corporation with its principal office in Los Angeles, California. Defendant,

321 Equipment Company is a North Carolina corporation with its principal office in Gaston County. On 30 May 1984, defendant responded to plaintiff's complaint filed in Gaston County with the filing of a 12(b) pre-answer motion to dismiss for insufficient service of process in the California action. Defendant filed an affidavit, signed by its president, asserting *inter alia*, that defendant had no contacts with the state of California and that the incident which gave rise to the California judgment did not arise through any contacts with the state of California.

On 31 December 1984, plaintiff filed a response to defendant's pre-answer motion to dismiss. Attached to plaintiff's response were the following: affidavit of Jerome B. Smith; requests for admissions and answers; the exemplified copies of the California judgment along with the court files pertinent thereto. The affidavit of Jerome B. Smith, attorney of record for plaintiff in the California action, purported to chronicle the case history of the California action. Attorney Smith asserted that on 6 March 1979, he received a copy of a letter to the Los Angeles Superior Court Clerk from defendant's attorney purporting to be a special appearance contesting jurisdiction. Attorney Smith stated in his affidavit that he moved the court for a default judgment against defendant after defendant had not "answered, responded, or made a special appearance to quash service." Included in the court files submitted by plaintiff were the declarations of two individuals asserting that they had telephone conversations with officials of defendant, 321 Equipment Company. These two individuals asserted that the company officials to whom they spoke indicated that defendant had previously done business in California.

On 3 January 1985, defendant filed a supplemental motion to dismiss on the grounds that the California judgment was entered contrary to its Rules of Civil Procedure and against public policy, to wit: pursuant to California Code of Procedure Section 430.30(c) defendant was not required to file an answer along with a demurrer and upon the court's striking of defendant's motion to dismiss defendant should have been allowed additional time to file an answer or other responsive pleadings.

On 18 February 1985, proceedings were held before Judge Saunders, whereby Bernard Dalton, owner of defendant, 321 Equipment Company, testified with respect to any of his com-

pany's contacts, or the lack thereof, with the state of California. On 21 February 1985, after reviewing the pleadings, affidavits, declarations, and hearing oral arguments and oral testimony of Mr. Dalton, the court made findings of fact and concluded as a matter of law that defendant does not have sufficient contacts with the state of California for the California courts to exercise personal jurisdiction over defendant. The court also concluded that the California court's failure to allow defendant additional time for responsive pleadings denied defendant of its due process of law. Defendant's motion to dismiss was granted and the case dismissed. From the 21 February 1985 order dismissing this action plaintiff appeals.

McElwee, McElwee, Cannon & Warden, by John P. McElwee, for plaintiff appellant.

Charles D. Gray, III, for defendant appellee.

JOHNSON, Judge.

In the case *sub judice* we are called upon to decide the jurisdictional question of whether, consistent with the due process clause of the fourteenth amendment to the United States Constitution, defendant had sufficient contacts with the state of California to allow a superior court of that state to exercise personal jurisdiction over defendant, thereby entitling plaintiff to have the Superior Court of North Carolina give full faith and credit to the California default judgment entered against defendant. We hold that defendant did not have sufficient contacts with the state of California to allow a superior court of that state to exercise jurisdiction over defendant and therefore the trial court was correct in not giving full faith and credit to the California judgment.

The United States Constitution provides "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV sec. 1. We acknowledge that we would be bound by the judgment entered in our sister state if the jurisdictional question raised by defendant had been fully and fairly litigated in the superior court of California from whence the judgment in question was entered. *See generally Hosiery Mills v. Burlington Industries, Inc.*, 285 N.C. 344, 204 S.E. 2d 834 (1974) (judgment entered in the state of

New York was not entitled to full faith and credit in the North Carolina Superior Court and therefore the affirmative defense of *res judicata* by virtue of an award of arbitrators and upheld by the New York Supreme Court could not be asserted by defendant).

In the case *sub judice* the North Carolina Superior Court found as fact the following:

> 13. That from the Court file, the Defendant's special appearance to contest jurisdiction was stricken by the Court and the California Court made no determination as to whether or not the Court had jurisdiction over the foreign corporation.

After extensively reviewing the aforementioned documents upon which Judge Saunders based finding No. 13, we agree with his finding. Our review reveals that: plaintiff did submit in writing to the California court a document dated 1 March 1979 entitled "SPECIAL APPEARANCE TO CONTEST JURISDICTION." This document moved the court to dismiss the action for lack of jurisdiction over the person of defendant. Attached thereto was a sworn affidavit of Bernard Dalton as president of 321 Equipment Company, denying any contacts with the state of California which would be sufficient to allow a California court to exercise jurisdiction over defendant, 321 Equipment Company. A document entitled "ARGUMENT IN SUPPORT OF SPECIAL APPEARANCE TO CONTEST JURISDICTION" was submitted by defendant in support of its special appearance to contest jurisdiction. The document stated, *inter alia*, "321 Equipment Company has no contacts whatsoever with the state of California, and that the service obtained in this matter was defective." Defendant further argued consistent with its special appearance that the California court did not have jurisdiction over it. Thereafter, plaintiff unsuccessfully attempted to enter default against 321 Equipment Company but the "clerk . . . declined to do so." In November 1979, defendant's counsel received a copy of a document entitled "NOTICE OF MOTION AND MOTION FOR AN ORDER ENTERING DEFAULT AGAINST 321 EQUIPMENT COMPANY, POINTS & AUTHORITIES AND DECLARATION OF JAMES WESTON AND BRUCE ALTSCHULD IN SUPPORT THEREOF." The basis for plaintiff's motion entailed allegations that documents filed by defendant did not constitute proper responses to a serving of

summons and complaint and "[did] not serve to make a proper challenge to jurisdiction." In the preliminary statement to plaintiff's "POINTS & AUTHORITIES" plaintiff requested the following:

> Under these circumstances, it is Plaintiff's position that the Defendant has made no adequate attempt to challenge the jurisdiction of the court and in fact has, in effect, not responded to the Court's summons in an appropriate manner. Therefore, Plaintiff respectfully requests that Defendant's 'Special Appearance to Contest Jurisdiction' should be stricken and Default should be entered against the Defendant.

Plaintiff's motion for an order entering default of defendant was heard on 27 November 1979 in the Los Angeles Superior Court. Defendant was not represented at this hearing on plaintiff's motion. Pursuant to plaintiff's motion the court "ordered that the special appearance of 321 EQUIPMENT COMPANY be stricken and that default be entered against Defendant, 321 EQUIPMENT COMPANY." The court did not consider any of defendant's grounds for contesting the California court's exercise of personal jurisdiction over defendant. The court merely granted plaintiff's request to strike defendant's pleadings because of plaintiff's assertion that they were improper responses to its complaint and summons. We hold that by striking defendant's special appearance the court effectively precluded the full and fair litigation of defendant's assertion that the California court should not be allowed to exercise *in personam* jurisdiction over it.

We now address the question of whether pursuant to the California long-arm statute the assumption of *in personam* jurisdiction by a California court over defendant offends the due process clause of the United States Constitution. Our review of the North Carolina Superior Court's decision to deny full faith and credit to the California judgment is to be guided by the statutes and decisions of the courts of California. *Montague v. Wilder, Jr.*, 78 N.C. App. 306, 337 S.E. 2d 627 (1985). The California long-arm statute states, "A court may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code sec. 410.10.

The basic test as stated by the California courts with which we are to determine if *in personam* jurisdiction may fairly be exercised over defendant is as follows:

> The basic test is whether the quality and nature of the defendant's activity in relation to the particular cause of action make it fair to exercise jurisdiction. The cause of action must arise out of an act done or a transaction consummated in the forum, or the defendant must perform some other act by which he purposely avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protection of its laws.

Foster v. Mooney Aircraft Corp., 68 Cal. App. 3d 887, 892, 137 Cal. Rptr. 694, 697 (1977). The pertinent findings of fact made by the North Carolina Superior Court are as follows:

> 1. The Plaintiff is a California corporation with its principal office in Los Angeles, California.
>
> 2. The Defendant is a North Carolina corporation with its principal office in Gaston County, North Carolina.
>
> 3. That on July 12, 1978, the Plaintiff, who is a poultry broker, contracted with Truckers Exchange Company to deliver an order of frozen poultry from Mississippi to Massachusetts.
>
> 4. Truckers Exchange Company is a Mississippi corporation.
>
> 5. Truckers Exchange Company contracted in North Carolina with the Defendant to make the delivery of the said poultry from Mississippi to Massachusetts and the Defendant pursuant to said contract, delivered the poultry from Mississippi to Massachusetts by the most direct route.
>
> 6. Because of disagreement over the temperature of the poultry on delivery, the poultry was rejected by the ultimate buyer, the U.S. Army, resulting in alleged losses by the plaintiff.
>
> 7. The plaintiff filed a lawsuit in the Superior Court of the State of California for the county of Los Angeles on January 24, 1979, naming as Defendants, Truckers Exchange Company and the Defendant herein.

8. On March 9, 1979, the Defendant, 321 Equipment Company, filed a Motion To Dismiss the California action as to it and made a special appearance contesting jurisdiction on the grounds that Defendant did not have sufficient contacts with the state of California to permit personal jurisdiction.

9. The Defendant, 321 Equipment Company, does not maintain an office in the state of California, has no employees, agents or other personnel in the State of California, does not advertise, promote or solicit business in the State of California and the incident which is the subject of this lawsuit did not arise out of any contract for services or goods to be made, performed or delivered within the State of California.

10. The only evidence in the California case and in the North Carolina case that the Defendant had any contacts at all with the State of California are two declarations filed by James Weston and Bruce Altschuld stating that they had talked with some person in North Carolina that indicated the Defendant had delivered cargo in the past in California.

11. That the aforesaid affidavits by James Weston and Bruce Altschuld were refuted by oral testimony of F. Brenard (sic) Dalton and further, the aforesaid affidavits were based on inadmissible hearsay evidence.

The foregoing findings of fact made by the trial court are amply supported by the record in the case *sub judice*. Whenever affidavits filed in support of motions to quash service of process for lack of jurisdiction are in conflict with those opposing it, we must deem that the trial court resolved such conflicts against the appellant and in support of its order. *Tiffany Records, Inc. v. M. B. Krupp Distributors, Inc.*, 276 Cal. App. 2d 610, 81 Cal. Rptr. 320 (1969).

On 18 February 1985, Bernard Dalton testified in proceedings in the Superior Court of Gaston County. Mr. Dalton's testimony supports the court's findings and establishes that defendant was not licensed to do business in California. James Weston, in his Declaration, purported to have spoken by telephone with a person named Bill Byers, who said that he was part owner of defendant, 321 Equipment Company. Mr. Weston stated that the telephone number he used was (704) 867-2317. Mr. Dalton testified that Mr.

Byers never had been connected with defendant, 321 Equipment Company. Moreover, Mr. Dalton testified that the telephone number (704) 867-2317 is the telephone number of another company named 321 Equipment Leasing Company. The telephone number used by defendant, 321 Equipment Company, is (704) 867-2315. Bruce Altschuld, in his Declaration, stated that he used telephone number (704) 867-2314 to call 321 Equipment Company. However, Mr. Altschuld could not even recall whom he spoke with on the telephone. Mr. Altschuld declared that this unidentified person "indicated" that defendant had done business in California in the past. However, Mr. Dalton's testimony established the fact that defendant, 321 Equipment Company, was not licensed to do business in the state of California prior to the filing of this lawsuit. The record supports Mr. Dalton's assertion that defendant, 321 Equipment Company, was not licensed to do business in the state of California and that it was not within the realm of possibility that defendant hauled freight to California prior to deregulation.

We conclude that (1) the quality and nature of defendant's activity in relation to his particular cause of action does not make it fair for a California Court to exercise jurisdiction; (2) plaintiff's cause of action does not arise out of an act done or transaction consummated in California; (3) defendant has not performed any act by which it purposely availed itself of the privilege of conducting activities in the forum, and did not invoke the benefit and protection of California's laws; (4) under California law defendant does not have sufficient minimum contacts with the state of California to subject defendant to jurisdiction in that state. Accordingly, the judgment is

Affirmed.

Judges WHICHARD and PHILLIPS concur.

Mobley v. Hill and Darden v. Hill

CYNTHIA MOBLEY v. CHARLES EVANS HILL AND DOUGLAS McCARR WALTERS

JAMES DARDEN v. CHARLES EVANS HILL AND DOUGLAS McCARR WALTERS

No. 853SC932

(Filed 1 April 1986)

1. **Rules of Civil Procedure § 15.2— amendment of pleadings to conform to evidence—no error**

The trial court did not err by allowing an amendment to the pleadings to conform them to the evidence where there was no prejudice from allowing the amendment at the charge conference, even though defendant Walters had already announced that he would not introduce evidence, because defendant Walters did not move to reopen evidence, has not suggested what evidence he might produce, and no additional evidence appears to have been available to either side; the complaints contained general allegations of failure to exercise reasonable care, there was no dispute as to whether the accident and injury occurred, but only as to how, the record does not reflect any discovery or motions for summary judgment and it is not surprising that the specific facts of the negligence first became apparent at trial; and the specific allegations added by the amendment were supported by evidence in the record.

2. **Automobiles and Other Vehicles § 55.2— driving without lights—evidence sufficient**

The evidence supported a verdict against defendant Walters in an action arising from an automobile collision where the evidence was sufficient to support a jury finding that Walters caused the accident by driving in the dark without his lights; cases holding that an unexpected left turn across the path of an oncoming vehicle insulated the driver of the through vehicle from liability do not apply because Walters did not have his headlights on and the turning driver in this case had no warning that Walters was approaching; and defendant Walters did not object to instructions on theories of negligence other than his failure to have his headlights on. App. Rule 10(b)(2). N.C.G.S. 1A-1, Rule 50(a).

3. **Evidence § 41— testimony as to whether defendant driver at fault—properly stricken**

The trial court did not err by striking cross-examination testimony from one plaintiff that an automobile accident was not defendant Walters' fault. N.C.G.S. 8C-1, Rules 701 and 704.

4. **Appeal and Error § 30.2— general objection—insufficient**

In a case arising from an automobile accident, the question of whether the court erred by admitting evidence that defendant Walters' car lay across the center line after the accident was not properly before the Court of Appeals

where defendant only objected generally to the admission of the evidence. N.C.G.S. 8C-1, Rule 103(a).

APPEAL by defendant Douglas McCarr Walters from *Tillery, Judge.* Judgment entered 24 April 1985 in Superior Court, PITT County. Heard in the Court of Appeals 17 January 1986.

This is an automobile accident personal injury case, in which plaintiff passengers sued defendant drivers. The accident occurred at about 5:20 p.m. on 24 December 1983. Both plaintiffs were passengers in an automobile operated by defendant Walters heading east on a Greenville city street. Walters entered an intersection at the same time as defendant Hill, who was headed west. As Hill was making a left turn, the two vehicles collided. Plaintiffs suffered personal injury. At trial the jury found that Hill was not negligent but that Walters was negligent. The jury awarded plaintiff Darden $15,000 and plaintiff Mobley $8,000. Defendant Walters appeals.

Dixon, Duffus & Doub, by Curtis C. Coleman, III, and J. David Duffus, Jr., for plaintiff-appellees.

Speight, Watson and Brewer, by Vicki Y. Gregory and W. H. Watson, for defendant-appellant Walters.

No brief filed for defendant Hill.

EAGLES, Judge.

In this appeal defendant Walters assigns as error several evidentiary rulings, a ruling allowing an amendment to the pleadings, and denial of his directed verdict and judgment n.o.v. motions based on the insufficiency of the evidence. He has grouped them together in a somewhat confusing manner, in violation of our rule requiring that questions be stated separately. App. R. 28(b)(5). Nevertheless, we have carefully reviewed them. We find no prejudicial error.

I

[1] We address first Walters' argument that the court erred in allowing an amendment to the pleadings to conform them to the evidence presented at trial. The complaints against Walters alleged that he was negligent in failing to see that his movement

could be made safely, in failing to keep a proper lookout, in failing to reduce speed to avoid an accident, and in failing to exercise reasonable care. By oral motion during the charge conference, plaintiffs sought to amend their pleadings by adding allegations that Walters negligently failed to keep his vehicle under control, failed to keep his vehicle to the right of the center line, and failed to have his headlights on. Walters assigns error to the court's allowing this motion.

A

"When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." G.S. 1A-1, R. Civ. P. 15(b). Even though technically no amendment is required when issues are tried by implied consent, the better practice is to move to amend the pleadings to actually reflect the theory of recovery. *Roberts v. William N. & Kate B. Reynolds Mem. Park*, 281 N.C. 48, 187 S.E. 2d 721 (1972). Those amendments should be freely allowed. *Id.*; R. Civ. P. 15(b). The rule is framed in mandatory terms: issues "*shall* be treated as if they had been raised. . . ." [Emphasis ours.] *See Wallin v. Fuller*, 476 F. 2d 1204 (5th Cir. 1973) (under identical language of federal rule, reversible error to deny amendment offered at charge conference). An amendment to conform the pleadings to the evidence may be offered even after oral argument. *Reid v. Consolidated Bus Lines, Inc.*, 16 N.C. App. 186, 191 S.E. 2d 247 (1972). To limit the scope of the issues raised by the evidence at trial, it is the duty of the opponent to object specifically to evidence offered at trial as being outside the scope of the pleadings. *Roberts*. Absent objection, the party will be deemed to have impliedly consented to trial of the issues. *Id.* Even when a timely specific objection is made, the party objecting must show some actual prejudice arising from a proposed amendment, *i.e.*, some undue disadvantage or difficulty in presenting the merits of its case. *Id.; see* Annot., 20 A.L.R. Fed. 448 (1974) (collecting decisions under identical language of federal rule).

B

Walters argues that he suffered special prejudice here because he had already announced that he would not introduce evidence when the motion to amend was made. We have affirmed

allowance of pleading amendments even after oral argument. *Reid v. Consolidated Bus Lines, Inc., supra.* Walters' announcement, nothing more appearing, does not give rise to prejudice. Walters did not move to reopen the evidence after the amendment, nor has he suggested here what, if any, evidence he might have introduced. It is difficult to imagine how the amendment changed the merits of the case significantly: all the witnesses to the accident (except Walters) had testified at length and no additional evidence appears to have been available to either side.

C

We note that the complaints contained general allegations of failure to exercise reasonable care. The only transaction at issue was the accident; no dispute arose as to *whether* the accident and injury occurred, but only as to *how*. The record does not reflect any pre-trial discovery or motions for summary judgment. Under these circumstances with "notice pleading," it is not surprising that the specific facts of the negligence alleged first became apparent at the trial stage.

D

Turning to the specific allegations added by the pleadings amendment, each of them is supported by evidence in the record and was therefore properly allowed.

The amendment added an allegation that Walters negligently failed to have his lights on. Witness Darden testified that it was dusk when he left home. Witness Barrett testified that it was dark enough to have car lights on. Witness White, the investigating officer, testified that it was dark. White also testified regarding the condition of the headlights of the two cars. Witness Gordon was asked, but could not remember, whether Walters had his lights on. Witness Hill testified affirmatively that Walters did not have his lights on; witness Darden testified affirmatively that Walters did have his lights on. None of this testimony was objected to on the ground that it was outside the pleadings. Accordingly, this amendment was properly allowed. The evidence clearly created a jury question.

The amendment also added an allegation that Walters failed to keep his vehicle to the right of the center line. Witness White testified that, after the accident, Walters' car lay further across

the center line than Hill's, and that the damage to both cars was directly across the front of each. Witness Hill also testified that a third of Walters' car came over into his lane. None of this testimony was objected to on the ground that it was outside the pleadings. Again, the amendment was properly allowed since the evidence raised an issue for the jury.

Finally, the amendment added an allegation that Walters failed to keep his vehicle under proper control. The duty to keep one's vehicle under proper control has not always been defined with precision and is often interrelated with the duty to maintain a safe speed. *See Radford v. Norris*, 74 N.C. App. 87, 327 S.E. 2d 620, *disc. rev. denied*, 314 N.C. 117, 332 S.E. 2d 483 (1985). Nevertheless, it appears that there was evidence tending to show that Walters' car swerved without explanation into Hill's line of travel which would tend to show a violation of that duty. *See Hunt v. Carolina Truck Supplies, Inc.*, 266 N.C. 314, 146 S.E. 2d 84 (1966) (defendant swerved into path of oncoming car; affirming judgment for plaintiff on lack of control theory); *see also* 7A Am. Jur. 2d Automobiles & Highway Traffic Section 415 (1980).

For the reasons stated, we conclude that plaintiffs' amendment was properly allowed.

II

[2] We now consider whether the evidence supported a verdict against Walters under any of the theories submitted. Walters raises this question by assignments of error to the denial of his motions for directed verdict and for judgment notwithstanding the verdict. These assignments raise the same evidentiary question. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985). The question is whether plaintiffs produced more than a scintilla of evidence, taking the record in the light most favorable to plaintiffs and with every favorable inference, that Walters was negligent and that his negligence caused their injuries. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). In "borderline" cases, the issue should be submitted to jury, in reliance on the common sense of the jurors and to avoid unnecessary appeals. *Cunningham v. Brown*, 62 N.C. App. 239, 302 S.E. 2d 822, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 754 (1983).

A

A motion for directed verdict shall state specific grounds. G.S. 1A-1, R. Civ. P. 50(a). Grounds not specifically raised at trial generally may not be raised on appeal, unless it is readily apparent from the record what grounds were relied on at trial. *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). A motion for judgment notwithstanding the verdict involves the same legal questions raised by the motion for directed verdict, R. Civ. P. 50(c), and is therefore equally restricted as a basis for asserting error on appeal. Walters raised two grounds in his motion for directed verdict: that there was no evidence of his negligence and that his negligence was insulated by Hill's sudden turn in front of him. We consider these grounds only.

B

As noted above, the evidence created a jury question as to whether Walters had his lights on. There was evidence that it was dark. Although it does not appear of record, we take judicial notice of the fact that December 24 is one of the shortest days of the year. This last point lies equally within the common knowledge of jurors. It is fundamental that it is negligent to drive in the dark without lights, and that motorists have a right to assume that oncoming motorists will travel with lights on when it is dark. G.S. 20-129; *White v. Lacey*, 245 N.C. 364, 96 S.E. 2d 1 (1957); *Chaffin v. Brame*, 233 N.C. 377, 64 S.E. 2d 276 (1951). The evidence here is adequate to support a jury finding that Walters negligently caused the accident by driving without his lights on. Nothing else appearing, that negligence could support a jury verdict against Walters. *White v. Lacey, supra.*

C

Walters argues that regardless of his own negligence or lack of negligence, Hill's negligence was the sole proximate cause of the accident and therefore insulates him from liability. He relies, as he did in the trial court, on four cases: *Dolan v. Simpson*, 269 N.C. 438, 152 S.E. 2d 523 (1967); *Harris v. Parris*, 260 N.C. 524, 133 S.E. 2d 195 (1963); *Hudson v. Petroleum Transit Co., Inc.*, 250 N.C. 435, 108 S.E. 2d 900 (1959); *Butner v. Spease*, 217 N.C. 82, 6 S.E. 2d 808 (1940). In each case a driver made a sudden left turn across

the path of an oncoming vehicle. In each case the unexpected turn was held to be negligence which insulated the driver of the through vehicle from liability. However, in each case the turning driver had a clear opportunity to see the oncoming car: in *Harris*, the accident occurred at noon on a clear day, and in the other three cases, involving nighttime accidents, the evidence established that the oncoming car did in fact have its headlights on. These cases do not apply here, where the theory was that Hill had no warning that Walters was approaching because Walters did not have his headlights on. We conclude that the case was properly submitted to the jury on this issue.

D

The case was submitted to the jury on other theories besides Walters' failure to have his headlights on. Walters did not object to the jury instructions at trial, however, nor did his motions specifically address these other theories. He did not tender or request special issues. Accordingly, we need not address the sufficiency of the evidence to support the instructions on these other theories. App. R. 10(b)(2); *Lee v. Keck, supra.* Walters' assignments to the denial of his motions for directed verdict and judgment notwithstanding the verdict are overruled.

E

Walters also assigns error to the denial of his motion for a new trial. That motion was addressed to the sound discretion of the trial court, reversible only for abuse of discretion. We perceive no abuse. *Commercial Credit Corp. v. Wilson*, 23 N.C. App. 227, 208 S.E. 2d 527 (1974). This assignment is also overruled.

III

Walters' remaining arguments attack several evidentiary rulings.

A

[3] Walters contends that the court erred in striking the following evidence elicited on his cross-examination of plaintiff Darden:

> Q: As a matter of fact, isn't it a fact that [the accident] was not Mr. Walters' fault; is that correct?
>
> A: That's right.

[Objection sustained and motion to strike allowed.]

We disagree. G.S. 8C-1, R. Ev. 704 does allow admission of lay opinion evidence on ultimate issues, but to qualify for admission the opinion must be helpful to the jury. R. Ev. 701. "[M]eaningless assertions which amount to little more than choosing up sides" are properly excludable as lacking helpfulness under the Rules. *Id.*, Commentary; *see Owen v. Kerr-McGee Corp.*, 698 F. 2d 236 (5th Cir. 1983) (under identical federal rules) (affirming exclusion of question "do you have any opinion as to the cause of the accident"). The court ruled correctly.

B

[4] Walters also attempts to challenge the admission of evidence that after the accident his car lay across the center line. He only objected generally to the admission of this evidence, however, and this question is not properly before us. R. Ev. 103(a); 1 H. Brandis, N.C. Evidence Section 27 (1982). These objections do not provide any basis for limiting the scope of the issues tried expressly or by implied consent. *Roberts v. William N. & Kate B. Reynolds Mem. Park, supra.* We find no error in the admission of any of this evidence.

CONCLUSION

Walters has failed to demonstrate any prejudicial error in the trial.

No error.

Judges MARTIN and COZORT concur.

JEANNE WEISS v. JAMES ALLEN WOODY AND WIFE MINNIE WOODY

No. 8528SC642

(Filed 1 April 1986)

1. Vendor and Purchaser § 5.1— specific performance—failure to pay full purchase price—sufficiency of pleadings

In an action for specific performance of a contract to convey real property, the pleadings were sufficient to raise an issue as to whether plaintiff had paid

the full purchase price so as to entitle her to specific performance of the contract.

2. **Evidence § 32.4— purchase price for land—acknowledgment of full payment—parol evidence admissible**

Where the parties' contract to convey real property provided that the purchase price was $13,500 and that this amount was paid in full, the acknowledgment of payment could not be attacked for the purpose of invalidating the contract or demonstrating that the purchase price was not $13,500, but parol evidence was admissible to show that the price was not paid in full because the acknowledgment was merely a receipt providing *prima facie* evidence of the amount actually paid.

3. **Vendor and Purchaser § 5.1— specific performance—full payment of purchase price—issue of fact**

In an action for specific performance of a contract to convey real property, the trial court did not err in denying plaintiff's motions for summary judgment and directed verdict since there was a material issue of fact for the trier of fact to resolve—whether the purchase price was paid in full.

APPEAL by plaintiff from *Ferrell, Judge.* Judgment entered 23 January 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 21 November 1985.

John E. Shackelford for plaintiff appellant.

Long, Howell, Parker & Payne, P.A., by Steve Warren, for defendant appellees.

BECTON, Judge.

This is a civil action brought by plaintiff, Jeanne Weiss, seeking specific performance of a contract for the sale of land.

Defendants James Allen Woody and Minnie Woody entered into a contract to sell a tract of land to Ms. Weiss for $13,500. The contract stated that the purchase price was paid in full as of the contract's execution date, 8 February 1983. The deed was to be delivered by 4 February 1984. Apparently, Mr. Weiss, acting as agent for Ms. Weiss, gave to the Woodys silver coins having a face value of $1,000 and a market value of $10,000. The Woodys assert that Mr. Weiss told them that the market value of the coins would increase to $13,500 by the end of the year. The deed was not delivered by 4 February 1984, and Ms. Weiss brought this action.

The defendants answered, asserting several defenses and counterclaims. They alleged that (1) the plaintiff's agent falsely and fraudulently represented the coins to be worth $13,500; (2) the value of the coins did not increase and, therefore, there was a failure of consideration; (3) plaintiff took possession of the land and owed rent and profits to defendants; (4) plaintiff damaged the property; and (5) there was a mutual mistake of fact regarding the value of the coins. The trial court dismissed the third and fourth counterclaims.

At the jury trial, plaintiff's counsel questioned Mr. Weiss on direct examination:

> Q. Do you have an opinion as to the fair market value of the silver on the day that you transferred it to them? Answer that either "yes" or "no."
>
> A. Yes.
>
> Q. What is your opinion?
>
> MR. WARREN: Objection.
>
> COURT: Overruled.
>
> A. You want me to tell you what I think it was worth?
>
> Q. Yes.
>
> A. Approximately thirteen thousand two hundred dollars; ninety percent of the market value.

On cross-examination, defense counsel elicited the following testimony from Mr. Weiss:

> Q. So you gave them what you thought to be about thirteen thousand two hundred dollars in silver?
>
> A. That's what I think, yes, sir.

Later in the trial, defendant offered evidence to show that Mr. Weiss represented that the value of the coins would increase to $13,500, but that, in fact, they had a value of only $10,000.

The court submitted two questions to the jury, and they were answered as follows:

1. Did the Defendants, on February 8, 1983, receive from the Plaintiff the sum of $13,500 or its equivalent as earnest money for the purchase of the property in question?

Answer: No.

2. If not, what amount are the Defendants entitled to recover of the Plaintiff?

Answer: $3,500.00.

The trial court then entered judgment ordering the plaintiff to pay $3,500 plus interest to the defendant. Plaintiff appeals, asserting that the trial court erred (1) in submitting issues to the jury that were not raised by the pleadings, (2) in allowing the defendant to violate the parol evidence rule, and (3) in failing to grant plaintiff's motion for summary judgment or for a directed verdict. We find no error, and the trial court's judgment is upheld. We remand the case, however, for the trial court to consider defendants' motion for partial relief from judgment under Rule 60(b) of the North Carolina Rules of Civil Procedure.

I

[1] Plaintiff argues that the issues submitted to the jury were not supported by the pleadings. Plaintiff acknowledges that defendants' counterclaims raised the issues of fraud, failure of consideration, and mutual mistake regarding the silver coins. In an amended answer to the complaint, defendants asserted:

> That the failure of the silver to rise in value to $13,500.00, as promised and guaranteed by Plaintiff, by and through her agent, Joe Weiss, as hereinbefore alleged, constitutes a failure of consideration, and that as a result thereof, should this Court order the Defendants to convey the property to Plaintiff, Plaintiff should be made to pay an amount equal to the difference between the fair market value of the silver on February 8, 1984, and $13,500.00 in order to prevent Plaintiff from being unjustly enriched by said sum.

Plaintiff argues that she had "no way of knowing what the Defendants [were] setting out to prove . . . ." We believe the plaintiff knew, or should have known, the substance of defendants' arguments: that the plaintiff should not be permitted to enforce the contract unless and until the full purchase price is paid.

This argument by defendants goes directly to the heart of plaintiff's equitable right to specifically enforce the contract.

> The remedy of specific performance is available to "compel a party to do precisely what he ought to have done without being coerced by the court." *McLean v. Keith*, 236 N.C. 59, 71, 72 S.E. 2d 44, 53 (1952). The party claiming the right to specific performance must show the existence of a valid contract, its terms, and either full performance on his part or that he is ready, willing and able to perform. 71 Am. Jur. 2d "Specific Performance," Sec. 207 (1973).

Munchak Corp. v. Caldwell, 301 N.C. 689, 694, 273 S.E. 2d 281, 285 (1981); *see Hutchins v. Honeycutt*, 286 N.C. 314, 210 S.E. 2d 254 (1974). The central issue—whether the full price was paid so as to entitle plaintiff to specific performance of the contract—was a question of fact raised by the evidence and was properly submitted to the jury. *Cf. Loman-Garrett Supply Co., Inc. v. Dudney*, 56 N.C. App. 622, 624, 289 S.E. 2d 600, 602 (1982) (The plaintiff was put on notice by the pleadings of the substance, "if not the label," of defendants' defense; summary judgment improper.).

We note that the award to defendants of $3,500 in the judgment was not an abuse of discretion in this case because the court imposed a concurrent obligation on defendants: "[U]pon payment into the Court [of $3,500,] the Defendants shall convey to Plaintiff the property described in the Complaint, by Warranty Deed in accordance with the terms of the Contract." The trial court also provided in its decree and order:

> That in the event the Plaintiff fails to pay the Judgment herein . . . the Defendants shall not be required to specifically perform the aforesaid contract and the Clerk of the Superior Court of Buncombe County shall return the three bags of silver marked Defendants' Exhibits 2, 3 and 4 to the Plaintiff or her counsel, and cancel the monetary portion of this Judgment.

The plaintiff sought to specifically enforce a land sale contract; the jury determined that plaintiff failed to pay the contract purchase price; therefore, the trial court ordered that the contract be performed by the defendants, but only if and when plaintiff pays the remainder of the purchase price. In effect, the trial

court gave plaintiff the option either to purchase the land (for the agreed price) or to rescind the contract. The trial court has the discretion to fashion a decree of specific performance on terms it deems just. *See Nugent v. Beckham*, 37 N.C. App. 557, 246 S.E. 2d 541 (1978). We find no error on this assignment.

II

[2] Plaintiff next contends that the court violated the parol evidence rule by admitting evidence that varied the terms of an integrated written contract. The contract provided that the purchase price was $13,500 and that this amount was paid in full. The contract also included the following integration clause:

> This contract contains the entire agreement of the parties and there are no representations, inducements, or other provisions other than those expressed in writing. All changes, additions or deletions hereto must be in writing and signed by all parties.

The parol evidence rule is often expressed as though it were a rule of evidence. It prohibits proof of certain facts, events, agreements or negotiations that occur prior to or contemporaneously with the execution of a writing intended to be the final expression of the parties' agreement. *See generally* Brandis, 2 *North Carolina Evidence* Sec. 251 (2d rev. ed. 1982). But it is actually a rule of substantive law. *Van Harris Realty, Inc. v. Coffey*, 41 N.C. App. 112, 115, 254 S.E. 2d 184, 186 (1979). The substantive rule is well stated in *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953) (citations omitted):

> [W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

Thus, for example, parol evidence cannot be used to contradict the purchase price as written in the contract. *Dixon v. Sedgefield Realty Co.*, 42 N.C. App. 650, 257 S.E. 2d 466, *disc. rev. denied*, 298 N.C. 567, 261 S.E. 2d 121 (1979). And when receipt of payment is noted on the contract, parol evidence cannot be used to attack the validity of the contract itself. *Westmoreland v. Lowe*, 225 N.C. 553, 555, 35 S.E. 2d 613, 614 (1945). But parol evidence is admissible to rebut the presumption of payment raised by a recital of consideration. *Id.* The distinction between the two rules was settled more than a century ago.

> When a receipt is evidence of a contract between parties it stands on the same footing with other contracts in writing, and cannot be contradicted or varied by parol evidence; but when it is an acknowledgement of the payment of money or of the delivery of goods, it is merely *prima facie* evidence of the fact which it recites, and may be contradicted by oral testimony.

Harper v. Dail, 92 N.C. 394, 397 (1885) (citations omitted). A more detailed statement of the distinction demonstrates its applicability in the case at bar:

> Where the payment of the consideration is necessary to sustain the validity of the deed or the contract in question, the acknowledgement of payment is contractual in its nature and cannot be contradicted by parol proof; but where it is to be treated merely as a receipt for money it is only *prima facie* evidence of the payment, and the fact that there was no payment, or that the consideration was other than that expressed in the deed, may be shown by oral evidence. Washburn thus states the rule, and the quotation seems to fit this case exactly: "Although it is always competent to contradict the recital in the deed as to the amount paid, in an action involving the recovery of the purchase money, or as to the measure of damages, in an action upon the covenants in the deed it is not competent to contradict the acknowledgement of a consideration paid in order to affect the validity of the deed in creating or passing a title to the estate thereby granted." 3 Wash. R. P. (5 Ed.), marg. p. 614.

Deaver v. Deaver, 137 N.C. 241, 243-44, 49 S.E. 113, 114 (1904); *Westmoreland; Jenkins v. Wood*, 201 N.C. 460, 160 S.E. 2d 488

(1931); *Barbee v. Barbee*, 108 N.C. 581, 13 S.E. 215 (1891); *cf. Kendrick v. Mutual Benefit Life Ins. Co.*, 124 N.C. 315, 32 S.E. 728 (1899) (An acknowledgement of the receipt of payment in an insurance policy estops the insurance company to attack the validity of the policy, but parol evidence is admissible to rebut the acknowledgement as prima facie evidence of the amount actually paid.). *See generally* Brandis, *supra*, Sec. 259 (Mere recitals of fact, such as receipts for money or statements of consideration, are not subject to the parol evidence rule.).

Applying these rules to the case at bar, the acknowledgement in the contract (that the purchase price of $13,500 was paid in full) cannot be attacked for the purpose of invalidating the contract or demonstrating that the purchase price was not $13,500. But parol evidence is admissible to show that the price was not paid in full. For purposes of this type of attack, the acknowledgement is merely a receipt, and it provides prima facie evidence of the amount actually paid. The evidence presented and admitted in the case at bar was not intended to, and did not, show that the purchase price was other than $13,500. Rather, it tended to contradict the receipt of the full purchase price. Therefore, it was not error to overrule the objection to the admission of this testimony.

III

[3] Finally, plaintiff argues that the trial court erred in denying plaintiff's motions for summary judgment and for a directed verdict. Plaintiff's position is that defendants' counterclaims for fraud and failure of consideration cannot be sustained as a matter of law. Yet, this argument ignores the fact that the plaintiff had a legal obligation to prove payment (or that she was ready, willing and able to pay) on the contract in order to be entitled to the specific performance remedy. *See Munchak; Hutchins.* The plaintiff asserted at trial that this obligation had been satisfied, but defendants contradicted plaintiff's evidence. Admittedly, the judgment appears to "award" $3,500 to defendants. But, in fact, it grants to the plaintiff the remedy of specific performance, conditioned on the fulfillment of plaintiff's obligation to pay the entire purchase price. As explained in Part I, *supra*, if plaintiff decides not to pay the remaining $3,500 of the purchase price, the defendants may keep the land but must return the silver coins originally

paid by plaintiff. This judgment was proper on the evidence in this case without regard to the merits of defendants' counterclaims.

In light of our conclusion that there was a material issue of fact for the trier of fact to resolve—whether the purchase price was paid in full—neither summary judgment nor a directed verdict would have been proper.

IV

On 12 November 1985, defendants filed a motion for partial relief from judgment, pursuant to Rule 60(b)(1) and (6) of the North Carolina Rules of Civil Procedure, based on allegations of mistake, inadvertence and surprise. Defendants allege that the description of the land in the 8 February 1983 contract inadvertently and mistakenly referred to a land description in Buncombe County Deed Book 955 at Page 289. Defendants assert that the description in Book 955 at Page 289 includes much more land than the .32 acres contemplated by the parties to the 8 February 1983 land sale contract and that the reference to Book 955 at Page 289 was mistakenly taken from a plat prepared by a registered land surveyor. Apparently, the defendants are currently in the process of selling a portion of the land described in Book 955 at Page 289 that is not part of the land intended to be sold to plaintiff; the purchasers are concerned about the clarity of defendants' title to this land because the judgment of the trial court below refers to the allegedly incorrect land description.

We express no opinion on the merits of defendants' motion for partial relief from judgment, but we remand the motion to the trial court for a hearing, if necessary. Should the court determine that the parties in this case inadvertently and mistakenly described the land sold to plaintiff, it shall modify its judgment to accurately describe the tract of land.

For the reasons set forth above, we find no error in the judgment, but we remand the case for consideration of defendants' Rule 60(b)(1) and (6) motion.

No error.

Remanded for consideration of Rule 60(b) motion.

Judges WEBB and COZORT concur.

STATE OF NORTH CAROLINA v. RANDALL DWIGHT SHOEMAKER

No. 8522SC931

(Filed 1 April 1986)

1. **Criminal Law § 128.1— improper comments by prosecutor—mistrial denied—no error**

The trial court did not abuse its discretion in an assault and murder prosecution by not declaring a mistrial on its own motion after improper and prejudicial remarks by the prosecutor where defendant did not object to several of the comments and did not move for a mistrial; the court orally reprimanded the prosecutor; and the statements by the prosecutor which failed to draw a response from the judge were not prejudicial and some could not even be considered improper.

2. **Homicide § 9.2— motion to dismiss based on self-defense denied—no error**

The trial court did not err by denying defendant's motion to dismiss charges of assault and murder or to set aside verdicts of voluntary manslaughter and assault with a deadly weapon inflicting serious injury based on self-defense where the State's evidence showed that defendant had exited the store where the victims assaulted him and had at least three minutes to make his escape; all of the evidence was that neither victim had a weapon and that only one victim had beaten defendant in the store; the jury was instructed on perfect and imperfect self-defense; and the evidence was sufficient to support the verdict.

3. **Criminal Law § 73— testimony concerning statement of victim—hearsay—not within party opponent admission exception**

The trial court did not err in an action for murder and assault by sustaining the State's objection to questioning about a statement the witness had allegedly heard one victim make. The hearsay exception for admissions of party opponents is available only for statements made by parties to a lawsuit; an adverse witness, even the complaining witness at a criminal trial, is not a party to the action. N.C.G.S. 8C-1, Rule 801(d)(A).

4. **Criminal Law § 89.4— prior statement of victim—excluded—no error**

The trial court did not err in a prosecution for murder and assault by not allowing defense counsel to question one victim regarding a statement he had allegedly made that he "was sorry he had gotten his brother killed." The victim denied in a *voir dire* ever making such a statement; defense counsel could not show a good faith basis for believing it had been made; defense counsel had no

evidence showing to whom the statement had been made; there was no impeachment value attributable to the statement; and the statement was of limited probative value and was conceivably highly prejudicial to the State's case.

5. **Homicide § 19.1— self-defense—character of victims—specific example of misconduct excluded—no error**

The trial court did not err in a murder and assault prosecution in which defendant claimed self-defense by not allowing a State trooper to testify about a specific instance of misconduct of the victims indicating their propensity for violence where there was no evidence showing that defendant was aware of the incident. N.C.G.S. 8C-1, Rule 405(b).

6. **Homicide § 28.3— self-defense—instruction on excessive force—no error**

The trial court did not err in a prosecution for murder and assault in which defendant claimed self-defense by not instructing the jury that the number of assailants involved should be considered in determining whether defendant utilized excessive force where the jury was instructed to consider "all the circumstances" and where all of the evidence indicated that there were separate assaults by two individuals rather than a single assault by multiple individuals.

APPEAL by defendant from *Seay, Judge.* Judgments entered 18 April 1985 in Superior Court, IREDELL County. Heard in the Court of Appeals 10 February 1986.

Defendant was charged in proper indictments with murder and assault with a deadly weapon with intent to kill inflicting serious injury. These charges arose out of an incident on 24 August 1984 in which defendant was involved in a fight with two brothers, Thomas and Larry Cass. The fight ended when defendant shot and killed Thomas then shot and seriously wounded Larry. Defendant admitted to shooting the brothers but claimed self-defense. The jury found him guilty of voluntary manslaughter in the death of Thomas Cass, and guilty of assault with a deadly weapon inflicting serious injury for the shooting of Larry Cass. The judge imposed the presumptive terms for each offense (six and three years, respectively), to run consecutively. Defendant appeals. Additional facts, as necessary, are set out in the opinion.

Attorney General Lacy H. Thornburg by Assistant Attorney General John F. Maddrey for the State.

Mark T. Davis, and Edmisten and Weaver by Reagan H. Weaver, for defendant-appellant.

PARKER, Judge.

[1] In his first assignment of error, defendant argues that the trial court erred in failing to declare a mistrial, on its own motion, after improper and prejudicial remarks by the prosecutor. During the trial, the prosecutor made attempts to link defendant and his attorneys with illegal gambling which had been taking place at the scene of the shootings by use of a video poker machine. The prosecutor, at various times, referred to one of defendant's attorneys as "that video lawyer." Also, during the direct examination of defendant by his attorneys, the prosecutor interrupted more than once with snide remarks. One example is that after defendant testified he had hidden the guns used in the shooting, before defendant's attorney had a chance to ask another question, the prosecutor interrupted with, "Why don't you ask him why he did that?" Usually when such a comment was made, though, the trial judge admonished the prosecutor that such conduct was improper.

Defendant asserts that the remarks by the prosecutor unduly prejudiced him and that the trial court's admonitions were insufficient to cure the damage. Defendant, however, failed to object to several of the prosecutor's comments and did not, at any time, move that a mistrial be declared. The conduct of a trial and the control of unfair tactics by either party is left largely in the discretion of the trial judge. *State v. Holmes*, 296 N.C. 47, 249 S.E. 2d 380 (1978). When the prosecutor made the egregious comments, the trial judge quickly stepped in and verbally reprimanded the district attorney. "Ordinarily, such action by the trial judge cures the impropriety of counsel since the presumption is that the jurors will understand and comply with the court's instructions." *Id.* at 52, 249 S.E. 2d at 383. The statements by the prosecutor which failed to draw a response from the trial judge were not prejudicial and some could not even be considered improper. We conclude, therefore, that the trial judge did not abuse his discretion by failing to declare a mistrial *ex mero motu.*

[2] Defendant's second assignment of error is that the trial judge erred in denying defendant's motion to dismiss the charges at the close of the evidence. Defendant contends that self-defense had been established as a matter of law, even when the evidence is viewed in the light most favorable to the State. We disagree.

When so viewed, the evidence shows that defendant was in the 901 Grand Prix truck stop off I-77 in Iredell County on business. His job was to collect the coins from the video machines located there, as well as do minor, routine maintenance on the machines. While defendant was chatting with the manager of the store, Larry and Thomas Cass came into the store. Both men were loggers and were large and very muscular. Larry immediately went up to defendant and accused him of "fixing" the video poker game so that the store would always win. Larry hit defendant in the face, then got him in a headlock and began beating defendant severely. The store manager threatened Larry with a stick whereupon Larry released defendant and chased the manager through the store. Both brothers began vandalizing the store by breaking video machines, throwing bottles and knocking the cash register onto the floor. While this was going on, the manager's wife walked in and threatened to "call the law." Larry Cass took a swing at her, barely missing, but knocking her glasses off. Thomas made Larry apologize to the lady and the brothers moved to leave. As Larry walked out of the door, though, he swung around and put his fist through the store's plate glass window, severely cutting his arm. The brothers walked to their truck, then returned to the store to retrieve Larry's hat. No one saw defendant between the time Larry released him to chase the manager until Larry and Thomas walked out of the store the second time after finding Larry's hat.

As they walked out of the store that second time, the brothers saw defendant in his truck and heard him yell something. Thomas ran over to defendant's truck and jumped on the hood, yelling something like, "Do you want some more?" Larry, nursing his severely cut arm, was several feet behind him. Defendant then got out of his truck and shot Thomas Cass with a single blast in the chest with a .12 gauge shotgun, killing him. Larry was still coming toward defendant and was about four feet from him when defendant turned on him and shot him five times in rapid succession with a .22 caliber automatic pistol. Larry survived, but is permanently paralyzed from the waist down.

Defendant then got back in his truck and drove to his father's house where he hid the guns and called his lawyer.

In order for a defendant to be entitled to dismissal of the charges based on a claim of self-defense, the evidence, viewed in the light most favorable to the State, must establish:

> 1. it appeared to defendant and he believed it necessary to kill in order to save himself from death or great bodily harm; and
>
> 2. defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> 3. defendant . . . did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> 4. defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Norris, 303 N.C. 526, 530, 279 S.E. 2d 570, 572-573 (1981).

The resolution of a question of self-defense is squarely based on the reasonableness of defendant's action. This makes it an issue peculiarly within the province of the jury. *State v. Ealy*, 7 N.C. App. 42, 171 S.E. 2d 24 (1969). Whether the defendant's apprehension of harm was reasonable and whether defendant utilized a reasonable amount of force are both questions which should be answered by a jury. The fact that the jury did not acquit, but did find defendant guilty of the lesser charge of voluntary manslaughter indicates the jury believed defendant's apprehension to be reasonable but that he responded with excessive force, or that he willingly entered into the second confrontation, exercising an *imperfect* right of self-defense. *Norris, supra. See also* Note, Perfecting the Imperfect Right of Self-Defense, 4 Campbell L. Rev. 427 (1982).

The State's evidence showed that defendant had exited the store and had at least three minutes in which to get to his truck and make his escape while the Cass brothers first vandalized the store and then went back to search for Larry's cap. All the evidence showed that neither of the victims possessed a weapon and that Thomas had never touched defendant; only Larry had beaten

him. For the death of Thomas Cass, the trial judge instructed the jury on second degree murder, on voluntary manslaughter by way of an imperfect right of self-defense, *see Norris, supra,* and on not guilty based on self-defense. The jury was instructed on guilty of assault with a deadly weapon with intent to kill inflicting serious injury, guilty of assault with a deadly weapon inflicting serious injury and not guilty based on self-defense in the shooting of Larry Cass. There was ample evidence from which a rational juror could conclude that defendant was guilty of voluntary manslaughter and assault with a deadly weapon inflicting serious injury. This assignment of error is overruled.

Defendant also assigns as error the failure of the trial court to grant his motion to set aside the verdicts as contrary to the weight of the evidence. Such a motion is directed to the discretion of the trial judge and is reversible only upon a showing of abuse of that discretion. *State v. Hamm,* 299 N.C. 519, 263 S.E. 2d 556 (1980). As discussed above, there was sufficient evidence to support the verdicts and there was no abuse of discretion for the trial judge to let them stand. This assignment of error is overruled.

[3] Defendant's fourth and fifth assignments of error challenge two evidentiary rulings by the trial judge concerning the admissibility of a statement allegedly made by Larry Cass that he was "sorry he had gotten his brother killed." The first ruling on the statement came when defense counsel attempted to question Kenneth McCann, a witness for the State, about the statement. McCann had allegedly overheard Larry Cass make such a statement. The trial judge sustained the State's objections to the questioning because the statement was hearsay. Defendant contends that McCann should have been able to testify about the statement because, he argues, it was an admission of a party-opponent, excepted from the hearsay exclusion by North Carolina Rule of Evidence 801(d)(A). This argument is without merit. The exception in 801(d)(A) is available only for statements made by parties to the lawsuit. The declarant, Larry Cass, was not a party to the action. An adverse witness, even the complaining witness in a criminal trial, is not a party to the action. Thus, the witness was properly prohibited from testifying about a hearsay statement.

[4] The second ruling concerning the statement came when defense counsel cross-examined Larry Cass. The trial court held a *voir dire* out of the presence of the jury in which Cass denied ever making such a statement. The trial court refused to allow counsel to question Cass about the statement because counsel could not show a good-faith basis for believing it had been made. Defense counsel had no evidence showing to whom the statement had been made. The statement was of limited probative value and was conceivably highly prejudicial to the State's case. Defendant argues it was probative for the purpose of impeaching the witness Larry Cass. However, the *voir dire* showed Cass would have denied making the statement, and there was no evidence the statement had been made; therefore, there was no impeachment value attributable to the statement and defendant could not have been prejudiced by the trial judge's refusal to allow any questioning about the alleged statement. Defendant's fourth and fifth assignments of error are overruled.

[5] Defendant's sixth assignment of error is that the trial court erred in refusing to allow a defense witness, State Trooper David Blackwell, to testify about a specific instance of conduct of the victims which indicated their propensity for violence. Trooper Blackwell had already testified that the victims had a bad reputation as violent people who were prone to fight, especially when drunk. This testimony was permissible under G.S. 8C-1, Rules 404(a)(2) and 405(a). Defense counsel then asked the witness if he had had any personal experience with the brothers which indicated their violent character. Upon objection by the State, and after *voir dire*, the trial court ruled that Trooper Blackwell would not be allowed to testify concerning an incident in which he attempted to arrest Thomas and Larry Cass, and had been repeatedly assaulted by the brothers.

Under G.S. 8C-1, Rule 405(b), evidence of specific instances of conduct is admissible when proving character only if character "is an essential element of a charge, claim, or defense . . . ." In self-defense cases, the character of the victim for violence is relevant only as it bears upon the reasonableness of defendant's apprehension and use of force, which are essential elements of the defense of self-defense. *State v. McCray*, 312 N.C. 519, 324 S.E. 2d 606 (1985). Thus, the conduct becomes relevant only if defendant knew about it at the time of the shooting. *Id.* No evidence was

presented which showed defendant had been aware of the incident involving the Cass brothers and Trooper Blackwell, and the evidence of this incident was properly excluded.

[6] Defendant's seventh and final assignment of error is that the trial court erred in failing to instruct the jury that the number of assailants involved should be considered in determining whether defendant utilized excessive force. Such a charge was requested, but "a trial judge is not required to give requested instructions verbatim . . . he is required to give the requested instruction at least in substance if it is a correct statement of the law and supported by the evidence." *State v. Corn*, 307 N.C. 79, 86, 296 S.E. 2d 261, 266 (1982). In regard to the excessive force determination, the trial judge charged:

> In making this determination you should consider the circumstances as you find them to have existed from the evidence, including the size, the age, and the strength of the Defendant Shoemaker, as compared to that of Thomas Cass; the fierceness of the assault, if any, being made upon the Defendant; the reputation, if any, of Thomas Cass for danger and violence. The Defendant would not be guilty of any murder or manslaughter if he acted in self-defense, as I have defined it to be; and that the Defendant did not use excessive force under the circumstances.
>
> A Defendant uses excessive force if he uses more force than reasonably appeared to him to be necessary at the time of the killing. It is for you, the Jury, to determine the reasonableness of the force used by the Defendant under *all the circumstances* as they appeared to him at the time. (Emphasis added.)

This charge adequately informed the jury of the factors to be considered in determining whether the defendant used excessive force. The phrase "all the circumstances" clearly implies that the jury was to consider more than just the size, age, and the other things specifically instructed on.

Furthermore, all the evidence indicates that only Larry Cass assaulted defendant in the store and that only Thomas Cass assaulted defendant outside, while Larry was still some twelve to eighteen feet away. Clearly, defendant had adequate time to deal

with the assault by Thomas before turning to face a possible assault by Larry. There was no single assault by multiple assailants. There were separate assaults by two individuals. Thus, it was not prejudicial error for the trial judge to omit from his instructions that the jury should consider the number of assailants in determining whether defendant used excessive force.

Having examined all of defendant's assignments of error, we conclude that defendant received a fair trial in which there was

No error.

Chief Judge HEDRICK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. DONALD WATSON

No. 852SC869

(Filed 1 April 1986)

Receiving Stolen Goods § 6— possession of stolen property—value of property—instruction on possession at one point in time

In a prosecution for possession of stolen property in which there was evidence of three separate sales of stolen property on two dates involving the amounts of $240, $20 and $220, the trial court erred in refusing to instruct the jury that the State must prove that defendant possessed goods valued at more than $400 *at one point in time* in order to find defendant guilty of felonious possession and in representing the three transactions as one and stating the cumulative amount to the jury in summarizing the evidence.

APPEAL by defendant from *Brown, Judge.* Judgment entered 27 March 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 7 January 1986.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kaye R. Webb, for the State.

Franklin B. Johnston for defendant appellant.

BECTON, Judge.

I

Defendant, Donald Watson, was convicted on 25 March 1985 of felonious possession of wire and ADS pipe allegedly taken from

the FCX Farm and Garden Supplies, Inc. store in Washington, North Carolina on or about 9 August 1984. There were no markings on the goods which would have identified them as the property of the Washington FCX store.

The State's evidence tended to show that Scott Alons, assistant manager of the Washington FCX store, noticed that some wire was missing from the fenced-in yard adjacent to the store on 13 August 1984 after a call from Detective Harvey Skinner of the Washington police department. Mr. Alons testified that he determined upon a visual inspection of the yard that approximately twenty-five rolls of wire were missing. He prepared an estimated list and gave it to Detective Skinner. Mr. Alon subsequently prepared a separate list by going through a cash register summary and subtracting the amount of wire sold from the amount of wire purchased in the previous three months. These two lists were similar although not identical. The last actual physical inventory of the FCX plant prior to 9 August 1984 was done on the last day of June 1984. Mr. Alons stated that he makes a list every Thursday upon a visual inspection of the yard of supplies to be ordered for the coming week. He testified that he does not compare these figures with the inventory listed in the FCX computer, and that he would not know if there were a discrepancy between the amount he "felt we needed" based on his visual inspection and the amount the computer listed as being in stock.

Defendant admitted that he was approached by two men who asked him to help them sell some fence wire and that he agreed to introduce the men to Donald Dixon, whom defendant knew to be the owner of the New and Used Bargain House in Washington. Three separate transactions occurred between Dixon (as buyer) and defendant with the three other men (as sellers) on 9 and 11 August 1984. Defendant signed receipts for each of these transactions in the amounts of $240.00, $20.00 and $220.00 respectively.

In the original indictment dated 5 November 1984, defendant was charged with felonious larceny and felonious possession of stolen goods allegedly taken from the Washington FCX store on 13 August 1984. His trial was scheduled for 5 November 1984. Defendant was prepared to answer these charges with the defense that he could not have committed the offenses on 13 August 1984 because he was in the Beaufort County Jail on that date.

The case was continued three times at the State's request, and on 18 March 1985 an amended indictment was issued charging the defendant with felonious larceny and felonious possession of stolen goods from the Washington FCX store on or about 9 August 1984. The case was called to trial on 25 March 1985.

II

Defendant assigns error to the trial court's refusal to clarify its jury instructions on larceny and possession of stolen goods. Since the jury found the defendant not guilty on the larceny charge, we will consider only the instructions on felonious and non-felonious possession of stolen goods.

Defendant requested a clarification of the trial court's instruction; specifically, that the State must prove that defendant possessed personal property valued at more than $400.00 *at one point in time* in order to find defendant guilty of felonious possession.

The State contends that defendant's request for elaboration in the charge on the crimes of larceny and possession, particularly with respect to whether there may have been one or more larcenies, was properly denied because (1) requests for special instructions must be in writing and submitted to the trial judge before the judge's charge to the jury; *State v. Long*, 20 N.C. App. 91, 200 S.E. 2d 825 (1973), and (2) when defendant fails to comply with the prescriptions of N.C. Gen. Stat. Sec. 1-181 (1983) by submitting a written, timely request, it is not an abuse of discretion to refuse to give defendant's proposed instruction. *State v. Harris*, 67 N.C. App. 97, 312 S.E. 2d 541, *disc. rev. denied and appeal dismissed*, 311 N.C. 307, 317 S.E. 2d 905 (1984). The State also argues that the defendant's requested instruction on clarification was not a correct statement of the law, and therefore the trial court properly denied the request.

The State has correctly stated the law with respect to special instructions; however, the clarification requested by defendant in this case did not amount to a special instruction within the meaning of G.S. Sec. 1-181. Rather, we look to N.C. Gen. Stat. Sec. 15A-1232 (1983). Although that section, as rewritten in 1985, no longer *requires* the judge to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence,

the law in effect at the time defendant's case was tried did so require. *See State v. McLean*, 74 N.C. App. 224, 330 S.E. 2d 617 (1985) (decided three months before the amended version of G.S. Sec. 15A-1232 became effective and shortly after defendant's trial).

Every substantial feature of the case arising on the evidence must be presented to the jury even without a special request for instructions on the issue. *State v. Dooley*, 285 N.C. 158, 203 S.E. 2d 815 (1974). Further, since it is always incumbent upon the court to properly instruct the jury on the applicable law it is immaterial whether the clarification defendant requested was a precisely correct statement of the law. G.S. Sec. 15A-1232 requires the trial court to summarize the evidence of both parties only to the extent necessary to explain the application of the law to the evidence. *State v. Carter*, 74 N.C. App. 437, 440, 328 S.E. 2d 607, 609, *disc. rev. denied*, 314 N.C. 333 (1985). Implicit in this requirement is that the trial court must *correctly* declare and explain the law as it relates to the evidence. The failure of the court in the case at bar to correctly instruct the jury on substantial features of the case arising on the evidence was error for which defendant is entitled to a new trial. *See State v. Smith*, 59 N.C. App. 227, 228, 296 S.E. 2d 315, 316 (1982).

The trial court was required to instruct the jury on the elements of felonious possession of stolen property, requiring them to find beyond a reasonable doubt the presence of each element of the alleged crime. The essential elements of felonious possession of stolen property are: (1) possession of personal property (2) valued at more than $400.00 (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981); *In re Dulaney*, 74 N.C. App. 587, 328 S.E. 2d 904 (1985).

Possession of stolen property is a continuing offense, beginning at the time of receipt, and ending at the time of divestment. *State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981); *State v. Andrews*, 52 N.C. App. 26, 277 S.E. 2d 857 (1981), *aff'd*, 306 N.C. 144, 291 S.E. 2d 581, *cert. denied*, 459 U.S. 946, 74 L.Ed. 2d 205, 103 S.Ct. 263 (1982). In this case, the evidence offered by the State

showed there were three separate transactions between defendant and the owner of the New & Used Bargain House. The State's evidence was that these transactions involved the exchange, at three distinct times, of $240.00, $20.00 and $220.00 respectively. The State never attempted to argue that defendant possessed any combination of the goods at one time. The State's evidence did not clearly establish when the goods were stolen or even that they were all goods stolen from FCX, as alleged in the indictment.[1]

When the trial court summarized the evidence, however, it told the jury that the State's evidence tended to show "that on August 9 and 11 the defendant sold to Donald Dixon 28 rolls of Keystone wire and was paid $460.00, and that on August 11, the defendant sold Dixon 2 rolls of ADS plastic pipe and was paid $20.00. . . ."

The trial court must instruct the jury on a crime of lesser degree than the crime charged when there is evidence from which the jury could find that the lesser crime was committed. *State v. Lampkins*, 286 N.C. 497, 212 S.E. 2d 106 (1975); *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971).

The trial court instructed the jury on felonious and non-felonious possession as follows:

> Now, I charge for you to find the defendant guilty of felonious possession of stolen goods, the State must prove five things beyond a reasonable doubt.
>
> That the wire and plastic pipe sold to Donald Dixon was stolen.
>
> Property again is stolen when it is taken and carried away without the owner's consent by someone who intends at the time to deprive the owner of its use permanently and knows that he's not entitled to take it; and
>
> Second, that this wire and plastic pipe were worth more than four hundred dollars; and

1. A comparison of the two lists made by Mr. Alons and the list testified to by Mr. Dixon reveals that at least one of the items sold to Mr. Dixon by defendant was not among the items reported missing by Mr. Alons.

Third, that the defendant possessed this wire and plastic pipe;

Fourth, that the defendant knew or had reasonable grounds to believe that the wire and plastic pipe had been stolen; and

Fifth, that the defendant possessed this wire and plastic pipe with a dishonest purpose, and converting it to his own use would be a dishonest purpose.

And so I charge that if you find from the evidence and beyond a reasonable doubt that the wire and plastic pipe were stolen and that this wire and plastic pipe were worth more than four hundred dollars and that on or about August 9 and 11 the defendant possessed the wire and plastic pipe and that the defendant knew or had reasonable grounds to believe that the wire and plastic pipe were stolen and that the defendant possessed the wire and plastic pipe for a dishonest purpose, it would be your duty to return a verdict of guilty of felonious possession of stolen goods. However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of felonious possession of stolen goods, and if you do not find the defendant guilty of felonious possession of stolen goods, you must determine whether he is guilty of non-felonious possession of stolen goods, and non-felonious possession of stolen goods differs from felonious possession of stolen goods in that the State need not prove that the goods were worth more than four hundred dollars.

And so I charge that if you find from the evidence and beyond a reasonable doubt that the wire and plastic pipe were stolen and that on or about August 9, and August 11 the defendant possessed the wire and plastic pipe and that the defendant knew or had reasonable grounds to believe that the wire and plastic pipe were stolen and that the defendant possessed this wire and plastic pipe for a dishonest purpose, it would be your duty to return a verdict of guilty of non-felonious possession of stolen goods. However, if you do not so find or have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not guilty.

The jury would not have known, absent specific instructions, that possession and divestment of goods on each occasion would have constituted separate non-felonious possessions.

The element of felonious possession requiring the property to be valued at more than $400.00 implicitly includes the requirement that there be at least one single point in time when the defendant possessed an amount of goods valued at more than $400.00. Otherwise, the State's burden of proof on a charge of felonious possession of stolen goods would be no greater than to present circumstantial evidence of two or more non-felonious possessions, add them together, and obtain a felony conviction. We do not believe the legislature intended this when it enacted N.C. Gen. Stat. Sec. 14-71.1 (1977).

Rather, G.S. Sec. 14-71.1 "was apparently passed to provide protection for society in those incidents when the State does not have sufficient evidence to prove who committed a larceny, or the elements of receiving." *State v. Kelly*, 39 N.C. App. 246, 248, 249 S.E. 2d 832, 833 (1978). Nonetheless, it is incumbent on the State to prove all the elements of felonious possession in order to obtain a conviction on that charge. The jury should have been instructed that the State must prove beyond a reasonable doubt that defendant possessed an amount of goods valued at more than $400.00 at one point in time.

The trial court erred by (1) representing the August 9 and 11 transactions as one and (2) stating the cumulative amount of $460.00 to the jury in its summary, without clarifying the instruction in light of the law of possession. The trial court misled the jury as to the elements of the offense and the State's burden of proof, to defendant's prejudice.

We therefore order a new trial.

III

Because we have ordered a new trial, we need not discuss defendant's remaining assignments of error. We do find it necessary, however, to dispose of the State's argument that because defendant has presented no authority in his brief to support his positions, he has abandoned all of them pursuant to Rule 28(b)(5), North Carolina Rules of Appellate Procedure (1985) and *State v. Craig and Anthony*, 308 N.C. 446, 457, 302 S.E. 2d 740, 747 (1983).

We find no merit in the State's reading of Rule 28(b)(5). That rule reads, in pertinent part:

> Exceptions not set out in the appellant's brief, *or* in support of which no reason *or* argument is stated *or* authority cited, will be taken as abandoned.

(Emphasis added.) This sentence is to be read in the disjunctive. It gives appellant at least three means of preserving exceptions in his or her brief; it does not require appellant to cite authority for every proposition put forward on appeal. If the State's arguments were correct, an issue of first impression would never come before this Court. This is not what Rule 28(b)(5) was intended to ensure.

For the foregoing reasons, this matter is remanded for a

New trial.

Judges WHICHARD and PARKER concur.

ELIZABETH LEWIS NIX v. JOHN WILLIAM NIX

No. 8515DC919

(Filed 1 April 1986)

1. **Divorce and Alimony § 30— equitable distribution—property brought to marriage by husband—no separate property**

   There was no merit to defendant's contention that he was entitled to retain as "separate property" the net value at the time of the marriage of a piece of property owned by him, since the trial court made detailed and specific findings of fact, and evidence was sufficient to support the disposition of the property. N.C.G.S. § 20-50(b).

2. **Divorce and Alimony § 30— equitable distribution—valuation of marital assets—sufficiency of evidence**

   Evidence was sufficient to support the trial court's determination as to valuation of the marital assets.

3. **Divorce and Alimony § 30— equitable distribution—source of funds theory applied**

   There was no merit to defendant's contention that the trial court erred in failing to apply the "source of funds" theory outlined in *Wade v. Wade*, 72

N.C. App. 372, and improperly valued defendant's separate property interest where the court in its extensive findings of fact undertook to trace the numerous purchases and divestments of the parties, applied the relevant precedent, and made an equitable distribution of the property.

APPEAL by defendant from *Allen, Judge.* Judgment entered 17 April 1985 in District Court, ALAMANCE County. Heard in the Court of Appeals 16 January 1986.

T. Paul Messick, Jr., for plaintiff appellee.

Frederick J. Sternberg, P.A., for defendant appellant.

BECTON, Judge.

This appeal involves a husband's claim under the North Carolina Equitable Distribution Act, N.C. Gen. Stat. Sec. 50-20 (Supp. 1983) that the trial court erred in the classification, valuation and division of property and, ultimately, in making its distributive award under that statute.

The plaintiff-appellee, Elizabeth Lewis Nix, and the defendant-appellant, John William Nix, were married on 21 October 1979, separated on 29 May 1983, and divorced on 11 December 1984. No children were born of this marriage.

When they first met, both parties were employed—Elizabeth Lewis Nix as a clerk earning minimum wage, and John Nix as a mechanic earning $19.00 per hour. Elizabeth Lewis Nix terminated her employment at the request of John Nix sometime shortly thereafter. At the time of their marriage, each party had separate property. Elizabeth Lewis Nix owned a house and small tract of land on Smith Street in Gibsonville, North Carolina, and John Nix owned 18.5 acres of property with a well, septic tank, and mobile home in Swepsonville, North Carolina. The fair market value of the Gibsonville property was $10,000 and was subject to a Purchase Money Deed of Trust with a balance of $4,972.00. The fair market value of the Swepsonville property was $18,500.00; the fair market value of improvements thereon was $8,200.00.

Prior to the marriage, John Nix had begun to build a house containing 3,300 square feet on the Swepsonville property. He had obtained a $35,000 loan to finance the construction. After the par-

ties were married, they obtained a second loan of $58,000 to complete the project. They repaid the balance of the first loan with the proceeds from the second. Both John Nix and Elizabeth Lewis Nix completed construction on the house, and it was sold for $95,900.00 in December of 1980. After paying the balance due on the $58,000 loan and other expenses incurred in connection with the construction and sale of the house, the parties realized a profit of $29,353.14. They deposited $20,000 in their joint savings account, paid the balance of the mortgage on the Smith Street property, which was approximately $4,773.00, and used the remaining $4,500.00 to settle other construction bills associated with the Swepsonville property. Next, they bought a travel trailer for $4,000.00, parked it at the Smith Street property, and commenced renovations and improvements on that property, using some of the remaining proceeds to finance this work and for living expenses.

In May of 1982, the parties borrowed $17,700.00 on the Smith Street property and purchased a $13,000 sailboat. In December of that same year, they borrowed an additional $15,389.13 on the Smith Street property and bought an 8.43 acre tract of land in Rockingham County for $5,000.00, as well as a dump truck, a heavy equipment trailer, a backhoe, a tractor and two lots and a trailer in Rockingham County, expending a total amount of $20,620.00.

I

A. Standard of Review

Our trial courts have broad discretionary powers in domestic law cases. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason, or that its ruling could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985), *modifying and aff'g*, 64 N.C. App. 432, 308 S.E. 2d 68 (1983). Only when the evidence fails to show *any* rational basis for the distribution ordered by the court will its determination be upset on appeal. *See id.*, 312 N.C. at 778, 324 S.E. 2d at 833. Further, when an appellant contends that the findings of fact are not supported by the evidence, we look to see whether the findings are supported by *any* competent evidence in the record. *See Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E. 2d 772, 776

(1984) (The trial court's findings were not sufficient to support its disposition or to allow the appeals court to determine the basis on which it reached its legal conclusions.); *Talent v. Talent*, 76 N.C. App. 545, 554, 334 S.E. 2d 256, 262 (1985) (The court ignored uncontradicted evidence in classifying and distributing certain jewelry as marital property.).

B. Equitable Distribution Procedure

In applying G.S. Sec. 50-20, the trial court must first undertake to identify, with specificity, the property owned by the parties. *See Wade v. Wade*, 72 N.C. App. 372, 376, 325 S.E. 2d 260, 266, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985); *Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985). Next, the court must classify each item as either separate or marital property per G.S. Sec. 50-20(b)(1) and (2). *Loeb v. Loeb*, 72 N.C. App. 205, 208-09, 324 S.E. 2d 33, 37, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). There is a presumption, rebuttable by clear, cogent and convincing evidence, that all property acquired by the parties during the marriage is marital property. *Id.*, 72 N.C. App. at 205, 324 S.E. 2d at 38. Property can have a dual nature, and can be classified as part separate and part marital. This approach takes into account the active appreciation of separate property which often results from contributions made by one or both spouses. *See generally*, 72 N.C. App. at 378, 325 S.E. 2d at 268; *Lawrence v. Lawrence*, 75 N.C. App. 592, 595, 331 S.E. 2d 186, 188, *disc. rev. denied*, 314 N.C. 541, 335 S.E. 2d 18 (1985).

After classifying the property as marital, separate or mixed, the court must determine the net value of the property. Net value has been defined as market value, if any, less the amount of any encumbrance serving to offset or reduce the market value. *Alexander*, 68 N.C. App. at 551, 315 S.E. 2d at 775.

Finally, the trial court must make an equal division of the marital property. If, after a careful and clearly articulated consideration of the statutory factors (G.S. Sec. 50-20(c)) the trial court finds that an equal division is not equitable, it may order an unequal but equitable division of the property. *See White*, 312 N.C. at 776-77, 324 S.E. 2d at 832-33. Such an order will be disturbed on appeal only upon the determination that an obvious miscarriage of justice has resulted. *Alexander*, 68 N.C. App. at 552, 315 S.E. 2d at 776.

II

[1] With these principles in mind, we turn to John Nix's assignments of error. His first assignment concerns what he terms the trial court's failure to "allocate and distinguish between 'separate property' and 'marital property' pursuant to G.S. Sec. 50-20(b) in its classification of the status, value and distribution of property in rendering its judgment." The gist of John Nix's contention is that he is entitled to retain as "separate property" the net value of the Swepsonville property at the time of the marriage. He argues that the trial court completely disregarded our holdings in *Wade*, *Loeb* and *Lawrence* by treating the Swepsonville property as neither entirely separate nor entirely marital property, and by granting him a $4,000.00 credit for his greater contribution to the increase in value of their separate property. We do not agree.

We believe that there was sufficient evidence to support the disposition of the property. The trial court made fifty detailed and specific findings of fact. The court found that John Nix had considerably more separate property before the marriage than Elizabeth Lewis Nix and that each party had directly and substantially contributed to the increase in value of the separate property of the other. Although none of the equitable distribution cases suggest that a spouse should take out of the marriage exactly that which was brought into it, plus at least one-half of the marital estate, John Nix appears to have done just that in this case. He has no reason to complain. He brought to the marriage a piece of semi-improved property with a partially constructed house on it, encumbered by a construction loan. He leaves the marriage with a renovated residence (the Smith Street property), encumbered by personal loans, and one-half of the marital estate, much of which was purchased with the proceeds from the loans on the Smith Street property. In addition, he takes a $4,000.00 credit for the value of his contribution, over and above his ex-wife's, to the increase in value of the separate property of each of them. We cannot say that an obvious miscarriage of justice has resulted from this division.

III

[2] John Nix's next assignment of error is that the trial court improperly determined "net value" pursuant to G.S. Sec. 50-20(c).

He urges us to find that the trial court "disregarded totally the testimony of the defendant" regarding the values of and encumbrances against certain marital property and consequently, that the marital property was substantially overvalued. We find these contentions to be without merit.

The trial court must make findings of fact, based upon competent evidence, to support its conclusions. The trial court, sitting as the trier of fact, is entitled to assess the credibility of the witnesses, and to determine the weight to be afforded their testimony. *See Mayo v. Mayo*, 73 N.C. App. 406, 410, 326 S.E. 2d 283, 286 (1985). When there is conflicting testimony as to value, the trial court may not merely guess at a figure somewhere in between, but may arrive at such a middle figure after considering the factors involved in the various appraisals. After examining the evidence in the record, we conclude that the trial court's findings are supported and that it did not abuse its discretion in valuing the marital assets as it did.

IV

The next assignment of error is that the trial court made an unequal division of marital property without consideration of the statutory factors enumerated at G.S. Sec. 50-20(c). That the court must consider the statutory factors when it undertakes to make an unequal distribution is clear. *Alexander*, 68 N.C. App. at 551, 315 S.E. 2d at 775; *Loeb*, 72 N.C. App. at 217, 324 S.E. 2d at 42. However, in the case at bar the trial court found, pursuant to the stipulation of the parties, that an *equal* division of all property determined to be marital property would be made. John Nix, in effect, re-argues his first assignment of error—that the trial court should have granted him a larger credit. We have already overruled that assignment of error, and consequently, this one too must fail.

V

[3] John Nix's last assignment of error represents yet another attack upon the trial court's finding that he was entitled to a $4,000.00 credit. This time, John Nix takes issue with the value the trial court placed on his separate property interest and argues that the trial court failed to apply the "Source of Funds" theory outlined by this Court in *Wade*.

Wade, upon which John Nix so heavily relies, is distinguishable from the case at bar in at least one significant respect. In *Wade*, the separate property of the husband—the unimproved land, and the marital property—the house constructed during the marriage, were still available for distribution at the dissolution of the marriage. In this case, the property had been sold several years before the separation of the parties, and funneled into various projects and purchases. The trial court carefully traced all of these transactions and found that John Nix was entitled to a $4,000.00 credit.

The trial court stated:

> The Court in considering all of the evidence and the difficulty of evaluating the percentage or degree of interest that each party thereby acquired in the separate property of the other, finds that by tracing the efforts each did in the improvement of the other's separate property and by the assets purchased as a result of these increases in value, that in order for this Court to equitably divide the marital property that the defendant should be given a credit in the final calculation of the marital property to be divided, since the defendant had substantially more separate property at the time of the marriage and that the defendant did more to improve both his property and the separate property of the plaintiff, and the plaintiff had a relatively little amount of property at the time of marriage and that both of their properties were increased in value by joint efforts.
>
> . . .
>
> [T]he Court in considering [the factors set forth in G.S. 50-20(c)] and all of the evidence and in tracing the assets from the original improved property finds it would be just and proper for the defendant to be given a credit of $4,000.00.

We cannot say that the trial court failed to consider the "source of funds" theory or that it abused its discretion, especially in light of the fact that it appears from the record that the trial court undertook to trace, sift and wind its way through the numerous purchases and divestments of the parties, apply the relevant precedent, and make an equitable distribution of the property.

For these reasons, we

Affirm.

Judges WHICHARD and PARKER concur.

ANTHONY MICHAEL DiDONATO AS ADMINISTRATOR OF THE ESTATE OF JOSEPH EDWARD DiDONATO v. WILLIAM J. WORTMAN, JR., M.D. AND JOHN T. HART, M.D.

No. 8526SC1015

(Filed 1 April 1986)

Death § 3— unborn fetus—no wrongful death action

There is no right of recovery under the North Carolina wrongful death statute for the death of an unborn fetus. Rather, a child must be born alive to be recognized as a "person" within the meaning of the wrongful death statute. N.C.G.S. § 28A-18-2.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Grist, Judge.* Judgment entered 17 July 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 February 1986.

This is an action for wrongful death and wrongful deprivation of life, brought by plaintiff on behalf of Joseph Edward DiDonato, who died prior to birth.

The undisputed facts are that Norma DiDonato became pregnant in 1982, when she was 36. She had a family history of diabetes. Norma DiDonato received prenatal care from defendants, who monitored her vital signs and those of the developing fetus. Delivery was due in early October 1982. A test on 26 October 1982 showed the fetus to be alive and healthy. On 30 October 1982, however, no fetal heartbeat could be detected. A 12 pound 11 ounce stillborn fetus was delivered by Caesarean section.

Plaintiff alleged that because of the family history of diabetes and the presence of increased levels of blood sugar in Norma DiDonato's blood, defendants should in the exercise of reasonable care have diagnosed the diabetic condition and delivered the baby

before it outgrew its blood and oxygen supply as a consequence of the high blood sugar level. Their failure to do so resulted in the wrongful death of plaintiff's intestate, triggering this action.

Defendants moved to dismiss on the ground that there is no right of recovery under the North Carolina wrongful death statute for the death of an unborn child. The court allowed the motion, and plaintiffs appealed.

James, McElroy & Diehl, by Gary S. Hemric, for plaintiff-appellant.

Golding, Crews, Meekins, Gordon & Gray, by John G. Golding and Andrew W. Lax, for defendant-appellees.

EAGLES, Judge.

The only question presented by this appeal is whether a viable child *en ventre sa mere* who dies as a result of a third party's negligence may obtain civil redress under our wrongful death statute, G.S. 28A-18-2. On appeal, plaintiff has apparently abandoned his analogous non-statutory claim for "wrongful deprivation of life."

The Supreme Court has not passed directly on the question before us. In *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425 (1966), the court reserved the question, but held that the speculative nature of damages required dismissal of plaintiff's action. The court has apparently recognized that a physician rendering prenatal care owes some duty of care to a fetus *in utero*, provided there is a live birth. *Azzolino v. Dingfelder*, 71 N.C. App. 289, 297, 322 S.E. 2d 567, 574 (1984) [explaining *Stetson v. Easterling*, 274 N.C. 152, 161 S.E. 2d 531 (1968)], *aff'd in part, rev'd in part*, 315 N.C. 103, 337 S.E. 2d 528 (1985), *reh'g denied*, --- N.C. ---, --- S.E. 2d --- (1986). In reversing in *Azzolino*, the Supreme Court simply assumed *arguendo* that this duty existed, over dissent. *Id.* (Martin, J., dissenting in part). As in *Gay*, the *Azzolino* decision turned chiefly on the speculative nature of damages, not the legal definition of "person."

In *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E. 2d 382, *cert. denied*, 287 N.C. 464, 215 S.E. 2d 623 (1975), this court expressly held that a child must be born alive to be recognized as a "person" within the meaning of G.S. 28-173, now G.S. 28A-18-2. We did

so upon careful review of the legislative history and authority of other jurisdictions, holding that creation of a right of action for wrongful death of an unborn fetus was an appropriate subject for legislative action, not judicial construction. We followed *Cardwell* in *Yow v. Nance*, 29 N.C. App. 419, 224 S.E. 2d 292, *disc. rev. denied*, 290 N.C. 312, 225 S.E. 2d 833 (1976). *But see Perry v. Cullipher*, 69 N.C. App. 761, 318 S.E. 2d 354 (1984) (rejecting contention that no right of action exists for desecration of grave of stillborn fetus). In *Stam v. State*, 47 N.C. App. 209, 267 S.E. 2d 335 (1980), *aff'd in relevant part*, 302 N.C. 357, 275 S.E. 2d 439 (1981), we held that, even upon a liberal construction, a fetus was not a "person" enjoying unlimited protection under N.C. Const. Art. I, Section 1 and Section 19. Reviewing the common law in *Stam*, we noted that property rights accorded to the unborn were always subject to live birth as a condition precedent. We are also advertent to the United States Supreme Court's ruling that the word "person" in the Fourteenth Amendment does not include the unborn. *Roe v. Wade*, 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705, *reh'g denied*, 410 U.S. 959, 35 L.Ed. 2d 694, 93 S.Ct. 1409 (1973). These precedents are persuasive.

We do not have authority to overrule our Supreme Court. *Cannon v. Miller*, 313 N.C. 324, 327 S.E. 2d 888 (1985). We therefore must hold, on the authority of *Gay v. Thompson*, *supra*, and following *Cardwell*, *Yow*, and *Stam*, that the trial court correctly dismissed plaintiff's action.

The issue is properly a subject for legislative attention and ought not be the subject of judicial intervention. We note that the General Assembly recently considered a bill that would have made it a crime to knowingly or recklessly cause the death of a viable fetus. H.B. 1276, 1985 General Assembly. While not directly on point in the instant case, the fact that this bill failed to pass seems to suggest a continuing legislative refusal to expand the concept of "person" beyond the current state of the law. The judiciary should not assume a more active role on what is essentially a legislative issue.

We are aware of the conflicting policy considerations raised by this case, including strong arguments for changing existing law. However, this Court is not the proper forum for making these changes. The decision of the trial court is therefore

Affirmed.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion G.S. 28A-18-2 as now written authorizes plaintiff's action and *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425 (1966) has no application to this case and the order appealed from should be reversed.

A "person," according to the common understanding of mankind if the dictionaries they use are any guide, is simply a human being. Nothing in the Wrongful Death Act or its history suggests that the word meant anything else to the General Assembly, but much indicates that it did not. The General Assembly frequently exercises its power to give words and phrases special meaning and if it had intended for the word "person" to have a limited application, it could have easily accomplished that purpose. Since there is no reason for supposing that the General Assembly intended the act to apply to less than all the human beings in this state, I view the restrictive definition coined by a panel of this Court in *Cardwell v. Welch*, 25 N.C. App. 390, 213 S.E. 2d 382, *cert. denied*, 287 N.C. 464, 215 S.E. 2d 623 (1975) as a judicial interpolation that should be disavowed, rather than followed. A viable, healthy 12-pound boy at term immediately before birth is certainly a human being and plaintiff's action is authorized in my opinion under both the language and spirit of the act.

Gay v. Thompson arose under G.S. 28-173, 174, our former Wrongful Death Act, and its only possible bearing on this case is that the court's failure there to recognize that ascertainable damages could result from the wrongful death of viable, healthy children ready to be born was one of the reasons the Legislature

replaced G.S. 28-174, the damages part of the old act, with what is now subsection (b) of G.S. 28A-18-2. Other reasons for that step were holdings denying recovery for the deaths of unemployed housewives, *Lamm v. Lorbacher*, 235 N.C. 728, 71 S.E. 2d 49 (1952), elderly persons no longer capable of earning wages, *Armentrout v. Hughes*, 247 N.C. 631, 101 S.E. 2d 793 (1958), mentally retarded people, *Scriven v. McDonald*, 264 N.C. 727, 142 S.E. 2d 585 (1965), and infants a few months old whose injuries occurred before they were born, *Stetson v. Easterling*, 274 N.C. 152, 161 S.E. 2d 531 (1968). In these and other cases recovery was denied upon the ground that no pecuniary injury resulted from the deaths involved, a patently fallacious ground, since some decedents were performing services of great value for their families; the expectancies of healthy children at all steps after becoming viable can be easily established by evidence and public records for more than a hundred years show that nearly all children that survive become wage earners; and it is elementary law that the difficulty of proving damages does not exonerate wrongdoers who create the difficulty. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265, 90 L.Ed. 652, 660, 66 S.Ct. 574, 580, *reh. denied*, 327 U.S. 817, 90 L.Ed. 1040, 66 S.Ct. 815 (1946). In all events, these and other obstacles to recovery, which had greatly limited the application and scope of our Wrongful Death Act, were removed when the 1969 General Assembly replaced G.S. 174, the damages part of the act, with what is now subsection (b) of G.S. 28A-18-2. In doing so the General Assembly made plain, both through the amendment and the enacting clause, that the new law corrected the deficiencies of the old, that the difficulty of proving damages was no longer a bar to recovery, and that the act applied to all human beings wrongfully killed in the state. The Act's enacting clause is as follows:

> WHEREAS, human life is inherently valuable; and
>
> WHEREAS, the present statute is so written and construed that damages recoverable from a person who has caused death by a wrongful act are effectually limited to such figure as can be calculated from the expected earnings of the deceased, which is far from an adequate measure of the value of human life; Now, therefore,

The General Assembly of North Carolina do enact:

And the enactment eliminated any basis forever dismissing a wrongful death claim on the ground that no damage resulted from the death by authorizing the recovery of nominal damages, as well as damages for lost services, society, assistance and companionship.

In my opinion, the dismissal of this action was without legal basis and I vote to reverse the order appealed from.

ROY A. COX, JR. v. JEFFERSON-PILOT FIRE AND CASUALTY COMPANY AND FIREMAN'S FUND INSURANCE COMPANY

No. 8518SC1178

(Filed 1 April 1986)

1. **Torts § 7.2— release—mental competence—test**

The test for mental competence to enter into a release is the same as that controlling the running of the statute of limitations, *i.e.*, whether at the time of execution of the release, the party challenging the release had the mental competence to manage his own affairs.

2. **Evidence § 52— mental competence—opinion of psychiatrist—inadmissibility**

A psychiatrist's testimony was incompetent on the issue of plaintiff's mental capacity to execute a release in 1978 in favor of defendants where the psychiatrist's testimony was based on plaintiff's recollection of his own mental state six years earlier; plaintiff's recollection was told to the psychiatrist for the purpose of establishing plaintiff's incompetency for a civil suit; these two factors indicated the unreliability of the basis of the psychiatrist's diagnosis; plaintiff's recollection was not told to the psychiatrist for the purpose of treatment; and there was therefore nothing to rebut the indicators of unreliability.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 22 July 1985 in GUILFORD County Superior Court. Heard in the Court of Appeals 6 March 1986.

During the years 1975, 1976 and 1977, plaintiff's then wife, Vickie, embezzled approximately $152,000.00 from her employer, defendant Jefferson-Pilot. Upon discovery of these circumstances, Vickie was arrested on 10 August 1977 and charged with embezzlement. Upon Vickie's arrest, plaintiff was interrogated, subsequently arrested and jailed for approximately fourteen days. The

criminal charges against plaintiff were dismissed. Vickie pled guilty and was sentenced to prison. Subsequent to the arrest of plaintiff, defendant Jefferson-Pilot instituted a civil suit against plaintiff and Vickie and attached their property. This suit was later settled by a consent judgment, signed by both plaintiff and Vickie, conveying property of both plaintiff and Vickie to either Jefferson-Pilot or defendant Fireman's Fund, which, under a fidelity fund policy, paid Jefferson-Pilot a substantial portion of the losses incurred as a result of Vickie's activities. Plaintiff also executed a release, dated 26 September 1978, in favor of both defendants.

In his complaint, plaintiff alleged that he was arrested and incarcerated, that defendants caused his property to be attached and seized and that he signed the release to defendants, but that he was mentally incompetent at the time and did not understand what he was doing. Plaintiff alleged that "[a]s a direct and proximate result of the wrongful acts of the Defendants . . ., which acts were done maliciously and intentionally to wrongfully deprive Plaintiff of all his resources, the Plaintiff's mental condition was sorely abused and he lost all his property all to his injury and damage. . . ."

In their answers, defendants asserted as affirmative defenses that plaintiff had executed a release and that plaintiff's claims were barred by applicable statutes of limitations.

All parties engaged in discovery, including interrogatories and depositions. Defendants took the deposition of plaintiff; Harold F. Greeson, an attorney who represented plaintiff in the criminal case and civil action between defendants and plaintiff in 1977 and 1978; and Stephen P. Millikin, an attorney who represented defendants in the 1977-1978 civil action. Plaintiff took the deposition of James P. Coffey, treasurer of defendant Jefferson-Pilot, and also presented the affidavit of Dr. Bob Rollins, a psychiatrist who examined and diagnosed plaintiff in 1983.

Following discovery, both defendants moved for summary judgment. From the trial court's order granting both motions, plaintiff has appealed.

Lunsford & Christy, by John W. Lunsford, for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto and Richard J. Votta, for defendant-appellee Jefferson-Pilot Fire and Casualty Company.

Hedrick, Eatman, Gardner, & Kincheloe, by Mel J. Garofalo and Mika Z. Savir, for defendant-appellee Fireman's Fund Insurance Company.

WELLS, Judge.

In his complaint, plaintiff did not identify any specific claim for relief. In his brief, he contends that he has sufficiently alleged claims for abuse of process and intentional infliction of emotional distress. We agree that the complaint is sufficient for the abuse of process claim. However, under the test established by our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979) and *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981), we hold that plaintiff has not sufficiently alleged—and that the forecast of evidence before the trial court does not tend to show—outrageous, malicious or calculated conduct on the part of either defendant intended to cause plaintiff mental anguish or emotional distress.

[1] It seems clear on the record before us that summary judgment was granted based upon defendants' affirmative defenses of the statute of limitations and the execution of a general release by plaintiff in defendants' favor. Plaintiff's complaint and the forecast of evidence make it clear that plaintiff's claim for relief for abuse of process accrued on or about 11 August 1977, at which time the applicable three-year statute of limitations, N.C. Gen. Stat. § 1-52 (1983), began to run. *See Shearin v. Lloyd*, 246 N.C. 363, 98 S.E. 2d 508 (1957). Plaintiff contends (1) that at the time his claim arose, he was mentally incompetent; that the statute of limitation was thereby tolled until his disability ended in January 1983; and that therefore his action was timely begun and (2) that he was mentally incompetent to execute the release to defendants and that therefore they are not entitled to that defense. Thus, the dispositive question in this case is that of plaintiff's mental competency or capacity on or about 11 August 1977 and on or about 26 September 1978 (the date of the release). Plaintiff does not

question the validity of the release on any grounds other than his mental capacity to enter into it. Although the disability statute which might operate to toll the statute of limitations, N.C. Gen. Stat. § 1-17(a) (1983), provides for tolling for persons who are "insane" when their "cause of action" accrues, under the decisional and statutory law of this State, we find that the appropriate test is one of mental competence to manage one's own affairs. *See Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490 (1969) and N.C. Gen. Stat. §§ 35-1.7(11) and 35-2 (1984). Although various standards have been used or referred to by our Supreme Court in release cases ("sufficient mental competence" to enter into a release, *Walker v. Walker*, 256 N.C. 696, 124 S.E. 2d 807 (1962); "sufficient mental capacity to know the nature and effect" of entering into a release, *Mangum v. Brown*, 200 N.C. 296, 156 S.E. 535 (1931); "mental incapacity" to enter a release, *Ipock v. R.R.*, 158 N.C. 445, 74 S.E. 352 (1912)), we perceive that the test for mental competence to enter into a release is the same as that controlling the running of the statute of limitations, *i.e.*, whether at the time of execution of the release, the party challenging the release had the mental competence to manage his own affairs.

On the issue of plaintiff's mental competence, defendants examined plaintiff at length as to the events in 1977 and 1978 which prompted plaintiff to file this action and as to plaintiff's life from 1977 to 1983. During this deposition, plaintiff was able to recall in substantial detail the events surrounding his former wife's arrest, his arrest, the attachment of his property, the resolution of the civil suit against him and the signing of the release. Plaintiff's deposition also showed that in 1977 and 1978 he was taking various medication for pain and nervous disorders (anxiety and depression) and that the events of 1977 and 1978 upset him and made him distraught, apprehensive and deeply resentful. Plaintiff's testimony does not show that he lacked the ability to understand and comprehend what was taking place. To the contrary, plaintiff's testimony shows that during the period 1977 through 1983 plaintiff lived alone, pursued gainful employment and was never hospitalized or institutionalized for treatment of mental illness.

In his deposition, Harold Greeson testified that he represented plaintiff with respect to his arrest, the attachment of plaintiff's property and the disposition of defendants' civil action against

plaintiff. Mr. Greeson testified that he had numerous meetings with plaintiff in 1977 and 1978 during which plaintiff clearly expressed his reactions to and attitudes about the events giving rise to this action. It was Greeson's opinion that plaintiff understood Greeson's advice about the events of 1977 and 1978.

[2] In summary, plaintiff's and Greeson's depositions constitute a forecast of evidence that in 1977 and 1978 and at all times between 11 August 1977 and January 1983 plaintiff was mentally competent to manage his own affairs and had the mental capacity in September 1978 to enter into the release. Plaintiff contends that the affidavit of Dr. Rollins refutes this forecast and shows that in 1977 and 1978 and until January 1983 plaintiff was lacking in mental competence to manage his own affairs and capacity to enter into the release. Dr. Rollins' affidavit reflects that he based his diagnosis of plaintiff on two interviews with plaintiff in April and May of 1983, review of plaintiff's "medical records," psychological testing, an interview with plaintiff's girlfriend and a telephone conversation with plaintiff's grandmother. Dr. Rollins gave his diagnosis and opinion as follows:

> *Mental Status:* Mr. Cox is a very tall, slim, Caucasian man, who looks his stated age 32 years. Dress is somewhat disheveled. Posture is normal and body movements are active. Eye contact and attention are good. Speech is clear. He is pleasant, cooperative, and responsive to questions. He describes a labile mood with frequent agitation. Thinking is mildly disorganized. There is no indication of suicidal intent. He describes paranoid thinking (co-workers talk about him, the insurance company may try to kill him). No hallucinations are noted. Perception, orientation, memory, and intellectual functions are intact. Concentration, judgment, and insight are impaired.
>
> *Analysis:* Mr. Cox was subjected to severe stress during his developmental years as a result of the death of his mother and abuse and neglect by his father. During adolescence he was withdrawn and poorly adjusted. His ill conceived first marriage failed. Mr. Cox developed symptoms of psychoses during his second marriage. These were exacerbated by his arrest and the seizure of his property. His wife's imprisonment, subsequent rejection by her, and pressure from the In-

ternal Revenue Service also contributed to his mental problems. The loss of his home was particularly traumatic in view of the previous loss of his mother and the breakup of his first marriage. Also, Mr. Cox felt quite abused by the insurance company, as he was unaware of his wife's criminal action. His adjustment has improved since the favorable Tax Court decision of December 12, 1982. He is in need of mental health treatment.

Opinions:

1. My diagnosis is Borderline Personality Disorder manifested by emotional instability, episodes of psychoses, labile affect, poor self image, impaired reality testing, poor control of anger, paranoid thinking, past alcohol and substance abuse, impaired interpersonal relationships, disturbed sleep, somatic symptoms, disorganized thinking, impaired concentration. (American Psychiatric Association Diagnostic and Statistical Manual, Third Edition, Diagnosis #301.83).

2. Mr. Cox's mental condition was aggravated by his arrest, confinement, and the attachment of his property.

3. Mr. Cox was not competent to sign the release to Jefferson-Pilot Fire and Casualty Company and Fireman's Fund Insurance Company in 1978.

4. For the purpose of "tolling" with regard to regaining his attached property, Mr. Cox was not competent until January 1983.

We are initially confronted with the question of whether Dr. Rollins would be competent to give testimony at trial as to plaintiff's mental competence or capacity in 1977 and 1978. The rule with respect to such testimony may be found in *State v. Wade*, 296 N.C. 454, 251 S.E. 2d 407 (1979), where the Court noted, from a thorough analysis of the major cases on the issue, that a common element in the decisions of the Court was the requirement that in order for a physician expert to be able to give an opinion based on his personal knowledge where that knowledge includes information supplied to the physician by others, including the patient, the information must be inherently reliable. *See also State v. Franks*, 300 N.C. 1, 265 S.E. 2d 177 (1980). In *Wade*, the Court found such inherent reliability based on the fact that (1) the

defendant had been sent to the testifying doctor for treatment and (2) the doctor's examination of the defendant was thorough. In *Franks*, the Court held that such testimony was inherently reliable based only on the second criterion used in *Wade*. We find it significant, however, that in both *Wade* and *Franks*, the testifying doctors had examined the defendant patient within a few months of the crime for which the defendant was being tried, whereas, in this case, Dr. Rollins did not examine plaintiff until almost six years after plaintiff's claim for relief accrued and about five years after plaintiff signed the release. We hold that these circumstances render Dr. Rollins' testimony incompetent. We base our holding on three criteria: (1) Dr. Rollins' testimony was based on plaintiff's recollection of plaintiff's mental state six years earlier, (2) plaintiff's recollection was told to Dr. Rollins for the purpose of establishing plaintiff's incompetency for a civil suit—these two criteria indicating the unreliability of the basis of Dr. Rollins' diagnosis—and (3) plaintiff's recollection was not told to Dr. Rollins for the purpose of treatment; therefore, there was nothing to rebut the indicators of unreliability.

The forecast of evidence before the trial court showed that because of the running of the statute of limitations and because plaintiff executed a valid general release of his claim plaintiff could not maintain his action. Summary judgment was therefore properly granted. Accordingly, the judgment below is

Affirmed.

Judges WHICHARD and COZORT concur.

B. F. Goodrich Co. v. Tire King and Smith v. Hill

THE B. F. GOODRICH COMPANY, PLAINTIFF v. TIRE KING OF GREENSBORO, INC., TIRE KING OF FAYETTEVILLE, INC., BOYD A. PERRY AND JOE B. SMITH, DEFENDANTS

JOE B. SMITH, THIRD PARTY PLAINTIFF v. DAVID HILL, TIRE COUNTRY, INC. AND STRATTON TIRE CORPORATION, THIRD PARTY DEFENDANTS

No. 8518SC647

(Filed 1 April 1986)

Process § 14.3— foreign corporation—contacts with N. C.—exercise of jurisdiction proper

The trial court could properly exercise jurisdiction over defendant West Virginia corporation where defendant promised to pay for services to be performed in this State by plaintiff in that plaintiff arranged tire sales through defendant for which defendant received compensation and for which defendant in turn compensated plaintiff; furthermore, defendant had sufficient minimum contacts with this State to permit the exercise of jurisdiction over it where plaintiff resident placed orders with defendant nonresident on behalf of North Carolina tire dealers over a period of at least six months and defendant did continuous substantial business through other dealers in North Carolina; defendant's business relationship with plaintiff was ongoing; defendant received as compensation a percentage of the tire sales placed through it in this State; and defendant undertook various collection activities on behalf of the tire suppliers. N.C.G.S. § 1-75.4(5)a.

APPEAL by third party defendant Stratton Tire Corporation from *Washington, Judge.* Order entered 2 May 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 2 December 1985.

This is an appeal from an order denying a motion to dismiss for lack of jurisdiction over the person.

Dees, Giles, Tedder, Tate & Wall, by T. M. Gaylord, Jr., for third party plaintiff-appellee.

Emanuel and Emanuel, by Robert L. Emanuel and George W. Kane, III, for third party defendant-appellant.

EAGLES, Judge.

Third party defendant Stratton Tire Corporation, a West Virginia corporation, appeals from an order denying its motion to dismiss on the grounds that the trial court lacked jurisdiction

over the person. The appeal is properly before this court. G.S. 1-277(b).

I

Plaintiff B. F. Goodrich Company ("Goodrich") sued for the purchase price of tires shipped to defendant Tire King of Greensboro but not paid for. Defendant Joe B. Smith had allegedly ordered the tires and arranged to have them billed to defendant Tire King of Fayetteville. Smith denied any liability. He filed a third party complaint against Stratton Tire Corporation ("Stratton") and the other third party defendants, seeking indemnity in case he was found liable. Smith alleged that third party defendants Hill and Tire Country asked him to act as their sales representative and to solicit orders from Stratton, and that Stratton approved this arrangement and agreed to pay commissions to Smith and Hill. Smith asserts that for these reasons the third party defendants must assume any liability determined to be his.

Stratton moved to dismiss on the grounds that it had no contacts with North Carolina. Stratton is a corporation, organized and doing business in West Virginia. According to its president, Stratton does not do any business or maintain a sales force in North Carolina, nor does it advertise here. Its sole business function is to process tire orders and forward them to Goodrich in Ohio. Goodrich then delivers the tires, and the customer pays Goodrich. Any disputes about price or quality do not involve Stratton; rather, on these issues the customer must deal directly with Goodrich. Once Goodrich is paid for an order, Goodrich pays Stratton who in turn pays a commission to the person who obtained the order.

Goodrich alleged in its complaint that Stratton acted at all pertinent times in its behalf, and that Stratton had, in Goodrich's behalf, presented the initial demand for payment.

Smith alleged that Stratton had sold over $170,000 of tires directly through him, and paid him $3,400 in commissions, over a period of some six months. Smith alleged further, on information and belief, that Stratton sold over $1,000,000 worth of tires in North Carolina per year.

The trial court found that Stratton promised to pay Smith for his services in North Carolina, that Stratton did substantial

business in this State, and that orders for tires were placed through Stratton and Stratton received compensation accordingly. Based on these findings, the court held that both statutory and constitutional standards for the exercise of jurisdiction over the person were met, and denied Stratton's motion to dismiss. Stratton appealed.

II

In order to determine whether North Carolina may properly exercise jurisdiction over the person of a foreign defendant, we apply a two-part test: (1) Do our "long-arm" jurisdiction statutes, G.S. 1-75.1 *et seq.*, when liberally construed, permit the exercise of jurisdiction? (2) If so, does the exercise of jurisdiction unconstitutionally violate due process of law? *See Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300, *appeal dismissed and disc. rev. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985).

III

The first prong of the jurisdictional test is easily satisfied. A court of this state has statutory jurisdiction upon proper service (service is not contested here) over actions arising out of a promise by a defendant (Stratton) "to pay for services to be performed in this State by the plaintiff" (Smith). G.S. 1-75.4(5)a. Smith arranged tire sales through Stratton, for which Stratton received compensation and for which Stratton in turn compensated Smith. Smith by his efforts in this State conferred a business benefit on Stratton and was paid accordingly. This was part of an ongoing contractual arrangement. Under a liberal construction, Smith performed a "service" in North Carolina for which Stratton promised to pay.

IV

The second constitutional prong of the test involves the "minimum contacts" test. *See International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). This test is not mechanical but depends on the factors in each individual case. *Id.; Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E. 2d 91 (1985). A single contract may constitutionally support jurisdiction over a non-resident corporate defendant, *McGee v. International Life Ins. Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957), especially when the defendant also does substantial other busi-

ness in the forum state. *Fiber Industries, Inc. v. Coronet Industries, Inc.*, 59 N.C. App. 677, 298 S.E. 2d 76 (1982). Mere fortuitous contact with the forum state in the course of business dealings will not suffice, however. There must be some act or acts by which the defendant has purposefully availed itself of the privilege of doing business there. *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228, *reh'g denied*, 358 U.S. 858, 3 L.Ed. 2d 92, 79 S.Ct. 10 (1958).

V

This Court has identified certain primary and secondary factors used in determining minimum contacts questions. *See Harrelson Rubber Co. v. Layne*, 69 N.C. App. 577, 317 S.E. 2d 737 (1984). These include three primary factors: (1) quantity of contacts, (2) nature and quality of contacts, and (3) the source and connection of the cause of action with these contacts. Two secondary factors, interest of the forum state and convenience to the parties, are considered. *Id.* No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case. *See Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *Harrelson Rubber Co. v. Layne, supra.*

Quantity of Contacts: It is undisputed that Smith placed orders with Stratton on behalf of North Carolina tire dealers, over a period of at least six months. Smith alleged, and Stratton did not deny, that Stratton did continuous substantial business through other dealers in North Carolina. This case does not arise out of a single, isolated contact. *Compare Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E. 2d 476 (1980) (single sale, no other dealings). We note that the fact that Stratton received orders in West Virginia and never physically operated in North Carolina does not mean it did not have business contacts here. *See Burger King Corp. v. Rudzewicz*, --- U.S. ---, 85 L.Ed. 2d 528, 105 S.Ct. 2174 (1985) (franchisee never visited forum state; jurisdiction proper).

Nature and Quality of Contacts: Stratton's business relationship with Smith was ongoing. If this lawsuit had not arisen, Smith apparently would have remained active placing orders from North Carolina with Stratton. Stratton did not deny that it receives as compensation a percentage of the Goodrich sales placed through

it in this state. *Compare United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979) (no jurisdiction over guarantor, who enjoyed no commercial benefit from transaction). While Stratton denied generally any collection activity on behalf of Goodrich, Goodrich alleged that specific collection activities were undertaken through Stratton and that Stratton acted at all times in its behalf. These facts indicate an ongoing business relationship, in which Stratton served as something more than a mere conduit of orders, as it now claims to be. The fact that Stratton did not advertise in North Carolina is relevant but does not appear especially important in light of its ongoing association with a major national advertiser, Goodrich.

Source and Connection of Cause of Action: The cause of action arose directly out of Smith's activities for which he was compensated by Stratton. *Compare Georgia Railroad Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E. 2d 637 (1980) (no connection between real estate, on which contacts predicated, and action; no jurisdiction).

Interest of Forum State: Any state has a general interest in providing a forum for its residents to settle disputes in which they are involved. *Harrelson Rubber Co. v. Layne, supra.* In addition, the dependent nature of Smith's claim against Stratton could mean that the entire matter would be relitigated from the beginning if we decline jurisdiction. Smith has apparently never been to West Virginia, while Stratton has been involved in substantial business in North Carolina.

Convenience: The record reflects no relevant convenience factors, other than the unavoidable inconvenience to one side or the other of litigating outside of its home state.

Upon review of these factors and the relevant cases, we conclude that Stratton has sufficient minimum contacts, purposefully made, with North Carolina and that exercise of jurisdiction over its person by our courts does not offend due process.

VI

Comparison of the facts here with the seminal "minimum contacts" case, *International Shoe Co. v. Washington, supra*, reveals a close parallel. There a shoe company protested attempted collection of unemployment compensation contributions by the State of

Washington, arguing that it was not "present" in the State and therefore not subject to its jurisdiction. The company maintained no office or stock of merchandise in Washington. Its salesmen received compensation solely on a commission basis, computed on sales accepted at company headquarters in St. Louis. All orders were shipped f.o.b. outside Washington. The salesmen had no authority to contract or make collections, and only had sample shoes, *i.e.*, one of a pair. The Supreme Court held that the company's contacts nonetheless supported Washington's exercise of jurisdiction: they were systematic and continuous, resulting in a large volume of interstate business, including the subject matter of the action. The company had sufficiently exercised the privilege of doing business in the State, enjoying the benefits and protection thereof, that due process was not offended by expecting it to defend there. *Id.* The only difference between the sales structure in *International Shoe* and here is that Stratton, rather than manufacturing the tires itself, forwards its tire sales orders to Goodrich. It does receive compensation for its services, however; its business operations in North Carolina can hardly be called incidental or fortuitous. We reaffirm our conclusion that Stratton may constitutionally be sued in North Carolina in this case.

CONCLUSION

Stratton did not deny that substantial orders for tires for North Carolina customers moved through it in the course of its regular business. It did not deny being compensated by Goodrich nor did it deny paying Smith for placing the orders with it. Stratton's claim that it simply served as a processing point for Goodrich's orders must accordingly be viewed with some skepticism. Accordingly, we conclude that the trial court correctly denied Stratton's motion to dismiss. The order appealed from must therefore be affirmed.

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

JUDY K. PHILLIPS & MELVIN OWENSBY v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8510IC865

(Filed 1 April 1986)

State § 8— tort claim against State agency—findings only as to "negligent act"

The Industrial Commission erred in denying plaintiff's claim against a State agency on the ground that the evidence failed to show any "negligent act" by any named employee since the State's liability extends to negligent omissions as well as negligent acts of its employees. N.C.G.S. § 143-291.

Chief Judge HEDRICK concurring in result.

APPEAL by plaintiffs from the decision and order of the North Carolina Industrial Commission entered 28 March 1985. Heard in the Court of Appeals 11 December 1985.

These claims, brought under the North Carolina Tort Claims Act, G.S. 143-291, *et seq.*, are for personal injuries sustained by the plaintiffs when a car Melvin Owensby was driving, in which Judy K. Phillips was a passenger, skidded on snow covered U.S. Highway 74 within the city limits of Lake Lure and dropped into a cavernous hole. The accident and plaintiffs' plight were discovered by a passing motorist who noticed some tire tracks leading from the highway onto the shoulder that abruptly and inexplicably disappeared. Upon stopping to investigate, he saw the car several feet below in the hole, which was partially obscured by underbrush. In filing the claim plaintiffs alleged that their injuries resulted from the negligence of the North Carolina Board of Transportation. Upon defendant moving to dismiss because a negligent employee had not been named, as required by G.S. 143-297, the plaintiffs amended their claim by stating that the negligent employees were Billy Rose in charge of the Division of Highways for North Carolina and J. B. Edwards in charge of highway maintenance in Rutherford County.

In the hearing before the Deputy Commissioner it was stipulated that the hole was within the highway right-of-way and Road Maintenance Supervisor Albert Jones, who had been employed by the defendant agency in Rutherford County for thirty-four years, testified that Highway 74 was under his direct supervision for

several years prior to January 1981 and that he had been aware of the hole for over thirty years. An operator of a wrecker service testified that he had removed numerous cars from the hole during the preceding fifteen years. In denying the claim the Deputy Commissioner found that Owensby, the driver of the car, was contributorily negligent and that his negligence was imputable to Phillips, the car owner. Upon appeal the Full Commission vacated the contributory negligence finding, found that Road Maintenance Supervisor Jones had known of the hole for thirty years and that between ten and twenty other cars had fallen into the hole during that time, but denied the claim because the evidence failed to show any "negligent act" by any defendant employee named.

Hamrick and Hamrick, by J. Nat Hamrick, for plaintiff appellants.

Attorney General Thornburg, by Assistant Attorney General George W. Lennon and Associate Attorney General Randy Meares, for defendant appellee.

PHILLIPS, Judge.

If G.S. 143-291 had not been amended by Session Laws 1977, c. 529, effective 1 July 1979, the Full Commission's decision denying recovery to plaintiffs would have to be summarily affirmed. For the negligence of the State in this case, if any, was that of inaction or omission rather than action or commission and before G.S. 143-291 was amended only claimants that had been injured by "a negligent *act*" of a state officer, employee, or other agent could recover under the Tort Claims Act. As earlier written the statute did not permit recovery from the State for the negligent omissions or failures to act of its employees. *Ayscue v. N. C. State Highway Commission*, 270 N.C. 100, 154 S.E. 2d 59 (1967); *Flynn v. N. C. State Highway and Public Works Commission*, 244 N.C. 617, 94 S.E. 2d 571 (1956). But that is no longer the law and the Commission erred in assuming that it is. By virtue of the amendment referred to, the words "a negligent act" were replaced by the words "the negligence" and G.S. 143-291, in pertinent part, now reads, and did when plaintiffs were injured, as follows:

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the *negligence* of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, *if a private person*, would be liable to the claimant in accordance with the laws of North Carolina. (Emphasis supplied.)

That the State's tort liability was greatly enlarged by the enactment and is no longer limited to responsibility for the negligent acts of its employees is obvious. *See, Watson v. N. C. Department of Corrections*, 47 N.C. App. 718, 721, 268 S.E. 2d 546, 549, *disc. rev. denied*, 301 N.C. 239, 283 S.E. 2d 135 (1980); 56 N.C. L. Rev. 1136, at p. 1148 (1978); Daily Bulletin No. 62, Institute of Government, p. 505 (April 7, 1977). It is just as obvious that the effect and purpose of the amendment was to extend the State's liability to include the negligent omissions and failures to act of its employees. A negligent act is but one form of negligence; whereas negligence if unrestricted, as it is in G.S. 143-291, is a term broad enough to embrace all negligent conduct, passive and active alike. Since it has been determined that plaintiffs were not contributorily negligent they are entitled to recover of the defendant if their injuries proximately resulted from a negligent omission or negligent failure to act by either of defendant's employees named in the amendment to plaintiffs' affidavit; they are not required to show that their injuries resulted from a negligent act of either employee.

Thus, the Full Commission's decision and order is defective and further findings and conclusions in accord with this opinion are necessary. The finding of fact that no "negligent act" had been committed by the employees named only partially addressed the issue raised and the Commission's conclusion of law based thereon that there was no negligence by such employees and the resulting decision for defendant cannot stand and are vacated. The Commission should have also found whether either of the employees named—Billy Rose, who was in charge of the Division of Highways for North Carolina, and J. B. Edwards, who was in charge of highways in Rutherford County—was negligent by reason of his failure to maintain said highway shoulder in a reasonably safe condition, or by his failure to correct the dangerous

condition that caused plaintiffs to be injured. The record shows without dispute or contradiction that a condition dangerous to users of the highway had existed for many years without being corrected by those responsible for maintaining the highway. The Deputy Commissioner's finding that no notice had been given to the department of the many accidents that had occurred at the place is not decisive. Notice is not required to a party that already has knowledge and the defendant clearly had knowledge of the dangerous condition through its local Road Maintenance Supervisor, Albert Jones. Furthermore, the defendant's duty to maintain the right-of-way necessarily carried with it the duty to make periodic inspections and if the hazard had existed on defendant's right-of-way in close proximity to the highway for more than thirty years, as the evidence and findings indicate, the defendant had implied notice of the condition as a matter of law. 65 C.J.S. *Negligence* Sec. 5(3) (1966).

Vacated and remanded.

Judge JOHNSON concurs.

Chief Judge HEDRICK concurs in the result.

Chief Judge HEDRICK concurring in result.

I concur in the decision of the majority vacating the decision of the Industrial Commission. The Commission erroneously denied plaintiffs' claim on the grounds that the evidence failed to disclose any "negligent act" by any defendant employee named. I disagree with the majority's efforts to do more than vacate the decision of the Commission and remand for a new hearing. I vote to remand to the Industrial Commission for a new hearing, new findings and conclusions and for a decision in accordance with the law relative to G.S. 143-291, as amended. It is for the Commission, not the appellate Court, to make findings of fact from the evidence given in the case.

F. RAY MOORE OIL COMPANY, INC. v. STATE OF NORTH CAROLINA; THOMAS TODD, STATE PURCHASING OFFICER; AND WILLIAM R. RHINEHART, SENIOR STATE PURCHASER

No. 852SC802

(Filed 1 April 1986)

1. **Contracts § 27.2— fuel oil supply contract—basis of pricing—breach of contract**

Plaintiff breached a contract to supply fuel oil to the State by basing its price to the State on the posted price of its supplier rather than on the price it was actually paying for the oil. Although plaintiff was required by the terms of its contract to list its principal supplier and notify the State of any change in the commercially posted price, this did not mean that plaintiff did not have to pass on any savings it had in the purchase of fuel oil in light of a specific contract requirement that the State receive full proportionate benefit immediately upon a price decrease.

2. **Unfair Competition § 1— fuel oil supply contract—misrepresentation as to supplier—unfair and deceptive trade practice**

The trial court properly found that plaintiff had engaged in an unfair and deceptive trade practice where there was evidence supporting the finding that plaintiff represented to the State that its supplier was Apex Petroleum when plaintiff was purchasing a large part of its fuel supply from other suppliers at a lower price; the State relied on this misrepresentation in paying for the fuel; there was evidence that plaintiff thought it was following the terms of its contract; and there is no reason the State as a consumer cannot take advantage of N.C.G.S. 75-16, even though it cannot be sued under that statute.

3. **Contracts § 26— action to construe fuel oil contract—findings supported by evidence**

In an action for a declaratory judgment to construe a fuel oil supply contract in a counterclaim for unfair and deceptive trade practice, there was evidence to support the court's findings of fact as to the average general market price available to plaintiff and that the contract required plaintiff to list its principal source of supply so that defendant could monitor plaintiff's fuel costs, and, while a question as to whether a witness had determined the general market price for fuel may have been irrelevant, the record did not show what the answer would have been and the court could not pass on the question.

APPEAL by plaintiff from *Brown (Frank R.), Judge.* Judgment entered 14 March 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 10 December 1985.

The plaintiff filed this action for a declaratory judgment, praying that the court construe a contract. The defendants counterclaimed asking for treble damages for unfair and deceptive

trade practices. The case was tried by the court without a jury. The evidence showed that the plaintiff responded to an offer to receive bids for the supplying of fuel oil to agencies of the State of North Carolina in eleven southeastern counties for the period from 1 July 1981 through 30 June 1982. The bid specifications provided there could be price adjustments during the contract period and contained the following terms:

> 3. PRICE ADJUSTMENTS: Any price changes, downward or upward; which might be permitted during the contract period must be general, either by reason of market change or on the part of the contractor to other customers.
>
> (a) *Notification:* Immediate notification must be given to the Division of Purchase and Contract, *in writing*, concerning *any* increase or decrease in the commercial posted price. A copy of manufacturers' official notice or other evidence that the change is general in nature must be submitted.
>
> (b) *Decrease:* The State shall receive full proportionate benefit immediately at any time during the contract period. Fill-up or voluntary discounts allowed other customers during this contract period shall also apply to this contract.
>
> . . . .
>
> 4. DEFINITIONS: For purposes of this Contract and related documents, the following definitions will apply.
>
> . . . .
>
> (b) *Commercial Posted Price:* A price readily available to customers indicating the current rack price, terminal price, posted price, etc., in effect and which is discounted for large wholesale purchasers or government entities.

In accordance with the bid specifications the plaintiff listed its supplier as Apex Petroleum.

There was evidence that the plaintiff adjusted its price on several occasions according to the price posted by Apex. The plaintiff purchased fuel oil from Apex and other suppliers at reduced prices which it did not pass on to the State. If these sav-

ings had been passed on the State would have paid $12,316.43 less for the fuel oil than it paid.

The court made findings of fact in accordance with the evidence and concluded the plaintiff misrepresented to the State the source and price of the oil it sold to the State. The court found further that the State relied on this misrepresentation to its detriment. It found that the plaintiff "by its actions and misrepresentations has engaged in a course of conduct which offends established public policy, is oppressive or substantially injurious to the consumer, or both, thereby constituting an unfair trade practice which necessitates the trebling of damages." The court entered a judgment for the State for $36,949.29.

The plaintiff appealed.

McMullan & Knott, by James B. McMullan, Jr., for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen and Associate Attorney General Victor H. E. Morgan, Jr., for defendant appellees.

WEBB, Judge.

[1] The first question posed by this appeal is whether it was a breach of contract for the plaintiff to base its price to the State on the posted price of Apex Petroleum rather than on the price it was actually paying for oil, some of which was bought from other suppliers. We hold this was a breach of contract. In the section of the contract dealing with price adjustments paragraph (b) says: "*Decrease:* The State shall receive full proportionate benefit immediately at any time during the contract period . . . ." We believe this means without ambiguity that if the plaintiff were to receive a reduction in the price it paid for oil this reduction was to be passed on to the State.

The plaintiff argues that it was required to base its price to the State on the rack price of Apex and not upon its actual cost. The contract required the plaintiff to list its principal supplier, which was Apex. It also required the plaintiff to notify the State immediately of a change in the commercial posted price. A commercial posted price is defined as "[a] price readily available to customers indicating the current rack price, terminal price,

posted price, etc. . . . ." The plaintiff contends that these requirements in the contract show that the price upon which it should base its price to the State should be based on the price charged by Apex. We do not so read these provisions. The plaintiff was required by the terms of its contract with the State to list its principal supplier and notify the State of any change in the commercially posted price. We do not believe this means the defendant did not have to pass on any savings it had in the purchase of fuel oil in light of the specific requirement of subparagraph (b) that the State shall receive full proportionate benefit immediately upon a price decrease.

[2] Our Supreme Court held in *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975) that false representations upon which the other party relies are unfair and deceptive trade practices. In this case the Court has found as a fact which was supported by the evidence that the plaintiff represented to the State that his supplier was Apex when in fact he was purchasing a large part of his fuel supply from other suppliers at a lower price than the posted price of Apex. The State relied on this representation in paying for the fuel. This would be a misrepresentation upon which the State relied and constitutes an unfair and deceptive trade practice. There is evidence that the plaintiff thought it was properly following the terms of the contract in its dealings with the State. In *Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981) it was held that it is not necessary to prove bad faith to show an unfair or deceptive trade practice. The good faith of the plaintiff in this case is irrelevant.

The appellant, relying on *Sperry Corp. v. Patterson*, 73 N.C. App. 123, 325 S.E. 2d 642 (1985) argues that the State is not a person within the meaning of G.S. 75-16. In *Sperry* we held that the State could not be sued for an unfair or deceptive trade practice. It is true that we said in that case that "[t]he State of North Carolina is not a 'person, firm, or corporation' within the meaning of G.S. 75-16 . . . ." *Id.* at 125, 325 S.E. 2d at 645. We believe the proper interpretation of that case should be that the State is not a person, firm or corporation that can be sued under G.S. 75-16. The statute is aimed at unfair and deceptive practice by those engaged in business for profit. The State was not engaged in business in *Sperry*. There is no reason why the State as a con-

sumer cannot take advantage of G.S. 75-16 if it is the victim of an unfair or deceptive trade practice.

[3] The appellant contends there was not sufficient evidence to support the court's findings of fact as to the average general market price available to plaintiff. An exhibit was offered which was prepared from the plaintiff's records which showed the amount and price of fuel purchased by Moore during the contract period. This supports the findings of fact as to the general market price available to the plaintiff.

The appellant also contends it was error for the court to find as a fact that the contract required the plaintiff to list its principal source of supply so that defendant could monitor plaintiff's cost of fuel. The appellant says this is so because the contract does not say why the principal source of supply must be listed. It is true the contract does not say this but a witness testified to it which supports this finding of fact.

In its last assignment of error the appellant argues it was error to sustain an objection to a question to one of its witnesses as to whether he had determined a general market price for fuel for the period of time of the contract. We cannot pass on this assignment of error because the record does not show what the answer would have been. We do not believe the general market price is relevant. The issue in this case is what was the price at which the plaintiff was able to buy fuel.

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. RANDY MILLER DAVIS

No. 8528SC861

(Filed 1 April 1986)

1. Constitutional Law § 63; Jury § 7.11— jurors excluded for death penalty views

Defendant's constitutional right to a fair and impartial trial was not denied by the trial court's allowing the prosecutor to challenge for cause potential jurors who voiced opposition to the death penalty.

2. Criminal Law § 102.5— prosecutor's improper questions—mistrial not required

The trial court acted properly in sustaining defendant's objections to the prosecutor's questions designed to plant in the minds of the jurors the thought that defense counsel had attempted to procure perjured testimony, and the trial judge did not abuse his discretion by failing to declare a mistrial.

APPEAL by defendant from *Gaines, Judge.* Judgment entered 14 February 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 3 March 1986.

Defendant was indicted for the first-degree murder of Salvadore Montez, Jr. The evidence showed that defendant and Montez had had a sort of "running feud" going on between them and that each had threatened to kill the other. On the day of the murder, defendant forced some friends to accompany him as he drove to several different places around Asheville, possibly searching for Montez. They testified that they had gone with defendant because he had displayed a gun to them and that they had felt threatened.

Defendant finally spotted Montez in the parking lot of the Pisgah View Apartments, a public housing project in Asheville. He shouted at Montez, who stopped and walked up to defendant's car. The two argued briefly and defendant shot Montez, killing him. The testimony of the witnesses varied as to where each of the antagonists were when the shot was fired. Also, the testimony differed as to whether Montez had pulled a knife just before he was shot. However, all of the witnesses agreed that there was an argument and that defendant shot Montez.

The defendant argued that the shooting was self-defense. The trial judge instructed the jury on first degree murder, second degree murder, voluntary manslaughter and not guilty by reason of self-defense. The jury returned a verdict of guilty of second degree murder and the trial judge sentenced defendant to thirty years imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg by Assistant Attorney General Thomas B. Wood for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr. by Assistant Appellate Defender Gordon Widenhouse for defendant-appellant.

PARKER, Judge.

[1] Defendant brings forth two assignments of error. One challenges the jury selection process. Defendant's case was tried as a capital case, and during jury *voir dire* the prosecutor was allowed to challenge for cause those jury venirepersons who voiced opposition to the death penalty. Defendant argues that this procedure violated his right, guaranteed by both the federal and state constitutions, to a fair and impartial jury made up of a cross section of the community. *See Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968). Empirical studies have been conducted which have shown that so-called "death-qualified" juries are more likely to convict a defendant than those not culled of people opposing the death penalty, and at least one of the United States Courts of Appeals has determined that this evidence was enough to show a violation of defendant's right to a fair trial. *See Grigsby v. Mabry*, 758 F. 2d 226 (8th Cir. 1985), *cert. granted sub nom., Lockhart v. McCree*, --- U.S. ---, 106 S.Ct. 59, 88 L.Ed. 2d 48 (1985). However, the Court of Appeals for this circuit and our own Supreme Court have consistently rejected this argument. *E.g., Keeten v. Garrison*, 742 F. 2d 129 (4th Cir. 1984); *State v. Payne*, 312 N.C. 647, 325 S.E. 2d 205 (1985). Moreover, our Supreme Court has recently refused to reconsider its holdings on this issue in light of *Grigsby*. *State v. Peacock*, 313 N.C. 554, 330 S.E. 2d 190 (1985). We, therefore, overrule this assignment of error.

[2] Defendant's other assignment of error is that the trial court erred in failing to declare a mistrial after certain improper questions were asked by the prosecutor. During the redirect examination of State's witness Janice Gail Edwards, one of the people in the car with defendant at the time of the shooting, the following exchange occurred:

> Q. Now, did you inform Mr. Hyler (defendant's attorney) you had given a statement to the police?
>
> A. Yes, I did.
>
> Q. What did he say about that statement?
>
> MR. HYLER: Objection.
>
> MR. BROWN: He's opened the door to this, Your Honor.

COURT: Sustained.

QUESTIONS BY MR. BROWN:

Q. Did you inform Mr. Hyler you had given a statement to the police two years before?

A. Yes, I did.

Q. Did he tell you to forget about this statement?

MR. HYLER: Objection.

COURT: Sustained.

Q. Did he say you could say something else other than what was in this statement?

MR. HYLER: Objection.

COURT: Sustained.

Q. Did he have a discussion with you about perjury?

MR. HYLER: Objection.

COURT: Sustained.

Defendant contends that this line of questioning was calculated only to prejudice defendant by planting in the minds of the jurors the thought that defense counsel had attempted to procure perjured testimony. A prosecutor "may not place before the jury through insinuating questions, argument or other means any evidence which is incompetent and prejudicial and not legally admissible in evidence." *State v. Herndon*, 292 N.C. 424, 430, 233 S.E. 2d 557, 562 (1977). While the prosecutor's questioning of the witness in this case violated his "duty to refrain from improper methods calculated to bring about a wrongful conviction," *State v. Britt*, 288 N.C. 699, 711, 220 S.E. 2d 283, 291 (1975), *quoting* 63 Am. Jur. 2d, Prosecuting Attorneys, { 27 (1972), the prejudice to defendant resulting from the questioning was not so great as to require the trial judge to declare a mistrial *ex mero motu*.

The cases cited by defendant in support of his argument all involved prosecutorial misconduct far more flagrant than that involved here. The trial judge in this case sustained defendant's objections to the questioning. No motion was made for a mistrial.

Control of the conduct of counsel during a trial is left largely to the discretion of the trial judge. *State v. Bowen*, 230 N.C. 710, 55 S.E. 2d 466 (1949). In our view, the judge below acted properly in sustaining defendant's objections to the questions and did not abuse his discretion by failing to declare a mistrial. This assignment of error is overruled.

Defendant attempts to argue a third assignment of error. However, we note that this assignment was not contained in the record on appeal and that defendant's motion to amend the record to include a new assignment of error was denied. Therefore, the purported assignment of error is not properly before us, and we shall not consider it. N.C. Rule App. Proc. 10(a).

No error.

Chief Judge HEDRICK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. RONALD M. BRITT

No. 855SC1006

(Filed 1 April 1986)

1. Rape and Allied Offenses § 5— second degree sexual offense—evidence sufficient

The trial court properly denied defendant's motion to dismiss two counts of second degree sexual offense committed against his twelve-year-old daughter based on insufficient evidence of force where there was testimony that the victim had told her mother and a detective that defendant on the first occasion pulled her down on a bed, would not stop when told, had his arm on her and held her down, and in the second incident pulled her down on a bed, held her there, pursued her into another room when she got away, forced her to lie down, and again refused to stop when told. N.C.G.S. 14-27.5.

2. Criminal Law § 73.1— second degree sexual offense—twelve-year-old victim—statements to mother and detective—admission not plain error

There was no plain error in a prosecution for second degree sexual offense against defendant's twelve-year-old daughter where the court allowed the victim's mother and a detective to testify about statements that the victim made to them but defendant did not object at trial.

Judge MARTIN concurring in the result.

APPEAL by defendant from *Barefoot, Judge*. Judgment entered 25 June 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 10 March 1986.

Defendant was charged in proper bills of indictment with two counts of second degree sexual offense. At trial, the State introduced evidence tending to show that on one occasion in late December 1982 and on another occasion in early January 1983, defendant forced his twelve-year-old daughter to engage in a sexual act with him. Defendant testified that he had never engaged in sexual acts with his daughter. Defendant was found guilty as charged. From a consolidated judgment imposing a prison sentence of twelve years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for the State.

Assistant Appellate Defender Leland Q. Towns for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns as error the trial court's denial of his motion to dismiss the charges. Defendant contends that the evidence was insufficient to show that he used force to commit the sexual offense. We disagree.

A person who engages in a sexual act with another person "[b]y force and against the will of the other person," is guilty of a second degree sexual offense. G.S. 14-27.5. Under our sexual offense statutes, actual physical force is not required to satisfy the statutory requirement that the act be committed by force and against the will of the victim; fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent, takes the place of force and negates the consent. *State v. Locklear*, 304 N.C. 534, 284 S.E. 2d 500 (1981).

In support of his argument that the evidence in this case is insufficient to show that he used force to commit the sexual acts charged, defendant relies on *State v. Lester*, 70 N.C. App. 757, 321 S.E. 2d 166 (1984), *aff'd*, 313 N.C. 595 (1985), where this Court reversed the defendant's conviction of second degree rape. In that case, the defendant's daughter testified that she initially refused

to have intercourse with the defendant, but later complied because she could tell that he was getting angry. This Court held that although this evidence was sufficient to show that the acts of sexual intercourse between the defendant and his daughter were against her will, there was no evidence of actual or constructive force. Defendant's reliance on *Lester* is misplaced.

The evidence in the present case tends to show that defendant committed a sexual act with his daughter on two occasions. In reference to the first incident occurring in late December of 1982, the victim's mother testified that her daughter told her that she went into her father's room and that he "pulled her down on the bed and put his hand inside her panties and put his finger inside her." A detective with the New Hanover Sheriff's Department who interviewed the victim testified that she told him that on that occasion that when defendant put his finger in her vagina, she told him to stop, but he would not stop, and that he "had his arm on her and was holding her down" and "told her to shut up." In reference to the incident occurring in January of 1983, the victim told her mother that defendant "pulled her down on the bed and held her there and he . . . tried to have sex with her, but she moved and she got away from him and he pulled her back and put his finger inside of her this time too." The victim also told the detective that when defendant came into her room on that second occasion, she ran into another room and tried unsuccessfully to lock the door. Defendant came into the room, "forced her to lay down," and again committed the same sexual act with her. She again told him to stop but he refused. This evidence is sufficient to show that defendant used force to commit the sexual acts charged.

[2] Defendant next contends that the trial court erred in allowing the victim's mother and the detective who interviewed the victim to testify about statements that the victim made to them. The evidence challenged by this argument was not objected to at trial. Defendant argues that the admission of this testimony constitutes plain error, entitling him to a new trial. We do not agree.

The plain error rule is defined as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamen-*

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

State v. Odom, 307 N.C. 655, 660, 300 S.E. 2d 375, 378 (1983) (citation omitted).

The testimony of the victim's mother and the detective was clearly hearsay, but under the circumstances of this case, we are of the opinion that the trial court did not err in allowing its admission. *See, State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985). Assuming, however, that the admission of this testimony was error, it was not plain error within the meaning of *Odom*.

No error.

Judge WELLS concurs.

Judge MARTIN concurs in the result.

Judge MARTIN concurring in the result.

The testimony of the victim's mother and of the police officer as to statements which the victim made to them was the only evidence offered by the State which tended to show that defendant used force in committing these despicable acts. Their testimony as to the use of force did not corroborate the victim's trial testimony and, had objections been interposed, would not have been admissible under any exception to the hearsay rule, including G.S. 8C-1, Rule 803(24). However, "[e]vidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have." 1 Brandis on North Carolina Evidence § 27 at 99 (2d rev. ed. 1982). In ruling on a motion to dismiss, the court is to consider all of the evidence, including in-

competent evidence, in the light most favorable to the State. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). When the evidence relating to defendant's use of force is considered in light of these rules it is sufficient to withstand defendant's motion to dismiss.

STATE OF NORTH CAROLINA v. KAREN GAIL CARAWAN

No. 853SC890

(Filed 1 April 1986)

Automobiles § 122— driving while impaired—park as public vehicular area

Where defendant allegedly drove while impaired in a park maintained and supported by a city and county, evidence permitted a finding that at the time in question, the portion of the park grounds legally in use as a parking lot for attendees at a river race was a "public vehicular area" within the meaning of N.C.G.S. § 20-4.01(32).

APPEAL by defendant from *Phillips, Judge*. Judgment entered 14 May 1985 in Superior Court, CRAVEN County. Heard in the Court of Appeals 14 January 1986.

Defendant appeals from a judgment of imprisonment entered upon a verdict of guilty of impaired driving.

Attorney General Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Voerman & Ward, P.A., by William F. Ward, III, for defendant appellant.

WHICHARD, Judge.

Defendant's sole contention is that the court erred in denying her motions to dismiss and for judgment notwithstanding the verdict. The basis of the contention is that the State's evidence was insufficient as a matter of law to permit a finding that the offense occurred upon a "public vehicular area" as defined by N.C. Gen. Stat. 20-4.01(32). We disagree.

N.C. Gen. Stat. 20-138.1(a) provides:

> A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
>
> (1) While under the influence of an impairing substance; or
>
> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more.

N.C. Gen. Stat. 20-4.01(32) defines "public vehicular area," as used in Chapter 20 of the General Statutes, in pertinent part as follows:

> Any area within the State of North Carolina that is generally open to and used by the public, including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley, or parking lot upon the grounds and premises of:
>
> a. Any public or private hospital, college, university, school, orphanage, church, or any of the institutions, parks or other facilities maintained and supported by the State of North Carolina or any of its subdivisions[.]

It further provides: "The term 'public vehicular area' shall not be construed to mean any private property not generally open to and used by the public."

The evidence as to the locale of the alleged offense here, and the use of the locale at the time, was as follows:

The Bicentennial Park is located in the city of New Bern in Craven County. On the date in question the city and county each owned a portion of the park.

Generally, the park is used as a recreation area and is closed to motor vehicles. Signs at the entrances state: "[N]o parking on the grass, no vehicles allowed."

On the occasion of special events, however, the city "identif[ies] a parking area out on the grass portion of the park" in order to "have better traffic control." There are usually ten to fifteen special events per year during which the city "allows people to come out and use the park and park out there."

The Trent River raft race, which took place on the date of defendant's alleged offense, was one such event. At least 200 vehicles were legally parked in the park for this event. Approximately fifty were still parked there when defendant backed her car into another vehicle while on the portion of the park grounds legally in use as a parking lot.

Defendant argues that the park grounds cannot be a "public vehicular area" because the uncontroverted evidence establishes that they are not "*generally* open to and used by the public." N.C. Gen. Stat. 20-4.01(32) (emphasis supplied). In construing this statutory language "we are guided by the primary rule that the intent of the legislature controls." *State v. Spencer*, 276 N.C. 535, 546, 173 S.E. 2d 765, 773 (1970). The statutory definition of "public vehicular area" includes, by way of illustration, "any . . . parking lot upon the grounds and premises of . . . [a]ny parks . . . maintained and supported by the State . . . or any of its subdivisions." N.C. Gen. Stat. 20-4.01(32). It is undisputed that the area in question was upon the grounds of a park maintained and supported by the city of New Bern and the county of Craven, which are subdivisions of the State. It is equally undisputed that at the time in question the area was legally in use as a parking lot for a special event, and that it generally was so used on the occasion of such events.

We believe the legislature, in the enactment of N.C. Gen. Stats. 20-138.1 and 20-4.01(32), clearly intended to protect persons in areas such as that in question from the dangers posed by others who drive there while impaired. Adoption of the construction of "public vehicular area" for which defendant contends would be counter to that legislative purpose, and "[a] construction which will operate to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *Spencer*, 276 N.C. at 546, 173 S.E. 2d at 773.

We therefore hold that the evidence permitted a finding that at the time in question the portion of the Bicentennial Park grounds legally in use as a parking lot was a "public vehicular area" within the meaning and intent of that phrase as used in N.C. Gen. Stat. 20-4.01(32). *See State v. Bowen*, 67 N.C. App. 512, 313 S.E. 2d 196, *appeal dismissed*, 312 N.C. 79, 320 S.E. 2d 405 (1984) (evidence sufficient to permit inference that driveway to

condominium complex was a "public vehicular area" as that phrase was defined in prior version of N.C. Gen. Stat. 20-4.01(32)). The court thus correctly denied defendant's motions to dismiss and for judgment notwithstanding the verdict.

No error.

Judges BECTON and PARKER concur.

NCNB NATIONAL BANK OF NORTH CAROLINA v. C. P. ROBINSON, JR.

No. 8521SC787

(Filed 1 April 1986)

1. **Rules of Civil Procedure § 56— summary judgment—motion to continue hearing denied—no error**

   The trial court did not err in an action based on a 1974 judgment by denying defendant's motion to continue the summary judgment hearing because plaintiff was relying upon an affidavit and defendant was unable to contact the witness to subpoena him before the hearing. The statement in the affidavit related for the most part to matters of public record and undisputed fact and defendant admitted in his answer both the 1974 judgment and that the judgment had not been paid.

2. **Judgments § 55— interest on judgment—legal rate eight percent—contract rate seven percent—no error**

   The trial court did not err in an action on a 1974 judgment on a note by awarding plaintiff interest at the legal rate of eight percent even though the debt was founded on a contract which provided interest at seven percent. Provisions of the promissory note relating to interest were no longer effective because they had merged into the 1974 judgment.

3. **Judgments § 55— interest on judgment arising from earlier judgment—interest on interest—error**

   The trial court erred in an action on a 1974 judgment for $100,000 by concluding that plaintiff was entitled to a judgment in the principal amount of $165,154.45, which included interest accrued on the 1974 judgment, then applying the legal rate of interest to the entire amount. The legal rate may only be applied to the $100,000 principal amount; equity dictates that a party should not be forced to pay interest on interest. N.C.G.S. 24-5.

APPEAL by defendant from *Morgan, Judge*. Order entered 23 April 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 January 1986.

Defendant executed a promissory note whereby he promised to pay plaintiff the sum of $100,000.00 with interest at the rate of seven percent (7%) per annum. Defendant failed to pay the note when it came due, and on 14 November 1974 judgment on the note was entered against defendant in the amount of $100,000.00 plus interest from the date of default according to the terms of the note. On 15 November 1983, plaintiff filed the present action against defendant based on the 1974 judgment and moved for summary judgment. The trial court granted plaintiff's motion and ordered defendant to pay plaintiff the sum of $165,154.45 with interest at the legal rate of eight percent (8%) per annum until paid.

From the order of the trial court, defendant appeals.

Hutchins, Tyndall, Doughton & Moore, by George E. Doughton, Jr. and Kent L. Hamrick, for plaintiff appellee.

Moore, Ragsdale, Liggett, Ray & Foley, by Jane Flowers Finch, for defendant appellant.

ARNOLD, Judge.

[1] Defendant first contends that the trial court erred in denying his motion to continue the summary judgment hearing because he was "unfairly prejudiced and good cause for the continuance was shown." Specifically, defendant complains that plaintiff relied upon the affidavit of Mr. William P. Baldridge in filing its motion for summary judgment, and defendant was unable to contact Mr. Baldridge to subpoena him for attendance at the motion hearing. Thus, defendant asserts he was denied the "important procedural right of examining opposing witnesses." We find the contention to be without merit.

The granting of a continuance is within the discretion of the trial court and absent a manifest abuse of discretion its ruling is not reviewable on appeal. *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980). The statements in the Baldridge affidavit related for the most part to matters of public record and undisputed fact. In his answer, defendant admitted both the 1974 judgment on the note and that the judgment had not been paid. Under these circumstances we find no abuse of discretion in the denial of the motion.

[2] Defendant next contends that the trial court erred in awarding plaintiff interest at the legal rate of eight percent (8%) because the debt was founded on a contract which provided interest at the rate of seven percent (7%) per annum. We disagree.

The rule is that "a judgment merges the debt upon which it is based and becomes the only evidence of the existence of the debt that can be used in court." *Saieed v. Abeyounis*, 217 N.C. 644, 647, 9 S.E. 2d 399, 401 (1940). Our Supreme Court explained this merger rule as follows:

> It is said that by judgment, the contract upon which it is based becomes entirely merged—loses all its vitality—and ceases to be obligatory upon the parties. Its force and effect are wholly expended, and all remaining liability is transferred to the judgment, which then becomes the evidence, and the only evidence that can be used in a court, of the existence of the original debt.

Trust Co. v. Boykin, 192 N.C. 262, 266-67, 134 S.E. 643, 645 (1926), *quoting Grant v. Burgwyn*, 88 N.C. 95, 99 (1883). Plaintiff's present action is an independent civil action upon the prior judgment. *See Investment Co. v. Toler*, 32 N.C. App. 461, 232 S.E. 2d 717 (1977). Because the provisions of the promissory note relating to interest are no longer effective due to the merger into the 1974 judgment, the trial court was correct in applying the legal rate of interest to the judgment in the present action.

[3] In its order the trial court concluded that plaintiff was entitled to judgment in the principal amount of $165,154.45. This amount included interest which had accrued on the 1974 judgment. The trial court then applied the legal rate of interest to the judgment for $165,154.45. Defendant contends that the trial court's order allowed plaintiff to recover "interest on interest" contrary to law. We agree.

Our Supreme Court, in *Deloach v. Worke*, 10 N.C. (3 Hawks) 36 (1824), mandated that in an action to revive a prior judgment, interest is to be applied only to the principal of the sum originally due. There is no procedure now recognized in this State by which a judgment may be revived or renewed. *Toler*, 32 N.C. App. at 463, 232 S.E. 2d at 718. Instead, a party must bring an action on a judgment, as in the case at bar, which is deemed an independent

action separate and distinct from the original suit in which the prior judgment was rendered. *Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126 (1964). Nevertheless, the reasoning of the Court in *Deloach* is still controlling. Equity dictates that a party should not be forced to pay interest on interest. Yet, the practical result of the trial court denominating the $165,154.45 as principal and then applying the legal rate of interest to that amount is to force defendant to pay interest on interest. Plaintiff is entitled to the judgment for $165,154.45 because the principal amount of the 1974 judgment plus the accrued interest and court costs equaled $165,154.45 as of the date of the court's order in this cause. However, the legal rate of interest may only be applied to the $100,000 principal amount due in the prior judgment. This result is consistent with G.S. 24-5 which mandates that in a breach of contract action, the fact finder "shall distinguish the principal from the interest in the award, and the judgment shall provide that the principal amount bears interest until the judgment is satisfied."

We therefore remand this cause to the trial court for modification of the judgment consistent with this opinion.

Affirmed in part, reversed in part and remanded.

Judges WEBB and WELLS concur.

JOHN T. COUNCIL, INC. v. BALFOUR PRODUCTS GROUP, INC.

No. 8514SC957

(Filed 1 April 1986)

Receivers § 12.6— order of discharge—failure to follow notice requirements

The trial court erred in entering an order discharging the receiver appointed to liquidate defendant corporation where there was no showing that notice was mailed to each claimant at least twenty days prior to the hearing on the receiver's petition for an order of discharge as required by N.C.G.S. § 1-507.7.

APPEAL by defendant from *Johnson, Judge.* Orders entered 8 December 1983 in Superior Court, DURHAM County. Heard in the Court of Appeals 4 February 1986.

Defendant was placed in permanent receivership in July 1979. Claude V. Jones was appointed receiver pursuant to N.C. Gen. Stats. 55-125, -127. The receiver petitioned the court for an order of discharge on 21 September 1982, on 9 February 1983, and finally on 18 November 1983. Over defendant's written objection the court heard and allowed the 18 November 1983 petition on 28 November 1983. The court entered orders on 8 December 1983 discharging the receiver and allowing attorney fees to be paid from the receivership proceeds. From entry of these orders, defendant appeals.

William Y. Manson for Claude V. Jones, Permanent Liquidating Receiver of Balfour Products Group, Inc., appellee.

Manning, Fulton & Skinner, by Howard E. Manning, Jr., for defendant appellant.

WHICHARD, Judge.

The principal issue is whether the order discharging the receiver can stand notwithstanding the failure to comply with N.C. Gen. Stat. 1-507.7. We hold that it cannot.

N.C. Gen. Stat. 1-507.7 provides, in pertinent part, that

> no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least 20 days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge.

The record contains no evidence of compliance with this statutory notice requirement. While the receiver petitioned the court for an order of discharge as early as 21 September 1982, N.C. Gen. Stat.

1-507.7 required that he produce "a receipt issued by the United States post office, showing that [notice of the 28 November 1983 hearing had] been mailed to each . . . claimant's last known address at least 20 days prior to the time set for hearing . . . ." N.C. Gen. Stat. 1-507.7 expressly prohibits issuance of an order of discharge unless the receiver demonstrates compliance with this statutory notice requirement.

Generally, when a statute prescribes a specific mode of notice that method must be strictly followed where notice must be relied upon to divest the recipient of a right. *In Re Appeal of Harris*, 273 N.C. 20, 24, 159 S.E. 2d 539, 543 (1968); *Holsomback v. Holsomback*, 273 N.C. 728, 732, 161 S.E. 2d 99, 102 (1968). Our Supreme Court has vacated an order of distribution for noncompliance with the notice of hearing requirements in the statutory predecessor to N.C. Gen. Stat. 1-507.7. *Surety Corp. v. Sharpe*, 232 N.C. 98, 103-04, 59 S.E. 2d 593, 597 (1950). The Court reasoned:

> The established rules of practice and procedure in the presentation, proof, and payment of claims in receivership are aptly designed to secure to each claimant his constitutional right to due process of law in its procedural aspect.
>
> It affirmatively appears upon the face of the record that these established rules were not observed in the proceeding under review; that the order of 14 January, 1950, was entered contrary to the course and practice of the court, and without notice, either actual or constructive, to the [claimant]; and that the order of 4 February, 1950, deprived [claimant] of its legal right to contest the claim of the plaintiff in the mode appointed by law. Moreover, the case on appeal reveals that there is a substantial question as to the asserted right of the plaintiff to a preferred claim or lien on the assets in receivership. [Citation omitted.]

Id. at 104, 59 S.E. 2d at 597.

The receiver correctly contends that defendant had actual notice of the 28 November 1983 hearing and has not shown how it was prejudiced by noncompliance with the prescribed notice procedure. In light of *Harris*, *Holsomback*, and the express mandatory prohibition of N.C. Gen. Stat. 1-507.7, we nevertheless hold that compliance with N.C. Gen. Stat. 1-507.7 is prerequisite to en-

try of an order of discharge. Accordingly, because there is no showing that notice was mailed to each claimant at least twenty days prior to the 28 November 1983 hearing, we vacate the order discharging the receiver.

Defendant also contends the court erred in awarding attorney fees from receivership proceeds. Since we have vacated the order discharging the receiver, the appeal from the order awarding attorney fees from receivership proceeds remains interlocutory and thus premature. *See Council v. Balfour Products Group*, 74 N.C. App. 668, 673, 330 S.E. 2d 6, 9, *disc. rev. denied*, 314 N.C. 538, 335 S.E. 2d 316 (1985). The appeal from that order is thus dismissed.

Vacated in part, dismissed in part.

Judges WELLS and COZORT concur.

NORTH CAROLINA NATIONAL BANK v. C. P. ROBINSON COMPANY, INC. AND C. P. ROBINSON, JR.

No. 8521SC788

(Filed 1 April 1986)

Wills § 9.1— sale of interest under will—venue

Proceedings requiring a sale of defendant's interest under his father's will in order to satisfy plaintiff's judgment against him should have been transferred to Anson County pursuant to defendant's motion, and the trial court erred in denying the motion, since N.C.G.S. § 28A-3-1 requires that venue for all proceedings relating to the administration of the estate of a decedent shall be in the county where decedent was domiciled at the time of his death, and decedent in this case was domiciled in Anson County.

Judge WEBB dissenting.

APPEAL by defendant Robinson from *Freeman, Judge*. Order entered 28 September 1984 in Superior Court, FORSYTH County. Heard in the Court of Appeals 14 January 1986.

On 14 November 1974 judgment was entered against defendant in the Superior Court of Forsyth County for default under a promissory note. Executions against defendant were returned un-

satisfied in 1975 and in 1984. On 30 July 1984, in the District Court of Forsyth County, plaintiff secured a Temporary Restraining Order prohibiting defendant from dispossessing any interest which he might have in certain properties under the will of his father. The holographic will had been duly probated in Anson County on 22 August 1980. The present matter was transferred to Superior Court and on 24 September 1984, all motions filed by the parties were heard. Plaintiff's motions for order that debtor's property be sold pursuant to G.S. 1-362 and for preliminary injunction and order pursuant to G.S. 1-358 were allowed. All other motions were denied. In the order the trial court made findings of fact and conclusions of law that defendant "possesses a vested remainder interest under the will of his father"; that his interest includes "one-half undivided interest in . . . certain intangible assets, . . . subject to the life estate of his mother"; and that "Defendant's vested remainder interest . . . is subject to execution and Plaintiff may execute upon said interest and have the same sold at an execution sale." On 13 November 1984, pursuant to the court's order, defendant's interest under his father's will was sold at execution sale in Anson County. Plaintiff purchased the interest at the sale and the net proceeds were credited against plaintiff's judgment.

From the order of the trial court, defendant appeals.

Hutchins, Tyndall, Doughton & Moore, by George E. Doughton, Jr. and Kent L. Hamrick, for plaintiff appellees.

Moore, Ragsdale, Liggett, Ray & Foley, by Jane Flowers Finch, for defendant appellant.

ARNOLD, Judge.

Defendant contends that the trial court erred in denying his motion to transfer the matter to Anson County for a determination of his interest under his father's will. We agree.

Plaintiff asserts that G.S. 1-307 supports the decision of the trial court. That statute provides that "[e]xecutions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered . . . ." Plaintiff maintains it

was only seeking to enforce its judgment on the note and thus the trial court acted properly in denying defendant's motion.

Defendant on the other hand asserts that G.S. 28A-3-1 is controlling. That statute provides that "[t]he venue for the probate of a will and for all proceedings relating to the administration of the estate of a decedent shall be: (1) If [sic] the county in this State where the decedent had his domicile at the time of his death. . . ." Defendant's father lived in Anson County at the time of his death and the will was probated there. Defendant argues that his interest under the will must be determined in Anson County before plaintiff can execute on that interest.

While we are sympathetic to plaintiff's attempts to collect the 1974 judgment on which defendant has made no payments, the better policy requires an initial determination of defendant's interest under the will in the county of probate. Once this determination has been made, plaintiff may then seek an order for execution from Forsyth County Superior Court if defendant has an interest which can be sold. To allow a party to seek construction of a will in conjunction with and pursuant to G.S. 1-307 would overly burden that procedure and open the door to possible confusion in the administration of estates. For this reason we hold that the trial court erred in denying defendant's motion to transfer the matter to Anson County. We vacate the order of the trial court and rescind all actions pursuant to that order.

Vacated.

Judge WELLS concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. I do not believe there was a construction of the will in Forsyth County in spite of the recitals in the court's order. I believe it was proper to sell whatever interest the defendant might have in his father's estate in Forsyth County. The purchaser of this interest may then bring an action in Anson County to determine what this interest may be. I vote to affirm.

BOBBY WAGONER, EMPLOYEE, PLAINTIFF v. DOUGLAS BATTERY MANUFACTURING COMPANY, EMPLOYER, AND HARTFORD INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC1023

(Filed 1 April 1986)

Master and Servant § 94.3— review by Industrial Commission—application of improper standard to the evidence

The full Industrial Commission erred in failing to weigh the evidence and in awarding plaintiff workers' compensation benefits under the mistaken impression that the law required a finding for plaintiff if there was any competent evidence, viewed in the light most favorable to plaintiff, to support such a finding.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission filed 30 April 1985. Heard in the Court of Appeals 6 February 1986.

Plaintiff seeks workers' compensation benefits for a psychiatric condition which he attributes to a previous compensable injury to his hand. The Hearing Commissioner denied compensation based on a conclusion that plaintiff's mental illness and resulting hospitalization were proximately caused by his having been under the influence of controlled substances. The full Commission, however, concluded that plaintiff's mental illness and hospitalization were proximately caused by his injury by accident which gave rise to this claim, and that he was entitled to compensation for such disability. Its Opinion and Award states: "Viewing the totality of the expert testimony in the light most favorable to plaintiff, there was 'some evidence that the accident at least might have or could have produced the particular disability in question.'"

Defendants appeal.

David B. Hough and Lawrence J. Fine for plaintiff appellee.

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

WHICHARD, Judge.

Defendants contend the Commission erred by applying an improper standard to the evidence, and that its determination thus was based on a misapprehension of the law. We agree.

This Court recently stated:

> The plenary powers of the Commission are such that upon review, it may adopt, modify or reject the findings of fact of the Hearing Commissioner, and in doing so may weigh the evidence and make its own determination as to the weight and credibility of the evidence. *Hollar v. Furniture Co.*, 48 N.C. App. 489, 269 S.E. 2d 667 (1980). The Industrial Commission has the duty and authority to resolve conflicts in the testimony whether medical or not, and the conflict should not always be resolved in favor of the claimant. *Rooks v. Cement Co.*, 9 N.C. App. 57, 175 S.E. 2d 324 (1970).

Cauble v. Macke Co., 78 N.C. App. 793, 795, 338 S.E. 2d 320, 321 (1986).

Here, as in *Cauble*, the Commission did not weigh the evidence. The above-quoted language from the Opinion and Award indicates that the Commission "apparently acted under the mistaken impression that the law required a finding for the plaintiff if there was *any* competent evidence [, viewed in the light most favorable to plaintiff,] to support such a finding." *Cauble*, 78 N.C. App. at 795, 338 S.E. 2d at 321-22. The authority cited by the Commission, *Buck v. Procter & Gamble Co.*, 52 N.C. App. 88, 278 S.E. 2d 268 (1981), applies to review of evidence by appellate courts upon appeal from the Industrial Commission. Appellate courts must follow the "any competent evidence" standard in deciding whether the evidence permits a determination by the Industrial Commission, which is the fact-finder. *Buck, supra.* The fact-finder, however, is not required so to view the evidence. Rather, its duty is to weigh the evidence, resolve conflicts therein, and make its own determination as to weight and credibility. *Cauble*, 78 N.C. App. at 795, 338 S.E. 2d at 321.

"When, as here, facts are found by the Commission under a misapprehension of the law, we are empowered to remand the case so that the evidence may be considered in its true legal light." *Cauble*, 78 N.C. App. at 795, 338 S.E. 2d at 322, citing *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 314 S.E. 2d 833 (1984). Accordingly, the Opinion and Award is reversed, and the cause is remanded to the Industrial Commission to make findings of fact and conclusions of law consistent with this opinion.

Reversed and remanded.

Judges WELLS and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 APRIL 1986

ALLEN v. MURRAY No. 8529DC820	Rutherford (82CVD146)	No Error
BARRY v. BARRY No. 8512DC1195	Cumberland (83CVD1696)	Affirmed
BOLIEK v. NEIL REALTY CO., INC. No. 854DC1118	Onslow (85CVD1225)	Affirmed
BROWN v. BROWN No. 8523SC999	Ashe (84SP98)	Affirmed
BURCH v. BURCH No. 854SC971	Sampson (84CVS20)	No Error
CAHOON v. CAHOON'S BULLDOZER SERVICE No. 8510IC1224	Ind. Comm. (930065)	Affirmed
CORNELL v. HARMON No. 8510SC1124	Wake (84CVS697)	Reversed & Remanded
HAGLER v. HAGLER No. 8517DC933	Rockingham (85CVD73)	Vacated & Remanded
HAITHCOX v. R. W. WILKINS, JR. No. 8519SC1031	Randolph (84CVS486)	Affirmed
HOUSING AUTHORITY OF THE CITY OF WINSTON-SALEM v. HARDY No. 8521DC1160	Forsyth (85CVS106)	Appeal Dismissed
IN RE BALL v. DOBLIN No. 8525SC1165	Burke (85CVS249)	Affirmed
IN RE HASKINS No. 8512DC1068	Cumberland (84J241)	Affirmed
JONES v. RUSSELL No. 8518SC856	Guilford (84CVS364)	Affirmed
JOYNER v. ADAMS No. 8510SC1094	Wake (83CVS6376)	Reversed & Remanded
LYNCH v. STROTHER No. 857SC695	Wilson (82CVS1062)	No Error
McDUFFIE v. McDUFFIE No. 8516DC1080	Robeson (82CVD1381)	Affirmed

N. C. BAPTIST HOS., INC. v. HARRIS No. 8523DC1142	Yadkin (83CVD151)	Affirmed
PRESBYTERIAN HOSPITAL v. MULLIS No. 8526DC920	Mecklenburg (81CVD10981)	Affirmed
RESKE v. GARSIDE No. 8510SC305	Wake (83CVS6499)	Affirmed
SOUTHEASTERN PAINT & DRYWALL, INC. v. RIMER No. 8515DC631	Orange (84CVD1155)	Affirmed in part, reversed and remanded in part.
STATE v. ARTIS No. 857SC1133	Wilson (84CRS11332) (84CRS11333)	No Error
STATE v. BEAMON No. 858SC1209	Wayne (85CRS0977) (85CRS0978)	No Error
STATE v. BURNETT No. 8516SC1150	Robeson (85CRS187)	No Error
STATE v. CAIN No. 8517SC1005	Rockingham (80CRS12517)	No Error
STATE v. CHESSON No. 858SC1130	Lenoir (84CRS12334) (84CRS12335)	No Error
STATE v. EDWARDS No. 858SC1018	Wayne (85CRS914) (85CRS916)	No Error
STATE v. HUNT No. 8516SC1089	Robeson (85CRS5528)	No Error
STATE v. HYDRICK No. 8510SC1091	Wake (84CRS82394)	No Error
STATE v. LAWSON No. 858SC1161	Wayne (83CRS15945)	No Error
STATE v. McLAURIN No. 8512SC804	Cumberland (84CRS2998)	No Error
STATE v. MAULDIN No. 8514SC883	Durham (84CRS34085) (84CRS34087)	No Error
STATE v. MOSS No. 8519SC1103	Cabarrus (84CRS9719)	No Error

STATE v. PAYNE No. 8525SC1185	Catawba (84CRS12272) (84CRS12273)	No Error
STATE v. ROBINSON No. 8529SC1014	Henderson (84CRS3537)	No error in the trial; remanded for proper sentence.
STATE v. SHIELDS No. 8510SC1024	Wake (83CRS58592)	No Error
STATE v. SMITH No. 8510SC675	Wake (83CRS63850)	No Error
STATE v. TAFT No. 853SC1038	Pitt (84CRS5453)	No Error
STATE v. WARREN No. 8527SC1049	Gaston (84CRS29630)	No Error
STATE v. WILLIAMS No. 8512SC476	Cumberland (84CRS2715) (84CRS2716) (84CRS2717) (84CRS2718) (84CRS2719)	No Error
STATE v. WITHERS No. 8526SC1145	Mecklenburg (85CRS01691)	No Error
THARPE v. THARPE No. 8523DC1179	Wilkes (84CVD0415)	Appeal Dismissed
YADKIN COUNTY SOC. SER. v. SMITH No. 8523DC1117	Yadkin (84CVD235)	Affirmed

RECA P. PERRY v. ROBERT PERRY

No. 857SC382

(Filed 1 April 1986)

1. **Husband and Wife § 15.1— tenancy by the entirety—equal right to control statute—applicability to pre-1983 estates**

The equal right to control and income provisions of N.C.G.S. § 39-13.6(a) were intended by the Legislature to apply to tenancies by the entirety created before the effective date of the statute, 1 January 1983.

2. **Husband and Wife § 15.1— tenancy by the entirety—equal right to control—application to pre-1983 estate—no taking of vested rights**

Application of the equal right to control and income provisions of N.C.G.S. § 39-13.6(a) to pre-1983 estates by the entirety did not amount to a taking of the husband's vested property rights without due process of law where the husband's claim to the exclusive right to control and income was based solely upon the common law incidents of a tenancy by the entirety.

APPEAL by plaintiff from *Bruce, Judge*. Judgment entered 2 January 1985 in Superior Court, NASH County. Heard in the Court of Appeals 23 October 1985.

Plaintiff wife and defendant husband have been married since 1 November 1945 and continue to live together as husband and wife. During their marriage they have acquired and presently own, as tenants by the entirety, two farms in Nash County and a house and lot in Bailey, N. C. On 6 March 1983, plaintiff brought this action seeking a declaratory judgment that she is entitled, by virtue of G.S. 39-13.6, to an equal right with defendant to control, use, possession, rents, income and profits of their entirety property. In a second claim for relief, she sought an accounting from defendant for income received from the property during 1983 and 1984 and damages amounting to one-half of such income.

Defendant answered, denying the applicability of G.S. 39-13.6 to the property owned by the parties on the grounds that it had been acquired by them as entirety property prior to the effective date of the statute. He affirmatively sought a declaratory judgment that G.S. 39-13.6 is not retroactive in effect.

By stipulation, the issues relating to the parties' respective claims for declaratory judgment were severed from plaintiff's claim for damages. The trial court found that each of the parcels

of real property which are the subject of this action was acquired by the parties, as tenants by the entirety, prior to the effective date of G.S. 39-13.6. The court concluded that defendant has a vested property right to the sole control, possession and income from said property and that G.S. 39-13.6, as it purported to have retroactive effect so as to divest him of his right, is unconstitutional. Judgment was entered declaring defendant to be entitled "to the sole and full control, possession, income, and usufruct" of the property. Plaintiff appeals.

Valentine, Adams, Lamar & Etheridge, by William D. Etheridge, for plaintiff appellant.

Vernon F. Daughtridge for defendant appellee.

MARTIN, Judge.

Two questions are presented by this appeal: whether the "equal right to control" provisions of G.S. 39-13.6(a) apply to tenancies by the entirety created before 1 January 1983 and, if so, whether such retroactive application violates constitutional limitations. For the reasons which follow, we hold that the statute should generally be construed to apply to tenancies by the entirety which pre-existed the effective date of the statute and that such application is not, in and of itself, unconstitutional. We also hold that defendant has failed to demonstrate that application of the "equal right to control" provisions of G.S. 39-13.6(a) to the estates by the entirety which he holds with plaintiff unconstitutionally interferes with his vested property rights.

At the outset, we note that the parties, by their pleadings, sought only a ruling as to whether G.S. 39-13.6 should be construed to apply to estates by the entirety created before 1 January 1983 (hereinafter referred to as "pre-1983 estates by the entirety"). The issue of the constitutionality of retroactive application is necessarily considered in determining the controversy, however, and that issue was raised at trial and tried by the implied consent of the parties. "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." G.S. 1A-1, Rule 15(b). The constitutional issue, having been raised and passed upon by the superior court, is properly before us. *See Bland v. City of Wilmington*, 278 N.C.

657, 180 S.E. 2d 813 (1971) (constitutional question not raised or considered in the court below will not be decided on appeal).

Prior to 1 January 1983, North Carolina followed the common law with respect to incidents of ownership of property held by a husband and wife as tenants by the entirety. Under the common law, the husband, during marriage, had control and use of the property and was entitled to its possession and the income from it. *Bryant v. Bryant*, 193 N.C. 372, 137 S.E. 188 (1927).

> Although neither the husband nor the wife can separately deal with the estate, and the interest of neither can be subjected to rights of creditors so as to affect the survivor's right to the estate, the husband, during coverture, is entitled to the full control, possession, income, and usufruct of the estate. (Citation omitted.)
>
> In the exercise of this control, use and possession, he may, without joinder of the wife, lease the property, mortgage the property, grant rights-of-way, convey by way of estoppel—qualified in all these instances by the fact that the wife is entitled to the whole estate unaffected by his acts if she survive him. (Citation omitted.)

L & M Gas Co. v. Leggett, 273 N.C. 547, 551, 161 S.E. 2d 23, 26-27 (1968).

In 1982, the North Carolina General Assembly enacted G.S. 39-13.6 by passage of legislation entitled "AN ACT TO EQUALIZE BETWEEN MARRIED PERSONS THE RIGHT TO INCOME, POSSESSION, AND CONTROL IN PROPERTY OWNED CONCURRENTLY IN TENANCY BY THE ENTIRETY." Session Laws 1981, Ch. 1245 (Reg. Sess. 1982). As originally enacted, the statute became effective 1 January 1983 and provided, in pertinent part:

> (a) A husband and wife shall have an equal right to the control, use, possession, rents, income, and profits of real property held by them in tenancy by the entirety. Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held without the written joinder of the other spouse. . . .
>
> . . . .

(c) This section shall apply to all conveyances on and after January 1, 1983. . . .

Id. At its 1983 session, the General Assembly amended G.S. 39-13.6 by deleting the first sentence of subsection (c), which provided that the statute was applicable only to conveyances made on or after 1 January 1983. Session Laws 1983, Ch. 449, sec. 1 (Reg. Sess. 1983). The effective date of the amendment was 1 July 1983. The statute is reflective of changed circumstances in economic relationships and responsibilities among married persons and expresses a public policy of this State that their rights in property should be equalized.

[1] Before we reach the constitutional question presented by the trial court's judgment, we must first consider whether the General Assembly intended that G.S. 39-13.6 apply to pre-1983 estates by the entirety. As a general rule of statutory construction, a statute will be given retroactive application only when it clearly appears that to do so was the intent of the legislature. *Housing Authority 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). The amending legislation was entitled "AN ACT TO AMEND CHAPTER 39 TO FURTHER EQUALIZE BETWEEN MARRIED PERSONS THE RIGHT TO INCOME, POSSESSION AND CONTROL IN PROPERTY OWNED CONCURRENTLY IN TENANCY BY THE ENTIRETY." Session Laws 1983, Ch. 449, *supra*. In addition to deleting the first sentence of subsection (c) of the original statute, which made the statute prospective in its application, the General Assembly also amended the income taxation provision of the statute. The amending legislation provided that it was "effective for taxable years beginning on or after January 1, 1983, except that all income received on or after January 1, 1983, but before July 1, 1983, *from a tenancy by the entirety created before January 1, 1983*, is considered to have been received by the husband." *Id.* at sec. 3 (emphasis added). In our view, the General Assembly has clearly manifested its intention that G.S. 39-13.6, including the "equal right to control" provision of subsection (a), apply to estates by the entirety created before 1 January 1983.

[2] The second issue, whether the statute may be constitutionally applied to pre-1983 estates by the entirety, involves consideration of two interests protected by Section 1 of the Fourteenth

Amendment to the United States Constitution; the rights to due process and equal protection of the laws. Defendant husband challenges the application of the "equal right to control" provision of the statute on the premise that it diminishes, without due process of law, his common law right to the exclusive possession and income of entirety property. A statute may not be given retroactive effect when such construction would interfere with vested rights acquired by reason of transactions completed prior to its enactment. *Gardner v. Gardner*, 300 N.C. 715, 268 S.E. 2d 468 (1980); *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. 2d 836 (1950). A vested right may not be diminished by act of the legislature in violation of Art. 1, Sec. 19 of the North Carolina Constitution and the Fourteenth Amendment to the Constitution of the United States. *Wachovia Bank and Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E. 2d 182 (1965).

The common law estate by the entirety, and its incidents are discussed at length in *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924). As to the interest of the wife, the Court, quoting *Corinth v. Emery*, 63 Vt. 505, 22 A. 618 (1891), said "[s]uch an estate is the real estate of a married woman, although her husband is joined with her in the title. It is the real estate of each." *Id.* at 209-10; 124 S.E. at 571. However, as an incident of the estate, the husband was said to be "entitled to the possession, income, increase or usufruct of the property." *Id.* at 206, 124 S.E. at 569, and to be "the absolute owner" of rents and profits. *Id.* at 207, 124 S.E. at 570. This incident of the estate has also been described as a "right," *Johnson v. Leavitt*, 188 N.C. 682, 684, 125 S.E. 490, 491 (1924); an "absolute and exclusive right," *N.C. Board of Architecture v. Lee*, 264 N.C. 602, 610, 142 S.E. 2d 643 (1965); and a "vested property right," *Homanich v. Miller*, 28 N.C. App. 451, 453, 221 S.E. 2d 739, 740 (1976). *See* 2 Lee, North Carolina Family Law, 4th Ed., § 115 (1980); Webster, Real Estate Law in North Carolina, Hetrick Rev., § 125, p. 130 (1981).

In 1971, the United States Supreme Court, in *Reed v. Reed*, 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (1971), held that the equal protection clause of the Fourteenth Amendment to the United States Constitution forbids state legislation providing for disparate treatment based solely on gender unless the gender based distinction is substantially related to the achievement of valid state objectives. *See Craig v. Boren*, 429 U.S. 190, 50 L.Ed.

2d 397, 97 S.Ct. 451 (1976). Previously, in *Shelley v. Kraemer*, 334 U.S. 1, 92 L.Ed. 1161, 68 S.Ct. 836 (1947), the Court had recognized that state enforcement of substantive common law rules which are impermissibly discriminatory was inconsistent with the equal protection clause of the Fourteenth Amendment.

That the common law incident of tenancy by the entirety, granting to the husband the exclusive right to possession, control, and income of entirety property, is gender-biased in favor of males is beyond dispute. The question is whether that common law aspect of tenancy by the entirety created a constitutionally impermissible classification. We discern no valid state objective to be served by prohibiting a married woman from participating in the management of real property in which she has an interest, or in sharing in the income derived therefrom. Indeed, the rationale for the common law rule has been stated:

> [W]hatever paramount rights the husband had at common law, and now has, in and to the rents and profits and over the lands held by him and his wife as tenants by the entirety, did not, and do not, spring from the peculiar nature of the estate, and are not incidents thereto, but they are rights enuring to the husband from the general principle of the common law which vests in the husband, jure uxoris, the right to the use and control of his wife's lands during coverture and to take the rents and profits arising therefrom.

Johnson v. Leavitt, supra, at 684, 125 S.E. at 491.

In *Homanich v. Miller, supra*, another panel of this Court found no discriminatory state action with respect to the common law incidents of tenancy by the entirety because the estate by the entirety is purely a voluntary and optional method by which married persons may take title to real property. A similar result was reached in *D'Ercole v. D'Ercole*, 407 F. Supp. 1377 (D. Mass. 1976) (Massachusetts does not compel husbands and wives to hold property as tenants by entirety, wife did not demonstrate that choice of tenancy by entirety was made through coercion, ignorance or misrepresentation). It is true that married persons in this State, desirous of owning property together, had, prior to 1 January 1983, and now have, the option to take title to the property as tenants in common, as well as tenants by the entirety. However, we do not agree that the existence of an alternative manner of

taking title justified the discriminatory aspects of the common law right of the husband to the income and control of tenancy by the entirety property. In *Kirchberg v. Feenstra*, 450 U.S. 455, 67 L.Ed. 2d 428, 101 S.Ct. 1195 (1981), the Supreme Court was confronted with the issue of whether or not Louisiana's community property law, giving a husband the right to dispose of jointly owned property without the consent of the wife, was constitutional. Notwithstanding the existence of a statutory provision by which the wife could prohibit such a transfer, the Court held the law to be violative of the equal protection clause of the Fourteenth Amendment. "The 'absence of an insurmountable barrier' will not redeem an otherwise unconstitutionally discriminatory law." *Id.* at 461, 67 L.Ed. 2d at 434, 101 S.Ct. at 1199.

The claim of a vested property right may not rest upon State enforcement of common law which is unconstitutionally discriminatory.

> The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.

Shelley v. Kraemer, supra at 22, 92 L.Ed. at 1185, 68 S.Ct. at 846. To the extent that defendant husband's claims to the exclusive right to control and income of the pre-1983 estates by the entirety involved in this case are based *solely* upon the common law incident of the tenancy previously discussed, they must fail, as the right recognized by the common law cannot be said to be a "vested property right." We hold, therefore, that the application of the "equal control" provision contained in G.S. 39-13.6(a) to Mr. and Mrs. Perry's pre-1983 estates by the entirety does not, in and of itself, amount to a taking of Mr. Perry's vested property right without due process of law. "[T]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v. Silver*, 280 U.S. 117, 122, 74 L.Ed. 221, 225, 50 S.Ct. 57, 58 (1929). Application of the statute to pre-1983 estates by the entirety serves a legitimate and permissible legislative purpose, i.e., the equalization, between married persons, of rights with respect

to management and control of jointly owned property. "[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134, 24 L.Ed. 77, 87 (1877).

A law is presumed constitutional until the contrary is shown and the burden is on the party claiming that the law is unconstitutional to show why it is unconstitutional as applied to him. *Hursey v. Town of Gibsonville*, 284 N.C. 522, 202 S.E. 2d 161 (1974). We recognize that there may be circumstances under which a husband's rights to income and control of pre-1983 tenancy by the entirety property, to the exclusion of his wife, may be classified as "vested rights" for reasons other than the common law incident of that estate. In such cases, the burden will be upon the husband to demonstrate facts showing why his rights are "vested rights" so that application of the "equal control" provisions of G.S. 39-13.6(a) to the estate would violate due process. Defendant husband in this case has failed to do so. The stipulated facts show only that Mr. and Mrs. Perry acquired property, as tenants by the entirety, in 1965, 1968 and 1978. There is no evidence as to which of them furnished the consideration or as to the reason, if any, for which they elected to take title as tenants by the entirety. Simply stated, the evidence does not show that the application of G.S. 39-13.6(a) to the estates held by these parties is unconstitutional.

Plaintiff seeks as relief a judgment declaring that she is entitled to an equal share of the income produced, after the effective date of G.S. 39-13.6, by the entirety property which she owned with her husband on that date and, prospectively to an equal right to use and control that property. We hold that, effective 1 July 1983, the provisions of the statute, as amended, entitle her to the relief which she seeks. We specifically limit our holding to rights of income and control created by the enactment and amendment of G.S. 39-13.6.

For the reasons stated herein, we reverse the judgment of the trial court and remand this case for entry of judgment consistent with this opinion and a determination of plaintiff's second claim for relief.

Reversed and remanded.

Judges ARNOLD and WELLS concur.

PARKER MARKING SYSTEMS, INC. v. DIAGRAPH-BRADLEY INDUSTRIES, INC.

No. 8512SC666

(Filed 1 April 1986)

Contracts § 27.2— distribution agreement—method of termination—failure to maintain stated level of purchases—issues of fact

The trial court erred in granting summary judgment for defendant manufacturer where genuine issues of material fact existed as to whether the parties intended that their distribution agreement would be terminable at will, and, if not, whether defendant had the right to terminate under the express terms of the agreement because of plaintiff's failure to maintain purchases at an agreed upon level.

APPEAL by plaintiff from *Farmer, Judge*. Judgment entered 22 April 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 2 December 1985.

Defendant, Diagraph-Bradley, Inc. (hereinafter Diagraph), is a manufacturer of industrial marking equipment principally used in packaging and shipping. It distributes its products through its own branch offices and through independent distributors. Since the mid-1950's, plaintiff, Parker Marking Systems, Inc. (hereinafter Parker) has served as one of Diagraph's independent distributors. Initially, Parker distributed Diagraph's products in North Carolina, South Carolina, and Virginia. In 1969, Parker and Diagraph entered into a written franchise agreement giving Parker the exclusive right to distribute Diagraph's products in North and South Carolina, and providing for termination by either party upon 60 days notice. On 15 December 1975, Diagraph gave notice that the franchise agreement would be terminated, effective 60 days from that date, but expressed a willingness to continue the business relationship "on a basis that would be agreeable to both parties."

Before the effective date of the termination, Julian Parker, the president of Parker, met with James Brigham, the president of Diagraph, and at least one other representative of defendant. At that meeting, Parker was advised that Diagraph intended to open its own "full-line" branch office in the Carolinas. The parties agreed that Parker would continue to distribute Diagraph products for an indefinite period of time and reached certain other agreements with respect to their future business arrangement. Shortly thereafter, Diagraph sent a letter agreement to Parker confirming the new arrangement. Parker executed the new agreement and returned it to Diagraph on 22 January 1976.

The pertinent parts of the letter agreement provided that Parker "would continue as a Diagraph distributor for an indefinite period, with the understanding that" Diagraph would establish a branch office in the Carolinas. The agreement further provided that "[t]he products which Parker Marking Systems had been buying from Diagraph as set forth in the Diagraph distributor price list dated 10/75 would continue to be available at the then current distributor price, so long as the purchases would not fall below 50% of the average of the past three years, or $51,000.00. In this event, the agreement could be terminated by either party." Parker was given the right to "terminate the agreement at any time, providing 60 days written notice is received by Diagraph."

On 27 January 1982, Diagraph's counsel notified Parker by letter that the 1976 agreement would be terminated on 1 March 1982, along with Parker's right to serve as a Diagraph distributor. No reason for the termination was stated. Notwithstanding the stated termination date, Diagraph continued to honor Parker's orders until 1 May 1982.

Parker brought this action, alleging that Diagraph had breached the 1976 agreement. In its answer, Diagraph denied that any contract existed and alternatively alleged that if, in fact, there was a contract, it was terminated according to its terms or was of indefinite duration and terminable at the will of either party, and that Parker had breached the agreement, justifying Diagraph's termination of it. Both parties requested a jury trial. Subsequent to discovery, Diagraph moved for summary judgment and supported its motion with an affidavit from James Brigham

and numerous exhibits attached thereto. Parker filed an affidavit of its president in opposition to the motion. In addition, depositions of Brigham and of John McKevitt, a vice-president of Diagraph, were submitted to the trial court. From an order granting Diagraph's motion for summary judgment, Parker appeals.

Rose, Rand, Ray, Winfrey & Gregory, by Ronald E. Winfrey, for plaintiff appellant.

Anderson, Broadfoot, Anderson, Johnson & Anderson, by John H. Anderson, II, for defendant appellee.

MARTIN, Judge.

Contending that genuine issues of material fact exist, plaintiff assigns error to the entry of summary judgment dismissing its claim. We conclude that there are unresolved issues of fact, the determination of which is material to the issue of whether the parties intended that the 1976 agreement be terminable at will, and if not, whether Diagraph had the right to terminate under the express terms of the agreement.

It is by now a fundamental principle of law that summary judgment should be granted only when the materials submitted to the court establish that there is no genuine issue as to a material fact and that a party is entitled to judgment as a matter of law. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). Summary judgment is designed to eliminate the necessity for formal trials where no genuine issues of fact exist and only questions of law are involved. *Id.* Although favored where there are no disputed issues of material fact, summary judgment is not appropriate where genuine disputes exist with respect to factual issues. *Id.*

Parker contends that an issue of fact exists with respect to whether the 1976 agreement was a new agreement or was merely a modification of the 1969 franchise agreement, which by its terms was to be construed according to Illinois law. Parker argues that the 1976 agreement merely modified the earlier one and that under Illinois law, the ability of a franchisor to terminate a franchise agreement is restricted. We reject this argument at the outset. The 1969 franchise agreement was clearly terminated, in compliance with a termination provision contained therein, by

Diagraph's 15 December 1975 letter. The same letter expressed a willingness to negotiate a new agreement. The letter agreement signed by Parker's president on 22 January 1976 and characterized by him as "the new agreement," was the product of those negotiations and is the only contract involved in this dispute.

The rights of the parties with respect to the 1976 agreement are governed by the provisions of the Uniform Commercial Code, Article 2—Sales, as adopted in North Carolina. G.S. 25-1-101 *et seq.* The article provides special rules governing the rights of parties to contract for the sale of goods and covers contracts to sell goods in the future, G.S. 25-2-105 and 106, based on buyer's requirements, G.S. 25-2-306, even where the price is to be fixed later, G.S. 25-2-305, and the contract calls for successive performances, G.S. 25-2-309.

Under the common law in North Carolina, a contract calling for successive and continuing performances which was indefinite in duration was terminable at will and could be terminated by either party upon giving reasonable notice. *Fulghum v. Selma*, 238 N.C. 100, 76 S.E. 2d 368 (1953); *East Coast Development Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 228 S.E. 2d 72 (1976). The common law rule is carried forward by G.S. 25-2-309 which provides:

> Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but *unless otherwise agreed* may be terminable at any time by either party.

G.S. 25-2-309(2) (emphasis added). The Uniform Commercial Code specifically emphasizes the ability of the parties to fix by agreement their rights to terminate a contract for the sale of goods; "termination" is defined as the event which "occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach." G.S. 25-2-106(3).

The 1976 letter agreement expressly states that Parker would continue as a Diagraph distributor for "an indefinite period." It contains no fixed period of duration, and under general contract law, is of indefinite duration and terminable at the will of either party. *Citrini v. Goodwin*, 68 N.C. App. 391, 315 S.E. 2d 354

(1984). However, under G.S. 25-2-309(2), we must look further to determine if there is any genuine issue of fact with respect to whether the parties "otherwise agreed" concerning Diagraph's right to terminate the contract at any time.

The Code defines "agreement" as the "bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance." G.S. 25-1-201(3). The Code further provides:

> The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (G.S. 25-1-205).

G.S. 25-2-208(2) (1985 Cum. Supp).

An agreement is construed according to the intent of the parties, "which is ascertained by the subject matter of the contract, the language used, the purpose sought and the situation of the parties at the time." *Pike v. Wachovia Bank and Trust Co.*, 274 N.C. 1, 11, 161 S.E. 2d 453, 462 (1968). While clear and unambiguous contracts may be interpreted by the court as a matter of law, if the language used by the parties is ambiguous and their intention unclear, interpretation of the contract is for the jury under proper instructions from the court. *Cleland v. Children's Home, Inc.*, 64 N.C. App. 153, 306 S.E. 2d 587 (1983). Extrinsic evidence relating to the agreement is competent to show the intentions of the parties and to clarify the terms of the contract. *Whitten v. Bob King's AMC/Jeep, Inc.*, 30 N.C. App. 161, 226 S.E. 2d 530 (1976), *rev'd on other grounds*, 292 N.C. 84, 231 S.E. 2d 891 (1977).

While stating that Parker would continue as a Diagraph distributor indefinitely, the 1976 letter agreement went on to provide that Diagraph would continue to sell its products to Parker for so long as Parker's purchases did not fall below $51,000.00, in which event either party was given a right of termination. In a succeeding section, the right to terminate at any time, without

regard to the amount of Parker's purchases, was reserved only to Parker. Thus, the terms of the written contract are unclear and ambiguous as to whether the contract was of indefinite duration and terminable at the will of either party, or whether Diagraph's right to terminate was conditioned on Parker's failure to meet the minimum purchase levels.

The affidavits submitted by the parties are conflicting as to this issue. Mr. Brigham states, in his affidavit, that a main point of the 1976 agreement was that Parker's right to continue as a Diagraph distributor was for an indefinite period and that the duration of the agreement was not otherwise specified in any manner. On the other hand, Mr. Parker stated that the parties agreed that Parker's rights as a distributor could not be terminated so long as Parker made the required purchases. Thus, there is a genuine issue of material fact as to whether the parties "otherwise agreed" to limit Diagraph's right to terminate the 1976 agreement. If the parties agreed that, although the 1976 agreement was indefinite in duration, Diagraph would be entitled to terminate only in the event Parker failed to meet its purchase requirements, the agreement was not terminable at will by Diagraph. *See Hoover v. Kleer-Pak*, 33 N.C. App. 661, 236 S.E. 2d 386, *disc. rev. denied*, 293 N.C. 360, 237 S.E. 2d 848 (1977); *Besco, Inc. v. Alpha Portland Cement Co.*, 619 F. 2d 447 (5th Cir. 1980); *Liberty Indus. Sales, Inc. v. Marshall Steel Co.*, 272 F. 2d 605 (7th Cir. 1959).

Diagraph contends that even if the contract was not terminable at will, it had the right to terminate the contract because Parker's purchases fell below 50% of the average of the past three years preceding the 1976 agreement, or $51,000. As to this issue, we find another genuine factual dispute. Diagraph's forecast of evidence in support of this contention shows that the amount of Parker's purchases were adjusted to reflect "inflationary distributor price increases" so that actual purchases were reduced by the inflationary percentage to arrive at amounts below the agreed upon level. At no point during the period from 1976 through 31 December 1981 did Parker's actual purchases fall below the level specified in the 1976 agreement. Parker offered evidence tending to show that adjustment of purchase figures to account for inflation had never been discussed between the parties, was not a common practice in the industry, and had not ever

been the practice between Parker and Diagraph. Aside from the assertions of each party, there is nothing in the record to indicate whether adjustment of purchases to account for inflation in order to determine whether minimum requirements had been met was within the contemplation of the parties at the time they entered the agreement. Issues relating to methods or practices in business are ordinarily questions for the factfinder, *Superior Foods, Inc. v. Harris-Teeter Super Markets*, 288 N.C. 213, 217 S.E. 2d 566 (1975), as are questions involving subjective issues such as the contemplation and intent of parties to a contract. *See Feibus & Co., Inc. v. Godley Construction Co., Inc.*, 301 N.C. 294, 271 S.E. 2d 385 (1980). Thus, a genuine issue of fact exists as to the right of Diagraph to terminate the agreement for Parker's failure to maintain purchases at the agreed upon level.

Reversed and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

CURTIS KENDRICK, PLAINTIFF-EMPLOYEE v. CITY OF GREENSBORO, DEFENDANT-EMPLOYER, AND AETNA INSURANCE COMPANY, DEFENDANT-INSURER

No. 8510IC909

(Filed 1 April 1986)

1. **Master and Servant § 65.2— workers' compensation—back injury—accident as cause of disability**

The evidence supported the Industrial Commission's finding that plaintiff's disability results from his having slipped and ruptured a disc in his back while lifting an eighty-pound bag of fertilizer at work although plaintiff thereafter played in a city softball tournament and had had back surgery on two prior occasions.

2. **Master and Servant § 67.3— workers' compensation—pre-existing back condition—back injury as cause of disability**

The Industrial Commission could properly determine that plaintiff's work-related back injury and the surgery which followed (lumbar laminectomy) contributed to his disability in a reasonable degree and that, as a result, plaintiff is entitled to compensation where the evidence, viewed in the light most favorable to plaintiff, indicates that plaintiff's capacity to work had not been

impaired by two previous lumbar laminectomies and, had he not slipped and reinjured his back, he would not now be disabled.

3. **Master and Servant § 69— workers' compensation—back injury impairing use of legs—compensation for total incapacity**

The Industrial Commission properly awarded plaintiff compensation for permanent total incapacity pursuant to N.C.G.S. 97-29 rather than compensation only for partial loss of use of the back pursuant to N.C.G.S. 97-31(23) where there was medical evidence that plaintiff suffers continuous pain in his back, both hips and legs and continuous numbness of the right foot, that plaintiff's pain is caused by use of his back in coordination with his hips and legs, and that plaintiff is 100% disabled.

APPEAL by defendants from Opinion and Award of the North Carolina Industrial Commission entered 23 April 1985. Heard in the Court of Appeals 16 January 1986.

On 7 October 1982 plaintiff, in the course of his employment with defendant-employer, injured his back when he slipped while lifting an eighty-pound bag of fertilizer. At that time he experienced shooting pain in his hip and right leg. The next day plaintiff saw a physician. He took "pain medication, Tylenol," and went back to work.

Plaintiff continued to experience pain and on 27 October 1982 he saw Dr. Cloninger, a specialist in neurosurgery. Dr. Cloninger diagnosed plaintiff as suffering from a ruptured lumbar disc and later performed a lumbar laminectomy.

Following surgery, plaintiff's condition did not improve. He experiences continuous pain in his back, hips and legs and numbness in his right foot. He cannot lift more than five to ten pounds and can "hardly walk."

Plaintiff applied for workers' compensation benefits. Deputy Commissioner Sellers concluded that plaintiff was totally and permanently disabled as the result of "an injury by accident arising out of and in the course of his employment . . ." and awarded compensation pursuant to N.C. Gen. Stat. 97-29. The Full Commission adopted the Opinion and Award of Deputy Commissioner Sellers.

Defendants appeal.

Walker, Ray, Simpson, Warren & Blackmon, by Richard M. Warren, for plaintiff appellee.

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

WHICHARD, Judge.

[1] Defendants contend the Commission erred in finding that plaintiff's disability results from his having slipped on 7 October 1982. In particular, defendants maintain that plaintiff could not have ruptured his disc on 7 October 1982 because the evidence established that on 16 October 1982 he played in a city softball tournament and was one of two persons chosen most valuable player.

Findings of fact by the Commission are conclusive on appeal if supported by any competent evidence. *Click v. Freight Carriers*, 300 N.C. 164, 166, 265 S.E. 2d 389, 390-91 (1980). Viewing the evidence in the light most favorable to plaintiff, as we must, *see id.*, we find ample competent evidence to support the Commission's finding.

Dr. Cloninger testified regarding plaintiff having played softball as follows:

> [A]s to whether I would agree that the disc problem for which I operated in November of 1982 probably was not caused by an incident involving a bag of fertilizer some eight or ten days before the softball game, unless he is a lot more stoic than I—I don't know how to answer that exactly, but my feeling is that the average somebody with a bona fide ruptured disc could not have done that kind of thing. As to whether given this history, [plaintiff's] condition for which I operated and treated him in November of 1982 probably, or more likely than not, was not caused by an incident involving a lifting of fertilizer bags some eight or ten days before the softball game, I can't say that with certainty, obviously. In this particular incidence [sic], I would just say that—well, I just can't answer that . . . . The reason of course is that some people tolerate pain an awful lot better than others and he could have had the problem then and it could have been persistent all through his course until I saw him . . . .

Dr. Cloninger's testimony does not, as defendants contend, compel a finding that plaintiff's condition did not result from injuries he sustained on 7 October 1982.

Plaintiff testified that he injured his back when he slipped while loading bags of fertilizer into a truck on 7 October 1982. He saw a physician regarding his injuries the following day. While plaintiff did play in a softball tournament nine days later, he and the coach of the softball team testified that before the game plaintiff told the coach that his back was hurting but he would play if the coach wanted him to. Each time plaintiff got on base the coach would substitute a runner for him. Dr. Cloninger testified that plaintiff told him on 27 October 1982 that he had injured his back while lifting a bag of fertilizer at work. Based on the foregoing evidence the Commission could find that plaintiff's condition resulted from injuries he sustained on 7 October 1982.

In addition, defendants maintain that the Commission erred in finding that plaintiff's disability results from his work-related accident and the surgery which followed because, prior to the lumbar laminectomy plaintiff underwent in November 1982, he had two other lumbar laminectomies which contribute to his present condition. We disagree.

"[W]here the right to recover is based on injury by accident, the employment need not be the sole causative force to render an injury compensable." *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E. 2d 101, 106 (1981). In *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951), the Supreme Court stated:

> By the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation *if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury.* But in such case "the employment must have some definite, discernible relation to the accident." [Citations omitted.]
>
> . . . .

> It appears . . . that the better considered decisions adhere to the rule that *where the accident and resultant injury arise out of both the idiopathic condition of the workman and hazards incident to the employment, the employer is liable.* But not so where the idiopathic condition is the sole cause of the injury. [Emphasis supplied.]

Vause, 233 N.C. at 92-93, 63 S.E. 2d at 176; *see also Rutledge v. Tultex Corp.*, 308 N.C. 85, 102-05, 301 S.E. 2d 359, 370-71 (1983) (reaffirming *Vause*). This Court has stated: "[W]hen industrial injury precipitates disability from a latent prior condition, such as heart disease, cancer, back weakness and the like, the entire disability is compensable . . . ." *Pruitt v. Knight Publishing Co.*, 27 N.C. App. 254, 258, 218 S.E. 2d 876, 879 (1975), *reversed on other grounds*, 289 N.C. 254, 221 S.E. 2d 355 (1976), *quoting* 2 A. Larson, Workmen's Compensation Law, Sec. 59.20, pp. 10-270-273 (1972); *see also Note*, Workmen's Compensation—Apportionment of Disabilities is Limited Under the North Carolina Act, 54 N.C.L. Rev. 1123 (1976). Thus, if plaintiff's work-related accident contributed in "some reasonable degree" to his disability, he is entitled to compensation. *Vause, supra.*

Dr. Cloninger testified regarding the relative effects of plaintiff's previous surgeries and the surgery which followed his work-related accident as follows:

> As to what causes the pain that he refers to, . . . he's had three lumbar laminectomies, the last time . . . we found a small fragment of disc and some spondylosis, which is commonly termed degenerative arthritis, it seemed to be compressing some nerve roots into the right leg. The patient did have a lot of scar tissue around the nerve as a result of not only one, but three, separate lumbar laminectomies. He was complaining, as I said, of pain—continuing pains and some numbness, and I think that was related to his two previous discs, plus the manipulation of surgery, and it was not an unreasonable situation that he would have pain at this point. As to whether it would also be related to the third laminectomy, yeah. It is cumulative. I would think in terms of the worse—seemed to be worse this time than with the other two surgeries.

In addition, Dr. Cloninger testified that plaintiff "initially did well" after his second lumbar laminectomy and that most patients who undergo two lumbar laminectomies are "able to do most things [they want] to do and most people can continue to do heavy work . . . ."

[2] This evidence, viewed in the light most favorable to plaintiff, *Click, supra,* indicates that plaintiff's capacity to work had not been impaired by the previous surgeries and, had he not slipped and reinjured his back, he would not now be disabled. *Pruitt, supra.* Based on the foregoing, the Commission could determine that plaintiff's work-related injury and the surgery which followed contributed to his disability in a reasonable degree and that, as a result, plaintiff is entitled to compensation.

Defendants further protest the award on the ground that plaintiff's permanent and total disability results from "his overall physical condition" and not simply his back condition. Defendants rely on the following testimony by Dr. Cloninger: "[Plaintiff] is one hundred percent disabled from working, based upon his overall physical condition. That includes a number of factors in addition to his back condition, such as several myocardial infarctions and some emotional overlay." The Commission, however, found that "plaintiff's permanent and total incapacity to earn wages is caused by pain in his back and other portions of his body and that all his disabling pain is due to his back injury and operations." Aside from the above quoted isolated remark, Dr. Cloninger spoke exclusively in terms of the pain plaintiff experiences as a result of his back condition and the physical limitations which accompany that pain. When the testimony of Dr. Cloninger is viewed in the light most favorable to plaintiff, *Click, supra,* there is sufficient competent evidence to support the Commission's finding.

[3] Defendants also argue that the Commission erred in awarding plaintiff compensation for permanent total incapacity pursuant to N.C. Gen. Stat. 97-29, as opposed to compensation for partial loss of use of the back pursuant to N.C. Gen. Stat. 97-31(23). Defendants rely on Dr. Cloninger's testimony that in his opinion the permanent disability to plaintiff's back "is approximately twenty percent."

N.C. Gen. Stat. 97-31, in pertinent part, provides:

> In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, and shall be in lieu of all other compensation, including disfigurement, to wit:
>
> . . . .
>
> (23) For the total loss of use of the back, sixty-six and two-thirds percent (66⅔%) of the average weekly wages during 300 weeks. The compensation for partial loss of use of the back shall be such proportion of the periods of payment herein provided for total loss as such partial loss bears to total loss, except that in cases where there is seventy-five per centum (75%) or more loss of use of the back, in which event the injured employee shall be deemed to have suffered "total industrial disability" and compensated as for total loss of use of the back.

Where all of a worker's injuries are compensable under 97-31, the compensation provided for under that section is in lieu of all other compensation. *Perry v. Furniture Co.*, 296 N.C. 88, 93-94, 249 S.E. 2d 397, 401 (1978). When, however, an employee cannot be fully compensated under N.C. Gen. Stat. 97-31 and is permanently incapacitated, he or she is entitled to compensation under N.C. Gen. Stat. 97-29 for total incapacity or N.C. Gen. Stat. 97-30 for partial incapacity. *Fleming v. K-Mart Corp.*, 312 N.C. 538, 543-46, 324 S.E. 2d 214, 217-19 (1985); *Little v. Food Service*, 295 N.C. 527, 530-31, 246 S.E. 2d 743, 745-46 (1978); *Jones v. Murdoch Center*, 74 N.C. App. 128, 129-30, 327 S.E. 2d 294, 295-96 (1985). In particular, "when . . . an injury to the back causes referred pain to the extremities of the body and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment." *Fleming*, 312 N.C. at 546, 324 S.E. 2d at 218-19 (a disabled plaintiff suffering from "chronic back and leg pain" as the result of a work-related injury to the back could not be fully compensated under N.C. Gen. Stat. 97-31(23) and was entitled to compensation under N.C. Gen. Stat. 97-29); *see also Little, supra* (plaintiff could not be fully compensated under N.C. Gen. Stat. 97-31(23) when injury to her back resulted in "weakness in all her extremities, and numbness or loss of sensation throughout her body").

Dr. Cloninger testified that plaintiff suffers continuous pain "in his back, both hips, and legs . . . [and] continuous numbness of the right foot," and that he is one hundred percent disabled. He opined that plaintiff's pain is caused by "the use of his back . . . in coordination with the hips and the legs . . . ." Based on the foregoing evidence the Commission could determine that plaintiff would not be totally compensated for his injuries under N.C. Gen. Stat. 97-31 and that, as a result, he is entitled to compensation for permanent total incapacity under N.C. Gen. Stat. 97-29.

Affirmed.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. RICHARD HOWARD HUNT

No. 8516SC893

(Filed 1 April 1986)

1. **Criminal Law § 57— demonstration of firearm—witness not expert—weapon in changed condition—demonstration admissible**

In a prosecution for assault with a deadly weapon inflicting serious injury, the trial court did not err in allowing a police officer to demonstrate the operation of a weapon which was not in substantially the same condition as it was at the time of the alleged assault and to render an opinion that the weapon could only be discharged if the hammer was cocked and the trigger pulled, since the officer was not attempting to say that he had tested or experimented with the gun and that it could not fire in the position defendant claimed; the officer demonstrated the operation of the weapon to the jury and testified that "under normal situations the only way to get it to discharge is to cock it and pull the trigger"; and defendant failed to object because of the condition of the weapon and further waived any objection he could have made by participating in the demonstration of the weapon.

2. **Criminal Law § 45— experimental or demonstrative evidence—admissibility—demonstrator's familiarity with object**

The admissibility of demonstrative or experimental evidence depends, as much as for any other piece of evidence, upon whether its probative value is outweighed by the potential undue prejudicial effect it may have on defendant's case; further, in the case of a courtroom demonstration, the demonstrator may not need to be qualified as an expert in the same way as an experimentor, but a proper foundation still must be laid as to the person's familiarity with the thing he or she is demonstrating.

3. Criminal Law § 142.3— restitution as condition of work release—evidence to support amount

The trial court's recommendation of restitution in the amount of $18,364 as a condition of work release was supported by the evidence and is not to be disturbed on appeal where the assault victim testified that his hospital bill was $10,364 and the doctor's bill was around $8,000.

APPEAL by defendant from *McLelland, Judge.* Judgment entered 15 March 1985 in Superior Court, ROBESON County. Heard in the Court of Appeals 14 January 1986.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Evelyn M. Coman, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Louis D. Bilionis, for defendant appellant.

BECTON, Judge.

Defendant, Richard Howard Hunt, was convicted by a jury of assault with a deadly weapon inflicting serious injury, and was sentenced to three years imprisonment. On appeal, defendant presents two issues: (1) whether the trial court erred in allowing a police officer to demonstrate the operation of a weapon which was not in substantially the same condition as it was in at the time of the alleged assault and to render an opinion that the weapon could only be discharged if the hammer was cocked and the trigger pulled, and (2) whether the trial court's order of restitution is fatally ambiguous under N.C. Gen. Stat. Sec. 15A-1343 (1983) because it is unsupported by the evidence in the record.

Most of the facts are not in dispute. Richard Howard Hunt, the defendant, and the woman with whom he had lived for five years, Donna Taylor, went to Donna's parents' home in Lumberton, North Carolina on New Year's Eve, 31 December 1984. Among those present at this family get-together were the victim, Matt Stephens, brother of Donna Taylor, his pregnant wife, Cathy Stephens, and J. N. Stephens, father of Matt and Donna.

At about 11:30 p.m., Matt Stephens was outside the residence preparing to leave with his wife. Donna was talking to Cathy. Matt approached Donna and began to engage in what he characterized as playful tussling. Donna did not find it playful and cried

out in pain. Cathy urged Matt to let go of his sister, but he would not. The defendant, who was inside the house, heard Donna's cries and came outside. According to Matt, the defendant told him to leave Donna alone or defendant would kill him. J. N. Stephens stepped outside and told everyone to leave, shoving his son Matt and telling him to go home.

Next, according to Matt, Donna threw a beer can at his car. He stepped out of his vehicle and the defendant began coming at him. Matt decided he would fight the defendant. He took off his shirt, unzipped his boots and started toward the defendant, who had gone to the trunk of his car while Matt was disrobing. As Matt approached, the defendant swung a shotgun out of the trunk and shot him in the lower abdomen.

Matt testified that immediately after the gun went off, the defendant said in a very emotional tone that he didn't know the gun was loaded. Defendant threw the gun to the pavement, shattering it, went over to Matt, helped him to another man's truck, and held him on the way to the hospital while the other man drove. Matt testified that the defendant repeated on the way to the hospital that he did not know the gun was loaded and that he did not mean to do it.

I

[1, 2] The defendant maintained from the outset that he had intended to use the shotgun as a club and that it must have discharged accidentally, because he had neither cocked the hammer nor pulled the trigger. Defendant assigns as error the trial court's allowing a police officer, who repeatedly said he was not an expert, to demonstrate the operation of the alleged assault weapon and to state his opinion that a gun of this type could not fire unless the hammer was cocked and the trigger pulled. This testimony was admitted over defendant's objection.

Defendant characterizes the demonstration as an "experiment" which cannot be admitted in evidence unless the alleged assault weapon upon which the experiment is conducted is in substantially the same condition that it was in at the time of the incident *and* the witness is qualified as an expert with respect to the mechanics of the weapon. These requirements are gleaned from a reading of *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963),

wherein our Supreme Court found that experimental evidence should have been rejected when it was given by a police officer who had no "instruction or schooling to qualify as an expert in the mechanism [sic] of a gun of [that] type" and where "the experiments the officer conducted on the weapon were not carried out under substantially similar circumstances to those which surrounded" the firing of the gun. Whether substantial similarity does exist is a question of law. *State v. Jones*, 287 N.C. 84, 98, 214 S.E. 2d 24, 34 (1975).

The threshold question is whether this was an "experiment," as defendant claims, or a "demonstration," as the State would have us hold. There is no contention that experimental evidence is *never* admissible, only that it needs to be received with great care following the two requirements enunciated in *Foust*. The State argues that "courtroom demonstrations which are not experiments are admissible evidence," and that a lesser evidentiary standard is to be employed in receiving evidence admitted in the form of courtroom demonstrations. We do not adopt this proposition as a rule. We hold instead that the admissibility of demonstrative or experimental evidence depends as much, as for any other piece of evidence, upon whether its probative value is outweighed by the potential undue prejudicial effect it may have on defendant's case. *See* Rule 403, N.C. Rules Evid. In the case of a courtroom demonstration, the demonstrator may not need to be qualified as an expert in the same way as an experimentor, but a proper foundation still must be laid as to the person's familiarity with the thing he or she is demonstrating.

Although we note that it is not always a simple matter to distinguish between "experimental" and real (or demonstrative) evidence, *see Williams v. Bethany Fire Dept.*, 307 N.C. 430, 298 S.E. 2d 352 (1983), we find that the testimony of the officer in this case was more akin to a demonstration, and that *Foust*, though strikingly similar, is distinguishable. Demonstration is defined as "an illustration or explanation, as of a theory or product, by exemplification or practical application." Experiment is defined as "a test made to demonstrate a known truth, to examine the validity of a hypothesis, or to determine the efficacy of something previously untried."

In *Foust*, the witness was attempting to testify about experiments he had conducted outside the courtroom on the alleged murder weapon to prove that it could not have discharged in the manner claimed by the defendant. In the instant case, the officer was *not* attempting to say that he had tested or experimented with the gun and that it could not fire in the position the defendant claimed. The officer was demonstrating the operation of the weapon to the jury and testified that "under normal situations, the only way to get it to discharge is to cock it and pull the trigger." As to other scenarios, whether the gun would fire in various positions or under a given set of circumstances, the witness repeatedly stated that he did not know because he was not an expert. Had this witness been permitted to testify that the gun could not fire in the manner urged by the defendant, without having first been qualified as an expert, it would have been improper.

Defendant also argues in this appeal that the officer's testimony should have been disallowed because the weapon was not in substantially the same condition as it was in at the time of the offense in question. However, defense counsel did not object to the use of the shattered shotgun in the courtroom demonstration on this ground. In fact, defense counsel participated in the demonstration during cross-examination of the police officer and during the direct examination of defendant. When objections to evidence are not made at trial or are waived by the admission of other evidence of similar import, evidence so admitted is not the proper subject for assignment of error on appeal. *State v. Smith*, 34 N.C. App. 671, 239 S.E. 2d 610, *disc. rev. denied and appeal dismissed*, 294 N.C. 186, 241 S.E. 2d 73 (1977). *See also State v. Long*, 58 N.C. App. 467, 294 S.E. 2d 4 (1982).

The shotgun was in at least six pieces at trial. There was no testimony whether the trigger mechanism, which the witnesses were allowed to demonstrate, was in normal working order at the time of the occurrence, or at the time of the trial. There was no testimony as to what effect, if any, the shattering had on the operation of the gun. Arguably, defendant not only failed to preserve what might have been a more meritorious assignment of error, but also waived any objection by participating in the demonstration before objecting on other (chain of custody) less efficacious grounds. In any event, the police officer's testimony,

referring only to what happens "under normal situations," renders any error harmless.

II

[3] Defendant next argues that the trial court's recommendation of restitution as a condition of work release must be vacated because it is fatally ambiguous and unsupported by the evidence. The victim, Matt Stephens, testified that the hospital bill "is $10,364" and the doctor's bill "around $8,000." The court recommended that defendant be required to pay restitution from his work release earnings to "Matt Stephens or Hospital or Doctor to be Determined $18,364.00. . . ."

We held in a recent case that a recommendation of restitution must be supported by the evidence before the trial court. *State v. Daye*, 78 N.C. App. 753, 338 S.E. 2d 557 (1986). Our Supreme Court has also recently held that a trial court need not make specific findings in support of its recommendation of probation. *State v. Hunter*, 315 N.C. 371, 338 S.E. 2d 99 (1986). We hold that this is true for a recommendation of work release as well. When, as here, there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal. We note, however, that restitution is intended to compensate victims for loss or damage, and not as a punitive measure against defendants. A trial court's recommendation may easily fall into this latter, and disfavored, realm when there is no basis to support it. We find

No error.

Judges WHICHARD and PARKER concur.

STATE OF NORTH CAROLINA v. KENNETH BREWER

No. 8526SC1125

(Filed 1 April 1986)

Burglary and Unlawful Breakings § 3— variance between intent alleged and proved—motion to dismiss properly denied

The trial court properly denied defendant's motion to dismiss the charge of first degree burglary where the indictment alleged the intent to commit the

felony of larceny and defendant argued that the evidence showed the intent to commit common law robbery. The evidence was sufficient to raise an inference of intent to commit larceny in that defendant followed his victims to an apartment and pushed his way inside as they attempted to close the door, took a purse from one of his victims, and fled. The fact that he was required to use force against his victims does not establish a fatal variance between the indictment and the proof. N.C.G.S. 14-51, N.C.G.S. 14-72(b)(1).

APPEAL by defendant from *Griffin, Judge*. Judgment entered 15 May 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 February 1986.

Defendant was charged in indictments, proper in form, with first degree burglary and common law robbery. He entered a plea of not guilty.

The essential facts are:

At approximately 10:00 p.m. on 18 January 1985 Gwendolyn Hill and Brenda Cox returned to Hill's apartment at 7111 Village Green Drive in Charlotte after seeing a movie. Brenda Cox was driving the two women in her car which she parked directly in front of the main entrance to Hill's apartment building. Both women saw a man walking around the corner of the apartment building, coming from the direction of the wooded area behind the building. The man walked along the sidewalk in front of the building and under a streetlight where both women were standing. Both women looked at the man but neither recognized him. Before entering the apartment building the women waved to Hill's roommate who was sitting in his car in the parking lot.

Hill and Cox entered the front door to the apartment building and went up the stairs leading to Hill's second floor apartment. They walked through a second door at the top of the stairs before reaching Hill's apartment door. Both women testified that they never noticed anyone following them into the building. When they reached Hill's apartment door, she opened the door with her key and walked into the apartment. The lights were already on in the apartment. A hallway light shone brightly just outside the apartment door. Cox followed Hill into the apartment. As Cox turned to close the apartment door she again saw the man she had seen just minutes before on the sidewalk outside the building. The man stood outside Hill's apartment door but said nothing. Cox asked Hill if she knew the man and as Hill responded that she did not,

the man jumped at the partially closed door and began pushing on it. Cox screamed and both women began pushing on the door to close it. The man succeeded in getting his head and arm inside the door and pushed it open. Hill ran into the kitchen and Cox ran down the hallway. The intruder chased Cox and a struggle ensued in the hallway. Hill left the apartment to find help from neighbors. All the while, Cox continued to struggle with the intruder. Hill, unable to locate neighbors on the second floor, ran downstairs and outside the building to get help and to see if her roommate was still in the parking lot. Cox continued to struggle with the intruder and eventually was shoved to the floor. The intruder grabbed her purse and ran out of the apartment and down the back stairway. The police were called.

Charlotte Police Officer Brown took statements from both Cox and Hill including a description of the man and the contents of the purse. Officer Brown then alerted other officers in the area to be on the lookout for the suspect. However no suspect was apprehended in the area.

The case was assigned to S. L. Mullis, Charlotte police felony investigator who talked with both Cox and Hill and obtained statements from them by telephone. During his investigation several suspects were developed, including the defendant. Mullis prepared a photographic lineup which consisted of seven colored photographs, including a picture of the defendant and showed it to Cox and Hill separately on 29 January 1985. Both women picked out the picture of the defendant as the man who entered Hill's apartment and stole Cox's purse.

At trial, both Cox and Hill identified the defendant as the intruder. The defendant presented one witness, Estee Boisy Bullock, Jr., who testified that he (Bullock) lived near Hill's apartment, and that he was 5 feet 3 inches tall and weighed approximately 135 to 140 pounds. He admitted that he knew the defendant but denied that he entered Hill's apartment on 18 January 1985 and stole Cox's purse. There was no cross-examination.

The jury returned verdicts of guilty as charged. Defendant received consecutive sentences of 30 years for the burglary conviction and 10 years for the robbery conviction. Defendant appealed.

Attorney General Thornburg by Assistant Attorney General Lucien Capone III, for the State.

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

EAGLES, Judge.

By his sole assignment of error defendant argues that the trial court erred in denying his motion to dismiss the charge of first degree burglary. Defendant contends that the State's proof was fatally at variance from the indictment because the felonious intent alleged was not the felonious intent proved. We disagree.

The indictment charging defendant with the crime of first degree burglary alleged that the defendant feloniously broke and entered the occupied dwelling of Gwendolyn Hill during the nighttime with the intent to commit the felony of larceny. The trial judge instructed the jury that the State was required to prove as one of the essential elements of first degree burglary that the defendant entered with the intent to commit larceny. The defendant argues that the State's evidence shows that defendant's intent at the time of entry was to commit common law robbery and not larceny and therefore the proof was fatally at variance from the crime charged. We are not persuaded.

First degree burglary is defined as the felonious breaking and entering of the occupied dwelling house or sleeping apartment of another during the nighttime with intent to commit a felony therein. *State v. Beaver*, 291 N.C. 137, 229 S.E. 2d 179 (1976). "[A]ctual commission of the felony, which the indictment charges was intended by the defendant at the time of the breaking and entering, is not required in order to sustain a conviction of burglary." *State v. Bell*, 285 N.C. 746, 750, 208 S.E. 2d 506, 508 (1974) (quoting *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967)). Common law robbery is the felonious taking of money or goods of value from the person of another, against his will by violence or fear. *State v. Black*, 286 N.C. 191, 209 S.E. 2d 458 (1974). Larceny is the "felonious taking by trespass and carrying away by any person of the goods or personal property of another, without the latter's consent and with the felonious intent permanently to deprive the owner of his property and to convert it to the taker's own use." *State v. McCrary*, 263 N.C. 490, 492, 139

S.E. 2d 739, 740 (1965) (quoting *Auto Co. v. Insurance Co.*, 239 N.C. 416, 80 S.E. 2d 35 (1954)). Our courts have held that robbery is merely an aggravated larceny and larceny from the person is a lesser included offense of common law robbery. *State v. Young*, 305 N.C. 391, 289 S.E. 2d 374 (1982); *State v. Black, supra.*

This is not a case where the defendant has been convicted of a greater offense than that alleged in the indictment. Rather, the issue here is whether the State's evidence was sufficient to show that defendant intended, upon breaking and entering, to commit the felony of larceny. "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. [Citations omitted.] 'The intent with which an accused broke and entered may be found by the jury from evidence as to what he did within the house.' " *State v. Bell, supra* at 750, 208 S.E. 2d at 508 (quoting *State v. Tippett, supra*).

Sufficient evidence was presented by the State to raise an inference of intent to commit larceny. The defendant followed his victims to the apartment and as they attempted to close the apartment door he pushed his way into the apartment. He took a purse from one of his victims and then fled. The evidence clearly supports a finding that he intended to commit and in fact did commit larceny from the person. *State v. Massey*, 273 N.C. 721, 161 S.E. 2d 103 (1968). The fact that he was required to use force against his victim in order to take the purse, thereby placing the victim in fear and elevating his crime to that of common law robbery, does not serve to establish a fatal variance in the indictment and the proof.

The cases relied on by the defendant are distinguishable. In *State v. Cooper*, 288 N.C. 496, 219 S.E. 2d 45 (1975) the indictment charged defendant with first degree burglary and alleged that defendant broke and entered with intent to commit a felony "by sexually assaulting a female." Our Supreme Court held that the indictment was defective because the phrase "sexually assaulting a female" could include a misdemeanor and first degree burglary requires intent to commit a felony. Unlike the indictment in *Cooper, supra*, the indictment here alleged the requisite felonious intent. For purposes of defining the crime of burglary, larceny is deemed a felony without respect to the value of the property

taken. G.S. 14-51. Further, larceny from the person has always been considered a felony. G.S. 14-72(b)(1). In *State v. Dawkins*, 305 N.C. 289, 287 S.E. 2d 885 (1982) the burglary indictment alleged that the defendant broke and entered with intent to commit rape. The court held that the State failed to prove the specific felonious intent alleged and defendant's conviction for first degree burglary was reversed. However, the court noted that an unexplained breaking and entering into a dwelling at night would have been sufficient to sustain a verdict that the breaking and entering was done with intent to commit felonious larceny. *Id.* at 290, 287 S.E. 2d at 886-87. We believe *Dawkins* more clearly supports the State's arguments since the intent to commit larceny can be based upon evidence of a breaking and entering alone. In *State v. Hankins*, 64 N.C. App. 324, 307 S.E. 2d 440 (1983), *aff'd per curiam*, 310 N.C. 622, 313 S.E. 2d 579 (1984) the trial court submitted first degree burglary to the jury on the basis of intent to commit rape and larceny. The evidence showed that the defendant entered the home by lightly tapping on the front door and when it was opened he then pushed open a screen door and stated to one woman "This is no joke. I have got a knife. Get up against the wall." The woman ran into a bedroom and as the defendant tried to force his way in, another woman came downstairs. Defendant said to her "I've got a knife. This is no joke. Get up against the wall or I will kill you." A man came out of the bedroom and began struggling with the defendant who then fled. This Court held that the evidence was insufficient to support an intent to commit rape or larceny. As to larceny, we stated:

> In this case we believe the manner of the defendant's entry into the house does not give rise to an inference that he intended to commit larceny. The defendant was apparently confused when he entered the house. *After Ms. Coates and Ms. Ashley left him alone he did not try to take anything.* We do not believe there is a logical inference from the manner of the defendant's entry into the house that he intended to commit larceny. [Emphasis added.]

Id. at 326, 307 S.E. 2d at 442. *Hankins* is distinguishable on its facts from the case before us.

In ruling upon defendant's motion to dismiss the charge of first degree burglary, the trial court must view the evidence in

the light most favorable to the State, drawing all reasonable inferences in the State's favor. The court must determine as a matter of law that the State has offered substantial evidence as to every material element of the crime charged. *State v. Simpson*, 303 N.C. 439, 279 S.E. 2d 542 (1981). Having considered the evidence in the light most favorable to the State, we find that there was substantial evidence of defendant's guilt as to each element of the crime of first degree burglary. Accordingly, defendant's assignment of error is overruled.

No error.

Judges ARNOLD and PHILLIPS concur.

PAMLICO MARINE COMPANY, INC. v. NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT, COASTAL RESOURCES COMMISSION DIVISION

No. 852SC1034

(Filed 1 April 1986)

1. Waters and Watercourses § 7— construction of decking or marina—building permit required—no exception from permit requirement of Coastal Area Management Act

There was no merit to petitioner's contention that its construction of decking on two sides of a marina to replace decking removed ten years earlier fit within the exception of the Coastal Area Management Act which excepted "[c]ompletion of any development, not otherwise in violation of law, for which a valid building or zoning permit was issued prior to the ratification of [the Act] and which development was initiated prior to the ratification of [the Act]," since petitioner had to obtain a new building permit from the Town of Bath prior to building the decking; the required building permit was issued after ratification of the act; and the exception therefore would not apply.

2. Waters and Watercourses § 7— replacement of decking on marina—no repair to existing structure—accessory use—Coastal Area Management Act—applicability of permit requirements

Replacement of decking on a marina was not a repair or replacement to an existing structure so as to exempt petitioner from the permit requirements of the Coastal Area Management Act, but construction of the decking was an "accessory use" exempted from the permit requirements as long as it met additional requirements set out by administrative regulations adopted by the Coastal Resources Commission.

3. Waters and Watercourses § 7; Statutes § 5.1— permitting procedure of Coastal Resources Commission—ambiguous regulations—legislative intent—"and" substituted for "or"

Administrative regulations adopted by the Coastal Resources Commission to govern its permitting procedure were ambiguous where the provisions allowing for exemption from the permit requirements stated that a development must meet *all* of the listed criteria, but between numbers five and six on the list appeared the disjunctive "or"; however, courts, in interpreting statutes and regulations, may substitute "and" for "or", and vice versa, where necessary to give full effect to the legislative intent when the context so indicates. Viewed in the light of the legislative intent to control development in the fragile coastal regions, the regulations in question must be interpreted as requiring that all criteria must be met before an exemption can be granted, and the Coastal Resources Commission's interpretation that "or" should be read as "and" is the correct one.

APPEAL by petitioner from *Hobgood, Judge.* Judgment entered 26 April 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 12 February 1986.

Petitioner appeals from a judgment affirming the decision of the Coastal Resources Commission assessing petitioner with a $250.00 civil penalty for "willfully undertaking minor development in a duly designated area of environmental concern without the required CAMA (Coastal Area Management Act) development permit."

Gaskins, McMullan and Gaskins, P.A., by Herman E. Gaskins, Jr. for petitioner-appellant.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General Daniel C. Oakley for respondent-appellee.

PARKER, Judge.

Petitioner operates a marina on Back Creek in the town of Bath. Before petitioner bought this marina, its previous owners had removed decking on two sides of the marina, but the decking on two sides of the marina remained. The previous owners, intending to replace the decking at a later time, had left the pilings supporting the removed decking in place. However, when petitioner bought the property, the pilings remained but the decking had not been replaced. In the summer of 1983, petitioner undertook to replace the decking. In its application to the Town of Bath for a building permit, petitioner acknowledged that the proposed

construction was one for which a CAMA permit was required, and that a permit was never applied for.

[1] The Coastal Area Management Act, G.S. 113A-100, *et seq.*, was enacted in order to "establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina." G.S. 113A-102(a). As part of this comprehensive plan, the General Assembly created the Coastal Resources Commission, G.S. 113A-104, in order to implement and enforce a permitting procedure through which development in the designated "areas of environmental concern," would be controlled. G.S. 113A-118. This permitting process required "every person . . . undertaking any development in any area of environmental concern" to obtain a permit from the Coastal Resources Commission. *Id.* "Development" is defined in G.S. 113A-103(5)(a), with specific exceptions listed in subsection (b). Petitioner asserts that its construction fit within exception (b)(7), which excepts the "[c]ompletion of any development, not otherwise in violation of law, for which a valid building or zoning permit was issued prior to the ratification of this Article and which development was initiated prior to the ratification of this Article."

Petitioner contends that, because the original marina and pilings were built before the ratification of CAMA, a permit was not required to reconstruct the decking removed some ten years earlier. This argument ignores the fact that petitioner had to obtain a new building permit from the Town of Bath prior to building this decking. Clearly, the required building permit was issued after the ratification of CAMA; therefore, the exception would not apply. The purpose of the exception was to exempt projects already underway and were so far along in their development that to require a CAMA permit would be unfair and possibly a denial of constitutionally protected vested private property rights. *See generally In re Application of Campsites Unlimited*, 287 N.C. 493, 215 S.E. 2d 73 (1975).

In laws regulating land use, provisions for exempting nonconforming uses, that is, those uses already in existence which, if built today, would violate the land use regulation, are not unusual. *See Atkins v. Zoning Board of Adjustment of Union County*, 53 N.C. App. 723, 281 S.E. 2d 756 (1981). However, those

exemptions end whenever the nonconforming use is destroyed. *Id.* Any expansion of a nonconforming use is also subject to regulation. *Id.* By analogy, the same reasoning applies in this case. The decking had been destroyed prior to the enactment of CAMA. Reconstruction of the decking was undertaken well after the law was in place. The law specifically provides that "enlargement of a structure" is "development" requiring a permit. G.S. 113A-103 (5)(a). Thus, the decking was new construction subject to the permitting requirements of the statute.

[2] Petitioner also contends that the rebuilding of the decking was exempt under the administrative regulations adopted by the Coastal Resources Commission to govern its permitting procedure. Section .0300, *et seq.*, of the North Carolina Administrative Code (NCAC), in effect at the time of the construction, established criteria for the minor developments which would be exempt from permitting outlined in G.S. 113A-103(5)(b). The provisions petitioner claims exempt it from the permit requirement read as follows:

> .0302 CRITERIA FOR EXEMPTION: MINOR DEVELOPMENT PERMIT
>
> Development activities in AECs must meet all of the following criteria in order to be eligible for the exemptions from the minor development permit requirements described in Rules .0303 and .0304 of this Section:
>
> (1) The development must not disturb a land area of greater than 200 square feet on a slope of greater than 10 percent;
>
> (2) The development must not involve removal, damage, or destruction of threatened or endangered animal or plant species;
>
> (3) The development must not alter naturally or artificially created surface drainage channels;
>
> (4) The development must not alter the land form or vegetation of a frontal dune;
>
> (5) The development must not be within 20 feet of any permanent surface waters; or

(6) The development must be consistent with all applicable use standards and local land use plans in effect at the time the exemption is granted.

.0303 ACCESSORY USES EXCLUDED

Accessory uses directly related to the existing dominant use that require no plumbing, electrical, or other service connections and do not exceed 200 square feet shall be exempt . . . .

.0304 REPAIR OR REPLACEMENT

Any structure or part thereof may be repaired or replaced in a similar manner, size, and location as the existing structure without requiring a minor development permit, unless such repair or replacement would be in violation of current AEC standards.

The clear meaning of these regulations is that in order for minor development to be exempt as an "accessory use" or as a "repair or replacement," it must also meet the criteria listed in Section .0302. The first determination, though, is whether the decking was an "accessory use" or a "repair or replacement."

The rule exempting repairs and replacements specifically refers to "existing" structures. This language clearly limits the exemption to the repair or replacement of structures existing at the time the Act was enacted. The decking was not "existing" at that time, and, thus, the replacement of it cannot come within the exception of Section .0304.

In our view, however, construction of the decking was an "accessory use," exempted by Section .0303. The marina itself was already existing at the time the Act was passed and decking attached to and surrounding the marina is an "accessory" to that marina. There is nothing in the record to indicate that the decking required any plumbing, electrical, or other service connections. The decking constructed was 130 square feet, well under the 200 square feet limit of the exemption. As an accessory use, within the requirements of Section .0303, the construction of the decking would be exempt from the permitting requirements so long as it met the additional criteria of Section .0302.

[3] As drafted, Section .0302 is ambiguous. The first sentence of the section requires that a development, to be exempt, must meet *all* of the listed criteria. However, between numbers five and six of the list appears the disjunctive "or." Petitioner contends that the use of the word "or" between numbers five and six indicates the exemption will be granted so long as the development meets requirements one through four and *either* five or six. Respondent, on the other hand, contends that the word "or" is inconsistent with the word "all" in the first sentence, that "and" was obviously intended and that all six criteria must be met before an exemption can be granted. Only by this interpretation, the Commission argues, can the legislative intent to control development in the fragile coastal regions be fully implemented.

Ordinarily, an administrative agency's interpretation of its own regulation is to be given due deference by the courts unless it is plainly erroneous or inconsistent with the regulation. *See Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed. 2d 474 (1969); *State v. Best*, 292 N.C. 294, 233 S.E. 2d 544 (1977). However, any law, ordinance or regulation adopted pursuant to the police power of the State which restricts the free use of private property is to be construed by the courts strictly in favor of the free use of that property. *In re Application of Rea Construction Co.*, 272 N.C. 715, 158 S.E. 2d 887 (1968).

Faced with these conflicting rules of construction for interpreting an ambiguous regulation, we must determine which interpretation will more effectively promote the intent of the General Assembly when it delegated to the Coastal Resources Commission the power to adopt these regulations. *See State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980). General Statute 113A-103(5)(c) reads:

> The Commission shall define by rule (and may revise from time to time) certain classes of minor maintenance and improvements which shall be exempted from the permit requirements of this Article, ... In developing such rules the Commission shall consider, with regard to the class or classes of units to be exempted:
>
> 1. The size of the improved or scope of the work;

2. The location of the improvement or work in proximity to dunes, waters, marshlands, areas of high seismic activity, areas of unstable soils or geologic formations, and areas enumerated in G.S. 113A-113(b)(3); and

3. Whether or nor [sic] dredging or filling is involved in the maintenance or improvement.

Clearly, one of the key considerations in determining whether a development should be exempt from the permitting requirement is "[t]he location of the improvement or work in proximity to . . . waters. . . ." *Id.* Petitioner's decking was right on the waters of Back Creek. Therefore, we conclude that the Commission's interpretation of its own regulation was the correct one; to hold otherwise would thwart the intent of the Legislature that "every person before undertaking any development in any area of environmental concern shall obtain . . . a permit," G.S. 113A-118(a), with only certain limited exceptions. G.S. 113A-103(5)(b), (c).

Normally, an administrative agency will not be allowed to correct the careless drafting of its regulations through interpretation by the courts. However, courts, in interpreting statutes and regulations, may substitute "and" for "or", and vice versa, where necessary to preserve the constitutionality of the law or to give full effect to the legislative intent, when the context so indicates. *DeSylva v. Ballentine*, 351 U.S. 570, 76 S.Ct. 974, 100 L.Ed. 1415 (1956); *Willis v. United States*, 719 F. 2d 608 (2d Cir. 1983). Viewed in light of the expressed intent of the Legislature, requirements five and six of Section .0302 of the regulations of the Coastal Resources Commission are not interchangeable, and it is inconceivable how one could act as the substitute for the other.

The judgment below is

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

RICHARD TURNER v. NICHOLSON PROPERTIES, INC.

No. 8510SC790

(Filed 1 April 1986)

1. **Arbitration and Award § 9— alleged partiality of arbitrator—evidence insufficient**

The superior court did not err by denying respondent's motion for an order permitting it to depose the arbitrator because the arbitrator had appeared as an expert witness for clients of the opposing counsel's former law firm where respondent argued that the prior association and the award itself indicated partiality by the arbitrator and that he exceeded his powers in that the claimant was awarded an amount which, when coupled with prior payments, exceeded claimant's contractor licensing limits. Respondent did not demonstrate that any evidence of prior payments was presented at the arbitration hearing, and the American Arbitration Association determined that the arbitrator's prior association with counsel was neither current, continuing, direct, nor substantial. Respondent had ample opportunity to explore the nature of the arbitrator's association with counsel but did not present any evidence indicating that the Arbitration Association erred.

2. **Arbitration and Award § 9— attack on award—error of law—confirmation of award proper**

The superior court did not err by confirming an arbitration award where respondent did not carry its burden of proving that the arbitrator was partial or exceeded his powers; an arbitrator does not exceed his powers merely by rendering an award based on errors of law. N.C.G.S. 1-567.12.

APPEAL by respondent from *Bailey, Judge.* Order and judgment entered 15 April 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 7 January 1986.

By two contracts dated 4 January 1984 claimant agreed to construct for respondent two townhouse units. The contracts provided that "[a]ll claims, disputes and other matters in question between [the parties] arising out of, or relating to [the performance of said contracts] shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . ." During performance of the contracts, certain claims and disputes arose between the parties, and claimant filed a "Demand for Arbitration" with the American Arbitration Association (hereafter the Association).

In accordance with Construction Industry Arbitration Rules the parties selected a mutually agreeable arbitrator and the Asso-

ciation confirmed their selection. At that time claimant had not retained an attorney to represent him in the arbitration proceedings. Three days prior to the arbitration hearing claimant hired John E. Bugg to represent him. Claimant notified respondent's counsel and the Association of his decision. Upon being notified of Bugg's appearance in the matter, the arbitrator notified the Association that he had appeared as an expert witness on behalf of clients of Bugg's former law firm. The Association advised the arbitrator to disclose his prior business association with Bugg to the parties at the hearing and to contact the Association should either party object to his qualification to serve as arbitrator.

Prior to commencement of the hearing, the arbitrator made such a disclosure; and while the arbitrator expressed his opinion that his prior association with claimant's counsel would not impair his ability to render a fair and impartial decision based on the evidence, respondent objected to the arbitrator's continued service. The arbitrator immediately consulted with the Association. Under Association rules, a person who is associated with a party is nonetheless qualified to serve as an impartial arbitrator when the association is neither current, continuing, direct nor substantial. The Association assessed the arbitrator's association with the claimant's counsel accordingly and determined that he was qualified to serve impartially. Over respondent's objection the hearing proceeded.

The arbitrator found in favor of claimant and awarded him $22,221.00 in damages. The Association thereafter confirmed its determination that the arbitrator was qualified to serve impartially.

Claimant applied for confirmation of the award pursuant to N.C. Gen. Stat. 1-567.12. Respondent filed an application and motion to vacate the award pursuant to N.C. Gen. Stat. 1-567.13(a)(2) and (3). The superior court confirmed the award and denied respondent's application and motion to vacate it.

Respondent appeals.

John E. Bugg, P.A., by John E. Bugg, for claimant-appellee.

Kimzey, Smith, McMillan & Roten, by James M. Kimzey, for respondent-appellant.

WHICHARD, Judge.

[1] Respondent contends the court erred in denying its motion for an order permitting it to depose the arbitrator. A party to an arbitration may depose the arbitrator relative to alleged misconduct only when "an objective basis exists for a reasonable belief that misconduct has occurred . . . ." *Fashion Exhibitors v. Gunter*, 291 N.C. 208, 219, 230 S.E. 2d 380, 388 (1976). Respondent maintains that the arbitrator's prior association with claimant's counsel, together with what it contends is an award in "flagrant disregard for the law," establishes an objective basis for believing there was evident partiality by the arbitrator. N.C. Gen. Stat. 1-567.13(a)(2). It also maintains that the award itself constitutes an objective basis for believing that the arbitrator exceeded his powers. N.C. Gen. Stat. 1-567.13(a)(3). We disagree.

Respondent objects to the award on the grounds that, when coupled with previous payments made to claimant by respondent, it constitutes payment to claimant in excess of claimant's licensing limits for a single project, in contravention of North Carolina licensing law. N.C. Gen. Stat. Ch. 87, Art. 1; *see Sample v. Morgan*, 311 N.C. 717, 319 S.E. 2d 607 (1984). In *Sample* the Supreme Court held that an underlicensed general contractor seeking contract damages may recover up to the limits of its license, but not beyond. Here, claimant and respondent entered into two contracts under which respondent was to pay claimant a total of $187,747. Claimant held a contractor's license limited to $175,000.00 on any single project. At the arbitration hearing claimant testified that the project was split into two contracts in order to stay within his $175,000.00 license.

Assuming, *arguendo*, that an award in contravention of established law could constitute an objective basis for a reasonable belief that an arbitrator acted with bias or exceeded his powers, respondent nevertheless cannot prevail. It has not shown the award to be in violation of North Carolina licensing law. It argues bare allegations and has failed to demonstrate that any evidence regarding the amount claimant received prior to the arbitration award was presented at the arbitration hearing. Without such evidence we cannot say that the award, when combined with previous payments to claimant, exceeded the amount claimant could receive under *Sample, supra.*

Further, the fact that the arbitrator had appeared as an expert witness for clients of opposing counsel's former law firm is alone insufficient to establish an objective basis for believing the arbitrator was biased. In accordance with its rules the Association determined that the arbitrator's prior association with claimant's counsel was neither current, continuing, direct nor substantial, and concluded that the arbitrator was qualified to serve impartially. Respondent had agreed to an arbitration in accordance with Association rules. Further, the factors examined by the Association are highly relevant to the question of whether a person associated with one of the parties could serve as an unbiased and impartial arbitrator. Respondent had ample opportunity at the arbitration hearing to explore the nature of the arbitrator's association with claimant's counsel. He has not, however, put forth any evidence which would indicate that the Association erred in ascertaining the nature of that association.

To allow inquiry into an arbitration award based solely on the disclosed fact that the arbitrator was indirectly and remotely associated with a party's counsel would severely frustrate the goals of parties seeking arbitration. *See generally,* Annot., 56 A.L.R. 3d 697, Sec. 6[a]. "A foundation of the arbitration process is that by mutual consent the parties have entered into an abbreviated adjudicative procedure, and to allow 'fishing expeditions' to search for ways to invalidate the award would tend to negate this policy." *Gunter,* 291 N.C. at 217, 230 S.E. 2d at 387. As stated by the court below, "[w]hile it might have been preferable had the Arbitrator not been the least bit acquainted with the parties or their counsel, the realities of today's business world as well as the [Association] rules of procedure clearly preclude the notion that this can or must be the case in every instance."

[2] Respondent also contends the court erred in confirming the arbitration award pursuant to N.C. Gen. Stat. 1-567.12. N.C. Gen. Stat. 1-567.12 provides that "[u]pon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award . . . ." Respondent urged the court to vacate the award under N.C. Gen. Stat. 1-567.13(a)(2) and (3). N.C. Gen. Stat. 1-567.13(a) provides:

> Upon application of a party, the court shall vacate an award where:
>
> . . .
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> (3) The arbitrators exceeded their powers; . . . .

An arbitration award is presumed valid and the burden of proving specific grounds for vacating an award rests on the party attacking it. *See Thomas v. Howard*, 51 N.C. App. 344, 353, 276 S.E. 2d 743, 745 (1981); *see generally*, Annot., 56 A.L.R. 3d 697, Sec. 5.

For reasons stated above, respondent has failed to carry his burden of proving that the arbitrator was partial or that he exceeded his powers. In addition, the legal premise by which respondent attempts to upset the arbitration award pursuant to N.C. Gen. Stat. 1-567.13(a)(3) is faulty. In essence, respondent argues that an arbitrator who errs as a matter of law exceeds his powers and as a result the award can be vacated. Allowing such relief is inconsistent with the general rule that "errors of law or fact, or an erroneous decision of matters submitted to [arbitration], are insufficient to invalidate an award fairly and honestly made." *Fashion Exhibitors v. Gunter*, 41 N.C. App. 407, 411, 255 S.E. 2d 414, 417-18 (1979). "If an arbitrator makes a mistake, either as to law or fact . . ., it is the misfortune of the party . . . . There is no right of appeal and the court has no power to revise the decisions of 'judges who are of the parties own choosing.' " *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 236, 321 S.E. 2d 872, 880 (1984), *quoting Fashion Exhibitors*, 41 N.C. App. at 415, 255 S.E. 2d at 420; *see also Gunter*, 291 N.C. at 218, 230 S.E. 2d at 387; *In re Cohoon*, 60 N.C. App. 226, 232, 298 S.E. 2d 729, 732-33, *disc. rev. denied*, 307 N.C. 697, 301 S.E. 2d 388 (1983). In addition, N.C. Gen. Stat. 1-567.13(a)(5) provides, "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."

If an arbitrator exceeded his powers merely by rendering an award based on errors of law, the general rule that such errors

are insufficient to invalidate an award would be easily circumvented. *See Fashion Exhibitors*, 41 N.C. App. at 414, 255 S.E. 2d at 419 (refusing to review plaintiff's contention that the arbitrator's decision was not supported by the evidence); *Trident Technical College v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 106, 333 S.E. 2d 781, 786 (1985), *cert. denied, George A. Creed & Son, Inc. v. Trident Technical College*, --- U.S. ---, 106 S.Ct. 803, 88 L.Ed. 2d 779 (1986) (interpreting a similar provision of the Federal Arbitration Act to require that an arbitrator resolve only those issues within the scope of the arbitration agreement; it did not require the court to review the merits of the arbitration decision). *But cf. Cotton Mills, Inc. v. Textile Workers Union*, 238 N.C. 719, 722, 79 S.E. 2d 181, 183 (1953) (decided under former law). N.C. Gen. Stat. 1-567.13(a)(3) would then open a "door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact may be suggested by the dissatisfied party. Thus . . . arbitration instead of ending would tend to increase litigation." *Cyclone Roofing*, 312 N.C. at 236, 321 S.E. 2d at 880, *quoting Fashion Exhibitors*, 41 N.C. App. at 415, 255 S.E. 2d at 420.

For the reasons stated, we affirm the order and judgment confirming the award pursuant to N.C. Gen. Stat. 1-567.12.

Affirmed.

Judges BECTON and PARKER concur.

ROLLING FASHION MART, INC. v. THERESA GAIL MAINOR

No. 851SC855

(Filed 1 April 1986)

1. Rules of Civil Procedure § 56.3— summary judgment—affidavit filed on day of hearing—admissibility

There was no merit to plaintiff's contention that the trial court erred in admitting an affidavit filed in support of a summary judgment motion because it was filed on the day of the hearing on the motion, since the affidavit was supplemental to earlier affidavits filed by the parties and it was within the discretion of the court to permit its introduction.

2. **Master and Servant § 1— negligent injury to employee—no action by employer against tortfeasor**

The trial court properly entered summary judgment for defendant on plaintiff's claims for loss of corporate earnings, loss of goodwill, and the value of merchandise which it had been unable to sell due to the injuries sustained by its president and sole employee in an automobile accident with defendant, since an employer may not maintain an action to recover damages from a tortfeasor because of negligent injury to an employee.

3. **Insurance § 75.4— action for damages to vehicle—owner previously compensated by insurer—claim assigned to insurer**

In an action to recover for damages to its vehicle sustained by plaintiff in an automobile accident with defendant, the trial court properly entered summary judgment for defendant where plaintiff had assigned its entire claim for damage to its liability insurer.

APPEAL by plaintiff from *John, Judge.* Order entered 13 March 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 January 1986.

Plaintiff corporation brought this action seeking recovery of money damages allegedly sustained by it due to defendant's negligence. The suit arises from a motor vehicle accident which occurred on 24 January 1981 when plaintiff's van, driven by plaintiff's president, O'Dell Jones, collided with an automobile driven by defendant. In its complaint, plaintiff alleged that defendant was negligent in several respects, proximately causing the collision. Plaintiff further alleged that it was a small company engaged in selling merchandise to customers at their homes and having only one employee, Mr. Jones, and that because Mr. Jones had been injured in the accident, plaintiff corporation had been unable to continue in business and that its merchandise had become worthless. It sought recovery for value of the merchandise, for lost corporate earnings, for lost "goodwill" and for damage to its van.

Defendant answered, denying negligence and asserting, alternatively, affirmative defenses of accord and satisfaction, arbitration and award, payment, and release. Defendant also moved for summary judgment and supported her motion by an affidavit from a claims representative of her insurance carrier. The affidavit showed that defendant's liability insurer had paid for a rental truck for plaintiff's use, that plaintiff's property damage claim had been submitted to arbitration between its collision in-

surance carrier and defendant's liability insurance carrier and that an arbitration decision had been rendered awarding plaintiff and its collision insurer $2,400.00 for damage to the van. Defendant's liability insurer paid that amount to plaintiff's insurer as "final settlement" of the property damage claim. The affidavit also showed that Mr. Jones and his wife had executed a release of their personal claims against defendant.

In opposition to the motion, plaintiff filed the affidavit of its president, Mr. Jones. According to the affidavit, plaintiff assigned its claim for property damage to its collision insurance carrier, Southern Home Insurance Company, in return for payment of the damage less $100.00 deductible, as provided by its insurance policy. Mr. Jones reiterated the corporation's claims for loss of business and earnings and denied that these claims had been assigned to its carrier or released.

The motion for summary judgment was heard 12 March 1985. At the hearing, defendant was permitted to submit, over plaintiff's objection, an affidavit from Garth Payne, a claims adjuster for plaintiff's collision insurance carrier. Attached to the affidavit was a copy of the agreement by which plaintiff assigned its property damage claim to Southern Home Insurance Company. The adjuster acknowledged that Southern Home Insurance Company had received and deposited a draft from defendant's liability insurer in payment of the arbitration award.

Summary judgment was entered in favor of defendant. Plaintiff appeals.

No counsel for Rolling Fashion Mart, Inc., plaintiff appellant.

Wyatt, Early, Harris, Wheeler & Hauser, by Kim R. Bauman, for defendant appellee.

MARTIN, Judge.

Plaintiff brings forward two assignments of error; the admission into evidence of the affidavit of Southern Home Insurance Company's claims adjuster, Mr. Payne, and the entry of summary judgment in favor of defendant. We conclude that the court did not abuse its discretion in admitting the affidavit and that summary judgment was appropriately granted.

[1] Plaintiff's first argument is that the trial court erred in admitting Mr. Payne's affidavit because the affidavit was filed by defendant on the day of the hearing. We do not agree. Although affidavits in support of a motion for summary judgment are required by G.S. 1A-1, Rules 6(d) and 56(c) to be filed and served with the motion, Rule 56(e) grants to the trial judge wide discretion to permit further affidavits to supplement those which have already been served. *Nationwide Mut. Ins. Co. v. Chantos*, 21 N.C. App. 129, 203 S.E. 2d 421 (1974). Mr. Payne's affidavit was clearly supplemental in that it did no more than explain the transactions referred to in the earlier affidavits filed by the parties and provide copies of the documents involved in those transactions. We discern no abuse of judicial discretion in the admission or consideration of Mr. Payne's affidavit.

By its second assignment of error, plaintiff contends that the trial court erred in granting summary judgment for defendant because there are genuine issues of fact. Summary judgment is appropriate only where the pleadings, affidavits and other evidentiary materials before the court disclose that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). A defending party is entitled to summary judgment if he can show that no claim for relief exists or that the claimant cannot overcome an affirmative defense to the claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E. 2d 325 (1981).

[2] In its complaint, plaintiff claims damages for loss of corporate earnings, loss of goodwill, and the value of merchandise which it has been unable to sell due to the injuries sustained by its president and sole employee. The basis for the claim is stated in the affidavit submitted by plaintiff's president, Mr. Jones:

> As a result of my injuries, I was and am still unable to carry on the business of Rolling Fashion Mart, Inc. Therefore Rolling Fashions [sic] Mart, Inc., ended up with over $7,000.00 worth of clothing and other merchandise, which due to my inability to get out and sell these items, are just sitting around, and, quite naturally, the corporation has lost all of its customers because of my inability to get out and sell them merchandise. It is for those losses, as opposed to any per-

sonal injury done to myself, that Rolling Fashion Mart, Inc. has brought this lawsuit.

Plaintiff, citing *Smith v. Corsat*, 260 N.C. 92, 131 S.E. 2d 894 (1963), contends that it is entitled to recover these damages allegedly sustained by it due to injuries negligently inflicted upon its sole employee. Plaintiff misconstrues the holding in *Smith*. In that case, the injured party sought to recover, as a part of his damages for personal injury, lost profits from the business owned and operated by him. The Court held that "where the business is small and the income which it produces is principally due to the personal services and attention of the owner," evidence of the earnings and profits of the business is admissible as evidence of the *owner's* diminished earning capacity, an element of damages recoverable by him for his personal injury. *Id.* at 96, 131 S.E. 2d at 897. The Court declined, however, to permit recovery for "loss of business" as special damages. Thus, under *Smith*, evidence of plaintiff's lost earnings would be admissible to support the claim of its president and sole employee, O'Dell Jones, for damages due to diminished earning capacity, properly recoverable by him as an element of his personal injury claim. Mr. Jones has, according to all of the evidence, entered into a settlement of his personal injury claim and has released defendant from further liability with respect thereto.

Plaintiff, however, seeks in the present action to recover for its *corporate* losses occasioned by the incapacity of Mr. Jones as a result of injuries which he sustained in the accident. Although we have found no North Carolina cases dealing with such a claim, the great weight of modern authority holds that an employer may not maintain an action to recover damages from a tortfeasor because of negligent injury to an employee. See *Ireland Elec. Corp. v. Georgia Highway Express, Inc.*, 166 Ga. App. 150, 303 S.E. 2d 497 (1983); *Hartridge v. State Farm Mut. Auto. Ins. Co.*, 86 Wis. 2d 1, 271 N.W. 2d 598, 4 A.L.R. 4th 495 (1978); *Frank Horton & Co., Inc. v. Diggs*, 544 S.W. 2d 313 (Mo. Ct. App. 1976); *Steele v. J and S Metals, Inc.*, 32 Conn. Supp. 17, 335 A. 2d 629 (1974); *Ferguson v. Green Island Contracting Corp.*, 36 N.Y. 2d 742, 368 N.Y.S. 2d 163, 328 N.E. 2d 792 (1975); *Nemo Found., Inc. v. The New River Co.*, 155 W.Va. 149, 181 S.E. 2d 687 (1971); Annot., 4 A.L.R. 4th 504 (1981), Annot., 74 A.L.R. 3d 1129 (1976). Since there exists no right to recover the damages sought by plaintiff, the trial court's

entry of summary judgment, dismissing plaintiff's claim for lost profits, loss of goodwill and the value of its unsold merchandise, was correct.

[3] The only additional claim stated by plaintiff was for property damage to its motor vehicle. It alleged that damage to the vehicle amounted to $2,000.00. The undisputed evidence before the trial court disclosed that plaintiff was paid the sum of $2,600.00 for damage to its vehicle by its collision insurer, after subtraction of the $100.00 deductible provided by the collision insurance policy. In return, plaintiff assigned its insurer "each and all claims and demands . . . arising from or connected with such loss or damage (and the said Company is hereby subrogated in the place of and to the claims and demands of the undersigned . . .) to the extent of the amount above named, and the said Company is hereby authorized and empowered to sue, compromise, and settle in my name or otherwise to the extent of the money paid as aforesaid." Thereafter, plaintiff's insurer submitted the property damage claim to arbitration with defendant's insurer and was awarded $2,400.00. Plaintiff's insurer accepted payment of that amount in "full settlement" of the claim for damages to the vehicle.

In North Carolina, where insured property is damaged by the negligence of another, a single indivisible claim for the damage accrues against the tortfeasor. *Security Fire & Indem. Co. v. Barnhardt*, 267 N.C. 302, 148 S.E. 2d 117 (1966). The claim accrues in favor of the owner, through whom the insurer, upon payment of the insurance, must enforce its subrogation rights, because the insured owner has legal title to the right of action against the tortfeasor. *Burgess v. Trevathan*, 236 N.C. 157, 72 S.E. 2d 231 (1952). In this case, however, plaintiff assigned to Southern Home Insurance Company its right of action, against defendant for damage to its vehicle, together with the full authority to resolve the claim as it saw fit. In so doing, plaintiff divested itself of legal title to the claim. The insurer chose to arbitrate the claim with defendant's liability carrier and to accept the arbitration award; plaintiff is bound by that resolution. Plaintiff argues, however, that it is entitled to recover at least its $100.00 deductible. We disagree. The property damage claim is a single indivisible claim, and cannot be partially assigned. Plaintiff assigned its entire claim for damage to its vehicle; that claim has been resolved by arbitration and award. To hold otherwise would subject defendant

to multiple actions for the same wrong and would sanction the splitting of an indivisible claim for relief.

Affirmed.

Judges EAGLES and COZORT concur.

PEE DEE OIL COMPANY v. QUALITY OIL COMPANY, INC., T/A SWINK-QUALITY OIL COMPANY, AND JAMES H. POU BAILEY, JR.

No. 8520SC360

(Filed 1 April 1986)

1. **Contracts § 27.1— existence of contract—sufficiency of evidence**

The evidence was sufficient to support a finding that defendant company entered a valid written contract to purchase certain assets of plaintiff where it tended to show that defendant signed a letter which was an offer to purchase certain assets for $215,000 and to pay the reasonable market value for certain equipment, and that plaintiff accepted that offer by notifying defendant orally and signing a written contract defendant had prepared. N.C.G.S. 22-2; N.C.G.S. 25-2-201.

2. **Contracts § 21.3— repudiation of contract—showing of compliance with conditions precedent unnecessary**

Plaintiff was not required to show that it had complied with conditions precedent in order to recover against defendant for breach of contract where defendant had repudiated the contract; rather, plaintiff was required to show only that it could have performed the contract if defendant had not repudiated it.

APPEAL by plaintiff from *McConnell, Judge*. Judgment entered 6 December 1984 in Superior Court, ANSON County. Heard in the Court of Appeals 22 October 1985.

The plaintiff, Pee Dee Oil Company, a North Carolina corporation, was engaged in the wholesale distribution and retail sale of various Shell Oil Company products in Anson, Richmond and Scotland Counties, and its President was James A. Hardison, Jr. Quality Oil Company, Inc., t/a Swink-Quality Oil Company, also a North Carolina corporation, was similarly engaged in Richmond County handling Texaco products; its President was Jack Swink and its Chairman of the Board was defendant James H. Pou

Bailey, Jr., who was also President of Z. V. Pate, Inc., the defendant company's controlling stockholder. Plaintiff asserts four claims against defendant oil company—breach of an express written contract, breach of implied contract, unfair trade practice, and punitive damages—all based upon defendant company's failure to buy certain of plaintiff's operating assets after either agreeing to buy them or leading plaintiff to believe that it would do so. One claim is asserted against defendant Bailey for maliciously inducing defendant corporation to breach its contract. A jury trial was waived and at the close of plaintiff's evidence all the claims were dismissed by a directed verdict.

Plaintiff's evidence included the deposition or other testimony of Mr. Hardison, Mr. Swink, and defendant Bailey, as well as several documents and letters that were either written, prepared or executed by one party or the other. Viewed in the light most favorable to plaintiff, the evidence was to the following effect: In September 1982 the presidents of the corporate parties had several discussions about the possibility of defendant company buying some or all of plaintiff's operating assets, and plaintiff was asked to submit a written offer of sale to the defendant company. By letter mailed on 7 October 1982, plaintiff offered to sell to defendant corporation one piece of real estate (the Fastway station in Rockingham) and five service station leases (Speedie property, Holiday Shell, Rockingham Shell, Capel Food Market and Laurinburg lot), along with certain tanks and other equipment, for $305,000. An attachment to the letter generally described each asset referred to, stated generally the terms of the leases involved, and put individual prices on several of the assets offered for sale. Defendant corporation replied by letter dated 14 October 1982, stating that it was interested in plaintiff's proposition but needed certain additional information before a decision could be made, and that information was sent to defendant by plaintiff's letter dated 19 October 1982. On 27 October 1982, in a telephone conversation between the two corporate presidents, defendant company made a counterproposal to buy certain of plaintiff's assets, which proposal was put in writing and mailed to plaintiff that same day, as follows:

Mr. James A. Hardison, Jr.
First National Bank
Post Office Box 111
Wadesboro, North Carolina 28170

Dear Jimmy:

Although we discussed a counter proposal to purchase certain assets of Pee Dee Oil Company by telephone today, we are describing our proposal in writing as you requested.

Since we are not as familiar with the Anson County market as you may be, we are having some difficulty in deciding if we should eliminate that market from your proposal. In such an event, we propose to allow you to continue to supply the two Speedee stations and Capel's Food Mart as a branded subjobber. This would allow you to continue to operate the entire Anson County market as you are presently doing.

We propose to purchase your Shell contract for $75,000.00 and the Fastway station in Rockingham for $140,000.00, for a total of $215,000.00. Further, we would pay you a reasonable market value for the equipment located at the Rockingham Self Service and Holiday Shell. We would, of course, assume the leases on these locations as well as the Laurinburg lot. The Gibson Oil Company contract would be honored by us, at least, for the remaining period of the contract.

Please contact us as soon as you have made your decision on our proposal.

Sincerely yours,

Jack B. Swink

Immediately upon receiving the proposal plaintiff's president advised Swink that it was accepted. Soon thereafter the corporate presidents agreed that the equipment referred to in the counterproposal was worth $20,000 and defendant corporation then had its attorneys prepare a written contract of purchase covering all the matters that were being agreed to. Near the end of January 1983 when the contract was completed, defendant company approved its terms and submitted the document unsigned to plaintiff. Among other things, the contract fully described all the assets referred to in the written counterproposal, stated that

they were being bought for $235,000, and subject to the approval of Shell Oil Company and the service station lessors approving the transfer of the franchise and leases involved, plaintiff executed the document on 1 February 1983 and immediately returned it to defendant oil company. Meanwhile plaintiff's attorneys prepared the many documents needed to convey or transfer the real estate, leases, Shell franchise, and articles of personal property involved in the sale to the defendant corporation, and those documents were forwarded to defendant's attorney by a letter dated 18 February 1983. By letter dated 28 February 1983 defendant's attorneys acknowledged receiving the documents but informed plaintiff's attorneys that their client had not yet signed the written contract and had advised them that the matter "would be held in abeyance at the present time." Shortly thereafter Swink told Hardison that the matter was "on hold" because the company had a problem, but he did not state what it was. On 15 March 1983 Swink told Hardison that the problem was that the defendant company's controlling stockholder, Z. V. Pate, Inc., had earlier agreed to sell one of its subsidiaries to Publix, a Tennessee company, and the non-compete clause in that agreement might be violated by defendant company operating the facilities involved. The next day Hardison sent a letter to Swink stating, in substance, that the delay in completing the purchase had greatly inconvenienced plaintiff's business; that the transaction between Z. V. Pate, Inc. and Publix was irrelevant to plaintiff's sale to the defendant company; and that Swink's help in expediting an early resolution of the matter would be appreciated. Plaintiff received no response thereto and in June 1984, out of necessity, it sold some of the assets involved at a loss.

Taylor and Bower, by H. P. Taylor, Jr., for plaintiff appellant.

Etheridge, Moser and Garner, by Kennieth S. Etheridge and Terry R. Garner, for defendant appellees.

PHILLIPS, Judge.

[1, 2] The directed verdict as to plaintiff's claim for breach of a written contract, the main claim asserted, was clearly erroneous —though why the trial judge directed a verdict rather than arrive at one is beyond our comprehension. Be that as it may, there

was plenary evidence before the court that the defendant company had a written contract to purchase certain assets of the plaintiff, that it refused to go through with the purchase, and that plaintiff was damaged thereby. That defendant company did not sign the asset purchase contract, which was prepared at its direction, is not decisive, for a written contract can consist of several writings. *Hines v. Tripp*, 263 N.C. 470, 139 S.E. 2d 545 (1965). The 27 October 1982 letter, which defendant did sign, can only be interpreted as an offer to buy the assets referred to except the equipment for $215,000, and to pay the reasonable market value for the equipment; and the evidence tends to show that plaintiff accepted that offer, first by notifying defendant orally and then by signing the written contract defendant had prepared, which essentially duplicated the terms contained in defendant's offer. The defendant's contention that the 27 October letter was too vague to be the basis for a contract because the price of the equipment was not set has no merit. The equipment was but a minor, incidental part of the purchase and contracts do not fail because minor details are left for future determination. *Hurdle v. White*, 34 N.C. App. 644, 239 S.E. 2d 589 (1977). Nor, as the defendants contend, is the claim barred as a matter of law either by the statute of frauds or because plaintiff failed to meet a condition precedent to closing the transaction, by obtaining the written approval of Shell Oil Company and the lessors to the transfer of the franchise and leases to defendant. If the parties did enter into a written contract, as plaintiff's evidence tends to show, the statute of frauds, G.S. 22-2, G.S. 25-2-201, is no stumbling block, because each party signed a writing that meets the requirements of those statutes. And if defendant had already repudiated the contract, as plaintiff's evidence tends to show, that relieved plaintiff of the necessity of complying with the conditions precedent before demanding compliance by the defendant; for the law does not require the doing of vain things. *Pappas v. Crist*, 223 N.C. 265, 25 S.E. 2d 850 (1943). It is enough that plaintiff's evidence tends to show that it could have performed the contract if defendant had not repudiated it; it was not required to show that it had performed. Thus, this cause of action is returned to the Superior Court for a new trial thereon.

But the verdicts directed against plaintiff's other claims are not shown to be erroneous and we affirm them. The punitive dam-

ages claim and the implied contract claim, neither of which are mentioned in plaintiff's brief, have been abandoned under the provisions of Rule 28, N.C. Rules of Appellate Procedure. And the evidence presented does not support either the unfair trade practices claim or the claim against defendant Bailey for maliciously interfering with plaintiff's contract rights.

The judgment dismissing plaintiff's first cause of action for breach of a written contract is vacated. The judgment dismissing plaintiff's second, third, fourth and fifth causes of action is affirmed.

Vacated in part; affirmed in part.

Judges WEBB and JOHNSON concur.

MICHAEL MORRISON AND WANDA JEAN MORRISON, APPELLANTS v. SEARS, ROEBUCK & COMPANY, APPELLEE v. COLBY FOOTWEAR, INC. AND COLBY MACHINE CORPORATION, THIRD-PARTY DEFENDANT v. YORK HEEL OF MAINE, INC., APPELLEE

No. 8523SC315

(Filed 1 April 1986)

1. **Sales § 22.1— defective shoe heel—summary judgment for defendant proper**

Summary judgment was properly granted for Sears in an action to recover for injuries from a fall when the heel of a shoe purchased at Sears allegedly buckled the second time the shoes were worn. There was no evidence that the shoes were patently defective; Sears was the seller, not the manufacturer of the shoes, despite the Sears label in the shoes; and Sears had no greater burden of testing than the law requires of sellers despite having test facilities or access to test facilities. N.C.G.S. 99B-1.

2. **Sales § 6.1— implied warranty of merchantability—defective shoe heel—no evidence of defect at time of sale**

Summary judgment was properly granted for Sears in an action arising from the buckling of a shoe heel where plaintiffs came forward with no evidence that a defect in the shoe existed at the time of sale. N.C.G.S. 25-2-314.

APPEAL by plaintiffs from *Rousseau, Judge*. Judgment entered 21 November 1984 in Superior Court, WILKES County. Heard in the Court of Appeals 5 November 1985.

Franklin Smith for plaintiff appellants.

Moore & Willardson by Larry S. Moore and William F. Lipscomb for defendant appellee, Sears, Roebuck & Company.

Smith, Moore, Smith, Schell & Hunter by J. Donald Cowan, Jr., for appellee, York Heel of Maine, Inc.

COZORT, Judge.

Plaintiff Wanda Jean Morrison filed suit against defendant Sears, Roebuck and Company (hereinafter Sears) on 12 August 1982, alleging that Mrs. Morrison bought a pair of high-heel shoes from Sears in the spring of 1981 and that on 2 April 1981, the second time she wore the shoes, the heel of the left shoe buckled under causing her to fall and sustain a back injury which required surgery. Plaintiff Michael Morrison sued for loss of consortium. Plaintiffs prayed for damages alleging (1) negligence in failing to market reasonably safe shoes which would withstand normal wear, and (2) breach of warranty of merchantability under G.S. 25-2-314. On 3 March 1983 defendant Sears filed a third-party complaint against Colby Footwear, Inc., and Colby Machine Corporation (hereinafter Colby), the manufacturer of the shoe in question. Plaintiffs were subsequently given leave to amend the complaint to add Colby as original defendants in the action. On 30 March 1984 the trial court granted a motion by plaintiffs allowing the filing of an amended complaint which added York Heel of Maine, Inc. (hereinafter York), the manufacturer of the heel which allegedly buckled under, as an additional party defendant. In an order filed 21 November 1984 the trial court granted summary judgment for defendant Sears. In an order filed 28 November 1984 the trial court granted defendant York's motion to dismiss. In an order filed 4 December 1984 the trial court granted summary judgment for defendant Colby. The sole issue presented for our review on appeal is whether the trial court erred in granting defendant Sears' motion for summary judgment.

[1] We turn first to plaintiffs' claim against Sears alleging negligence. Under North Carolina law, " '[a] retailer who purchases from a reputable manufacturer and sells the product under circumstances where he is a mere conduit of the product is under no affirmative duty to inspect or test for a latent defect, and, therefore, liability cannot be based on a failure to inspect or test

in order to discover such defect and warn against it.' (Citations omitted.)" *Cockerham v. Ward*, 44 N.C. App. 615, 623, 262 S.E. 2d 651, 657, *disc. rev. denied*, 300 N.C. 195, 269 S.E. 2d 622 (1980).

In response to Sears' summary judgment motion, plaintiffs presented no evidence that the shoes were patently defective. Plaintiffs' own expert, Marshall A. Brem, testified in his deposition that he "cannot see any defect in these heels." Thus, it is undisputed that the alleged defect was latent. The affidavits filed in this case and the deposition of Brem present uncontradicted evidence that Colby manufactured the shoe, inspected it, and shipped it to Sears. The shoes are received by Sears in individual boxes. The boxes containing each pair of shoes are placed in inventory until requested by and shown to a customer. Thus, under *Cockerham*, Sears, as a seller, had no duty to inspect or test the shoe. Nevertheless, plaintiffs contend that summary judgment for Sears was improper because Sears occupies the same legal relationship to the plaintiffs as that of a manufacturer and should thus be held to a stricter standard of care. In support of this contention, plaintiffs argue that Sears holds itself out as the manufacturer of the shoe because its trademark, "SEARS The Shoe Place," is imprinted in the shoe, and there is no reference to the true manufacturer of the shoe. Plaintiffs further argue that they have, by affidavit, presented evidence that Sears has testing facilities, or at least has access to testing facilities. Plaintiffs' contention is not the law.

Chapter 99B of the General Statutes, The Products Liability Act, which governs this case, defines "manufacturer" and "seller" as follows:

> (2) "Manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs or otherwise prepares a product or component part of a product prior to its sale to a user or consumer, including a seller owned in whole or significant part by the manufacturer or a seller owning the manufacturer in whole or significant part.
>
> * * * *
>
> (4) "Seller" includes a retailer, wholesaler, or distributor, and means any individual or entity engaged in the business of

> selling a product, whether such sale is for resale or for use or consumption. "Seller" also includes a lessor or bailor engaged in the business of leasing or bailment of a product.

G.S. 99B-1. Sears is not the manufacturer of the shoe within the meaning of G.S. 99B-1(2). Rather, with respect to the shoe, Sears is the seller/retailer. As noted earlier, it is undisputed that Colby manufactured the shoe, inspected it, and shipped it to Sears. There is no evidence that either Sears or Colby owned the other in whole or significant part. All of the evidence before the court shows two things: (1) the alleged defect in the shoe was latent at the time of sale, and (2) Sears was the seller and not the manufacturer of the shoe.

We note that the imprinting of Sears' trademark in the shoe does not make Sears the manufacturer of the shoe. That fact is insufficient to bring Sears within the definition of manufacturer in G.S. 99B-1(2). Also, having testing facilities or access to testing facilities would not place on Sears a greater burden to test shoes it sells than the law provides. A seller is simply under no affirmative duty to test for latent defects. *See Cockerham, supra*, 44 N.C. App. at 623, 262 S.E. 2d at 657.

We hold that the evidence forecast by the plaintiffs is insufficient to make out a case for negligence against Sears and that the trial court correctly granted summary judgment for Sears.

[2] We now address the plaintiffs' claim of breach of implied warranty of merchantability. To prove a breach of implied warranty of merchantability under G.S. 25-2-314,

> a plaintiff must prove, first, that the goods bought and sold were subject to an implied warranty of merchantability; second, that the goods did not comply with the warranty in that the goods were defective at the time of sale; third, that his injury was due to the defective nature of the goods; and fourth, that damages were suffered as a result. (Citations omitted.) The burden is upon the purchaser to establish a breach by the seller of the warranty of merchantability by showing that a defect existed at the time of the sale. (Citations omitted.)

Id., 44 N.C. App. at 624-25, 262 S.E. 2d at 658.

The crucial issue in this appeal on the granting of summary judgment for Sears on plaintiffs' claim for breach of implied warranty of merchantability is whether there is any evidence that a defect existed at the time of the sale. "[P]laintiff must offer evidence that the goods in question were not merchantable at the time of sale. (Citation omitted.) Plaintiff can establish lack of merchantability by showing, *inter alia*, that the goods were not fit for the ordinary purpose for which such goods are purchased because they contained a defect at the time of sale. G.S. 25-2-314(2)(c)." *Southern of Rocky Mount, Inc. v. Woodward Specialty Sales, Inc.*, 52 N.C. App. 549, 555, 279 S.E. 2d 32, 36 (1981).

In the unverified complaint, plaintiff Wanda Jean Morrison alleged the shoe heel buckled under the second time she wore the shoe. Mrs. Morrison, however, did not file an affidavit to that effect. Plaintiffs' expert Brem, testifying by deposition on 24 August 1984, stated that the shoes had been worn many times: "There is wear, which shows this pair of shoes has been worn and worn and worn." Plaintiffs came forward with no evidence that a defect in the shoe existed at the time of sale. With no evidence of a defect at the time of sale, plaintiffs cannot meet their burden of proof under the breach of warranty claim. The granting of summary judgment is proper where the forecast of the evidence compels a verdict in the movant's favor as a matter of law. *City National Bank v. Rojas*, 64 N.C. App. 347, 348, 307 S.E. 2d 387, 388 (1983).

Affirmed.

Judges ARNOLD and MARTIN concur.

CHARLES BACKER AND WIFE, MARIE B. BACKER v. CARLOS GOMEZ AND WIFE, BARBARA JONES GOMEZ

No. 8512DC683

(Filed 1 April 1986)

Execution § 6; Landlord and Tenant § 13— termination of lease—appeal pending—action against subtenants proper

Plaintiff lessees were not precluded from proceeding against defendant subtenants for possession and damages where their appeal from a judgment

terminating their lease with the owner was pending and they had been granted a stay of execution and left in possession of the property. N.C.G.S. §§ 1-289, 1-292, 1-296.

APPEAL by defendants from *Cherry, Judge*. Judgment entered 8 January 1985 in District Court, CUMBERLAND County. Heard in the Court of Appeals 6 January 1986.

This is an appeal from a judgment of summary ejectment and an award of delinquent rental payments.

On 26 October 1972, plaintiffs entered into a thirty year written lease with Homeland, Inc., renting ten acres of land located in Cumberland County. Improvements on the land consisted of thirty duplexes. The monthly rent for the property was $1,000.00. Thereafter, plaintiffs placed nineteen mobile homes on the property. On 1 January 1979, plaintiffs subleased a portion of the property to the defendants for a monthly rental of $3,000.00.

On 9 March 1983, plaintiffs instituted this summary ejectment proceeding against defendants in magistrate's court. From an adverse judgment defendants appealed to District Court. Defendants obtained a stay of execution of judgment pending trial in District Court. On 1 September 1983, Homeland, Inc. instituted an action in Superior Court, Cumberland County, against plaintiffs alleging, *inter alia*, that plaintiffs had breached their thirty year lease agreement by subletting and committing acts of waste upon the property. On 4 October 1984, while the district court action was pending trial, Homeland, Inc. obtained judgment against plaintiffs in its superior court action for possession of the property, termination of the lease plus damages on the ground that plaintiff had breached the lease with Homeland by committing acts of waste upon the property. From the judgment of superior court, plaintiffs appealed to this Court. Pending that appeal to this Court plaintiffs obtained an order from superior court staying execution upon the judgment awarding Homeland, Inc. damages and possession of the property.

While the superior court action was pending on appeal to this Court, the instant case was tried in district court 8 January 1985, at which time judgment was entered in favor of plaintiffs, granting immediate possession of the subleased property and $60,000.00 in delinquent rental payments on the ground that de-

fendants had breached the sublease by failing to pay the monthly rental. From said judgment defendants appealed.

Charles Backer, pro se, and wife, Marie B. Backer, pro se, for plaintiff appellees.

Beaver, Thompson, Holt & Richardson, P.A., by H. Gerald Beaver and Mark A. Sternlicht, for defendant appellants.

JOHNSON, Judge.

By their sole issue raised in this appeal, defendants contend that the Superior Court judgment of 4 October 1984 terminating plaintiffs' lease with Homeland, Inc. precluded plaintiffs from asserting any leasehold rights under the lease. We disagree.

N.C.G.S. 1-289 regarding undertaking to stay execution on a money judgment provides in pertinent part that:

> If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal.

N.C.G.S. 1-292 regarding undertaking to stay judgment on real property provides in pertinent part that:

> If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment. . . .

Defendants concede in their brief that plaintiffs obtained a stay of execution on the judgment awarding damages and ter-

minating plaintiffs' lease with Homeland, Inc. However, notwithstanding the order staying execution on the judgment and leaving plaintiffs in possession of the property, defendants argue that the Superior Court judgment terminating plaintiffs' leasehold interest in the property remained in full force and effect and precluded plaintiffs from thereafter seeking possession and damages against defendants in the instant case. Defendants rely upon N.C.G.S. 1-296 which reads as follows:

> The stay of proceedings provided for in this Article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this Chapter, until such judgment is reversed or modified by the appellate division.

In our research we have been unable to find a case similar to the case at hand wherein a lessee seeks to proceed against his subtenant for possession and damages pending appeal of a judgment terminating the lease between the owner in fee and the lessee; and where the lessee has been granted a stay of execution and left in possession of the property. We agree with defendants that a stay of the proceedings as provided under N.C.G.S. ch. 1, art. 27 does not operate to vacate the judgment terminating plaintiffs' lease with Homeland, Inc. However, the appeal placed the judgment in a state of suspension. *Bond v. Wool*, 113 N.C. 20, 18 S.E. 77 (1893). Under the stay of execution pursuant to N.C.G.S. 1-289 and 1-292, plaintiffs, by maintaining possession, would be liable to Homeland, Inc. for any waste they committed or allowed to be committed on the property, and if the judgment is affirmed, plaintiffs would also be required to pay the value of the use and occupation of the property, from the time of the appeal until delivery of possession of the property pursuant to the judgment. Therefore, it seems clear to us that by maintaining possession pursuant to the stay of execution order, plaintiffs remained vested with a possessory and proprietary interest in the property, which interest they had a right to protect. Defendants' possession and proprietary rights in the property are derived solely through the possessory and proprietary rights vested in the plaintiffs. Therefore, in light of the order staying execution on the

judgment and leaving plaintiffs in possession, plaintiffs were not precluded from proceeding against defendants, their subtenants.

We also take judicial notice that this Court reversed the judgment terminating plaintiffs' lease with Homeland, Inc. *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 337 S.E. 2d 114 (1985). This Court's decision vacating the judgment relates back to the time the judgment was entered and renders it null and void, *ab initio*. The proceeding is left where it stood before the judgment was entered, and the parties stand in the same position as if no such judgment had ever been rendered. For this reason also, the issue defendants raise in this appeal is moot.

Defendants raise several other questions by assignments of error on appeal from trial; however, defendants failed to present or discuss any of them in their brief for review on appeal. These questions are deemed abandoned. Rule 28(a), N.C. Rules App. P.

The judgment of District Court is

Affirmed.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. HAROLD DONALD RIPPY

No. 853SC976

(Filed 1 April 1986)

1. Taxation §§ 2.3, 26.1— commercial fishing pier license—uniform taxation

The statute requiring the manager of an ocean fishing pier who charges the public a fee to fish from the pier to obtain a pier license, N.C.G.S. § 113-156.1(a), does not create an unconstitutional classification and satisfies the requirements of uniformity, equal protection and due process under both state and federal constitutions, since the opportunity to establish an exclusive zone around ocean piers provided by N.C.G.S. § 113-185(a), and the costs to the State of enforcing this zone, distinguish ocean piers from other piers and provide reasonable grounds for their separate license tax classification.

2. Taxation § 26.1— ocean fishing pier license—purpose to which tax applied

The statute requiring the operator of a commercial ocean fishing pier to obtain a license, N.C.G.S. § 113-156.1, does not violate the requirement of Art. V, § 5 of the N. C. Constitution that every act levying a tax shall state the

special object to which it is to be applied since it is evident that the license tax is levied and applied for the conservation of marine and estuarine wildlife resources.

3. Constitutional Law § 4— no standing to attack constitutionality of statute

An ocean fishing pier owner lacked standing to challenge the constitutionality of the statute affording the operators of such piers the opportunity to establish an exclusive 750 foot zone around such piers since plaintiff has not been injured by the alleged unconstitutionality of the statute.

APPEAL by defendant from *Phillips, Judge.* Judgment entered 15 April 1985 in Superior Court, CARTERET County. Heard in the Court of Appeals 4 February 1986.

Defendant is the owner and operator of Sportsmans Pier at Atlantic Beach, North Carolina, an ocean fishing pier at which the public is charged a fee to fish. Defendant refused to procure an ocean fishing pier license as required by N.C. Gen. Stat. 113-156.1(a), which states that "[e]very manager of an ocean fishing pier within the coastal fishing waters who charges the public a fee to fish in any manner from the pier must secure a current and valid pier license from the Department [of Natural Resources and Community Development]." He was cited for violation of N.C. Gen. Stat. 113-156.1(a) by unlawfully and willfully engaging in a commercial fishing operation without first procuring an ocean fishing pier license.

The jury returned a verdict of guilty. The court ordered defendant to pay the costs of court and to purchase a license. Defendant appeals.

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

John E. Nobles, Jr., for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends that N.C. Gen. Stat. 113-156.1 violates the due process clause of the federal and state constitutions in that taxation must be uniform. Specifically, he argues that the licensing requirement of N.C. Gen. Stat. 113-156.1 creates an unconstitutional classification by requiring such a license for commercial fishing piers on the ocean but not in other areas. We disagree.

Article V, Section 2 of the North Carolina Constitution provides that "[n]o class of property shall be taxed except by uniform rule . . . ."

> Although [this] provision of the North Carolina Constitution does not expressly apply to a [license] tax but rather to "property and other subjects," numerous decisions of [the North Carolina Supreme] Court have held the clause to be applicable to license, franchise and other forms of taxation. . . . In *Hajoca Corp. v. Comr. of Revenue* . . ., [the Supreme] Court stated: " '[T]he requirements of "uniformity," "equal protection," and "due process," are, for all practical purposes, the same under both the State and Federal Constitutions.' " A tax is uniform when it imposes an equal tax burden upon all members of a particular class. . . . As long as a classification is not arbitrary or capricious, but rather [is] founded upon a rational basis, the distinction will be upheld by the Court. [Citations omitted.]

Realty Corp. v. Coble, Sec. of Revenue, 291 N.C. 608, 617, 231 S.E. 2d 656, 661-62 (1977). On review, wide latitude is accorded the General Assembly; the only limitation on its power is that the classification must be founded upon reasonable, and not arbitrary, distinctions. *In re Champion International Corp.*, 74 N.C. App. 639, 645, 329 S.E. 2d 691, 694, *appeal dismissed*, 314 N.C. 540, 335 S.E. 2d 15 (1985).

> The Legislature is not required to preamble or label its classifications or disclose the principles upon which they are made. It is sufficient if the Court, upon review, may find them supported by justifiable reasoning. In passing upon this the Court is not required to depend solely upon evidence or testimony bearing upon the fairness of the classification, if that should ever be required, but it is permitted to resort to common knowledge of the subjects under consideration, and publicly known conditions, economic or otherwise, which pertain to the particular subject of the classification.

Snyder v. Maxwell, Comr. of Revenue, 217 N.C. 617, 620, 9 S.E. 2d 19, 21 (1940).

In *Snyder* the Court upheld a statute which imposed a higher license tax on the privilege of operating vending machines selling

soft drinks than on vending machines selling other kinds of merchandise at the same price. *Id.* at 619-22, 9 S.E. 2d at 20-22. It found these classifications to be based upon real and reasonable distinctions since it was common knowledge that soft drink sales afforded a unique opportunity for gainful return, thus justifying a higher tax on the privilege. *Id.* at 621, 9 S.E. 2d at 22.

In light of the foregoing authorities, we hold that N.C. Gen. Stat. 113-156.1 satisfies the requirements of uniformity, equal protection and due process under both the state and federal constitutions. *Realty Corp., supra,* 291 N.C. at 617, 231 S.E. 2d at 661-62. The statute applies equally to "[e]very manager of an ocean fishing pier within the coastal fishing waters who charges the public a fee to fish in any manner from the pier . . . ." N.C. Gen. Stat. 113-156.1. Given N.C. Gen. Stat. 113-185(a), which affords the operators of such piers the opportunity to establish an exclusive 750 foot zone within which other commercial and recreational fishing is prohibited (with the exception of surf casting), to require a license for managers of ocean piers only is a wholly reasonable classification. N.C. Gen. Stat. 113-185(a) does not apply to piers over interior waters such as sounds and rivers. The opportunity to establish an exclusive zone around ocean piers, and the cost to the State of enforcing this zone, distinguish ocean piers from other piers and provide reasonable grounds for their separate license tax classification.

[2] Defendant also contends that N.C. Gen. Stat. 113-156.1 violates Article V, Section 5 of the North Carolina Constitution, which provides that "[e]very act of the General Assembly levying a tax shall state the special object to which it is to be applied and it shall be applied to no other purpose." N.C. Gen. Stat. 113-156.1 is part of Chapter 113, which is entitled Conservation and Development, and more particularly of Subchapter IV, which is entitled Conservation of Marine and Estuarine and Wildlife Resources. The special purpose of Subchapter IV, as revealed by its title, is the conservation of marine and estuarine and wildlife resources. It is evident that the license tax is levied and applied for this purpose. We thus find this contention without merit.

[3] Defendant finally contends that N.C. Gen. Stat. 113-185 violates Article V, Section 2 of the North Carolina Constitution because it fails to serve a public purpose. However, " '[o]nly one

who is in immediate danger of sustaining a *direct injury* from legislative action may assail the validity of such action.' " *Wilkes v. Bd. of Alcoholic Control*, 44 N.C. App. 495, 496, 261 S.E. 2d 205, 206 (1980). Defendant fails to allege any direct injury resulting from the alleged unconstitutionality of N.C. Gen. Stat. 113-185, and none is apparent. On the contrary, as an ocean pier owner defendant benefits from the exclusive zone established by that statute. Accordingly, we hold that he lacks standing to challenge its constitutionality. *Id.*

No error.

Judges WELLS and COZORT concur.

STATE OF NORTH CAROLINA v. WILLIAM ELLIS CHILDERS

STATE OF NORTH CAROLINA v. GLENN THOMPSON

No. 856SC943

(Filed 15 April 1986)

1. **False Pretense § 2.1— indictment—causal connection between false representation and victims' payment of money—allegations sufficient**

There was no merit to one defendant's contention that the bills of indictment were fatally defective because they did not state a causal connection between the alleged false representation by defendant and the payment of money by the victims, since the indictments made it clear that defendants obtained money as a result of their misrepresentations that termites were present and that they would provide the treatments necessary to exterminate them.

2. **False Pretense § 3.1— need for termite treatments—obtaining money from homeowners by false pretense—sufficiency of evidence**

In a prosecution of defendants for obtaining money by false pretense, evidence was sufficient to be submitted to the jury where it tended to show that defendants falsely represented to each of four homeowners that active infestations of termites were present in their homes and that treatment therefor was necessary when in fact no active termite infestations were present; one defendant testified that there were no signs of active termite infestations at any of the houses, although there were signs of old infestations at two of the houses; this testimony supported a reasonable inference that defendant knew that his representations with respect to the presence of active termite infestations were false and that he made these representations in order to induce the

respective homeowners to pay for termite treatments which were unnecessary; defendants misrepresented the nature of the treatment which was actually provided; and each of the homeowners was actually deceived by defendants' false representations.

3. False Pretense § 3— evidence of previous similar transactions by defendant—admissibility to show motive

In a prosecution of defendants for obtaining money by false pretense where the evidence tended to show that defendants obtained money from elderly homeowners by falsely representing that their homes needed treatment for active termite infestations, the trial court did not err in permitting cross-examination of one defendant concerning previous transactions with other elderly homeowners, since evidence with respect to other similar transactions in which defendant had engaged as an employee of an exterminating company was relevant to show motive, intent, plan and knowledge. N.C.G.S. 8C-1, Rule 404(b).

4. Criminal Law § 92.4— multiple charges against same defendant—consolidation proper

The trial court did not err in joining for trial four cases against defendant for obtaining money by false pretense since each of the charges was transactionally connected in that they each involved a similar modus operandi and similarities in time, location and in the victims' ages, economic circumstances and literacy, and the trial court could properly find them indicative of a single scheme or plan to defraud elderly homeowners under the pretext of performing unnecessary insect extermination services.

5. Criminal Law § 92.1— two defendants charged with same offense—consolidation proper

The trial court did not abuse its discretion in consolidating for trial charges against two defendants for obtaining money by false pretense.

6. Criminal Law § 101— prosecuting witness's conversation with jurors—no mistrial

Defendant failed to show that he was prejudiced by casual conversations unrelated to the case between one of the prosecuting witnesses and two jurors, and he failed to show that the trial court abused its discretion in denying his motion for mistrial.

7. Criminal Law § 99.8— court's examination of witness—no expression of opinion

There was no merit to defendant's contention that the trial court impermissibly expressed an opinion in questioning one of the State's witnesses, since the court made it clear that the questions were for the purpose of clarifying the witness's testimony.

8. Criminal Law § 9.3— defendant as aider and abettor—sufficiency of evidence

In a prosecution for obtaining money by false pretense where the evidence tended to show that defendants obtained money from elderly homeowners after falsely representing that the homes needed treatment for active termite infestations, evidence was sufficient to permit a reasonable in-

ference to be drawn that one defendant, by his presence and participation in the initial termite inspections and subsequent spray treatments, assisted the other defendant in the perpetration of the false pretense upon each of the homeowners, and the issue of defendant's guilt as an aider and abettor was properly submitted to the jury.

9. Criminal Law § 102— multiple defendants—offer of evidence—right to closing argument

There was no merit to one defendant's contention that, because he presented no evidence and objected to joinder of his cases with those of the other defendant, he should have been permitted to make the last argument to the jury, since Rule 10, General Rules of Practice for the Superior and District Courts provides that ". . . where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor."

APPEAL by defendants from *Stephens, Judge.* Judgment entered 8 March 1985 in HERTFORD County Superior Court. Heard in the Court of Appeals 15 January 1986.

Defendants were tried jointly on bills of indictment charging each of them with four counts of obtaining money by false pretense in violation of G.S. 14-100. The bills of indictment allege that defendants intentionally defrauded four elderly homeowners in connection with the rendering of termite extermination services on 24 and 25 May 1984 and 19 June 1984. A jury found defendants guilty of all charges. From judgments entered on the verdicts, both defendants appeal.

Attorney General Lacy H. Thornburg by Assistant Attorney General Alan S. Hirsch for the State.

Appellate Defender Malcolm Ray Hunter, Jr. by Assistant Appellate Defender Louis D. Bilionis for defendant Childers.

Cherry, Cherry, Flythe and Overton by Joseph J. Flythe for defendant appellant Thompson.

MARTIN, Judge.

Both defendants bring forward several assignments of error relating to the conduct of the trial. Since each defendant has raised different issues on appeal, we will address their appeals separately. We find no prejudicial error as to either defendant.

I

THE EVIDENCE

The State offered evidence tending to show that defendant Thompson owned and operated Sun Exterminating Company and that defendant Childers was employed as a salesman for the company. On 24 May 1984, defendants went to the home of Tommy Peel. Defendant Childers offered Mr. Peel a free termite inspection and defendant Thompson went under Mr. Peel's house. When he came out from beneath the house, he brought a piece of a board and handed it to Childers. Childers examined the board and told Mr. Peel that there were termites underneath the house and "They'll eat your house up." After some negotiations, Childers offered to treat the house for termites for $250.00. After Mr. Peel paid Childers, Thompson sprayed beneath the house. Childers provided Mr. Peel, who does not read very well, with a written contract showing that the treatment rendered was for powder post beetles.

On the same day, defendants went to the home of Booker Lee. After a similar "free inspection," Mr. Lee was informed that his house was infested by termites. He paid defendants $150.00 to treat the premises. Childers told Mr. Lee that an additional treatment would be necessary. However, when Childers called Mr. Lee to make arrangements for the additional treatment, Mr. Lee declined because he was unable to pay for it.

On or about 25 May 1984, defendants went to James Eason's residence and offered a free termite inspection. After Thompson inspected the house, Childers told Mr. Eason that the house needed to be sprayed for termites. Mr. Eason agreed to pay $400.00 for the termite treatment. After defendants completed the treatment, Childers gave Mr. Eason a written contract specifying that treatment had been rendered for powder post beetles instead of termites. Mr. Eason cannot read. Sometime later, Childers called Mr. Eason and told him that the house had not been treated for termites and that a termite treatment would require an additional fee. Mr. Eason's daughter then contacted defendant Thompson and, as a result, Thompson returned to the Eason home and provided the additional treatment at no additional cost.

On 19 June 1984 defendants went to the home of Floyd Anderson and, after a free inspection, told him that his house had termites. Mr. Anderson paid Childers $775.00 for termite treatment and received a written contract. Defendant Thompson sprayed beneath the house. Mr. Anderson cannot read or write.

The State also offered the testimony of Bennie C. Griffin, a pest control inspector with the North Carolina Department of Agriculture. Mr. Griffin inspected each of the four houses in July 1984. He found no evidence of termites in Tommy Peel's house, nor did he find any evidence that termite treatment had been rendered. He found evidence of an old powder post beetle infestation, but in his opinion there had not been an active infestation in May 1984. Inspections of the Lee and Anderson homes revealed no evidence of active or recent termite or powder post beetle infestations, although there were indications of past infestations at both houses. Upon inspecting James Eason's home, Mr. Griffin found that it had been treated for powder post beetles and for termites. However, Mr. Griffin found no evidence that termites had ever been present and, in his opinion, powder post beetles had not been present in May 1984.

Defendant Thompson did not testify or offer evidence. Defendant Childers testified that Thompson was the owner of Sun Exterminating Company and that Thompson had performed the inspections and rendered the treatment at each of the four homes. Childers also testified that each of the four homes showed signs of active powder post beetle infestations and that he sold only powder post beetle treatment to those homeowners. Two additional witnesses testified concerning transactions which they had had with defendants; both were satisfied with the exterminating work. Another witness, Calvin Bryant, corroborated defendant Childers' testimony with respect to the transaction with Floyd Anderson.

II

APPEAL OF WILLIAM ELLIS CHILDERS

[1] Defendant Childers contends that the bills of indictment are fatally defective because they do not state a causal connection between the alleged false representations by defendant and the payment of money by the victims. We find the indictments sufficient.

A bill of indictment must allege "facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant . . . of the conduct which is the subject of the accusation." G.S. 15A-924 (a)(5). With respect to a bill of indictment for obtaining property by false pretense, there must be allegations sufficient to state a causal connection between the alleged false representation and the obtaining of the property or money. *State v. Whedbee*, 152 N.C. 770, 67 S.E. 60 (1910). However, no particular form of allegation is required; an allegation that the money or property was obtained "by means of a false pretense" is sufficient to allege the causal connection where the facts alleged are adequate to make clear that the delivery of the property was the result of the false representation. *State v. Dale*, 218 N.C. 625, 12 S.E. 2d 556 (1940); *State v. Claudius*, 164 N.C. 521, 80 S.E. 261 (1913).

Each of the indictments alleged that defendant obtained a specified sum of money from the victim "by means of a false pretense." The false pretense was thereafter more fully described as:

> The said defendant requested of the said [homeowner] to inspect his house for termites and following such inspections stated to the said [homeowner] that there were termites under his house and that he, the said defendant, would spray and treat the said termites for the payment of [specified amount] from the said [homeowner]. . . . That at the time the said defendant told [homeowner] that he would spray and treat his house for termites he, the said defendant, knew in fact that such treatment was not for the purpose of termites. . . .

While perhaps not artfully drawn, the bills of indictment make clear that defendants obtained money as a result of their misrepresentations that termites were present and that they would provide the treatments necessary to exterminate them. This assignment of error is overruled.

[2] Defendant Childers next contends that the trial court erred in denying his motions to dismiss, post verdict motions and post trial motions, all made upon grounds that the evidence was insufficient to support his convictions. He contends that the evidence fails to show that his representations to the four homeowners,

that their homes were in need of treatment for termites, were false or that he knew the representations were false.

The standard by which the sufficiency of the evidence in a criminal case is measured is whether there is substantial evidence of each material element of the offense. *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982). The evidence is to be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). All of the evidence favorable to the State, including that offered by defendant, is taken into consideration. If the evidence, when so viewed, allows a reasonable inference to be drawn as to defendant's guilt, it is sufficient. *Id.*

The elements of the crime of obtaining property by false pretense, as defined by G.S. 14-100, are "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E. 2d 277, 286 (1980). Viewed in the light most favorable to the State, the evidence permits a reasonable inference that defendants falsely represented to each of the four homeowners that active infestations of termites were present in their homes and that treatment therefor was necessary, when in fact no active termite infestations were present. Defendant Childers testified that there were no signs of active termite infestations at any of the houses, although there were signs of old infestations at the Eason and Lee homes. His testimony supports a reasonable inference that he knew that his representations with respect to the presence of active termite infestations were false and that he made these representations in order to induce the respective homeowners to pay for termite treatments which were unnecessary. In addition, the evidence supports a reasonable inference that defendants misrepresented the nature of the treatment which was actually provided. That each of the homeowners was actually deceived by defendants' false representations is clear. We hold that the evidence was sufficient to overcome defendant Childers' motions.

In related assignments of error, defendant contends that the trial court erred in submitting the cases to the jury on theories

unsupported in the bills of indictment and that the evidence with respect to the Anderson and Peel cases was insufficient when viewed in terms of the allegations of the indictments. We find no merit in either of these contentions. The trial court's instructions permitted the jury to find defendant guilty if the State proved, beyond a reasonable doubt, that defendant falsely represented to the homeowner the presence of an active termite infestation and the necessity for treatment, and falsely represented the nature of the treatment provided, with knowledge that the representations were false and with the intent to deceive the homeowner, and that defendant obtained money from the homeowner by actually deceiving him by the false representation. This is precisely the theory alleged in each of the bills of indictment and, as previously discussed, is supported by the evidence in each case. Although the indictments contained additional factual allegations, they were not necessary elements of the offenses charged and were therefore not necessary to be proved. *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978). These assignments of error are overruled.

[3] By his final assignment of error, defendant Childers contends that the trial court erred in permitting the District Attorney to cross-examine him concerning previous transactions with other elderly homeowners. Defendant contends that the questions amounted to an impermissible attack on his credibility, prohibited by G.S. 8C-1, Rule 608(b). In our view, evidence with respect to other similar transactions in which defendant had engaged as an employee of Sun Exterminating Company was relevant to show motive, intent, plan and knowledge and was a generally permissible inquiry pursuant to G.S. 8C-1, Rule 404(b). In his brief, however, defendant specifically addresses one question which the District Attorney asked him concerning his flight from a home where he had solicited business and his subsequent apprehension by police officers. The record reflects that no objection was made to the question nor was any exception noted in the record. Defendant has therefore waived his right to raise the issue on appeal. G.S. 8C-1, Rule 103; N.C. R. App. P. 10(b)(1).

III

APPEAL OF GLENN THOMPSON

By his first assignment of error, defendant Thompson contends that the trial court erred in joining the four charges against

him for trial and in consolidating his cases with those of defendant Childers. We find no error in either respect.

[4] G.S. 15A-926(a) permits joinder of offenses for trial when the offenses are based "on a series of acts or transactions connected together. . . ." Each of the four charges against defendant Thompson was transactionally connected in that they each involved a similar *modus operandi* and similarities in the victims' ages, economic circumstances and literacy. Other similar circumstances existed as to time and location. Considering these circumstances, the trial court could properly find them indicative of a single scheme or plan to defraud elderly homeowners under the pretext of performing unnecessary insect extermination services. Thus, we find no abuse of the trial court's discretion in permitting the offenses to be joined. *State v. Bracey*, 303 N.C. 112, 277 S.E. 2d 390 (1981); *State v. Neal*, 76 N.C. App. 518, 333 S.E. 2d 538 (1985), *disc. rev. denied*, 315 N.C. 394, 338 S.E. 2d 884 (1986).

[5] Charges against multiple defendants may be joined for trial, pursuant to G.S. 15A-926(b)(2), when each defendant is charged with accountability for each offense, or when the several offenses were part of a common scheme or plan. "[W]here there are two indictments in which both defendants are charged with the same crimes, then they may be consolidated for trial in the discretion of the court." *State v. Mitchell*, 288 N.C. 360, 364, 218 S.E. 2d 332, 335 (1975), *death sentence vacated*, 428 U.S. 904, 96 S.Ct. 3209, 49 L.Ed. 2d 1210 (1976). The court's ruling is not reviewable on appeal absent a showing of abuse of discretion. *State v. Rinck*, 303 N.C. 551, 280 S.E. 2d 912 (1981). Defendant Thompson has not shown, nor has he argued, that the trial court abused its discretion.

[6] Defendant Thompson next assigns error to the court's denial of his motion for mistrial due to alleged juror misconduct. During the course of the trial, one of the prosecuting witnesses, Booker Lee, was observed conversing with two jurors on separate occasions during recesses. After each occurrence, the court conducted an inquiry and determined that the contact was casual and not related to the case.

Where juror misconduct is alleged, it is the duty of the trial judge to investigate the matter and to make such inquiry as is appropriate under the circumstances. *State v. Jackson*, 77 N.C. App.

491, 335 S.E. 2d 903 (1985). The court's determination of whether misconduct has occurred, and if so, whether it is prejudicial, will not be disturbed on appeal unless the ruling is clearly an abuse of discretion. *Id.* Defendant Thompson has failed to show that he was prejudiced by the casual conversation between Booker Lee and either of the jurors, or that the trial court abused its discretion in denying the motion for mistrial.

[7] Defendant Thompson also contends that the trial court impermissibly expressed an opinion in questioning the State's witness, Bennie Griffin. We disagree. The court prefaced its questions by saying that the questions were for the purpose of clarifying the witness's previous testimony. The court explained that it had not understood the previous testimony and provided counsel an opportunity to examine Mr. Griffin further concerning his responses to the court's questions. It is well settled in this State that the trial court may ask a witness questions in order to clarify confusing testimony, so long as the court does not intimate an opinion as to a factual issue, the defendant's guilt, or the weight or credibility of the evidence. *State v. Blackstock*, 314 N.C. 232, 333 S.E. 2d 245 (1985). We discern no such expression of opinion from the questions asked by the trial court.

[8] By his next assignment of error, defendant Thompson contends that the evidence was insufficient to support his convictions as an aider and abettor to defendant Childers. He argues that the evidence shows only that he was present and conducted the initial inspections and the subsequent spraying, all at Childers' direction. We deem it unnecessary to repeat the evidence or the test by which the sufficiency of the evidence is measured, which we discussed in our consideration of defendant Childers' appeal. Suffice it to say that the evidence permits a reasonable inference to be drawn that defendant Thompson, by his presence and his participation in the initial termite inspections and subsequent spray treatments, assisted defendant Childers in the perpetration of the false pretense upon each of the four homeowners. The issue of his guilt as an aider and abettor was properly submitted to the jury.

Defendant Thompson also contends that the trial court committed reversible error in its jury instructions by misstating a contention of fact unsupported by the evidence. We note that defendant failed to object at trial and has, therefore, failed to

preserve the exception for review. N.C. R. App. P. 10(b)(2). In our discretion, however, we have reviewed the court's instruction and find that the portion of the charge to which defendant excepts was a correct statement, contained in the final mandate, of the elements which the State was required to prove in order to warrant a conviction. This assignment of error is overruled.

[9] Defendant Thompson finally contends that because he presented no evidence and objected to joinder of his cases with those of defendant Childers, he should have been permitted to make the last argument to the jury. Rule 10, General Rules of Practice for the Superior and District Courts, provides: "In a criminal case, where there are multiple defendants, if any defendant introduces evidence the closing argument shall belong to the solicitor." Defendant Childers offered evidence, therefore the State was entitled to conclude the arguments. *State v. Taylor*, 289 N.C. 223, 221 S.E. 2d 359 (1976).

IV

CONCLUSION

We conclude that each of the defendants received a fair trial, free from prejudicial error.

No error.

Judges EAGLES and COZORT concur.

C. EVERETTE LEWIS v. LEWIS NURSERY, INC. AND AMERICAN FOODS, INC.

No. 855DC629

(Filed 15 April 1986)

1. Agriculture § 7— term of lease—issue of fact—summary judgment improper

The trial court erred in entering summary judgment for plaintiff landlord in a declaratory judgment action to determine ownership in the proceeds realized from the harvest and sale of strawberry plants grown on the leased land where there was an issue of fact as to whether the lease was intended to run for one year, thus triggering the application of N.C.G.S. § 42-23, or for less than one year.

2. Agriculture § 7— term of lease—right to emblements

If the parties' lease was for less than one year, the tenancy would be an estate for years automatically terminating on 31 December 1978 without need for notice, and defendant who was holding over would thereafter be a tenant at sufferance not entitled to emblements, since there is no right or privilege granted by law entitling a holdover tenant to gather the annual yield of land resulting from one's labor after the expiration of a fixed tenancy unless the landlord recognizes the tenancy for an additional period.

3. Agriculture § 7— term of lease—notice of termination—extension of lease—right to proceeds from sale of crop

If the parties' lease was for one year, N.C.G.S. § 42-23 applied requiring that one month's notice to quit be given, and failure to give notice would result in extension of the tenancy for another period, thus entitling defendant, as tenant and owner of strawberry plants on the leased land, to proceeds realized from their harvest and sale during the extension.

4. Waiver § 2— ownership of crops—statement not waiver of claim

In a declaratory judgment action to determine ownership in the proceeds realized from the harvest and sale of strawberry plants after expiration of the parties' lease, plaintiff's statements at his deposition that he claimed no ownership interest in the plants did not amount to a waiver of his right to the proceeds from their sale.

5. Agriculture § 7; Landlord and Tenant § 7; Fixtures § 2— strawberry plants—no trade fixtures

Where defendant contended that it was entitled to remove strawberry plants as trade fixtures even after the end of its tenancy, the trial court did not err in concluding as a matter of law that the plants were not trade fixtures, since trade fixtures are items of personal property affixed to the leasehold which are necessary for or beneficial to the operation of a trade or business on the property, but the plants in question were annual yield in the nature of crops, to be gathered in a single season.

APPEAL by defendant from *Tucker, Judge.* Order entered 11 March 1985 in District Court, PENDER County. Heard in the Court of Appeals 21 November 1985.

R. V. Biberstein, Jr., for plaintiff appellee.

Poyner, Geraghty, Hartsfield & Townsend, by Cecil W. Harrison, Jr., for defendant appellant.

BECTON, Judge.

In this declaratory judgment action, plaintiff C. Everette Lewis (Lewis) and defendant Lewis Nursery, Inc. (Nursery) both claim ownership of funds held in an escrow account. The funds

are the proceeds realized from the harvest and sale of strawberry plants grown on twelve acres in Pender County, North Carolina. Both parties filed motions for summary judgment. The trial court granted summary judgment in favor of plaintiff Lewis, and defendant Nursery appeals. We reverse and remand in part and affirm in part.

I

The material facts are not in dispute. Lewis owns a twelve-acre tract of land in Pender County. On 8 February 1978, Lewis leased the property to American Foods, Inc. (American) "for Ninety Dollars ($90.00) per acre for the 1978 calendar year." American had been using and cultivating the property before the lease was executed. Lewis knew American would be growing strawberry plants, removing them during their dormant season, and reselling them to nurseries. The dormant season in Pender County usually occurred between December and February, depending on weather conditions. In the 1978-79 growing season, the strawberry plants were dormant and ready for harvesting from late December 1978 through January 1979.

In July 1978, American sold and assigned its leasehold in Lewis' tract of land to defendant Nursery. Defendant Nursery received no actual notice that its leasehold would terminate at the end of the year or that Lewis would not allow Nursery to complete the harvest after 31 December 1978. On 31 December 1978, nearly all the plants on the twelve-acre tract remained in the ground.

On 3 January 1979, Lewis notified Nursery that its lease had expired on 31 December 1978 and that further harvesting should not take place until proper arrangements were made. Arrangements were made in the form of an escrow agreement which allowed Nursery to harvest the strawberry plants, sell them, and deposit the proceeds in an escrow fund. According to the agreement, Nursery was to be paid for harvesting and selling the plants. The plants were harvested between 24 February and 9 April 1979.

At the hearing on the motions for summary judgment, the trial court concluded as a matter of law that the lease created an estate for years; that the tenant had no right to emblements; that

G.S. Sec. 42-23 did not apply in this case; that the plants were not "trade fixtures"; that the plants became the property of the landlord on 31 December 1978; and that Lewis was entitled to the proceeds in escrow. The court then ordered the escrow agent to pay over the funds to plaintiff Lewis.

Defendant Nursery contends the trial court erred in granting plaintiff Lewis' motion for summary judgment and denying Nursery's motion for summary judgment for three reasons: (1) the lease is an agricultural lease governed by N.C. Gen. Stat. Sec. 42-23 (1984) which requires one month's notice before terminating the tenancy; (2) Lewis waived any ownership rights he might have had; and (3) the strawberry plants were trade fixtures which Nursery was entitled to remove upon termination of its tenancy. We reverse the judgment on the first issue and remand the case for the jury to determine whether the lease was for one year. We affirm on all other issues.

II

[1] Defendant Nursery first contends that G.S. Sec. 42-23 applies to the lease in the case at bar. This statute provides:

> All agricultural leases and contracts hereafter made between landlord and tenant for a period of one year or from year to year, whether such tenant pay a specified rental or share in the crops grown, such year shall be from December first to December first, and such period of time shall constitute a year for agricultural tenancies in lieu of the law and custom heretofore prevailing, namely from January first to January first. In all cases of such tenancies a notice to quit of one month as provided in G.S. 42-14 shall be applicable. If on account of illness or any other good cause, the tenant is unable to harvest all the crops grown on lands leased by him for any year prior to the termination of his lease contract on December first, he shall have a right to return to the premises vacated by him at any time prior to December thirty-first of said year, for the purpose only of harvesting and dividing the remaining crops so ungathered. But he shall have no right to use the houses or outbuildings or that part of the lands from which the crops have been harvested prior to the termination of the tenant year, as defined in this section.

> This section shall only apply to the counties of . . . Pender . . . .

Although this statute contains some ambiguities, we agree with defendant Nursery that for a lease to fall within the statute it must be both (1) for an agricultural purpose, and (2) "for a period of one year or from year to year."

Plaintiff Lewis filed a Complaint which provided in Paragraph 4: "On or about February 15, 1978, the Plaintiff leased to American Foods, Inc., these 12 acres of land for the 1978 calendar year." This was admitted in defendant's Answer. This statement is susceptible to two interpretations: either the parties intended the lease (1) to be for the entire 1978 year, but they executed the lease in February, or (2) to run from mid-February 1978 to the end of the 1978 calendar year. In either case, the term was for a definite period; therefore, it created an estate for years. *See Davis v. McRee*, 299 N.C. 498, 503, 263 S.E. 2d 604, 607 (1980). And there is no dispute that, according to the lease, the termination date was 31 December 1978. The issue is whether the lease was intended to run for one year, thus triggering the application of G.S. Sec. 42-23, or for less than one year. The trial court concluded as a matter of law that "the lease was for a period of less than one year." Accordingly, the court concluded that G.S. Sec. 42-23 did not apply and entered summary judgment. This was improper.

Summary judgment should not be entered unless there are no genuine issues of material fact for the jury to resolve and it appears the movant is entitled to judgment as a matter of law. *Wiggins v. City of Monroe*, 73 N.C. App. 44, 326 S.E. 2d 39 (1985). In the case at bar, the trial court's conclusion that the lease ran for less than one year is not compelled by the evidence. A jury may reasonably conclude that the agricultural lease[1] was intended to run for the *entire* 1978 calendar year. *Cf. Davis*, 299 N.C. at 503, 263 S.E. 2d at 607 ("The parties to a lease may provide that the commencement of the lease term operate retrospectively." (Citation omitted.)). There is evidence to support a finding that

1. We reject as specious Lewis' argument that a lease cannot be an agricultural lease unless the document itself explicitly states as much.

the parties simply delayed the execution of the lease.[2] Lewis testified in his deposition that the lease was originally intended to "run for one year." This is a genuine issue of material fact. Therefore, the judgment is vacated, and the case is remanded for the court to submit this issue to the jury.

[2] If the jury finds that the lease was for less than one year, G.S. Sec. 42-23 will not apply. The tenancy would be an estate for years, automatically terminating on 31 December 1978 without need for notice. *See Midimis v. Murrell*, 189 N.C. 740, 128 S.E. 150 (1925). Thereafter, Nursery would have been holding over and would have remained a tenant at sufferance until Lewis elected to treat Nursery as a trespasser or to recognize it as a tenant from year to year. *See Coulter v. Capital Finance Co.*, 266 N.C. 214, 146 S.E. 2d 97 (1966); *Kearney v. Hare*, 265 N.C. 570, 144 S.E. 2d 636 (1965).

It is clear from the evidence that Lewis chose to dispossess Nursery rather than recognize a new term: Lewis did not accept rent for a new term and gave Nursery notice of eviction on 3 January 1979, three days after the tenancy expired. *See Kearney; Webster's Real Estate Law in North Carolina* Sec. 87 (P. Hetrick rev. ed. 1981); *see also Simmons v. Jarman*, 122 N.C. 195, 29 S.E. 332 (1898). *See generally* 49 Am. Jur. 2d *Landlord and Tenant* Secs. 1143-45 (1970). And because we conclude in Part IV, *infra*, that the strawberry plants were in the nature of crops and were not trade fixtures, Nursery would have no right to the proceeds from the sale of the plants. A tenant at sufferance, who holds over after a tenancy for years, is not entitled to emblements; that is, there is no right or privilege granted by law entitling a holdover tenant to gather the annual yield of land resulting from one's labor after the expiration of a fixed tenancy unless the landlord recognizes the tenancy for an additional period. *Sanders v. Ellington*, 77 N.C. 255, 258 (1877); *Webster's, supra*, Secs. 81, 107; *cf. Webster's, supra*, Secs. 92, 103 (When the termination date of the tenancy is not known to the tenant, for example in a tenancy from year to year or in a tenancy at will, then the tenant has a right to emblements.).

2. To the extent that the court below engaged in contract interpretation, it should have resolved ambiguities in favor of the lessee, especially when, as here, the lessee had no part in preparing the lease document. *Coulter v. Capital Finance Co.*, 266 N.C. 214, 220, 146 S.E. 2d 97, 101-02 (1966).

[3] If the jury finds that the lease was for one year, the trial court must apply G.S. Sec. 42-23. This statute requires that notice to quit be given, in accordance with G.S. Sec. 42-14, one month before the expiration of the tenancy, even if the tenancy is an estate for years.[3] Because the statute prescribes 1 December as the expiration of the lease year, notice must be given by the preceding 1 November. The evidence shows that notice was not given by Lewis until 3 January 1979.

Generally, the effect of failure to provide notice when it is required under G.S. Sec. 42-14 is that the parties are bound to a new term. *See Simmons; Webster's, supra,* Sec. 97. This rule was designed for periodic tenancies; in the absence of notice to the contrary, the law implies the parties' intent to extend the tenancy for another period. We believe the legislature intended to apply the same presumption to agricultural tenancies, even those for fixed one-year terms, under G.S. Sec. 42-23. First, it is reasonable to presume that in all agricultural tenancies a hold-over tenant intends to remain on the land for another full year to harvest a crop. And a landlord who fails to notify an agricultural tenant to quit the premises at the end of a season should expect the tenant to remain for another year. Second, to rule otherwise would render the notice requirement in G.S. Sec. 42-23 meaningless in the case of a fixed one-year term; failure to give notice as required by the legislature would have no effect, because the tendency for one year would terminate automatically, leaving the tenant at sufferance no right to emblements or other remedies.

Therefore, if G.S. Sec. 42-23 applies, the parties would be bound to a new one-year term. Nursery, as the tenant and owner of the strawberry plants, would be entitled to the escrow proceeds, but it would also be liable for rent to Lewis.

III

[4] Defendant Nursery next argues that Lewis waived his right to the escrow funds when he stated several times at his deposition that he claimed no ownership interest in the strawberry plants. A careful reading of the deposition, however, reveals that

3. We recognize that notice is not usually required for an estate for years because the tenancy ends on a specific predetermined date. Perhaps the legislature intended to provide additional protection for agricultural lessees by requiring notice of one month in all annual leases.

Lewis did not intentionally waive his legal right. The statements quoted by defendant Nursery were responses to questions posed by defendant's attorney, and they related to whether Lewis had any direct claim to the strawberry plants prior to the expiration of the lease. Later in his deposition, Lewis explained his position:

> Q. But after the expiration of the lease what was your position?
>
> A. It was my land and anything remaining on it at the time was mine.
>
> Q. And does that explain this lawsuit?
>
> A. Yes.

"A waiver is a voluntary and intentional relinquishment of a known right or benefit. It is usually a question of intent." *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E. 2d 190, 195 (1975) (citation omitted). The plaintiff in the case at bar did not waive his right to the escrow funds.

IV

[5] Defendant Nursery's final argument is that the trial court erred in concluding as a matter of law that the strawberry plants were not trade fixtures. Defendant contends it was entitled to remove the plants as trade fixtures even after the end of its tenancy. *See Ilderton Oil Co. v. Riggs*, 13 N.C. App. 547, 186 S.E. 2d 691 (1972). Plaintiff Lewis contends, and we agree, that the strawberry plants were "end products" in the nature of crops, not trade fixtures. Therefore, the doctrine of emblements will apply if the jury on remand finds that the lease was for less than one year. *See* Part II, *supra.*

Trade fixtures are items of personal property affixed to the leasehold that are necessary for or beneficial to the operation of a trade or business on the property. *See Stephens v. Carter*, 246 N.C. 318, 98 S.E. 2d 311 (1957) (Gasoline storage tanks were trade fixtures at a service station.). Defendant relies on the annotation at 125 A.L.R. 1406 (1940) and cases cited therein for the proposition that plants grown for nursery purposes are distinguishable from crops, and should be regarded as trade fixtures. But the defendant uses language from the annotation out of context. The annotation discusses the ancient rule that things growing or af-

fixed to land become part of the realty. The exceptions established by case law are noted in order to demonstrate the relaxation of this rule when a tenant grows things as part of a business or builds a greenhouse or similar structure. These items do not become part of the realty. Rather, they are considered personal property. 125 A.L.R. at 1411. The cases discussed in the annotation and cited by defendant considered whether nursery stock becomes part of the landlord's realty or remains the personal property of the tenant in various situations. Courts used a legal fiction—that the plants were "severed" from the realty—in order to allow the tenant to sue for wrongful conversion of the tenant's growing nursery stock or to protect the tenant from liens executed on the realty of the landlord. But the decision to treat nursery stock as personal property was not intended to alter the rule of emblements—that annual yield must be removed before the end of the tenancy—and nursery stock generally was treated in the same way as crops. *See* 125 A.L.R. at 1412-13. The concept of "trade fixtures" was used by way of analogy to enable tenants to remove structures such as greenhouses, when they were used for a trade or business, even though a greenhouse built onto a personal residence for private enjoyment became part of the land and could not be removed.

It is sometimes important to distinguish between plants that are part of realty and plants that are considered personalty. *See generally* 63A Am. Jur. 2d *Property* Sec. 19 (1984) (whether nursery stock is part of realty or personal property). This determination depends on the facts of each case. *Springs v. Atlantic Refining Co.*, 205 N.C. 444, 450, 171 S.E. 635, 638 (1933). Whether the parties intended that the tenant would remove the item upon the expiration of the lease is one important factor. *See Western North Carolina Railroad v. Deal*, 90 N.C. 110 (1884). But in the case at bar, the inquiry is not whether the items were realty or personalty; the parties agree that the strawberry plants were personalty which the tenant was expected to remove. The issue is whether they are more like "crops" or more like "trade fixtures." In this regard, the annotation quoted above discusses a helpful opinion:

> Attention is called to certain cases distinguishing nursery stock from "crops" or similar products of the soil . . . . In *Kennedy v. Spalding* (1936) 143 Kan. 76, 53 P. (2d)

804, the court held that nursery stock two or more years old did not constitute "crops," defining that term as any product of the soil grown and raised annually and gathered during a single season. . . .

125 A.L.R. at 1415.

The type of strawberry plants involved in the case at bar are raised annually and gathered during a single season. In contrast, trade fixtures generally are items designed to adapt the premises to the tenant's business. 35 Am. Jur. 2d *Fixtures* Sec. 40 (1967). They are, for example, machinery; mining, agricultural, industrial or other specialized equipment; particular buildings; heating, cooling, electrical, plumbing and refrigeration systems; storage facilities; and some specialized appliances. *See generally id.* Secs. 75-127, at 759-97. We have found no cases in this jurisdiction identifying the end product of a trade or business as a trade fixture. *Cf., e.g., Ilderton Oil Co.* (storage tank, pump, and accessory equipment); *Stephens* (storage tanks); *Causey v. Orton*, 171 N.C. 375, 88 S.E. 513 (1916) (poultry houses and fences); *Asheville Woodworking Co. v. Southwick*, 119 N.C. 611, 26 S.E. 253 (1896) (bar counter and bar fixtures); *Deal* (railroad depot building).

We conclude that the strawberry plants in this case were personalty; they were not affixed to the realty so as to become part of it. But they were not "trade fixtures" as that term is defined and applied in this State. The plants were annual yield in the nature of crops, to be gathered in a single season. Therefore, if the jury finds that the lease was for less than one year, Nursery would have been a tenant at sufferance after 31 December 1978, and it would not be entitled to emblements. The proceeds from the sale of the plants would belong to Lewis.

For the reasons stated in Part II of the opinion, the judgment of the trial court is reversed, and the case is remanded for a jury trial on whether the lease was for one year or for less than one year. We affirm on all other issues.

Reversed and remanded in part and affirmed in part.

Judges WEBB and COZORT concur.

BARRY K. BUCHELE, M.D. v. PINEHURST SURGICAL CLINIC, P.A.

No. 8520SC620

(Filed 15 April 1986)

1. **Master and Servant § 9— employee's right to bonus—conclusion unsupported by findings**

The trial court's broad conclusion that the granting of bonuses to employees was discretionary with defendant's board of directors was incomplete and not entirely supported by the finding of fact that "bonuses may be paid by [defendant] pursuant to a bonus plan regularly adopted by the Board of Directors," since the evidence showed that the board did not have the discretion, after it had already determined that plaintiff's department would receive a bonus, to alter the bonus plan for that department to exclude plaintiff from the bonus distribution.

2. **Corporations § 16— agreement to purchase stock—payment not tendered—no right to distribution of earnings to shareholders**

Plaintiff was not entitled to a distribution of retained earnings to shareholders in defendant where plaintiff's employment contract provided that plaintiff agreed to buy one share of stock in defendant at the beginning of his second year of employment, but plaintiff never bought the required share, nor did he tender payment within a reasonable time or demonstrate circumstances excusing such tender.

Judge WEBB dissenting.

APPEAL by plaintiff from *Albright, Judge.* Judgment entered 24 January 1985 in Superior Court, MOORE County. Heard in the Court of Appeals 21 November 1985.

Joe McLeod and John Michael Winesette for plaintiff appellant.

Van Camp, Gill, Bryan, Webb & Thompson, P.A., by James R. Van Camp, for defendant appellee.

BECTON, Judge.

In this contract dispute, the plaintiff, Barry K. Buchele, M.D., brought an action against his former employer, Pinehurst Surgical Clinic, P.A. (Pinehurst), claiming that he was entitled to a share of profits and retained earnings under his employment contract. After a non-jury trial, the trial court entered judgment for the defendant, and Dr. Buchele appeals.

I

Dr. Buchele is licensed to practice medicine in North Carolina and specializes in obstetrics and gynecology. Dr. Buchele began working for Pinehurst on 20 August 1979 without a written contract. He received a copy of his contract approximately eight months later, but he did not sign it until 17 March 1981. This contract was similar to a sample contract that was shown to Dr. Buchele before he began working for Pinehurst.

As part of his employment compensation, Dr. Buchele participated in his department's profit-sharing plan. Each of Pinehurst's several departments accounted for and shared its own profits according to a plan approved by the Pinehurst Board of Directors. In Dr. Buchele's department, any profits distributed as bonuses were to be shared equally among those doctors who had shown a profit during the period of time covered by the bonus. His contract also provided that in the beginning of his second year at Pinehurst, Dr. Buchele would purchase one share of stock in Pinehurst.

On 8 April 1981, at a Board of Directors meeting, Dr. Buchele formally was asked to resign or to have his employment terminated by Pinehurst. In order to assist Dr. Buchele in accomplishing the requirements for certification in his specialty, the Board of Directors consented to making Dr. Buchele's resignation effective as of 20 August 1981. The Board accepted the resignation on 8 April 1981 with "all due rights of his contract" recognized up through 20 August 1981.

Also on 8 April 1981, apparently prior to the meeting of the Board of Directors, Pinehurst's Director of Administration sent a letter to Dr. Buchele stating that the Obstetrics and Gynecology Department accepted his resignation effective 20 August 1981, and that he would share in his department's subsequent bonus distribution if his financial status in the department were profitable. Although a bonus was distributed to Dr. Buchele's department, and Dr. Buchele's financial status was profitable during the relevant period of time, he never received any share of this bonus distribution under his department's plan. The other three doctors in his department divided the profits equally among themselves.

In May 1981, the Board of Directors voted to distribute retained earnings to shareholders of record. Dr. Buchele had never purchased the share of stock referred to in his employment contract, but he was listed in a memo as being entitled to receive a share of retained earnings equal to $3,046.00. He did not receive any of the retained earnings, which were distributed in September 1981.

In June 1981, Dr. Buchele requested information regarding benefits owed to him. He received a letter from the Department of Obstetrics and Gynecology and the Board of Directors dated 22 June 1981 delineating the benefits he was to receive. The letter did not mention bonuses, profits or retained earnings. Subsequently, Dr. Buchele was told orally that he would receive no bonus. He continued working and accepting his salary until 20 August 1981.

After receiving evidence and hearing arguments in a nonjury trial, the trial court made the following critical findings of fact, among others:

> That paragraph 11 of the contract provided, in essence, that bonuses may be paid by the Corporation pursuant to a bonus plan regularly adopted by the Board of Directors. That the payment of bonuses was discretionary with the Board of Directors.
>
> . . . .
>
> That in May of 1981, the Board of Directors of the Defendant Corporation voted to distribute the retained earnings of the Defendant to shareholders of record. That even though there was a memo distributed showing that the Plaintiff could receive $3,046.00 in retained earnings, the Plaintiff did not receive retained earnings as he was not a shareholder of the Defendant. That no other nonshareholder physician-employee received retained earnings.

The Court concluded as a matter of law:

> That pursuant to the terms of the written contract dated March 17, 1981 the distribution of bonuses was discretionary with the Defendant Corporation.

> That the Plaintiff was not a shareholder in the Defendant Corporation at the time that the retained earnings of the corporation were distributed and thus was not entitled to the retained earnings distribution.

Dr. Buchele contends on appeal that the trial court erred (1) in finding facts not supported by the evidence and (2) in failing to find facts as proposed by plaintiff.

II

[1] Dr. Buchele apparently concedes that the Pinehurst Board of Directors had the discretion either to pay bonuses or not to pay bonuses. The language in the contract, "[f]irst party may pay bonuses," compels such a conclusion. Nonetheless, Dr. Buchele asserts, and we agree, that the issue in this case is whether, once the Board decided to pay bonuses to Dr. Buchele's department, it was obligated to distribute the bonuses according to the plan already adopted and approved by the Board for the department in which Dr. Buchele worked.

The contract signed by Dr. Buchele included the following paragraphs:

> Subject to his due performance of his responsibilities hereunder and his observance of all the requirements herein set forth, second party [Dr. Buchele] shall enjoy all the benefits provided by first party [Pinehurst] for its professional employees, including participation in any profit sharing . . . plans.
>
> . . . .
>
> First party may pay bonuses to second party pursuant to a regularly adopted bonus plan of the department of which he is a member and which is approved by the Board of Directors of first party.

An internal Pinehurst memorandum entitled "PINEHURST SURGICAL CLINIC, P.A. BONUS DISTRIBUTION PLAN" provided, in part, ". . . the following bonus distribution plans, which have been submitted by the departments, are adopted to provide motivation and financial reward to those employees who have participated in helping the department reach corporate goals."

Specific plans for some of the departments provided for distribution of bonuses "in relationship to the productivity of the individual employee to the total productivity of his department." This was the plan for Class I employees (medical doctors) in the Urology, General Surgery, Plastic & Reconstructive Surgery, and Thoracic and Cardiovascular Surgery departments. The plan for Dr. Buchele's department, Obstetrics and Gynecology, provided: "The bonus will be distributed equally among the Class I employees of the department." The same language was adopted for the Orthopaedic Department and the Ear, Nose, Throat and Maxillofacial Surgery Department. A separate memorandum shown to Dr. Buchele at his employment interview with Pinehurst stated that his first year salary would be $45,000 plus moving expenses and that if he created a profit, he would "share equally in the Department's profit."

Pinehurst argues that the Board had given bonuses to Dr. Buchele in the past even though he was not in a profit situation, and on occasion the Board had elected not to distribute bonuses at all. One witness for Pinehurst testified that the Board had the absolute discretionary authority "to set bonuses or not set bonuses." We believe this misses the point. There was no evidence that a profitable physician, in a department that shared bonuses equally, was ever denied a bonus after the Board had granted bonuses to that physician's department and the other physicians in the department had shared the bonuses equally. The issue is whether the Board had the discretion to declare a bonus distribution for a department and then alter the previously adopted plan to the detriment of one doctor within that department. This issue was not explicitly addressed by the trial court, and it should have been resolved in the negative.

It appears from the evidence that the Pinehurst Board of Directors originally intended that Dr. Buchele would share equally in bonuses. The minutes of the Executive Committee meeting on 4 June 1980 stated in part:

> A fair amount of discussion ensued about a new man joining a department and the administrative expenses involved with such arrangements. At present, Ob-Gyn is scaling their $60,000 of administrative expense over three years regarding Dr. Buchele, and Dr. Buchele is meeting this obli-

> gation through salary, whereas he shares equally in bonuses. The General Surgery Department is dealing with the same problem via the bonus mechanism, not through salary.

This is consistent with the bonus distribution plans mentioned above. Dr. Buchele, a member of the Ob-Gyn Department, which shared bonuses equally, met his obligation for administrative costs through an adjusted or lower salary rather than a reduced bonus. The same obligation was met through adjusted bonuses, rather than salary, in the General Surgery Department, which shared bonuses "in relationship to the productivity of the individual employee to the total productivity of his department."

A bonus offered by an employer to encourage more efficient service by an employee is an enforceable supplementary contract even though the bonus may be measured by earnings or productivity rather than by a fixed sum. *Chew v. Leonard*, 228 N.C. 181, 44 S.E. 2d 869 (1947). Although the bonus plan in the case at bar was clearly discretionary in part, it was, by its own terms, "adopted to provide motivation and financial reward" to productive employees. We conclude that Dr. Buchele reasonably expected to share profits awarded to his department according to its specific plan. The trial court's broad conclusion that the granting of bonuses was discretionary with the Board of Directors is incomplete and not entirely supported by the finding of fact that "bonuses may be paid by the Corporation pursuant to a bonus plan regularly adopted by the Board of Directors." The evidence shows that the Board did not have the discretion, after it had already determined that Dr. Buchele's department would receive a bonus, to alter the bonus plan for that department to exclude Dr. Buchele from the bonus distribution. The judgment of the trial court is reversed on this issue, and the case is remanded for the court to determine the share of the bonus distribution to which Dr. Buchele was entitled, plus interest.

III

[2] The trial court found and concluded that Dr. Buchele was not a shareholder in Pinehurst. Dr. Buchele's contract provided in part:

> Second party agrees to buy one (1) share of stock in first party at the beginning of his second year of employment for

> One Hundred ($100.00) Dollars plus an equal share of the undistributed earnings and the value of the inventory as determined by the first party. At the termination of second party's employment first party shall repurchase the stock for One Hundred ($100.00) Dollars.

Pinehurst did not offer to sell, and Dr. Buchele did not seek or request to buy, a share of the Pinehurst Clinic. Dr. Buchele argues, without citing any authority, that because (1) he fulfilled his obligation under the contract for the required year, (2) Pinehurst recorded his share of retained earnings in its account ledger, and (3) Pinehurst failed to tender a share of stock for the nominal price of $100.00 to Dr. Buchele, that he became an equitable stockholder entitled to his share of the retained earnings.

Pinehurst is a professional association under N.C. Gen. Stat. Sec. 55B (1982), and it may issue capital stock to licensed medical doctors such as Dr. Buchele. The Business Corporation Act, Chapter 55, applies to Pinehurst to the extent that it does not conflict with the Professional Corporation Act. G.S. Sec. 55B-3.

Assuming, *arguendo*, that Pinehurst and Dr. Buchele entered into a binding post-incorporation subscription agreement, *see* G.S. Sec. 55-43(a), (b) & (c); *cf. MacCulloch v. Carolina Mines, Inc.*, 145 F. Supp. 421 (W.D.N.C. 1956), Dr. Buchele had the right to enforce the agreement "upon tender of his own performance or circumstances excusing such tender." Robinson, *North Carolina Corporation Law and Practice* Sec. 19-8 (3rd ed. 1983); *accord Schwartz v. Manufacturers' Casualty Insurance Co.*, 335 Pa. 130, 6 A. 2d 299 (1939); Annot., 122 A.L.R. 1048 (1939). The terms of the agreement indicate the parties' intention to exchange one share of stock for $100.00 plus an equal share of the undistributed retained earnings and inventory "at the beginning of [Dr. Buchele's] second year of employment."

Although Dr. Buchele did not tender payment for the stock at the beginning of his second year, the law would afford him a "reasonable time" within which to tender payment. *See Wilson v. Duplin Telephone Co.*, 139 N.C. 395, 52 S.E. 62 (1905); *cf. Hurdle v. White*, 34 N.C. App. 644, 651, 239 S.E. 2d 589, 593 (1977) (When no time of performance is specified, the law implies that an option to buy land may be exercised within a reasonable time.), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). While Dr. Buchele

was employed, the agreement to purchase the stock was executory on both sides. Of course, had Dr. Buchele tendered payment at that time, Pinehurst could not effectively withhold the stock certificate solely to avoid distributing retained earnings to him. *See generally* 18A Am. Jur. 2d *Corporations* Sec. 733, at 604 (1985). Nonetheless, Dr. Buchele did not tender payment at any time during his employment, even though the Board voted to distribute retained earnings in May 1981, the June 1981 letter (issued to Dr. Buchele at his request) did not mention his entitlement to retained earnings, and he was told before he left Pinehurst that he would receive no bonuses. Even in his Complaint, Dr. Buchele failed to assert his ability and willingness to tender payment, to allege his right to retained earnings, or to request that they be awarded to him. Under the facts of this case, Dr. Buchele neither tendered payment within a reasonable time nor demonstrated circumstances excusing such tender. There is no need to remand the case for findings on this issue. We affirm this portion of the case.

For the reasons set forth above, we

Reverse and remand in part and affirm in part.

Judge WEBB dissents.

Judge COZORT concurs.

Judge WEBB dissenting.

I dissent. I believe the evidence showed and the superior court properly found that it was within the discretion of the directors of Pinehurst Surgical Clinic, P.A. as to whether to pay a bonus to the plaintiff who was not a stockholder in the corporation. I vote to affirm.

HARDAWAY CONSTRUCTORS, INC. (SUCCESSOR AND ASSIGN TO B. F. DIAMOND CONSTRUCTION COMPANY, INC.) v. NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8510SC830

(Filed 15 April 1986)

1. **Highways and Cartways § 9— construction of barrier rails—method of construction—conclusion unsupported by findings of fact**

The trial court's findings of fact were insufficient to support its conclusion that the parties' construction contract contemplated that the only acceptable method of construction of barrier rails was by the use of a fixed form, since defendant's "Standard Specifications for Roads and Structures" did not require fixed form construction, and other provisions of the contract, which were detailed and specific, did not require fixed form construction or exclude slip forming of the barriers, the method which plaintiff used.

2. **Highways and Cartways § 9— construction of barrier rails—method of construction not spelled out—method agreed to by defendant—reduction in payment improper**

Section 108-5 of defendant's "Standard Specifications for Roads and Structures" applied to the parties' course of dealings in the construction of bridges and barrier rails so as to entitle plaintiff to funds withheld by defendant where plaintiff sought to use the slip forming rather than the fixed form method of construction for the barriers; defendant agreed but required plaintiff to sign a supplemental agreement reducing the amount of payment by $7 per lineal foot; plaintiff signed the agreement under protest and completed the job to defendant's satisfaction; section 108-5 provided for instances where the contract did not specifically require a method of construction, as in this case; and the section provided that "No change will be made in basis of payment for the construction items involved."

Chief Judge HEDRICK dissenting.

APPEAL by defendant from *Battle, Gordon, Judge*. Judgment entered 5 June 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1986.

This is a civil action instituted by plaintiff Hardaway Constructors, Inc. against defendant, North Carolina Department of Transportation. Plaintiff is a corporation organized under the laws of Georgia and the assignee of B. F. Diamond Construction Company, Inc. (B. F. Diamond), which has been merged into plaintiff (hereinafter referred to collectively as plaintiff). Defendant is a public agency with the statutory authorization to administer contracts for the construction of highways and bridges.

In April 1980, B. F. Diamond Construction Co., Inc., was awarded a contract by defendant to build dual bridges on U.S. 17 over Lake Drummond Canal at South Mills, North Carolina, Project No. 8.1112203 in Camden County. The terms of the contract included, *inter alia*, that B. F. Diamond was to build 8,537.8 feet of concrete barrier rail at the price of forty-two dollars ($42.00) per lineal foot. On 14 August 1981, B. F. Diamond informed defendant of its intention to subcontract the construction of the barrier rail to A. C. Auckerman and that slip-forming would be used as the method of constructing the barrier rail. Defendant refused to approve the use of slip-forming as a method of construction unless B. F. Diamond executed a supplemental agreement with a reduction of seven dollars ($7.00) per lineal foot equaling a total reduction of $59,764.60 from the contract price. B. F. Diamond executed the supplemental agreement under protest and attached a letter expressly reserving its objections to the deduction of seven dollars ($7.00) per lineal foot. Slip-forming was used as the method of constructing the barrier rail which was completed in June 1982. Thereafter, defendant accepted the 8,537.8 lineal feet of barrier, but withheld seven dollars ($7.00) per lineal foot.

On 4 January 1983, B. F. Diamond in accordance with the terms and conditions of the contract filed a written and verified claim pursuant to G.S. 136-29. Defendant denied B. F. Diamond's claim. On 30 December 1983, plaintiff, as successor and assign to B. F. Diamond, instituted this action by the filing of its complaint.

Plaintiff's complaint stated three claims for relief. The first claim for relief sought to recover the $59,764.60 deducted from the contract price pursuant to the supplemental agreement executed under protest. In plaintiff's second claim for relief plaintiff sought to recover $11,653.00 for clearing and grubbing of land which was performed. The third claim for relief sought $71,417.60 for breach of contract in the alternative should the court determine that plaintiff was not entitled to proceed pursuant to G.S. 136-29 on its first and second claims for relief. Defendant filed a motion to dismiss this action for failure to state a claim upon which relief may be granted. Rule 12(b)(6), N.C. Rules Civ. P. Defendant also filed a motion to dismiss this action for lack of subject matter jurisdiction. Rule 12(b)(1), N.C. Rules Civ. P. In an order filed 23 January 1984, the court denied defendant's motions to dismiss as to plaintiff's first and second claims for relief.

However, the court granted defendant's motions to dismiss as to plaintiff's third claim for relief. Defendant, in his amended answer, asserted two defenses to plaintiff's claims. Defendant's first defense included general denials of the allegations of plaintiff's complaint and specific denials of all allegations that defendant had any contractual relationship with Hardaway Constructors, Inc. Defendant's second defense included, *inter alia*, the averment that the plans and specifications showed that fixed forms were to be used in the construction of the barrier rails; and that B. F. Diamond could have proceeded to use fixed forms, but that it elected to voluntarily enter into a supplemental agreement with defendant to use slip-forming at the reduced price. Defendant also averred that the clearing and grubbing, which plaintiff sought recovery for, were not separate pay items. This cause of action was tried before Judge Battle without a jury. The parties submitted a set of stipulated facts, a copy of their contract and a copy of the Standard Specifications for Roads and Structures dated 1 July 1978. In a judgment filed 5 June 1985, the court concluded, *inter alia*, as a matter of law that defendant was fully authorized to require a reduction in price when the construction method for the barrier rails was changed at plaintiff's request from fixed forms as contemplated by the standard specifications and special provisions. The court denied all claims for relief set forth in plaintiff's complaint. Plaintiff appeals.

Sanford, Adams, McCullough & Beard, by Charles C. Meeker, for plaintiff appellant.

Attorney General Rufus Edmisten, by Assistant Attorney General Evelyn M. Coman, for defendant North Carolina Department of Transportation.

JOHNSON, Judge.

[1] Plaintiff's appeal does not bring forward its second Assignment of Error with respect to that portion of the judgment denying its second claim for relief. We deem that plaintiff's second Assignment of Error is abandoned. Rule 28(a), N.C. Rules App. P. Plaintiff's first and third Assignments of Error are both with respect to plaintiff's first cause of action. The first question presented for our review by way of plaintiff's appeal is whether the trial court erred in its conclusion of law that the Standard

Specifications and Special Provisions incorporated by the parties contemplated the construction of barrier rails by the use of a fixed form.

When the trial judge sits as the trier of fact the judgment rendered will not be disturbed on the theory that the evidence did not support his findings if there is competent evidence to support the judgment. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E. 2d 316 (1976). However, the record may clearly reveal that the court erred in its legal conclusions from the facts. *H. V. Allen Co. v. Quip-Matic, Inc.*, 47 N.C. App. 40, 266 S.E. 2d 768, *cert. denied*, 301 N.C. 85, 273 S.E. 2d 298 (1980).

The conclusions of law which plaintiff excepts to are as follows:

> Based upon the foregoing finds (sic) of fact, the Court concludes as a matter of law that the Standard Specifications and Special Provisions incorporated by the parties in their contract control the disposition of this controversy; that these documents contemplated the construction of barrier rails by the use of fixed form; . . . that under the specifications the DOT [defendant] was fully authorized to require a reduction in price when the construction method for the barrier rails was to be changed at the request of Hardaway.

The court, pursuant to the parties' stipulation, found as fact the following:

> 12. The contract specifications for this project include the 'North Carolina Department of Transportation—Raleigh—Standard Specifications for Roads and Structures,' dated July 1, 1978 ('Standard Specifications') as well as all special provisions in the document entitled, 'Contract and Contract Bonds for Project No. 8.1112203, F75-5(13)' ('Contract').

The two sections of the contract, which the court quotes in its pertinent findings of fact are section 108-5 of the Standard Specifications and the special provisions section of the contract entitled "Concrete Barrier Rails." Neither section 108-5 nor the special provisions quoted by the trial court state that cast-in-place forms are required as a method of constructing the barrier rails. The trial court found as fact the following:

> 14. The plans and specifications do not state anywhere that 'slip-forming of the concrete barriers will not be permitted.' The plans and specifications do not state anywhere that 'slip-forming of the concrete barrier rails will only be permitted at a $7.00 per lineal foot credit to the North Carolina Department of Transportation.'

Our review of the entire language of the contract reveals that the contract language was explicit when the drafters intended that no other methods were to be used in other phases of the construction project. For example, subsection 1 of the section entitled "Reinforced Concrete Deck Slab" states "Plans for the concrete deck slab are detailed for the use of metal stay-in-place forms; however, the contractor shall have the option of constructing a cast-in-place slab using removable forms, or a cast-in-place slab using precast prestressed concrete panels in the prestressed concrete girder spans." An even more convincing example of the way this document was drafted may be found in subsection 3 entitled "Construction methods." "Curing methods for the concrete will perform to the standard specifications except when using prestressed concrete panels the cast-in-place concrete shall be cured by the water method as specified in subarticle 420-17(b) of the standard specifications. *No other methods will be allowed.*" (Emphasis added.) The language we are concerned with in the section entitled "Concrete Barrier Rails" is as follows:

> The quantity, measured as described above, will be paid for at the contract unit price per lineal foot bid for concrete barrier rail, which price and payment shall be full compensation for all materials, admixtures, *forms*, form lining, false work, curing, surface finish, tools, labor, equipment and incidentals necessary to complete the item.
>
> *At the Contractor's option* he may line the inside of *his forms* the roadway face of the barrier rail with an absorbent material that meets the approval of the Head of Structure Design, *or* he may use forms with no lining and afterwards, the roadway face of the barrier rail with an absorbent material that meets the approval of the Head of Structure Design, or he may use forms with no lining and afterwards, the roadway face of the barrier rails shall be given a Class II surface finish in accordance with the specifications.

> *In the event* the Contractor uses a lining in his forms for the roadway face of the barrier rail, and after removing the forms, the surface on the roadway face of the barrier rail is not acceptable in the opinion of the Engineer, the Contractor will be required to give this surface a Class 2 surface finish in accordance with the specifications.

(Emphasis added.) These excerpts from the contract, recited by the court in its findings of fact, refer to "Forms" only. There is no specification of fixed forms. The trial court may have intended to find as fact that "forms" referred to fixed forms. However, in the absence of such a finding, our review of the findings of fact do not disclose any support for the court's conclusion of law that the contract contemplated fixed forms as the only acceptable method of construction. The contract does not specify fixed forms as the only method of construction. A mere recitation of the contractual terms in the findings of fact is insufficient to support the court's conclusion of law that the contract contemplated the use of fixed forms.

[2] The court's findings of fact contain an excerpt from section 108-5 as follows:

> When the contract specifies that the construction be performed by the use of certain methods and equipment, such methods and equipment shall be used unless others are authorized by the Engineer. If the contractor desires to use a method or type of equipment other than those specified in the contract, he may request authority from the engineer to do so. The request shall be in writing and shall include a full description of the methods and equipment proposed to be used and an explanation of the reasons for desiring to make the change. If approval is given it will be fully responsible for producing construction work in conformity with contract requirements. If, after trial use of the substituted methods or equipment, the Engineer determines that the work produced does not meet contract requirements, the Contractor shall discontinue the use of the substitute method or equipment and shall complete the remaining construction with the specified methods and equipment. The contractor shall remove the unsatisfactory work and replace it with work of specified quality, or take such other corrective action as the

> engineer may direct. *No change will be made in basis of payment for the construction items involved* nor in the completion date as a result of authorizing a change in methods or equipment under these provisions.

(Emphasis added.) We deem that section 108-5 is controlling in the case *sub judice*. Section 108-5 provides for instances where the contract has not specifically required a method of construction, which is the situation that we must address.

Slip-forming as a method of construction is not specified in the contract. Plaintiff indicated its desire to use slip-forming to defendant. Defendant approved plaintiff's use of slip-forming as a method of construction. The work done by plaintiff met the contract requirement and as the trial court found as fact the work was done to "the satisfaction of all." Therefore, the supplemental agreement that changed the basis of payment, which plaintiff executed under protest, is at variance with the terms of the agreement. Section 108-5 unequivocally states that "No change will be made in basis of payment for the construction items involved." The contract contemplates payment "at the contract unit price [$42.00] per lineal foot bid for Concrete Barrier Rail, which price and payment shall be full compensation for all . . . forms." It is apparent that the end result of the contract measured by lineal feet is the basis of payment upon which the contract is based. Plaintiff fulfilled the pertinent terms of the contract by erecting 8,537.8 feet of concrete barrier rail and is entitled to the contract price of forty-two dollars ($42.00) per lineal foot of concrete barrier rail. Plaintiff is entitled to recover the $59,764.60 deducted by defendant as a credit pursuant to the supplemental agreement. For the aforementioned reasons the judgment must be reversed and the matter remanded to the trial court for entry of judgment for plaintiff not inconsistent with this opinion.

Reversed and remanded.

Judge PHILLIPS concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

I dissent. I agree with the majority's holding that the trial court's findings of fact do not support the trial court's conclusion of law construing the construction contract to require the use of fixed form construction methods. I do not agree that the trial court's findings of fact compel this Court to order judgment for plaintiff.

The majority states, "Section 108-5 unequivocally states that 'No change will be made in basis of payment for the construction items involved.'" Section 108-5 is not so broad. The section specifies that "[n]o change will be made in basis of payment for construction items involved nor in the completion date as a result of authorizing a change in methods or equipment under these provisions." It is not clear from the trial court's order whether the changes in construction methods authorized in the contract modification resulted in a change in the quality of the barrier rail called for in the contract. I am unable to determine from the trial court's order whether the Department of Transportation accepted the slip formed barrier rails only because of the contract modification. I would therefore reverse and remand for further findings of fact.

STATE OF NORTH CAROLINA v. LAWRENCE CLINTON COLEMAN

No. 8522SC834

(Filed 15 April 1986)

1. **Criminal Law § 138.23— second degree murder—use of deadly weapon as aggravating factor—error**

In a second degree murder case where the facts were such that a jury instruction could have been given on the inference of malice from the use of a deadly weapon had defendant not entered a plea of guilty on the day set for trial, the trial court erred in finding as a statutory aggravating factor that defendant used a deadly weapon at the time of the crime.

2. **Criminal Law § 138.21— second degree murder—atrocity as aggravating factor—error**

The trial court in a second degree murder case had insufficient evidence to find as a factor in aggravation that the offense was especially heinous, atrocious or cruel, although defendant's actions appeared to have been con-

scienceless, since the evidence tended to show that one wound was inflicted to the jugular vein; the victim walked approximately forty-five feet and collapsed, losing consciousness soon after the wound was inflicted; and there was an absence of excessive brutality beyond that normally present in the offense.

3. **Criminal Law § 138.21— second degree murder—brutality as aggravating factor—error**

The trial court erred in finding as a nonstatutory aggravating factor that the offense was characterized by more brutality than is inherent in any murder, that the victim suffered physically and mentally by being conscious of the fact that his life blood was flowing away and being unable to do anything about it, and that the offense had dehumanizing features, since that factor was tantamount to a finding that the offense was especially heinous, atrocious or cruel, and evidence was insufficient to support such a finding.

4. **Criminal Law § 138.29— second degree murder—guilty plea—failure to show remorse—no aggravating factor**

The trial court's finding that defendant exhibited no remorse for the crime could not be the basis for a nonstatutory aggravating factor, since it is improper to aggravate a defendant's sentence for his failure to perform an act when the doing of the act would support the finding of a factor in mitigation, and since *State v. Brown*, 64 N.C. App. 578, held that the court erred in finding as an additional factor in aggravation that defendant had not acknowledged his guilt or wrongdoing, and that rule applies to defendants who plead guilty as well as to those pleading not guilty.

5. **Criminal Law § 138.23— use of deadly weapon—evidence necessary to prove joinable offense—use of deadly weapon as aggravating factor proper**

There was no merit to defendant's contention that the court could not find the use of a deadly weapon at the time of the crime as a factor in aggravation of the larceny offense because evidence of its use was necessary to prove an essential element of the joinable offense of second degree murder.

6. **Criminal Law § 138.26— taking of property of great monetary value—aggravating factor proper**

Evidence in a prosecution for felonious larceny was sufficient to support the trial court's finding in aggravation that the offense involved the taking of property of great monetary value, since evidence tended to show that defendant took a taxi cab, and testimony of an SBI agent tended to show that its value was approximately $3,000.

7. **Criminal Law § 138.34— several offenses—mitigating factor in one offense not found in another—no error**

There was no merit to defendant's contention that the trial court erred in failing to find as a mitigating factor for larceny and armed robbery that defendant was suffering from a physical condition which reduced his culpability when the court did find this factor in mitigation of the second degree murder offense, since it is the established rule that, when one sentencing hearing addresses multiple offenses, the trial judge must treat each offense separately and make separate findings as to the aggravating and mitigating factors for each.

State v. Coleman

APPEAL by defendant from *Cornelius, Preston, Judge.* Judgment entered 4 February 1985 in Superior Court, DAVIE County. Heard in the Court of Appeals 11 December 1985.

Defendant was charged with first-degree murder, felonious larceny, felonious possession of stolen goods, and robbery with a dangerous weapon, all charges flowing from one incident occurring 11 May 1984. Defendant entered pleas of guilty to second-degree murder, felonious larceny, and robbery with a dangerous weapon on the day set for trial. Following a sentencing hearing, defendant was sentenced to consecutive maximum prison terms of fifty (50) years, ten (10) years, and forty (40) years respectively. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Victor H. E. Morgan, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Robin E. Hudson, for defendant appellant.

JOHNSON, Judge.

Evidence presented to establish the factual basis for defendant's plea tended to show in pertinent part that shortly after midnight on 11 May 1984, defendant and a companion, Wilson Wommack, called Blue Bird Cab Company and requested that a cab be dispatched to an address on Granite Street in Winston-Salem, North Carolina, the address of defendant's mother. Cab number twenty-two (#22), driven by Joseph Gray Privetta, was dispatched to that address at 12:23 a.m. According to a statement made by Wilson Wommack, they wanted a cab to take them to the highway because they planned to go on a camping trip. As they were riding down Interstate Forty (I-40) defendant took out a knife, leaned over and cut the cab driver's throat. According to Wommack's written statement and testimony, defendant's action took him completely by surprise.

The cab driver, bleeding profusely, got out of the vehicle under his own strength. Detective John Stevens of the Davie County Sheriff's Department testified that shortly after 1:00 a.m. on 11 May 1984, he found the body of the deceased Joseph Privetta in the westbound lane of Interstate Forty (I-40) with a trail of blood forty-five feet five inches leading to the body. Both defend-

ant and Wommack were apprehended that same day late in the morning near Bland, Virginia, not far from where the taxicab was found.

The court accepted pleas of guilty from defendant to charges of second-degree murder, armed robbery and felonious larceny and pleas of guilty from Wommack to accessory after the fact as to each of the same three offenses.

In arriving at a sentence for defendant for each offense beyond the presumptive, the court correctly treated each offense separately and supported each offense separately by findings tailored to the individual offense as required by *State v. Ahearn*, 307 N.C. 584, 598, 300 S.E. 2d 689, 698 (1983). Separate treatment not only aids appellate review but also offers the option of affirming judgment for one offense while remanding for resentencing only the offense or offenses where error is found. *Id.* Consistent with the requirement of separate treatment and for purposes of clarity, we will discuss defendant's Assignments of Error as they apply to each offense separately.

SECOND-DEGREE MURDER

[1] Defendant contends the court erred in finding as a statutory aggravating factor that defendant used a deadly weapon at the time of the crime. Our Supreme Court has held that when "evidence of the use of a deadly weapon is deemed necessary to prove the element of malice," the court is precluded from using it as an aggravating factor at sentencing. *State v. Blackwelder*, 309 N.C. 410, 417, 306 S.E. 2d 783, 788 (1983). The State argues that *Blackwelder* is inapposite because in the instant case defendant pled guilty, but in *Blackwelder* the defendant's case went to trial and the jury was actually instructed on the inference of malice raised by the use of a deadly weapon. The State's argument is without merit. When our Supreme Court adopted what it referred to as a "bright-line" rule, it set forth with specificity when evidence of the use of a deadly weapon is precluded from serving as an aggravating factor, to wit:

> When the facts justify the giving of the instruction of the inference of malice arising as a matter of law from the use of a deadly weapon and it is in fact given, or *when it could have been given had defendant not entered a plea of guilty*. . . .

Id. (emphasis added). In the instant case the facts are such that a jury instruction *could* have been given on the inference of malice from the use of a deadly weapon had the defendant not entered a plea of guilty on the day set for trial. Therefore, we hold that *Blackwelder* is controlling and that the court erred in finding this factor in aggravation of defendant's sentence. Defendant is entitled to a new sentencing hearing regarding the murder offense for this error alone. *State v. Ahearn, supra.*

Because defendant raises other issues on appeal, which if left unresolved could lead to error at resentencing, we will address all remaining Assignments of Error.

[2] Defendant contends the court had insufficient evidence to find as a factor in aggravation that the offense was especially heinous, atrocious or cruel. Our Supreme Court has given us guidance in determining the applicability of this factor in the context of capital cases. Previous construction of the heinous, atrocious or cruel language has led courts to conclude that the following considerations are pivotal: whether death was immediate; whether there was unusual infliction of suffering upon the victim; whether there is evidence of excessive brutality beyond that normally present in any killing; and whether the facts as a whole portray the commission of the crime as conscienceless, pitiless or unnecessarily torturous to the victim. *State v. Ahearn, supra,* at 599, 300 S.E. 2d at 698. "[T]he focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" *State v. Blackwelder, supra,* at 414, 306 S.E. 2d at 786 (emphasis in original).

An examination of the facts of the case *sub judice* neither supports a finding that this murder was excessively brutal nor discloses physical or psychological suffering beyond that normally present in the offense. One wound was inflicted to the jugular vein. The victim walked approximately forty-five feet and collapsed, losing consciousness soon after the wound was inflicted. Although we acknowledge defendant's actions appear to have been conscienceless, other considerations—the absence of multiple wounds, the relative immediacy of death, the absence of excessive brutality—lead us to conclude that this finding was not sufficiently supported by the evidence.

[3] Defendant next contends that the court erred in finding two nonstatutory factors in aggravation. We agree. The court found as nonstatutory aggravating factors the following:

> Court finds that Statutory Aggravating factors to be uncontradicted and manifest credib[i]lity; find that the offense was characterized by more brutality than is inher[e]nt in any murder; that the victim suffered physically & mentally b[y] being conscious of the fact that his life blood was flowing away and being unable to do anything about it. The offense had dehumanizing features.
>
> Defendant has exhibited no remorse for crime.

We find that the first factor above is tantamount to a finding that the offense was especially heinous, atrocious or cruel. The factors are equivalent. The court merely restated the statutory aggravating factor in definitional terms. Because we found the evidence insufficient to support the finding that the crime was especially heinous, atrocious or cruel, this nonstatutory factor, likewise, cannot stand.

[4] Next defendant contends that the court's finding that defendant exhibited no remorse for the crime cannot be the basis for a nonstatutory aggravating factor. We agree for two reasons. First, it is improper to aggravate a defendant's sentence for his failure to perform an act when the doing of the act would support the finding of a factor in mitigation. *State v. Rivers*, 64 N.C. App. 554, 558, 307 S.E. 2d 588, 590 (1983) (even though cooperation with the authorities is a mitigating factor, absence of cooperation cannot support a factor in aggravation). Evidence which shows that defendant exhibited remorse for the crime could support finding the statutory mitigating factor that defendant voluntarily acknowledged wrongdoing prior to the arrest or at an early stage of the criminal process. *State v. Ahearn, supra*, at 607-08, 300 S.E. 2d at 704. Therefore, assuming *arguendo* that the record contains evidence showing defendant exhibited no remorse prior to arrest or at an early stage of the criminal process, this lack of remorse cannot be the basis for an additional written finding of a factor in aggravation.

Secondly, the Court in *State v. Brown*, 64 N.C. App. 578, 582, 307 S.E. 2d 831, 834 (1983), specifically held that the court erred

in finding as an additional factor in aggravation that the defendant had not acknowledged his guilt or wrongdoing. The Court in *Brown* stated that acknowledgment of wrongdoing would be inconsistent with the defendant's plea of not guilty. In the instant case, defendant pled not guilty, then changed his plea to guilty on the day of trial. We see no reason why only defendants who plead not guilty should benefit from the rule formulated in *Brown*. Both nonstatutory factors in aggravation are in error.

FELONIOUS LARCENY

[5] Defendant contends the court cannot find the use of a deadly weapon at the time of the crime as a factor in aggravation of the larceny offense because evidence of its use was necessary to prove an essential element of the joinable offense of second-degree murder. We disagree.

This very issue was addressed in *State v. Toomer*, 311 N.C. 183, 316 S.E. 2d 66 (1984), where the defendant challenged the aggravation of his first-degree burglary offense with the fact he had the use of a deadly weapon when evidence of the use of a deadly weapon was necessary to prove an essential element of the joinable crime of first-degree sexual offense. The Court upheld the judge's finding of the use of a deadly weapon in aggravation. *Id.* We hold *Toomer* is controlling on the facts at bar. Defendant's Assignment of Error on this point is overruled.

[6] Next the defendant challenges the court's finding as a factor in aggravation that the offense involved the taking of property of great monetary value. Defendant contends the record is devoid of evidence regarding the value of the property taken, that is, the taxicab. We disagree.

We have reviewed the record and have found evidence, the testimony of S.B.I. Special Agent William R. Foster, tending to show the value of the taxicab was approximately $3,000.00. Further, the trial judge is not precluded from finding the taking of property of great monetary value as an aggravating factor because defendant had been charged with larceny. *State v. Thompson*, 309 N.C. 421, 422, 307 S.E. 2d 156, 158 (1983). Evidence necessary to prove *great* monetary value is deemed evidence in *addition* to that needed to prove an element of felonious larceny. *Id.* Accordingly, defendant's Assignment of Error on this point is overruled.

[7] In defendant's last Assignment of Error regarding sentencing for the larceny offense, defendant contends the court erred in failing to find as a mitigating factor that defendant was suffering from a physical condition which reduced his culpability when the court did find this factor in mitigation of the second-degree murder offense. Defendant's contention is without merit. To adopt such a rule would undermine the well-settled rule we stated earlier, namely, when one sentencing hearing addresses multiple offenses, the trial judge must treat each offense separately and make separate findings as to the aggravating and mitigating factors for each. *State v. Ahearn, supra,* at 598, 300 S.E. 2d at 698; *State v. Thompson,* 64 N.C. App. 354, 356, 307 S.E. 2d 397, 399 (1983). Defendant argues on appeal that defendant was less culpable because he was under the influence of alcohol and marijuana at the time the crime was committed. We are indulging defendant in allowing him to speculate for the sake of argument that it was the evidence of alcohol and drug influence upon which the court relied when it found this mitigating factor regarding the second-degree murder offense. The record itself is unconclusive on this point. Nonetheless, recent use of alcohol and drugs is not *per se* a statutorily enumerated mitigating factor. It could perhaps be found to mitigate the offense as suggested by defendant. *See State v. Bynum,* 65 N.C. App. 813, 815, 310 S.E. 2d 388, 390 (1984). We agree with the Court's reasoning in *Bynum.* The evidence at the sentencing hearing, even though it could have permitted such a finding, did not compel it. *Id.* This Assignment of Error is overruled.

We find no errors occurred at the sentencing hearing with respect to the offense of larceny; therefore, judgment is affirmed as to sentencing for this offense.

ROBBERY WITH A DANGEROUS WEAPON

In defendant's only Assignment of Error regarding the armed robbery phase of the sentencing hearing, he contends the court erred in failing to find as a mitigating factor that defendant was suffering from a physical condition which reduced his culpability when the court found this factor in mitigation of the second-degree murder offense. This is the same argument we addressed immediately above regarding the offense of felonious larceny. For the reasons stated therein, we overrule this Assign-

ment of Error. The judgment as to the sentence for the offense of robbery with a dangerous weapon is affirmed.

In summary, we hold as follows:

In Case Number 84CRS1635—charge of felonious larceny—Sentence Affirmed;

In Case Number 84CRS2402—charge of robbery with a dangerous weapon—Sentence Affirmed;

In Case Number 84CRS1634—charge of second-degree murder—Sentence Vacated and case remanded for resentencing.

Chief Judge HEDRICK and Judge PHILLIPS concur.

H. L. MIZE AND WIFE, BRENDA M. MIZE, THOMAS A. LEMPICKE AND WIFE, CAROL J. LEMPICKE, AND WILLIAM F. SEALS AND WIFE, TREVA L. SEALS v. COUNTY OF MECKLENBURG

No. 8526SC552

(Filed 15 April 1986)

1. **Municipal Corporations § 31— judicial review of zoning ordinance—Zoning Board of Adjustment as necessary party**

The Zoning Board of Adjustment is a necessary party respondent to a petition pursuant to N.C.G.S. § 153A-345(e) which provides for review of the Board's decisions, since the Board is the agency having custody of the record which is being reviewed; moreover, there was no merit to petitioners' contention that respondent county is the only necessary party because the Board has only that authority which has been delegated to it by respondent and it is therefore an agent of respondent, since the Board is an independent, quasi-judicial body whose decisions cannot be reviewed or reversed by respondent's Board of Commissioners or the town manager.

2. **Municipal Corporations § 31; Rules of Civil Procedure § 12— failure to join necessary party—amendment not allowed—abuse of discretion**

The trial court abused its discretion by failing to allow petitioners to amend their petition to join the Zoning Board of Adjustment where petitioners complied with all the express requirements of N.C.G.S. § 153A-345 by filing a petition in superior court within 30 days of the decision of the Board, and dismissal under N.C.G.S. § 1A-1, Rule 12(b)(7) is proper only when the defect cannot be cured.

3. Municipal Corporations § 31— review of decision of Board of Adjustment—no right to jury trial

Petitioners who sought review of a decision of the Zoning Board of Adjustment were not entitled to a jury trial since the superior court was not the trier of fact but instead sat in the posture of an appellate court.

4. Municipal Corporations § 30.20— enforcement of zoning ordinance—injunction proper

The trial court did not err in issuing an injunction prohibiting petitioner-appellants from operating an airport, since N.C.G.S. § 153A-123 and -345 give the superior court the power to enforce zoning ordinances through the issuance of an injunction, and no stay is provided pending a petition to the superior court to review the decision of a Zoning Board of Adjustment.

APPEAL by petitioners from *Burroughs, Judge.* Order and Judgment entered 18 December 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 November 1985.

Gene H. Kendall for petitioner appellants.

Ruff, Bond, Cobb, Wade & McNair by James O. Cobb for respondent appellee.

COZORT, Judge.

The petitioners instituted this action by filing a Petition in the Nature of Certiorari with the Clerk of Superior Court of Mecklenburg County on 18 July 1984. Petitioners sought to have a decision of the Zoning Board of Adjustment of Mecklenburg County reviewed challenging, among other things, the procedure followed by the Board upholding the decision of a Zoning Administrator which required the petitioners to stop using their land as an airport. The petitioners served the County of Mecklenburg with a copy of their petition. The County of Mecklenburg filed a Rule 12(b)(7) motion to dismiss for failure to join a necessary party arguing that the only necessary party to the Petition filed pursuant to G.S. 153A-345(e) was the Mecklenburg County Zoning Board of Adjustment. The County of Mecklenburg also filed a motion to strike the petitioners' demand for a jury trial and a motion for an injunction requesting the superior court to issue an order enjoining petitioners from using their land as an airport. On 2 November 1984, petitioners made a motion for leave to amend to add the Mecklenburg County Zoning Board of Adjustment to the ac-

tion. On 18 December 1984 the superior court entered an order granting Mecklenburg County's motion to dismiss for failure to join a necessary party, their motion to strike petitioners' demand for jury trial, and their motion for an injunction enjoining petitioners' use of their land as an airport. From this order petitioners appealed.

First we address whether the Zoning Board of Adjustment is a necessary party to a petition filed pursuant to G.S. 153A-345(e). G.S. 153A-345(e) provides:

> Each decision of the [Zoning Board of Adjustment] is subject to review by the superior court by proceedings in *the nature of certiorari.* Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy . . . . (Emphasis added).

G.S. 153A-345(e) specifies that the proceeding to review the decision of the Zoning Board of Adjustment is in the nature of certiorari. The statute does not set forth who is to be named as a respondent or defendant in a proceeding under its provisions. Our research reveals no North Carolina cases on this point. There is a split in authority among other jurisdictions which have addressed this question. In *Tri-State Generation and Transmission Co. v. City of Thornton,* the Supreme Court of Colorado stated:

> [When] an action is for the purpose of determining whether the "*inferior tribunal* . . . has exceeded its jurisdiction or abused its discretion" . . . it is this tribunal which must be joined in a certiorari action, and not some other municipal body. . . .
>
> Although joinder of a city rather than its council may oftimes achieve a functionally equivalent result, it cannot be assumed that this is always the case. Where review of a city council's quasi-judicial action is sought, it is not unduly burdensome to require that the council be named as a defendant, and it is not an unreasonable or unexpected result in light of the nature of the relief sought . . . .

647 P. 2d 670, 676 (Colo. 1982). In a case involving a zoning review procedure similar to the procedure before us, the Court of Appeals of New York reiterated the long-recognized rule in that State requiring the Zoning Board of Adjustment to be a necessary party defendant to an action reviewing its decision. *Commco, Inc. v. Amelkin*, 62 N.Y. 2d 260, 476 N.Y.S. 2d 775, 465 N.E. 2d 314 (1984). The New York rule is a vestige of the *in rem* nature of certiorari, to which the only necessary party defendant was the agency having custody of the record. *Id.* at 269-70, 476 N.Y.S. 2d at 780, 465 N.E. 2d at 319 (Meyer, J., dissenting). *See also Board of Supervisors v. Board of Zoning Appeals*, 225 Va. 235, 302 S.E. 2d 19 (1983). But, in *Town of Boothbay Harbor v. Russell*, 410 A. 2d 554, 560-61 (Me. 1981), the Supreme Court of Maine held that an agency which performs a purely adjudicatory function is not a proper party to an appeal from a decision made by that agency. The Maine court reasoned that the agency, when acting as a quasi-judicial body, had no interest to defend in such an action because it was not a partisan participant in the proceeding. *Id. See also A. Di Cillo & Sons, Inc. v. Chester Zoning Bd. of Appeals*, 158 Ohio St. 302, 109 N.E. 2d 8 (1952).

[1] Our analysis begins with an examination of the nature of certiorari. Certiorari is a common law writ, which issues from a superior court to an inferior tribunal to send up the record of a particular case for review. *Wheeler v. Thabit*, 261 N.C. 479, 480, 135 S.E. 2d 10, 11 (1964); *In re Pine Hill Cemeteries, Inc.*, 219 N.C. 735, 15 S.E. 2d 1 (1941). Strictly speaking, the only necessary party to a petition for certiorari is the party or parties whose acts are the subject of review. 14 C.J.S. *Certiorari* Sec. 60 (1939). The Zoning Board of Adjustment is a necessary party because the Board is the agency having custody of the record that is being reviewed. Common sense and logic dictates such a result.

The appellant argues that Mecklenburg County is the only necessary party in this case because the Board of Adjustment has only that authority which has been delegated to it by Mecklenburg County and is therefore an agent of Mecklenburg County. Nonetheless, the Board of Adjustment is an independent, quasi-judicial body whose decisions cannot be reviewed or reversed by the Board of Commissioners or the town manager. *Jackson v. Guilford County Bd. of Adjustment*, 2 N.C. App. 408, 163 S.E. 2d 265 (1968), *aff'd*, 275 N.C. 155, 166 S.E. 2d 78 (1969). Further, we

note that instances may arise where the position of the Board of Adjustment and the County of Mecklenburg may be adverse. The focus of the review under G.S. 153A-345(e) is on the decision of the Zoning Board of Adjustment. While the County delegates to the Board the authority to hear appeals of zoning cases, once the delegation has occurred the County has no power to influence the decisions of the Board. Thus, we hold that the Zoning Board of Adjustment is a necessary party respondent to a petition filed pursuant to G.S. 153A-345(e).

The Zoning Board of Adjustment may not be the *only* necessary party in an action to review its decision. The real adverse party in interest is the party in whose favor the Zoning Board's decision has been made. *See Lee v. Small Claims Court*, 34 Cal. App. 2d 1, 92 P. 2d 937 (1939). Thus, our decision does not preclude the trial court from determining that other parties may in fact be necessary to determine issues raised in a petition under G.S. 153A-345(e). *See Phillips v. Village of Oriskany*, 57 A.D. 2d 110, 394 N.Y.S. 2d 941 (1977) (town is a necessary party when the constitutionality of a town ordinance is questioned).

[2] Having determined the Board of Adjustment is a necessary party, we consider whether the trial court erred by dismissing the petitioners' claim for failure to join a necessary party. The County maintains that G.S. 153A-345 requires that a petition be filed within the thirty-day period, and failure to file against the Zoning Board of Adjustment within that time bars the petition. We disagree. The proceeding in question is purely statutory in nature; thus we look to the provisions of G.S. 153A-345 to determine if the petition complies with its requirements as to proper filing. The purpose of G.S. 153A-345 is to provide a right of review, and statutes providing for review of administrative decisions should be liberally construed to preserve and effectuate that right. *See In re Appeal of Harris*, 273 N.C. 20, 159 S.E. 2d 539 (1968). The language of G.S. 153A-345 requires only that any petition seeking review by the superior court be filed with the clerk of superior court within 30 days after the decision of the Board is filed or after a written copy has been delivered to every aggrieved party. The petitioners complied with all the express requirements of this vague statute by filing a petition in Mecklenburg County Superior Court within 30 days of the decision of the Board. "[D]ismissal under Rule 12(b)(7) is proper only when the

defect cannot be cured, and the court ordinarily should order a continuance for the absent party to be brought into the action and plead." *Howell v. Fisher*, 49 N.C. App. 488, 491, 272 S.E. 2d 19, 22 (1980), *cert. denied*, 302 N.C. 218, 277 S.E. 2d 69 (1981). We hold that, under the circumstances presented, the court abused its discretion by failing to allow the petitioners to amend the petition to join the Zoning Board of Adjustment.

[3] Next, petitioners contend they are entitled to a jury trial to determine their rights as property owners. This argument is without merit. The scope of review under G.S. 153A-345(e) is: (1) reviewing the record for errors in law; (2) insuring that procedures specified by law in both statute and ordinance are followed; (3) insuring that appropriate due process rights of a petitioner are protected, including the right to offer evidence, cross-examine witnesses and inspect documents; (4) insuring that the decisions of zoning boards are supported by competent, material and substantial evidence in the whole record; and (5) insuring that decisions are not arbitrary and capricious. *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 626, 265 S.E. 2d 379, 383 (1980). In reviewing zoning decisions, the superior court is not the trier of fact; it sits in the posture of an appellate court. *Id.* There is no necessity for, or entitlement to, a jury trial.

[4] The petitioners' final contention challenges the issuing by the trial court of an injunction prohibiting the petitioner-appellants from operating an airport. G.S. 153A-123 and -345 give the superior court the power to enforce zoning ordinances through the issuance of an injunction. G.S. 153A-345(b) provides for a stay of enforcement pending an appeal from an administrative official to the Zoning Board of Adjustment; however, no stay is provided pending a petition to the superior court to review the decision of the Board. If the General Assembly had intended to stay enforcement of the Board's decision pending review in superior court, it could have provided for a stay at that step, as it provided for a stay when the administrative official's decision is pending review by the Board. The injunction to enforce the Board's decision is thus proper on its face, and petitioners have failed to cite any reasons why the injunction is improper. Because the superior court has the power to issue such an injunction and no stay is provided in the applicable statutes, we find that the injunction was proper.

The decision of the trial court is reversed in part and affirmed in part, and this case is remanded to the trial court for disposition consistent with this decision.

Affirmed in part, reversed in part, and remanded.

Judges WEBB and BECTON concur.

CARL V. NELSON AND WIFE, JANET P. NELSON, MRS. GERALDINE S. BASS, HAROLD J. GREEN, MRS. FRANCES T. BENNETT, GEORGE W. FOX AND WIFE, SALLY M. FOX v. CITY OF BURLINGTON, NORTH CAROLINA; AND DR. KEN L. KETCHUM, DAVID L. MAYNARD, KATHRYN O'D. HYKES, CAROLINE ANSBACHER, AND WILLIAM H. LASHLEY, MEMBERS OF THE BURLINGTON CITY COUNCIL; AND WINFIELD A. SCOTT, EQUICAP PROPERTIES, INC., OWNER-APPLICANTS

No. 8515SC702

(Filed 15 April 1986)

1. **Municipal Corporations § 30.9— rezoning of one lot—no arbitrary or capricious action**

A city council's rezoning of a lot from single family and multi-family residential classifications to a general business district classification was not unreasonable, arbitrary or capricious in light of the prevalence of general business zoning in the immediate vicinity of the lot in question.

2. **Municipal Corporations § 30.20— denial of rezoning petition—reconsideration upon city council's own motion—no 12 month waiting period**

There was no merit to plaintiffs' contention that rezoning of defendant's lot was invalid because the City Council could not reconsider defendant's rezoning petition within 12 months of the original denial, since the zoning ordinance in question did not impose a time limit within which the city council could, upon its own motion, reconsider a previously rejected petition.

3. **Municipal Corporations § 30.9— rezoning of one lot—uses of property—summary judgment improper**

In an action for an adjudication that defendant city's rezoning of defendant's lot from single family and multi-family residential classifications to a general business district classification was invalid, the trial court erred in entering summary judgment for all defendants where there was sufficient evidence that defendant city council relied on the assurances of defendant business that it would use the property in a certain way rather than making a determination that all uses under the general business district classification were permissible and where there was no evidence that the area was unsuitable for development for uses permissible under the original residential classifications.

APPEAL by the plaintiffs from *Williams (Fred J.), Judge.* Judgment entered 14 March 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 3 December 1985.

The plaintiffs appeal an order of the superior court granting summary judgment in favor of all defendants. The plaintiffs instituted this action seeking an adjudication that rezoning by the defendants City of Burlington and the Burlington City Council of the defendant Equicap's property was invalid.

Evidence at the City Council meeting revealed the following. Equicap's property, Lot 41, is on the south side of Church Street in Burlington on the edge of a neighborhood zoned almost exclusively R-15. Most of the property on the north side of Church Street is zoned B-2. On 18 May 1984 the defendant Equicap filed an application with the City of Burlington to rezone the lot from R-15, Single-family Residential, and MF-A, Multi-family Residential, to B-2, General Business District. At that time Equicap also submitted a request for a special use permit to develop a "unified business development," or shopping center, on Lot 41. These applications were withdrawn. On 17 August 1984 Equicap resubmitted identical applications. The Burlington Planning and Zoning Commission recommended denial of these requests. The Burlington City Council voted on 2 October 1984 to deny Equicap's proposals.

On 6 December 1984 articles began appearing in the Burlington newspaper concerning Equicap's intention to use a portion of Lot 41, still zoned Multi-family Residential, as the site for a low-income, government-subsidized housing project. Several area residents organized in opposition to this plan, stating that they preferred a shopping center to government-subsidized housing in their neighborhood.

After a public meeting the City Council voted on 28 January 1985 to rezone Lot 41 to B-2, General Business District. The plaintiffs began this action in superior court challenging the validity of the City Council's action. The trial court considered the evidence submitted at the City Council meeting and granted summary judgment in favor of all defendants. The plaintiffs appealed.

Gabriel, Berry, Weston & Weeks, by M. Douglas Berry, for plaintiff appellants.

City Attorney Robert M. Ward and Assistant City Attorney Robert H. Smith, for defendant appellees City of Burlington and Members of the Burlington City Council.

Schoffner, Moseley & Scott, by W. Phillip Moseley, for defendant appellee Equicap Properties, Inc.

WEBB, Judge.

The plaintiffs first argue that the action of the Burlington City Council was not in accordance with the City's Comprehensive Land Use Plan and is therefore invalid. We cannot agree.

G.S. 153A-341 states in pertinent part:

> Zoning regulations shall be made in accordance with a comprehensive plan. . . . The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the county.

"By necessity, a comprehensive plan must undergo changes. If any zoning plan is to be comprehensive, it must be kept up to date." *Graham v. City of Raleigh*, 55 N.C. App. 107, 113, 284 S.E. 2d 742, 746 (1981), *disc. rev. denied*, 305 N.C. 299, 290 S.E. 2d 702 (1982). For that reason, it is well-settled that a city's legislative body has authority to rezone when reasonably necessary in the interests of the public health, safety, morals or general welfare. Ordinarily the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously. *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971).

[1] In the present case it is clear from the minutes of the 28 January meeting that the Council amended the City's comprehensive plan to bring about the necessary conformity between the amended zoning ordinance and the comprehensive plan. The only remaining question is whether the Council acted unreasonably, arbitrarily or capriciously in rezoning Lot 41.

A duly adopted rezoning ordinance is presumed to be valid and the burden is upon the plaintiff to establish its invalidity. *Graham, supra.*

> When the most that can be said against [a] zoning ordinance is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable the courts will not interfere . . . . It is sufficient that the legislative body of the city had reasonable ground upon which to conclude that one or more of the purposes [of the comprehensive plan] would be accomplished or aided by the amending ordinance. When the action of the legislative body is reviewed by the courts, the latter are not free to substitute their opinion for that of the legislative body so long as there is some plausible basis for the conclusion reached by that body.

Zopfi v. City of Wilmington, 273 N.C. 430, 436-437, 160 S.E. 2d 325, 332 (1968). (Citations omitted.)

In the present case the record reflects that before Lot 41 was rezoned there was a small area zoned B-2 on the south side of Church Street and that the majority of the property directly across the street was also zoned B-2. In light of the prevalence of B-2 zoning in the immediate vicinity of Lot 41 we cannot say that the City Council's action in rezoning the lot was arbitrary, capricious or without some plausible basis.

[2] The plaintiffs next argue that the rezoning is invalid because under *George v. Town of Edenton*, 294 N.C. 679, 242 S.E. 2d 877 (1978), the City Council could not reconsider Equicap's rezoning petition within 12 months of the original denial. We disagree.

In the *George* case the Court interpreted the following ordinance:

> 14-1 Who May Petition
>
> A petition for a zoning amendment may be initiated by the Town Council, the Planning Board, any department or agency of the Town, or the owner or renter of any property within the zoning jurisdiction of the Town of Edenton.
>
> . . . .

14-8 Reconsideration

> When the Town Board shall have denied any application for the change of any zoning district, it shall not thereafter accept any other application for the same change of zoning amendment affecting the same property, or any portion thereof, until the expiration of six (6) months from the date of such previous denial.

The Supreme Court held that the Edenton Town Council violated this ordinance when it reconsidered within 6 months a proposed zoning change it had earlier denied. The Court found that the language "accepting any other application for the same change of zoning amendment" included reconsideration upon the Council's own motion as well as upon applications submitted by others entitled to petition for rezoning.

The ordinance in the present case provides in pertinent part:

Section 32.19: Changes and Amendments to the Burlington City Zoning Ordinance

A. City Council: The City Council may, on its own motion, amend, supplement, or repeal any of the districts or regulations herein established.

B. Planning Board: The Planning Board may on its own motion recommend to the City Council changes and amendments to any of the districts or regulations herein established.

C. Other Citizens: Owners or optionees of property which they wish to have rezoned and other citizens wishing changes in this Ordinance may petition to the City Council for such change, in accordance with the following procedure:

. . . .

3. Time Limit Between Requests: No petition requesting substantially the same change whether filed by a same or a different petitioner or petitioners shall be considered within a period of 12 months, unless the facts and circumstances applying to such case have substantially changed.

It is clear from this language that the 12 month time limit within which one may not submit substantially the same rezoning petition was intended to apply only to applications made by "other citizens" but not to those submitted by the Planning Board or considered upon the City Council's own motion. We believe it would be illogical to extend the reasoning of the *George* case to include a situation in which the ordinance itself imposes no time limit within which the City Council may upon its own motion reconsider a previously rejected petition. We decline to do so.

By their third assignment of error the plaintiffs argue that the City Council's action is invalid because Roberts Rules of Order were not followed at the 18 December 1984 meeting at which the Council voted to reconsider its previous denial of Equicap's petition. The plaintiffs have cited no authority, and we know of none, which requires that City Council meetings, to be valid, must be conducted in accordance with those rules.

[3] Finally, the plaintiffs argue that the action of the City Council constituted contract zoning and is invalid.

In *Allred v. City of Raleigh, supra,* and *Blades v. City of Raleigh,* 280 N.C. 531, 187 S.E. 2d 35 (1972), our Supreme Court held that if a city council does not make a determination that the existing circumstances justify rezoning so as to permit within the rezoned area all uses permissible under the classification but relies instead upon assurances that the applicant will make a specific use of the property, this is an invalid exercise of the city's legislative power. In determining in those cases that the rezoning was not proper one factor the Court considered was the lack of any evidence that the property was not suitable for use in the manner for which it was zoned before the proposed change.

We hold that there was sufficient evidence that the City Council relied on the assurances of Equicap that it would use the property in a certain way rather than making a determination that all uses under B-2 were permissible and that therefore summary judgment was improper. There was evidence that some of the neighbors changed their positions so that a shopping center instead of government-subsidized housing would be built in the area. Discussion at the City Council meeting centered almost entirely around whether a shopping center was proper for this location. Most importantly, the notice of that meeting published in

the newspaper stated that the question of rezoning would be whether to change to "B-2, General Business District, as shown in the photograph below." Immediately below the announcement was a picture of the proposed shopping center. Evidence that the Council determined that the area was suitable for all uses permissible in the B-2 classification is found in the testimony of Mr. Connor, the City Planner, and the fact that part of the surrounding area is zoned B-2. There was no evidence that the area was unsuitable for development for uses permissible under the original R-15 and MF-A classifications. The court should have made findings of fact on this disputed evidence rather than deciding the matter by summary judgment. *See Zopfi v. Wilmington, supra.*

Reversed and remanded.

Judges BECTON and COZORT concur.

EUGENE R. AMICK v. ELOSIA L. AMICK

No. 8521DC776

(Filed 15 April 1986)

1. Divorce and Alimony § 29— separation agreement and divorce—estoppel to deny validity

Evidence was sufficient to support the trial court's conclusion that plaintiff was estopped by his own acts from denying the validity of the parties' separation agreement and asserting the invalidity of a divorce decree in order to avoid his obligations under that judgment, since plaintiff filed for divorce and performed some of his obligations under the agreement for several years; he remarried in reliance on the divorce judgment; and he did not object to the validity of the divorce decree or the separation agreement until he sought to defend his failure to comply with the judgment on grounds that it was void.

2. Divorce and Alimony § 21.5— failure to pay alimony—finding of contempt—present ability to pay

There was no merit to plaintiff's contention that the trial court erred in ordering him jailed for contempt because the court's findings of fact did not show that he had the present ability to comply with the judgment, since the court found that plaintiff was gainfully employed at the N. C. State Department of Vocational Rehabilitation; he had a gross monthly income of $2,114 and net monthly income of $1,522.49; he stated in open court the day before the

contempt order was entered that he was able to pay immediately; the trial court had before it a detailed financial affidavit which invited affiant to itemize all assets and liabilities and show any change of circumstances, but plaintiff did not see fit to provide this information to the court in his affidavit; and plaintiff did in fact pay arrearages when faced with the possibility of being jailed.

APPEAL by plaintiff from *Keiger, Judge*. Order entered 19 April 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 7 January 1986.

White and Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, Randolph M. James and Robin J. Stinson for plaintiff appellant.

Meyressa H. Schoonmaker for defendant appellee.

BECTON, Judge.

This case involves whether a husband may raise as a defense to a motion for contempt, that a separation agreement and divorce judgment were void based on the fact that the husband and wife had engaged in sexual intercourse on two isolated occasions between the making of the separation agreement and the granting of the divorce. If so, the husband contends, he could not be held in contempt of such a void judgment, and the trial court's orders to that effect were in error. We disagree with the husband and we affirm the trial court's orders of 19 April 1985 and 24 May 1985.

I

The plaintiff-appellant, Eugene R. Amick, and the defendant-appellee, Elosia L. Amick, were married on 19 December 1964. They have two children, now ages eighteen and seventeen. Eugene Amick and Elosia Amick separated on 10 June 1980 and entered into a "Separation Agreement and Property Settlement" (Agreement) on 11 June 1980. That Agreement provided, among other things, that Eugene Amick would pay child support and alimony to Elosia Amick, with certain yearly increases and adjustments based on a flat percentage or the net increase in his annual pay, whichever was less.

On 27 September 1982, Eugene Amick filed a complaint for absolute divorce based on one year's separation. Elosia Amick

filed an answer requesting that the Agreement be incorporated into the divorce decree. On 10 January 1983, Judge James A. Harrill signed a judgment of absolute divorce, incorporating the Agreement.

Eugene Amick began paying an additional $20.00 in December 1981, but has failed to pay the yearly or percentage increase agreed upon. On 14 November 1984, Elosia Amick filed a motion for contempt and alleged that Eugene Amick was $7,000.00 in arrears. Eugene Amick answered asserting that the Agreement was null and void because the parties had engaged in sexual intercourse in December of 1981, after the Agreement was signed and before the final divorce decree was entered. He also alleged that he did not have the means to pay the arrearages. Eugene Amick filed a motion to set aside the divorce judgment and the Agreement incorporated therein.

On 19 April 1985, Judge Kason Keiger signed an order holding Eugene Amick in contempt of court and ordering him to pay $2,730.00 in arrearages and $500.00 in attorney's fees, or be incarcerated. Eugene Amick paid the judgment and gave notice of appeal to this Court. On 7 May 1985, Eugene Amick filed a Motion pursuant to Rule 60(b)(4) and (6), N.C. Rules App. Proc., for relief from the 19 April 1985 order. On 24 May 1985, Judge Keiger ruled that the court would be inclined to deny Eugene Amick's Rule 60(b)(4) and (6) motion if his appeal were not pending before this Court. Eugene Amick appeals that ruling as well.

II

[1] Eugene Amick first assigns error to the trial court's failure to set aside the 10 January 1983 judgment which incorporated the 11 June 1980 Agreement. This assignment of error is rejected.

The trial court held that Eugene Amick was estopped by his own acts from denying the validity of the Agreement. We need not decide whether the Agreement is void under *Murphy v. Murphy*, 295 N.C. 390, 245 S.E. 2d 693 (1978). Instead, we rely on the rationale expressed by this Court in *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E. 2d 659, *disc. rev. denied*, 311 N.C. 760, 321 S.E. 2d 139 (1984), to affirm the trial court.

In *Mayer*, we found that a husband who actively participated in his wife's procurement of an invalid divorce from her prior hus-

band was estopped from denying the validity of that divorce. We reached that conclusion by applying a quasi-estoppel analysis that one is not permitted to injure another by taking a position inconsistent with prior conduct. *Mayer*, 66 N.C. App. at 532. The analysis is based on the principle of equitable estoppel, which arises when an individual, by acts, representations, admissions, or by silence when he or she has a duty to speak, intentionally or through culpable negligence, induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his or her detriment. *Thompson v. Soles*, 299 N.C. 484, 263 S.E. 2d 599 (1980). Neither bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied. *Hamilton v. Hamilton*, 296 N.C. 574, 576, 251 S.E. 2d 441, 443 (1979).

North Carolina courts have recognized the doctrine of equitable estoppel to preclude a party from denying the validity of a divorce decree or separation agreement. *See, e.g., Hamilton; McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507 (1937); *Harris v. Harris*, 50 N.C. App. 305, 318-19, 274 S.E. 2d 489, 497, *disc. rev. denied and appeal dismissed*, 302 N.C. 397, 279 S.E. 2d 351 (1981); and *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E. 2d 606 (1980).

In *Harris*, we held that a husband who had paid alimony for thirty-two months pursuant to a separation agreement and who had accepted the benefits of the contract, including the complete and final settlement of all marital rights and property with his wife, was estopped from denying the validity of the contract even though he had divorced and remarried. The divorce terminated all of the wife's rights arising from the marriage except those specifically provided for in the deed of separation. We held that since the husband paid alimony for 32 months, it was reasonable for the wife to rely on his continued performance, and that the husband should be estopped from denying the validity of the contract.

In *Mayer*, we said, "[a]s much as in any area of the law, quasi-estoppel cases turn on the particular facts of each case." 66 N.C. App. at 535, 311 S.E. 2d at 668. The facts in this case, as in *Mayer*, compel us to reach the conclusion that Eugene Amick is estopped from asserting the invalidity of the divorce decree in order to avoid his obligations under that judgment.

Eugene Amick's attack on the divorce judgment is inconsistent with his prior conduct. He filed for divorce and performed some of his obligations under the Agreement for several years. He remarried in reliance on the divorce judgment. He did not object to the validity of the divorce decree or the Agreement until he sought to defend his failure to comply with the judgment on grounds that it was void. Or, put another way, by accepting the benefits of the Agreement, Eugene Amick has in essence ratified and affirmed it, and may be estopped from questioning its validity and effect. *See Walker v. McLaurin*, 227 N.C. 53, 55, 40 S.E. 2d 455, 457 (1946).

Elosia Amick contends, and the trial court found as fact, that she had performed her obligations under the Agreement and that she had relied on the Agreement and formed expectations of future support from Eugene Amick based on partial compliance with its terms for a period of four years. The trial court further found that Eugene Amick gave Elosia Amick no indication that he considered the divorce or the Agreement void until she pursued her rights under the contract, and that she would be injured if the judgment (and Agreement) were to be set aside as null and void. No evidence in the record contradicts these findings. We find no error in the trial court's conclusion, based on these facts, that Eugene Amick is estopped from denying the validity of the judgment and was, therefore, in contempt of a court order for maintenance and child support.

III

[2] Eugene Amick contends that it was error for the trial court to order him jailed for contempt because the court's findings of fact did not show that he had the present ability to comply with the judgment. He cites numerous cases in which trial courts were required to find as a fact that the plaintiff possessed the means to comply with an order for payment. We hold that the trial court made sufficient findings of fact to conclude that Eugene Amick had the present ability to pay the arrearages under the order and he had willfully refused to do so.

The trial court found that Eugene Amick was gainfully employed at the North Carolina State Department of Vocational Rehabilitation, that he had a gross monthly income of $2,114.00, that his net monthly income was $1,522.49 and, perhaps most impor-

tantly, that he stated in open court on 18 April 1985, the day before the contempt order was entered, that he was able to pay immediately.

In contempt proceedings, the judge's findings of fact are conclusive on appeal when supported by any competent evidence, and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment. *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E. 2d 129, 139 (1978).

Eugene Amick argues that the trial court should have considered his monthly living expenses, assets, liabilities and financial condition, and cites *Henderson v. Henderson*, 55 N.C. App. 506, 286 S.E. 2d 657, *disc. rev. allowed*, 306 N.C. 384, 294 S.E. 2d 208 (1982), *aff'd*, 307 N.C. 401, 298 S.E. 2d 345 (1983) for that proposition. Although the Supreme Court, in affirming this Court's decision in *Henderson*, noted that the trial court had failed to adduce evidence with respect to any assets or liabilities of the defendant, any inventory of his property, his present ability to work, or even his present salary, *Henderson* did not set out a prescription to be followed to determine whether a finding of fact is supported by sufficient evidence. *See id.*

The trial court had Eugene Amick's detailed financial affidavit before it. That form affidavit invites the affiant to itemize all assets and liabilities, and affords the affiant the opportunity to show any change of circumstances. Eugene Amick did not see fit to provide this information to the court in his affidavit. The court made findings as to his employment and his gross and net monthly pay. Eugene Amick stated in open court that he could pay, and he did in fact pay when faced with the possibility of being jailed. There was adequate and competent evidence to support the trial court's conclusion that Eugene Amick had the means to pay the arrearages and to warrant the contempt order against him.

IV

Eugene Amick last assigns error to the trial court's refusal to grant his Motion for Relief from Judgment pursuant to Rules 60(b)(4) and (6). Since we have found no error in the trial court's actions as discussed in parts II and III above, we find no merit in this assignment of error as well. The order appealed from is therefore,

Affirmed.

Judges WHICHARD and PARKER concur.

IN RE: WILLIAM NICHOLAS FORTESCUE, JR., UNMARRIED, GRANTOR AND RECORD OWNER; FORECLOSURE OF DEED OF TRUST RECORDED IN DEED OF TRUST BOOK 332 AT PAGE 682 OF THE HENDERSON COUNTY REGISTRY

No. 8529SC551

(Filed 15 April 1986)

1. Mortgages and Deeds of Trust § 26— notice of foreclosure—assignment by holder between notice and hearing

There was no merit to respondent's contention that he was not given proper notice of foreclosure where the notice of hearing on foreclosure issued 18 January 1984 and received by respondent 23 January 1984 named a certain person as the original and present holder of the note and deed of trust; on 9 February 1984, before the hearing on foreclosure, the holder assigned the note and deed of trust to another person who then proceeded with foreclosure; on 23 February 1984 a foreclosure hearing was held before the clerk of the court; N.C.G.S. § 45-21.16 which provides for notice of foreclosure does not prohibit an assignment or negotiation of the debt instrument during the interval between the date notice is issued and the time of the hearing and it is silent as to whether additional notification is necessary when an assignment takes place; and respondent had nine months between the hearing before the clerk of superior court and the *de novo* hearing before the trial court to make attempts to resolve the matter of his outstanding debt.

2. Mortgages and Deeds of Trust § 25— right to foreclose—sufficiency of documentary evidence

There was sufficient evidence to establish a note holder's right to foreclose where all of the findings of fact necessary to satisfy the four statutory requirements for foreclosure were established by the documents before the court. N.C.G.S. § 45-21.16(d).

APPEAL by respondent from *John B. Lewis, Jr., Judge.* Order entered 13 December 1984 in Superior Court, HENDERSON County. Heard in the Court of Appeals 19 November 1985.

Stepp, Groce & Cosgrove, by Timithy R. Cosgrove, for petitioner appellee.

William N. Fortescue, Jr., pro se, as respondent appellant.

BECTON, Judge.

Respondent, William N. Fortescue, Jr., appeals from an order allowing foreclosure on real property he owns in Henderson County, North Carolina.

I

On 5 October 1979, Fortescue executed a promissory note in the amount of $30,000 in favor of A. S. Browning, Jr., and executed a deed of trust to James H. Toms, as trustee for Browning, to secure the debt. Subsequently, $20,000 of the original note was repaid to Browning, and the note was modified on 2 February 1983 so that the remainder was due and payable on or before 2 August 1983.

The debt was not repaid by 2 August 1983, and, in late December 1983, Browning mailed notice to Fortescue that Browning would seek attorney's fees in addition to interest and principal if he were not paid within five days. On 16 January 1984, R. Charles Waters was substituted as trustee for James H. Toms under the deed of trust and was given the authority to foreclose on the property upon default. On 18 January 1984, Waters filed a motion for a hearing on foreclosure under the deed of trust. A Notice of Hearing on Foreclosure was issued to Fortescue both individually and as president of Flat Rock Company, and to A. Louis Skolnik and Lillian Skolnik, junior lienholders on the property. The notice provided that the hearing before the clerk of the superior court would be held on 14 February 1984, and stated, "The name of the original and present holder of the above-described deed of trust and the debt secured thereby is A. S. Browning, Jr. . . ." This notice was received by Fortescue on 23 January 1984.

Subsequently, Fortescue conferred with A. Louis Skolnik who assured Fortescue that Skolnik would help to cover the debt by paying Browning and assuming the note. Apparently, Fortescue was later reassured by A. Louis Skolnik by telephone that the note would be purchased from Browning.

On 9 February 1984, Browning negotiated the note and deed of trust to Lillian Skolnik by written assignment, duly recorded on 13 February 1984, and Lillian Skolnik elected to accelerate the defaulted note and to foreclose on the deed of trust. The hearing

before the clerk was held in February, and foreclosure was allowed. Fortescue appealed to the superior court.

On 30 November 1984, the trial court reviewed the documents involved and heard the arguments of counsel. The trial court made findings of fact and drew the following conclusions of law, among others:

> That no valid reason has been presented as to why the Substitute Trustee should not foreclose the aforementioned Deed of Trust under the power of sale contained therein and the Substitute Trustee has the right to foreclose under the terms and provisions thereof.
>
> That William Nicholas Fortescue, Jr., individually, William Nicholas Fortescue, Jr., President of Flat Rock Company, A. Louis Skolnik and Lillian Skolnik had been given adequate and timely notice of this hearing, as they are entitled under Subsection B of North Carolina General Statutes Chapter 45-21.16, and that notice in all respects was reasonably calculated to inform each of said parties of said hearing and of the imminent foreclosure.

Fortescue contends that the trial court committed two reversible errors: (1) in concluding there was sufficient evidence to establish the note holder's right to foreclose and (2) in concluding that Fortescue received adequate notice of the foreclosure hearing as required by N.C. Gen. Stat. Sec. 45-21.16 (1984). We hold that the trial court did not err, and we affirm.

II

[1] Fortescue argues that he was not given proper notice of foreclosure. The Notice of Hearing on Foreclosure issued 18 January 1984 and received by Fortescue 23 January 1984 named A. S. Browning, Jr., as the original and present holder of the note and deed of trust. On 9 February 1984, before the hearing on foreclosure, A. S. Browning assigned the note and deed of trust to Lillian Skolnik who then proceeded with the foreclosure. On 23 February 1984, a foreclosure hearing was held before the clerk of the court. Fortescue relies on G.S. Sec. 45-21.16 which provides in part:

> (c) Notice shall be in writing and shall state in a manner reasonably calculated to make the party entitled to notice aware of the following:
>
> * * *
>
> (2) The name and address of the holder of the security instrument, and if different from the original holder, his name and address.

He argues that he was entitled to notice stating the name and address of the holder as of the date of the hearing before the clerk of the superior court. Fortescue believed that A. Louis Skolnik, not Lillian Skolnik, was the holder of the note and deed of trust because Fortescue and A. Louis Skolnik had agreed that A. Louis Skolnik would purchase the debt from Browning. Thus, Fortescue asserts, he "relaxed his efforts to meet this debt," and "last minute attempts to negotiate a resolution" were "quite possibly frustrated" by the improper notice that Lillian Skolnik was the holder rather than A. Louis Skolnik.

Fortescue cites *PMB, Inc. v. Rosenfeld*, 48 N.C. App. 736, 269 S.E. 2d 748 (1980), *disc. rev. denied*, 301 N.C. 722, 274 S.E. 2d 231 (1981) for the proposition that any deviation from the requirements of G.S. Sec. 45-21.16 invalidates a foreclosure action and that actual notice is irrelevant. But *PMB, Inc.* is distinguishable. In *PMB, Inc.* written notice was never sent to the mortgagor. The mortgagee had sent a letter, not registered or certified, only to the mortgagor's attorney and had conversed by telephone with the mortgagor. This Court said G.S. Sec. 45-21.16 was clear in its requirement that notice be served in order to assure "unbiased and reliable extrinsic evidence of the fact notice was served." 48 N.C. App. at 737, 269 S.E. 2d at 749.

In the case at bar, even a formalistic reading of the statute reveals that notice was technically proper. At the time notice was issued, the original holder, who was also the then-present holder, was A. S. Browning. The statute does not prohibit an assignment or negotiation of the debt instrument during the interval between the date notice is issued and the time of the hearing, and it is silent as to whether additional notification is necessary when an assignment takes place.

Taking a less formalistic and more policy-oriented view of the statute, we conclude that the purpose of the notice provision was fully satisfied in the case at bar. The latest we can say Fortescue must have known the identity of the holder of the note and deed of trust was 23 February 1984, the date of the hearing before the clerk of the superior court. The *de novo* hearing before the trial court was held on or about 30 November 1984. Fortescue had ample time before foreclosure for "last minute attempts" finally to resolve with Lillian Skolnik the matter of his outstanding debt. *See Lovell v. Rowan Mutual Fire Insurance Co.*, 46 N.C. App. 150, 264 S.E. 2d 743 (1980), *rev'd on other grounds*, 302 N.C. 150, 274 S.E. 2d 170 (1981).

Although we agree that G.S. Sec. 45-21.16 is intended to assure complete and accurate notice of the current holder of a security instrument, we cannot say R. Charles Waters, substitute trustee, failed to comply with the technical provisions of the statute. And Fortescue, with over nine months actual notice before the trial court's *de novo* hearing, was not prejudiced.

III

[2] the only issue raised in the trial court was whether notice was proper. Skolnik argues that Fortescue cannot raise issues in this Court that he failed to raise in the trial court. We agree, but we address, in our discretion, Fortescue's contention that the trial court erred in finding default based only on the arguments of counsel and the documents presented in evidence.

Fortescue correctly points out that the trial court must find (1) a valid debt of which the foreclosing party is the holder, (2) default, (3) a right to foreclose under the instrument, and (4) proper notice. *See* G.S. Sec. 45-21.16(d). The trial court found facts in accordance with those described in Part I, *supra*. Fortescue argues that the trial court failed to consider sufficient evidence to make these findings. We disagree. All of the findings of fact necessary to satisfy the four statutory requirements were established by the documents before the court: the promissory note, the deed of trust, the modification agreement, the written assignment of the deed of trust, the written notice of default and foreclosure, the written substitution of trustee, the motion for hearing, and the special proceedings summons. Most of these documents were recorded in the Henderson County Registry. From

this evidence, unchallenged by Fortescue, the court found that Lillian Skolnik, the party seeking foreclosure, was the holder of a valid debt instrument; that Fortescue had defaulted on the instrument; that the instrument authorized foreclosure; and that proper notice had been received. We believe there was ample evidence to support these findings of fact. *See In re Foreclosure of Burgess*, 47 N.C. App. 599, 267 S.E. 2d 915, *appeal dismissed*, 301 N.C. 90 (1980).

For the reasons set forth above, we

Affirm.

Judges WEBB and COZORT concur.

STATE OF NORTH CAROLINA v. RONALD EUGENE PATTON

No. 8528SC1220

(Filed 15 April 1986)

1. **Burglary and Unlawful Breakings § 5.6— first degree burglary—intent to commit larceny—sufficiency of evidence**

There was sufficient evidence of defendant's intent to commit larceny to support his conviction for first degree burglary where the evidence tended to show that he entered a woman's apartment at 3:00 a.m., was confronted by her and struggled with her in her bedroom, and fled from the apartment, dragging her with him, after hearing her son shout out; after a further struggle with the woman in her backyard, defendant fled when a neighbor called out; and there was no evidence tending to show that defendant entered the woman's home with any intent other than to commit larceny.

2. **Burglary and Unlawful Breakings § 7— first degree burglary—necessity for submission of lesser offense**

The trial court in a first degree burglary case erred in failing to submit to the jury the lesser included offense of misdemeanor breaking and entering where the only evidence of defendant's intent to commit larceny was the fact that he broke and entered into the apartment.

3. **Assault and Battery § 16.1— assault with deadly weapon—evidence of assault on female—submission of guilt of simple assault not required**

Where, in a prosecution for assault with a deadly weapon, the evidence tends to show assault on a female at least, the trial court does not err in failing to submit the question of guilt of simple assault.

State v. Patton

APPEAL by defendant from *Gaines, Judge.* Judgments entered 11 June 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 April 1986.

Defendant was charged in proper bills of indictment with assault with a deadly weapon inflicting serious injury and first degree burglary. The State's evidence at trial tended to show the following: At 3:00 a.m. on 27 October 1983, Linda Littlejohn was awakened by a squeaking sound on the stairs leading to her bedroom. She hid behind her dresser with a wooden clog shoe in her hand. When a man, who Ms. Littlejohn identified at trial as defendant, entered her room she began screaming and held up the shoe to throw it. Defendant picked Ms. Littlejohn up from the floor and threw her down on the bed. She grabbed his hair and wrestled with him on the bed. He hit her once in the mouth with his fist and then hit her on the jaw with a garden tool. After Ms. Littlejohn's son called out from his bedroom, "Who's out there?", defendant pulled her from the bed, shoved her to the stairway, turned on the light on the stairway, and pushed her down the stairs until they reached the bottom floor. She asked defendant what he wanted, but he did not reply. He pulled her out the door into the backyard. As she was being pulled out the door, she saw that defendant was barefoot and that a pair of tennis shoes were on her back porch. Defendant dragged Ms. Littlejohn across the yard, hitting her in the face and chest and kicking her in the head. She heard a voice call from a window, "That's enough. Leave her alone." She then grabbed a garden spade from defendant's hand, threw it across the yard and ran to her neighbor's apartment.

Ms. Littlejohn testified that nothing was missing from her apartment and that she had never seen the spade before that night. After she returned from the hospital, she told her neighbor where she had thrown the spade and her neighbor found it. At trial, she identified State's Exhibit No. 1 as the tool defendant had used to hit her.

Charles Kilgore testified that he was awakened that night by screams. He looked out the window, saw some figures struggling, and called out "That's enough." He further testified that a figure, who he recognized as defendant, looked up and then left.

Defendant presented no evidence at trial. The jury found defendant guilty of assault with a deadly weapon and first degree

burglary. From judgments imposing prison sentences of forty years for the burglary charge and two years for the assault charge, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel C. Oakley, for the State.

Assistant Appellate Defender Geoffrey C. Mangum for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant contends that the trial court erred in failing to dismiss the charge of first degree burglary. The trial judge charged the jury that to find defendant guilty of first degree burglary that "the State must prove to you that at the time of the breaking and entering the Defendant intended to commit a felony, that is to say, larceny." Defendant argues that there is insufficient evidence of intent to commit larceny to support his conviction for first degree burglary. We disagree.

First degree burglary is defined as the unlawful breaking and entering of an occupied dwelling or sleeping apartment in the nighttime with the intent to commit a felony therein. G.S. 14-51; *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976). In *Sweezy*, the Court, citing *State v. McBryde*, 97 N.C. 393, 396-97, 1 S.E. 925, 927 (1887), addressed the question of the sufficiency of the evidence to show an intent to commit larceny:

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

Sweezy, 291 N.C. at 384, 230 S.E. 2d at 535. Where the defendant's actions could be subject to more than one interpretation, it is the function of the jury to infer the defendant's intent

from the circumstances. *State v. Coleman*, 65 N.C. App. 23, 308 S.E. 2d 742 (1983), *cert. denied*, 311 N.C. 404, 319 S.E. 2d 275 (1984).

In the present case, the evidence tends to show that defendant entered Ms. Littlejohn's apartment at 3:00 a.m., was confronted by and struggled with Ms. Littlejohn in her bedroom, and fled from the apartment, dragging her with him, after hearing her son shout "Who's out there?" After a further struggle with Ms. Littlejohn in the backyard, defendant fled when Charles Kilgore called out, "That's enough." There is no evidence in the record tending to show that defendant entered Ms. Littlejohn's home with any intent other than to commit larceny. Therefore, under the requirements of *McBryde*, the State has produced sufficient evidence to support the jury's inference that defendant intended to commit larceny.

[2] Defendant also contends that the trial court erred in failing to submit to the jury the lesser included offense of misdemeanor breaking and entering. We agree.

Misdemeanor breaking or entering is a lesser included offense of burglary in the first degree as set forth in G.S. 14-51. *State v. Perry*, 265 N.C. 517, 144 S.E. 2d 591 (1965). The distinction between the two offenses rests on whether the unlawful breaking or entering was done with the intent to commit the felony named in the indictment. *State v. Jones*, 264 N.C. 134, 141 S.E. 2d 27 (1965). In *State v. Thomas and State v. Christmas and State v. King*, 52 N.C. App. 186, 278 S.E. 2d 535 (1981), this Court, based on analysis of prior decisions, stated that:

> [W]here the only evidence of the defendant's intent to commit a felony in the building or dwelling was the fact that the defendant broke and entered a building or dwelling containing personal property, the appellate courts of this State have consistently and correctly held that the trial judge must submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict. . . . However, where there is some additional evidence of the defendant's intent to commit the felony named in the indictment in the building or dwelling, such as evidence that the felony was committed . . . or evidence that the felony was attempted, . . . or . . . evidence that the felony was planned, and there

> is no evidence that the defendant broke and entered for some other reason, then the trial court does not err by failing to submit the lesser included offense of misdemeanor breaking and entering to the jury as a possible verdict.

Id. at 196-97, 278 S.E. 2d at 542-43 (citations omitted).

In the present case, Ms. Littlejohn testified that nothing was missing from her apartment. There is no evidence tending to show that larceny was committed, attempted or planned by defendant. The only evidence of defendant's intent to commit larceny is the fact that he broke and entered into Ms. Littlejohn's apartment. Therefore, the trial court erred in failing to submit the lesser included offense of misdemeanor breaking or entering to the jury as a possible verdict.

[3] Finally, defendant contends that the trial court erred in failing to submit to the jury the possible verdict of simple assault as a lesser included offense of assault with a deadly weapon. Defendant argues that because the trial judge submitted the question to the jury of whether the garden tool defendant used to assault Ms. Littlejohn was a deadly weapon and because there was other evidence of simple assault, the jury could have found that defendant committed this lesser included offense. Defendant's contention is without merit.

Assault with a deadly weapon and assault on a female are both punishable by a fine, imprisonment for not more than two years, or both, pursuant to G.S. 14-33(b). Where, in a prosecution for assault with a deadly weapon, the evidence tends to show assault on a female at least, the trial court does not err in failing to submit the question of guilt of simple assault. *State v. Church*, 231 N.C. 39, 55 S.E. 2d 792 (1949); *State v. Hill*, 6 N.C. App. 365, 170 S.E. 2d 99 (1969). Since the evidence in the present case warranted an instruction to the effect that the jury might return a verdict of guilty of assault on a female, prejudicial error has not been shown. *Id.*

For the foregoing reasons, we hold that defendant had a fair trial free of prejudicial error on the charge of assault with a deadly weapon, but is entitled to a new trial on the charge of first degree burglary.

No error in part; new trial in part.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. JESSIE BROWN

No. 851SC1159

(Filed 15 April 1986)

1. **Homicide § 21.9— kicking unconscious victim—sufficiency of evidence of voluntary manslaughter**

In a prosecution of defendant for voluntary manslaughter, evidence was sufficient to be submitted to the jury where it tended to show that the victim was kicked, stomped and beaten with various objects by a group of people; after the victim was unconscious, he was kicked about his chest and abdomen by defendant; and the victim died as a result of complications from the splitting of the pancreas which resulted from blows to the abdominal area.

2. **Criminal Law § 113.7— aiding and abetting—instruction improper**

The trial court in a prosecution for voluntary manslaughter erred in instructing that the jury could convict defendant on the theory of aiding and abetting where there was no evidence that defendant acted as an aider and abettor to other persons in beating the victim, and all the evidence showed that defendant acted independently of the others in his assault on the victim.

APPEAL by defendant from *Griffin, William C., Judge.* Judgment entered 13 June 1985 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 7 April 1986.

Defendant was indicted for voluntary manslaughter in the death of William D. Stone. The evidence tended to show that defendant was among a group of people gathered at the Amusement Parlor in Elizabeth City. Shortly before midnight an altercation occurred. Defendant was not involved in this altercation. During the course of this altercation, the victim, William Stone, pulled a gun and shot into the ceiling. Several people began struggling with Stone in an attempt to take the gun away from him. Stone was wrestled to the floor where he proceeded to fire five or six more shots. For the next several minutes a group, variously estimated at between 6 and 15 people, kicked, stomped and struck Stone with various objects including chairs, pool cues and their feet. The defendant was not observed among this group of people.

Following the beating, Stone was left unconscious on the floor. After the beating, defendant was observed outside the Amusement Parlor with a bullet wound to his leg.

Police and rescue squad units arrived and started to transport the injured to area hospitals. Stone and defendant were placed in the same ambulance. Lieutenant W. O. Leary of the Elizabeth City Police Department testified that after Stone was placed in the ambulance with defendant, defendant got up and began kicking Stone about his chest and abdomen. Lt. Leary stated that he saw defendant kick the unconscious Stone three or four times before being pulled out of the ambulance by two officers and an ambulance attendant.

Stone was taken to a Norfolk hospital where he died nine days later. Dr. F. B. Preswella, the medical examiner, testified:

> Based on the autopsy I performed I formed an expert opinion satisfactory to myself as to the cause of William D. Stone's death. My opinion is that Mr. Stone died as a result of medical complications which resulted from the splitting of the pancreas which resulted from blows to the abdominal area. The actual medical complications are the pneumonia that I mentioned, which goes under a name of adult respiratory distress syndrome, in the failure of the organs, especially the liver and the kidney.

On cross-examination, the medical examiner gave the following testimony regarding the type of instrument which could have inflicted the blow which caused the fatal injury:

> It is my opinion that the type of blow was a blunt force injury, to a relaxed abdomen, in either a person who was asleep or unconscious, with a small surface area. It could be a kick, it could be as was suggested the end of a pool stick, the leg of a chair, or, again, a similar thing which is thrust in with force, but which is blunt. It does not penetrate, but it pushes the abdomen in.
>
> A stomp or a kick with the toe of a shoe could do it, if given the right angle and the ability to kick that way.

The jury convicted defendant of voluntary manslaughter. From a judgment sentencing him to the presumptive term of six years imprisonment, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney Kathryn L. Jones for the State.

John W. Halstead, Jr., for defendant appellant.

MARTIN, Judge.

Defendant assigns error to the denial of his motion to dismiss and to the trial court's instructions to the jury. For error in the trial court's instructions to the jury, we must order a new trial.

[1] Defendant first contends that the court erred by denying his motion to dismiss at the close of all the evidence. He argues that there was insufficient evidence to establish that his acts were the proximate cause of Stone's death.

In ruling on a motion to dismiss, the trial court must determine whether the State has produced substantial evidence of each element of the offense and that defendant was the perpetrator. *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982). "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal. . . ." *State v. Powell*, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980).

Voluntary manslaughter is the unlawful killing of a human being without malice, premeditation or deliberation. *State v. Brown*, 300 N.C. 731, 268 S.E. 2d 201 (1980). The State must produce evidence which is sufficient to show beyond a reasonable doubt that defendant's unlawful acts were the proximate cause of the victim's death. However, defendant's acts need not be the sole proximate cause of death. It is sufficient if defendant's "unlawful acts join and concur with other causes in producing" the victim's death. *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E. 2d 923, 926, *aff'd*, 301 N.C. 374, 271 S.E. 2d 277 (1980).

From the evidence presented at trial the jury could find that defendant's kicking the victim several times in the abdominal area caused or contributed to the victim's death. Thus, the trial court properly overruled defendant's motion to dismiss.

[2] The defendant next contends the court erred by giving the following instruction to the jury:

You must clearly understand that, if a person aids and abets in the commission of voluntary manslaughter or involuntary manslaughter, he is guilty of those crimes, either or both, just as if he had personally done all the acts necessary to constitute that crime.

Now, as to the defendant, Jesse Brown, I charge that for you to find Jesse Brown guilty of voluntary manslaughter or involuntary manslaughter because of aiding and abetting the State must prove from the evidence and beyond a reasonable doubt that voluntary manslaughter or involuntary manslaughter was committed by another person or other persons acting in concert, and, second, that the defendant, Jesse Brown knowingly advised, instigated, encouraged, or aided another or others acting in concert to commit voluntary manslaughter or involuntary manslaughter. However, a person is not guilty of the crime merely because he is present at the scene, even though he may silently approve of the crime or secretly intend to assist in its commission. To be guilty, he must aid and actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission. So, I charge that if you find from the evidence and beyond a reasonable doubt that on or about October 14, 1984 that another person or others, either known or unknown, committed voluntary manslaughter, that is that another or others known or unknown, intentionally kicked, stomped or struck with a chair, pool cue or stick, William D. Stone, proximately causing William D. Stone's death, and that Jesse Brown by his conduct knowingly advised, instigated, encouraged or aided another or others either known or unknown, to commit voluntary manslaughter, it would be your duty to return a verdict of guilty of voluntary manslaughter. If you do not find the defendant Jesse Brown guilty of voluntary manslaughter by aiding and abetting that crime, or if you have a reasonable doubt as to one or more of those things, then it would be your duty to return a verdict of not guilty of voluntary manslaughter by reason of aiding and abetting. You must then determine whether the defendant Jesse Brown is guilty of involuntary manslaughter by aiding and abetting.

The defendant contends the foregoing instructions permitted the jury to convict him on the theory that he aided and abetted the other persons involved in the beating of Stone, a theory unsupported by the evidence. We agree. There is no evidence that defendant acted as an aider and abettor to other persons in beating Stone. All the evidence shows that defendant acted independently of the others in his assault on the victim. Thus, there was no basis in the evidence for the court to instruct the jury on the law of aiding and abetting. It is generally error, prejudicial to defendant, for the trial court to instruct the jury upon a theory of a defendant's guilt which is not supported by the evidence. *State v. Dammons*, 293 N.C. 263, 237 S.E. 2d 834 (1977). This error entitles defendant to a new trial.

In view of our decision, we deem it unnecessary to address defendant's remaining assignments of error.

New trial.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. JOHNNIE OLIVER JOHNSON, JR.

No. 8526SC877

(Filed 15 April 1986)

Criminal Law § 122.2— inability to reach verdict—inconvenience of retrial—instructions improper

Where the trial court had a statement from the foreman that the jury was unable to reach a verdict and the court was advised of the eleven to one division of the jury, the trial court erred in mentioning the potential inconvenience and use of the court's time in retrying the case. N.C.G.S. § 15A-1235.

APPEAL by defendant from *Wright, Judge.* Judgments entered 18 April 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 January 1986.

Defendant was convicted of (i) "[p]reparation to commit burglary to wit: possession without lawful excuse an implement of housebreaking" and (ii) "[p]reparation to commit burglary to wit being found in a building with the intent to commit larceny

therein." Defendant appealed from the imposition of two consecutive nine-year terms of imprisonment.

Attorney General Thornburg, by Lucien Capone, III, Assistant Attorney General, for the State.

Public Defender Isabel Scott Day, by Gail M. Phillips, Assistant Public Defender, for defendant appellant.

PARKER, Judge.

In his first assignment of error, defendant contends the trial court erred during the charge to the jury by commenting on the effect of the failure of the jury to reach a verdict. We agree.

The jury in this case began deliberations at approximately 2:54 p.m. At approximately 5:35 p.m., the jury sent a note to the court which stated: "The jury is not able to reach a verdict. . . . The jury feels you should know that the vote is [e]leven to one [g]uilty as charged. [O]nly [t]en of us think you should know this." The jury thereafter returned to the jury box, and the following dialogue occurred:

THE COURT: Do you have a foreman?

MR. REID: Yes, sir.

THE COURT: Who speaks for you?

MR. REID: I am speaking as foreman, Tom Reid.

THE COURT: Now, I have been given a note. You are familiar with this note?

MR REID: Uh-huh.

THE COURT: Please don't answer until I tell you to answer because the slightest thing that I do in this court could make a reversal in the higher courts. You have said here, I believe, that it stands 11 to 1. Is that true?

MR. REID: That is correct.

THE COURT: Thank you. You can have a seat. Now, ladies and gentlemen of the jury, I presume you ladies and gentlemen realize what a disagreement means on the failure of the jury to reach a verdict. It means, of course, that it will be

another week, or hopefully less, time of this court that will have to be consumed in the trial of this action again. I don't want to force you or coerce you in any way to reach a verdict, but it is your solemn duty to try to reconcile your differences and reach a verdict, if it can be done without the surrender of anyone's conscientious convictions. You have heard the evidence in this case. A mistrial, of course, will mean that another jury will have to be selected and hear the case and the evidence again. The Court recognizes the fact that there are sometimes reasons why jurors cannot agree. The Court wants to emphasize the fact that it is your duty as citizens to do whatever you can to reason the matter over together as reasonable men and reasonable women and try to reconcile your differences, if such is possible, without surrender of your conscience or your convictions and reach a verdict. I will let you resume your deliberations and see if you can. Sheriff, take the jury back to the jury room.

The jury returned to the jury room at 5:40 p.m. Within one hour of this instruction, a verdict of guilty on both counts was reported to the court.

Our Supreme Court in *State v. Easterling*, 300 N.C. 594, 608, 268 S.E. 2d 800, 809 (1980) stated that pursuant to G.S. 15A-1235 "a North Carolina jury may no longer be advised of the potential expense and inconvenience of retrying the case should the jury fail to agree. It was thus error for the trial court to mention this fact to the jury." However, since the instruction was given before the jury had returned announcing any deadlock, the Court held that the error was not prejudicial.

The Court further stated:

We caution the trial bench, however, that our holding today is not to be taken as disapproval of the contrary result reached in *State v. Lamb*, [44 N.C. App. 251, 261 S.E. 2d 130, *disc. rev. denied*, 299 N.C. 739, 267 S.E. 2d 667 (1980)], a case in which initial jury disagreement preceded the offending instruction. Clear violations of the procedural safeguards contained in G.S. 15A-1235 cannot be lightly tolerated by the appellate division. Indeed, it should be the rule rather than the exception that a disregard of the guidelines established

in that statute will require a finding on appeal of prejudicial error. 300 N.C. at 609, 268 S.E. 2d at 809-10.

In *State v. Lamb, supra,* this Court granted defendant a new trial where the judge's charge mentioned the expense and inconvenience of a retrial. In particular, the foreman informed the court that the numerical division of the jury was nine to three and stated that in his opinion the jury could not reach a decision. The trial judge thereafter mentioned the time and expense of a retrial, and the next morning offered substantially the same charge as was given here.

In the case *sub judice,* not only did the trial judge have a statement from the foreman that the jury was unable to reach a verdict, the court was advised of the eleven to one numerical division of the jury. "[W]here the jury is deadlocked, and this fact is known to the trial judge, the mention of inconvenience and additional expense may well be prejudicial and harmful to the defendant, and must be scrutinized with extraordinary care." *State v. Mack,* 53 N.C. App. 127, 129, 280 S.E. 2d 40, 42 (1981). *See also State v. Lipford,* 302 N.C. 391, 276 S.E. 2d 161 (1981).

Although the instruction herein did not mention the expense of retrying the case, it clearly mentioned the potential inconvenience and use of the court's time. In our view, based on the principles outlined above, this instruction constituted prejudicial error. We are unable to perceive any distinguishable differences between the factual situation presented in *State v. Lamb, supra,* and the one presented herein.

We do not discuss defendant's remaining assignments of error as they may not occur at retrial.

For the reasons set out herein, the case is remanded to the Superior Court of Mecklenburg County for a

New trial.

Judges WHICHARD and BECTON concur.

FIRST CHARTER NATIONAL BANK v. ROBERT R. TAYLOR

No. 8519DC720

(Filed 15 April 1986)

Process § 9.1— nonresident defendant in another state—insufficient minimum contacts—no personal jurisdiction

Defendant did not have sufficient minimum contacts with this State to allow the exercise of personal jurisdiction over him where the evidence tended to show that a check drawn on a joint investment account by defendant, payable through a Pennsylvania bank, was cashed by plaintiff in North Carolina and then accidentally shredded by plaintiff, and defendant refused to honor plaintiff's demand that the check be replaced.

APPEAL by defendant from *Horton, Judge.* Order entered 24 April 1985 in District Court, CABARRUS County. Heard in the Court of Appeals on 6 November 1985.

Hartsell, Hartsell & Mills by Starkey Sharp V and Elizabeth C. Richardson for plaintiff appellee.

Latham and Wood by B. F. Wood and William A. Eagles for defendant appellant.

COZORT, Judge.

This appeal involves a civil action in which plaintiff First Charter National Bank sued defendant alleging defendant was unjustly enriched because plaintiff accidentally shredded a check drawn on defendant's account with an investment firm payable through a Pennsylvania bank. Plaintiff allowed a third party to negotiate the check and gave the third party $1,800 in exchange for the check. After it shredded the check, plaintiff demanded defendant replace the $1,800. Defendant, a resident of Florida, refused. Plaintiff filed suit in the District Court of Cabarrus County. Defendant moved to dismiss under Rule 12(b) of the Rules of Civil Procedure, alleging a lack of jurisdiction over the person of the defendant. The trial court denied the motion, and defendant appealed. We reverse.

The sole question to be decided by this appeal is whether the trial court erred in denying the defendant's motion to dismiss for lack of personal jurisdiction. In its order, the trial court stated the following:

3. By drawing a personal check and delivering that personal check to the named Payee, said check being endorsed and eventually being honored by First Charter National Bank, a national bank with its principal office in Concord, North Carolina, the Defendant had sufficient contacts with the State of North Carolina through the Federal Reserve System for the Plaintiff to properly assert personal jurisdiction through N.C.G.S. 1-75.4.

4. The maintenance of this suit by the Plaintiff against the Defendant does not offend traditional notions of fair play and substantial justice.

The rules for determining whether our courts have personal jurisdiction over non-residents were stated clearly and concisely in *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E. 2d 91 (1985):

> (1) Did defendant's conduct bring him within the North Carolina "long-arm" jurisdictional statutes? and (2) If so, does the exercise of that jurisdiction satisfy constitutional standards of due process? . . .
>
> I
>
> Our jurisdictional statutes are to be construed liberally in favor of finding personal jurisdiction. . . .
>
> * * * *
>
> II
>
> The second question involves a determination of whether defendant, by his conduct, has established sufficient "minimum contacts" with this state such that requiring him to defend here will not offend traditional notions of fair play and substantial justice. (Citation omitted.) The minimum contacts test is not mechanical . . . but requires consideration of the facts of each case. . . .
>
> Minimum contacts do not arise *ipso facto* from actions of a defendant having an effect in the forum state. (Citation omitted.) There must be some act or acts by which the defendant purposely availed himself of the privilege of doing business there, (citation omitted) such that he or she should reasonably anticipate being haled into court there.

76 N.C. App. at 606-07, 334 S.E. 2d at 92-93.

Defendant contends on appeal that the second question should have been answered in the negative by the trial court. He argues there were not sufficient minimum contacts to require him to defend a lawsuit here without offending the traditional notions of fair play and substantial justice. He contends the trial court's Finding No. 3, quoted above, is not supported by the record, and contends further that, even if the finding were supported, it would not support the conclusion that sufficient minimum contacts exist. Plaintiff argues that, under the circumstances, it is fair and just to find personal jurisdiction. It contends that "the Defendant participated in the injection into the stream of interstate commerce a check drawn on his account. The Defendant knew, or should have known, that [the third party] might cash the check in a state other than Florida. . . . [T]he Defendant invoked the protection and benefits of the banking regulations of any state in which transactions involving the check occur. It was foreseeable that the check could be cashed in North Carolina." We reject the plaintiff's argument and hold that there were not sufficient minimum contacts to support a finding of personal jurisdiction.

We note, initially, that there was no evidence before the trial court that the defendant was the actual drawer of the check. In affidavits filed in the district court, defendant averred that the account was a joint account, and that he did not sign "any such check as mentioned in the . . . case." Even if the evidence showed defendant to be the drawer of the check, there still would not have been sufficient minimum contacts for personal jurisdiction. Defendant's affidavits stated that he had received no benefit from the transaction, that the transaction occurred in Florida, that defendant never resided in North Carolina, and that he was never in North Carolina for purposes of the transaction in question. Plaintiffs offered no evidence of any other contacts between defendant and the State of North Carolina. Thus, the only facts upon which the trial court could determine whether defendant was subject to personal jurisdiction in North Carolina were: (1) a check drawn on a joint investment account of the defendant, payable through a Pennsylvania bank, was cashed by plaintiff in North Carolina and then shredded by plaintiff; and (2) defendant refused to honor plaintiff's demand that the check be replaced.

Those facts simply do not meet the minimum contacts requirement. In *First National Bank of Shelby v. General Funding Corporation*, 30 N.C. App. 172, 226 S.E. 2d 527 (1976), our Court ruled there were not sufficient minimum contacts for personal jurisdiction where defendants, residents of Florida, executed promissory notes in Florida, payable to a limited partnership in that State. The notes were assigned to a North Carolina corporation, without the prior knowledge or approval of the makers. The makers made payments by mail to the Bank in North Carolina. In holding there was no personal jurisdiction, this Court said:

> While the provisions of the North Carolina "long arm" statute are to be liberally construed in favor of finding personal jurisdiction, we cannot expand the permissible scope of state jurisdiction over nonresident parties beyond due process limitations. The mere mailing of a payment from outside the State by a nonresident to a party in this State under a contract made outside the State is not sufficient "contacts" within this State to sustain *in personam* jurisdiction in the forum State. (Citations omitted.)

Id. at 176, 226 S.E. 2d at 530.

The order of the trial court is reversed and the cause remanded.

Judges ARNOLD and MARTIN concur.

BURNETTE INDUSTRIES, INC. v. DANBAR OF WINSTON-SALEM, INC. AND BARBARA C. RUSSELL, INDIVIDUALLY

No. 8521SC888

(Filed 15 April 1986)

1. Mortgages and Deeds of Trust § 32.1— interest on purchase money note—recovery barred by anti-deficiency judgment statute

The anti-deficiency judgment statute, N.C.G.S. § 45-21.38, prohibited plaintiff from recovering interest on a purchase money note, since interest was part of the debt secured by the purchase money deed of trust, and this was a deficiency which plaintiff was barred from recovering.

2. Mortgages and Deeds of Trust § 2— deed of trust as purchase money deed of trust

There was no merit to plaintiff's contention that the deed of trust in this case was not a purchase money deed of trust because it was not made as a part of the same transaction in which the debtor purchased the land and it embraced only a part of the land purchased, since so long as the debt of the purchaser of property is secured by a deed of trust on the property or part of it given by the purchaser to secure payment of the purchase price the deed of trust is a purchase money deed of trust.

APPEAL by plaintiff from *DeRamus, Judge.* Judgment entered 10 May 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 January 1986.

The plaintiff brought this action for interest on a note. The case was tried before a jury. The plaintiff's evidence showed that Danbar of Winston-Salem, Inc. purchased 26 lots of real property from Burnette Industries, Inc. in 1978. Danbar gave Burnette in payment for the property a note for $90,000.00 secured by a deed of trust on the property. Danbar sold some of the lots and made payments on the note. On 1 November 1979 the original note and deed of trust were cancelled and the defendant corporation gave the plaintiff a note for $61,300.00 secured by a deed of trust on the lots that had not been sold.

In July 1982 Barbara C. Russell the principal owner and manager of Danbar contacted the plaintiff and requested permission to return the remaining lots to the plaintiff and receive credit equal to the principal amount owed. The appellant agreed to this with the condition that the interest on the debt be paid. The plaintiff's evidence showed that the defendants agreed to this and Barbara C. Russell agreed to guarantee the payment of the interest. The interest owed was in the amount of $13,949.04.

At the end of the plaintiff's evidence the court allowed the defendants' motions for directed verdict. The plaintiff appealed.

Alexander, Wright, Parrish, Hinshaw, Tash and Newton, by Robert D. Hinshaw, for plaintiff appellant.

Peebles and Schramm, by John J. Schramm, Jr., for defendant appellees.

WEBB, Judge.

[1] The question posed by this appeal is whether the anti-deficiency judgment statute G.S. 45-21.38 prohibits the plaintiff from recovering interest on a purchase money note. We hold that it does so prohibit and affirm the judgment of the superior court.

The plaintiff argues that there is no deficiency because when the lots were reconveyed to it the agreement was that this would be in payment of the entire principal. The plaintiff says that because the entire principal was paid there can be no deficiency. We hold the interest was part of the debt secured by the purchase money deed of trust and this is a deficiency which the plaintiff is barred from recovering by G.S. 45-21.38. We believe we are bound by *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E. 2d 600 (1985), and *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979), to reach this result. Although the facts of those cases are different from the facts of this case, we believe an inference that our Supreme Court wants drawn from these cases is that G.S. 45-21.38 be liberally construed to restrict the right to have deficiency judgments.

We are not persuaded by the plaintiff's argument that because Chapter 24 of the General Statutes governs interest payments that G.S. 45-21.38 does not deal with interest. We do not believe that the fact that G.S. 45-21.38 does not mention interest means that the General Assembly did not mean this part of the debt which is secured by a purchase money deed of trust is not subject to the section. Nor do we believe *Reavis v. Ecological Development, Inc.*, 53 N.C. App. 496, 281 S.E. 2d 78 (1981), is helpful to the plaintiff. In that case this Court held that the holder of a purchase money deed of trust could recover its costs including attorney fees after the foreclosure when the debtor had contracted for it. The costs of the sale are not a part of the debt as is interest.

[2] The appellant next argues that the deed of trust in this case is not a purchase money deed of trust because (1) it was not made as a part of the same transaction in which the debtor purchased the land and (2) it embraced only a part of the land purchased. We note that in answer to a request for an admission the plaintiff admitted this was a purchase money deed of trust. Nevertheless, the plaintiff argues that in *Barnaby v. Boardman, supra*, our

Supreme Court said that *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E. 2d 601 (1940), a case in which a deed of trust which was given to the seller had been replaced by a deed of trust in a smaller amount and subordinated to another deed of trust did not involve a purchase money deed of trust. This statement in *Barnaby v. Boardman, supra,* is contained in a footnote. As pointed out in the dissent in *Barnaby* it was not necessary to overrule *Brown* for the Court to reach its decision. Nevertheless, our Supreme Court said that it rejected the reasoning of *Brown*. It was to this statement that the footnote was directed. We do not believe this dictum in *Barnaby* requires us to hold the instrument in this case is not a purchase money deed of trust. We hold that so long as the debt of the purchaser of property is secured by a deed of trust on the property or part of it given by the purchaser to secure payment of the purchase price the deed of trust is a purchase money deed of trust. We believe this holding is consistent with *Barnaby* and *Realty Co., supra.*

The plaintiff argues that *Ingle v. McCurry*, 243 N.C. 65, 89 S.E. 2d 745 (1955), requires that we hold it was error to allow the defendants' motion for a directed verdict. In that case the defendant pled as an affirmative defense in an action on a note that the note was a purchase money note. The Court did not recite what the evidence showed but held it was error to grant the defendant's motion for nonsuit because the evidence did not establish the affirmative defense. In this case the evidence showed that it was an action to recover a deficiency on a purchase money note. This distinguishes this case from *Ingle*.

The appellant contends it was error to allow the motion for directed verdict against Barbara C. Russell. It argues that she guaranteed the payment of interest and this guarantee is enforceable. It said that it is not barred by the statute of frauds G.S. 22-1 because the evidence shows her promise to pay the interest was for the primary purpose of obtaining a benefit for herself. If it is subject to the statute of frauds, the plaintiff contends there was a sufficient memorandum in writing of the guaranty to comply with the statute. We have held that the debt for the interest was extinguished when the lots were conveyed to the plaintiff. Ms. Russell is not liable for interest because none is due.

Affirmed.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. EARNEST LEE MARKHAM

No. 851SC1035

(Filed 15 April 1986)

Criminal Law § 73.4— whereabouts of thief during pursuit—excited utterance exception to hearsay rule

In a prosecution of defendant for felonious larceny, the trial court did not err in allowing a witness, who related her pursuit of the thief, to testify as to what a bystander told her with regard to the thief's whereabouts, since the testimony was admissible under the present sense impression and excited utterance exceptions to the hearsay rule. N.C.G.S. 8C-1, Rule 803(1) and (2).

APPEAL by defendant from *Watts, Judge.* Judgment entered 15 May 1985 in PASQUOTANK County Superior Court. Heard in the Court of Appeals 10 March 1986.

Defendant was convicted of felonious larceny. At trial, the State's evidence tended to show that on 14 January 1985, Delores White was employed at an Elizabeth City clothing store. At about 3:00 p.m., White observed a man leaving the store with clothing over his arm. She had not previously observed the man in the store nor had she sold him any clothing. White asked another employee to call the police, then pursued the man into the street. During the pursuit, the man dropped some of the clothing. When White stopped to pick up the dropped clothing, the man disappeared. White subsequently returned to the store where she talked with Officer Cutrell, telling him what had happened. At trial, White identified defendant as the thief.

Tyrone Sutton observed defendant running down a street near the clothing store near the time of the theft. Defendant was carrying an armful of suits. Sutton observed defendant run into a parking lot and place the suits under a car. Sutton saw White and told her defendant was the person she wanted. Sutton later identified defendant as the thief to Officer Cutrell.

Officer Cutrell went to the clothing store in response to a call. There, he interviewed White and Sutton. White gave a description of the thief and Sutton told Cutrell of seeing defendant running with the suits and placing them under a car in a nearby parking lot. Cutrell went to the lot and recovered the suits.

Defendant did not offer evidence.

From judgment entered on the jury's verdict of guilty, defendant has appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David E. Broome, Jr., for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by David W. Dorey, Assistant Appellate Defender, for the defendant-appellant.

WELLS, Judge.

In his sole assignment of error, defendant contends that the trial court erred in allowing Delores White to give hearsay testimony. During direct examination, White related her pursuit of the thief. In doing so, she was allowed to testify, over defendant's objection, that when she lost sight of the man she was pursuing, a nearby woman yelled at her and asked what she (White) was doing. When White explained that she was looking for a man with some suits that he had taken from the store "she said that he had gone in the lot. She pointed towards the lot behind Perry Apartments." Defendant contends that such testimony was hearsay, should not have been allowed and was sufficiently prejudicial to require a new trial. We disagree and find no error.

N.C. Gen. Stat. § 8C-1, Rule 803 of the Rules of Evidence provides, in pertinent part:

> Rule 803. *Hearsay exceptions; availability of declarant immaterial.*
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present Sense Impression.—A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Assuming that the statement objected to was arguably hearsay, we nevertheless hold that this statement was admissible under either of the above two exceptions. As Professor Brandis has observed, the trustworthiness of such an utterance "lies in its *spontaneity*—the unlikelihood of fabrication because the statement is made in immediate response to the stimulus of the occurrence and without opportunity to reflect . . . ." 1 Brandis, *N.C. Evidence* § 164 (2d rev. ed. 1982). The official commentary to the Rules of Evidence is in the same vein:

> The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant at the trial even though he may be available.
>
> . . .
>
> The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation . . . . The theory of Exception (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication . . . . Spontaneity is the key factor in each instance . . . .[1]

For the reasons stated, defendant's assignment of error is overruled and we find no error in the trial.

No error.

Chief Judge HEDRICK and Judge MARTIN concur.

1. With respect to Exception (2), our Supreme Court has used the McCormick on Evidence standard, *i.e.*, that for such utterance to qualify under Exception (2) there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication. *See State v. Smith*, 315 N.C. 76, 337 S.E. 2d 833 (1985).

Hunter v. City of Asheville

ROBERT HUNTER (ACCT. NO. 305440), APPLE TREE CHEVROLET (ACCT. NO. 0177800), SKYLAND OLDS (ACCT. NO. 5606700), MARY THRASH (ACCT. NO. 6077900), W. ANDERSON (ACCT. NO. 0158600), CLARENCE E. MARTIN, JR. (ACCT. NO. 3812100), WAYNE COOPER (ACCT. NO. 1470900) v. CITY OF ASHEVILLE

No. 8528SC1171

(Filed 15 April 1986)

Judgments § 5.1; Municipal Corporations § 31— annexation ordinance appealed— effective date

The effective date of an annexation ordinance was the date the judgment of the Court of Appeals holding the ordinance to be valid was certified, not the date of the Supreme Court's order dismissing plaintiffs' appeal and denying discretionary review of the judgment of the Court of Appeals, since N.C.G.S. § 160A-50 provides that the effective date is the date of the final judgment of the superior court or appellate division, as an order of an appellate court dismissing an appeal or denying a petition for review is not a judgment but is purely procedural.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 6 August 1985 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 6 March 1986.

On 14 May 1981 the Asheville City Council adopted Ordinance Number 1219 annexing property in the West Patton Avenue area of Asheville, the effective date of the annexation being 30 June 1981. Plaintiffs, owners of property in the annexed area, brought a civil action contesting the validity of the ordinance. That action resulted in a judgment in the Superior Court of Buncombe County adjudging the annexation to be invalid and void. Upon appeal by Asheville, this Court reversed the Superior Court and held the annexation to be valid. The judgment of this Court was certified to the Superior Court of Buncombe County on 11 July 1983.

On 26 July 1983, plaintiffs appealed to the North Carolina Supreme Court from the judgment of this Court, asserting a substantial constitutional question, and also petitioned the Supreme Court for discretionary review of our judgment. Plaintiffs did not seek from the Supreme Court a stay of our judgment nor a stay of the annexation ordinance. On 6 December 1983, the Supreme Court entered its order dismissing plaintiffs' appeal and denying

their petition for discretionary review. *In re Annexation Ordinance*, 309 N.C. 820, 310 S.E. 2d 351 (1983).

Asheville billed plaintiffs for *ad valorem* taxes on their annexed property based on an effective date of 11 July 1983, the date our judgment was certified. Plaintiffs paid the billed taxes under protest and subsequently requested defendant to refund the taxes paid. Defendant denied the request for refund. Upon appeal by plaintiffs, the superior court entered judgment finding and concluding that the effective date of the annexation ordinance was 6 December 1983, the date of the Supreme Court's order, and ordered defendant to refund to plaintiffs the prorated taxes accrued between 11 July 1983 and 6 December 1983. Defendant has appealed from that judgment.

Shuford, Best, Rowe, Brondyke and Orr, by Robert F. Orr, for plaintiff-appellee.

Sarah Patterson Brison for defendant-appellant.

WELLS, Judge.

The question dispositive of the rights and obligations of the parties to this appeal is whether the effective date of the annexation ordinance was 11 July 1983, the date the judgment of this Court holding the ordinance to be valid was certified, or whether the effective date of the ordinance was 6 December 1983, the date of our Supreme Court's order dismissing plaintiffs' appeal and denying discretionary review of our judgment.

N.C. Gen. Stat. § 160A-50 (1982) governs appeals from the enactment of annexation ordinances. Subsection (i) provides:

> If part or all of the area annexed . . . is the subject of an appeal to the superior court or Court of Appeals on the effective date of the ordinance, then the ordinance shall be deemed amended to make the effective date with respect to such area the date of the final judgment of the superior court or appellate division, whichever is appropriate. . . .

The trial court found and concluded that the "final judgment" in the annexation case was the "judgment" of the Supreme Court dismissing the appeal and denying the petition for discretionary review. We disagree and reverse.

A judgment is a determination or declaration on the merits of the rights and obligations of the parties to an action. *See* 46 Am. Jur. 2d *Judgments* § 1 (1969); *see also Beam v. Almond*, 271 N.C. 509, 157 S.E. 2d 215 (1967); *Russ v. Woodard*, 232 N.C. 36, 59 S.E. 2d 351 (1950); *State v. Williamson*, 61 N.C. App. 531, 301 S.E. 2d 423 (1983). N.C. Gen. Stat. § 1A-1, Rule 54(a) of the Rules of Civil Procedure defines judgment as follows:

> (a) Definition—A judgment is either interlocutory or the final determination *of the rights of the parties* [emphasis supplied].

An order has been defined as being every direction of a court not included in a judgment. *See* 46 Am. Jur. 2d *Judgments* § 3 (1969); *see also State v. Williamson, supra.* An order of an appellate court dismissing an appeal or denying a petition for review is not a judgment; it is not a ruling on the merits of the rights or obligations of the parties but is purely procedural in nature. Accordingly, we hold that the final judgment of the appellate division in the annexation case was the judgment of this Court certified to the court below on 11 July 1983. It follows that the annexation ordinance became effective the same date—11 July 1983—and that plaintiffs are not entitled to a refund of the taxes paid under protest. For the reasons stated, the judgment of the trial court must be reversed and this cause remanded for an order dismissing plaintiffs' action.

Reversed and remanded.

Judges WHICHARD and COZORT concur.

STATE OF NORTH CAROLINA v. RONALD DAVID

No. 8520SC1143

(Filed 15 April 1986)

1. Constitutional Law § 45— motion to remove attorney—denial proper

The trial court did not err in denying defendant's motion to remove his attorney where the attorney assured the court that he was not less inclined ably to represent defendant because defendant had not yet fully paid counsel fees, and the attorney further assured the court that he was prepared for trial.

2. Criminal Law § 91.1— defendant's dealings with attorney—denial of continuance proper

The trial court did not err in denying defendant's motion for continuance made on the grounds that defendant lacked confidence in his counsel and disagreed with counsel's trial strategy; defendant only recently informed counsel of a witness; and defendant spoke with an attorney who indicated an interest in reviewing defendant's case.

3. Criminal Law § 138.42— age of victim as mitigating circumstance—no "victim"

In a prosecution of defendant for sale and delivery of cocaine, there was no merit to defendant's contention that the trial court erred in failing to find as a mitigating factor that "[t]he victim was more than 16 years of age and was a voluntary participant in or consented to the defendant's conduct," since the paid police informant who volunteered to purchase cocaine in furtherance of a police investigation was not a victim within the meaning of N.C.G.S. § 15A-1340.4(a)(2)g.

APPEAL by defendant from *Freeman, Judge.* Judgments entered 16 July 1985 in Superior Court, RICHMOND County. Heard in the Court of Appeals 7 April 1986.

Defendant was charged in proper bills of indictment with possession of cocaine with intent to sell or deliver and of sale or delivery of cocaine. The State presented evidence tending to show that a paid informant purchased from defendant one-fourth gram of a white powdery substance subsequently determined to be cocaine. Defendant presented no evidence. From judgments imposing an eight-year prison sentence for sale and delivery of cocaine and a three-year concurrent prison sentence for possession of cocaine with intent to sell or deliver, defendant appealed.

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

Assistant Appellate Defender Louis D. Bilionis for defendant, appellant.

HEDRICK, Chief Judge.

By his first assignment of error, defendant contends that the trial court erred in denying defendant's motion to remove his attorney and in denying defendant's motion for continuance.

[1] The grounds stated in support of defendant's motion to dismiss his attorney were: 1) defendant lacked confidence in counsel because defendant had not fully paid counsel fees; and 2) de-

fendant disagreed with counsel's judgment regarding the evidence to present at trial. When faced with a request that counsel be withdrawn, a trial court's sole obligation is to make a sufficient inquiry to determine whether defendant will receive effective assistance of counsel. *State v. Poole*, 305 N.C. 308, 312, 289 S.E. 2d 335, 338 (1982).

Defendant's attorney assured the court that he was not less inclined to ably represent defendant because defendant had not yet fully paid counsel fees. Defendant's attorney further assured the court that he was prepared for trial. We have carefully examined the record. We conclude that defendant was adequately represented at trial and that his right to effective assistance of counsel was not abridged. *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981).

[2] The grounds stated in support of defendant's motion for a continuance were: 1) defendant lacked confidence in counsel; 2) defendant disagreed with counsel's trial strategy; 3) defendant only recently informed counsel of a witness; and 4) defendant spoke with an attorney who indicated an interest in reviewing defendant's case. In reviewing defendant's contention that the trial court erred in denying his motion for a continuance, we note that ordinarily the decision to grant or deny a continuance rests in the sound discretion of the trial court and will not be disturbed absent an abuse of discretion.

It is not an abuse of discretion for the trial court to deny a motion for continuance motivated by a defendant's lack of confidence in his counsel. *State v. Billups*, 301 N.C. 607, 272 S.E. 2d 842 (1981). A mere disagreement between a defendant and his counsel as to trial tactics is not sufficient to require the trial court to grant a continuance. See *State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976). It is not an abuse of discretion to deny a motion for continuance when defendant waits until the trial date, 14 months after indictment, to inform his attorney that he has a witness. See *State v. McDiarmid*, 36 N.C. App. 230, 243 S.E. 2d 398 (1978). The trial court is certainly not required to grant a motion for continuance grounded on the possibility of obtaining new counsel. Defendant's first assignment of error is overruled.

[3] Defendant's remaining assignment of error is to the court's failure to find a mitigating factor that "[t]he victim was more than

16 years of age and was a voluntary participant in or consented to the defendant's conduct." At the sentencing stage of trial, the trial court must find each mitigating factor enumerated in the Fair Sentencing Act and supported by uncontradicted, substantial and manifestly credible evidence. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983).

Defendant contends that the paid police informant who volunteered to purchase cocaine in furtherance of a police investigation is a victim within the meaning of G.S. 15A-1340.4(a)(2)g. Such an interpretation is contrary to the ordinary meaning of the term victim. Defendant's assignment of error is overruled.

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

No error.

Judges WELLS and MARTIN concur.

WESLEY C. BOWERS v. KEITH BILLINGS AND DARREN MAC JOINES

No. 8523SC995

(Filed 15 April 1986)

Rules of Civil Procedure § 4— process—person residing in defendant's house—defendant's father living in another house—service sufficient

Service of process by leaving the complaint with defendant's father met the requirement of N.C.G.S. § 1A-1, Rule 4(j)(1)a that the paper be left at defendant's usual place of abode with some person of suitable age and discretion then residing therein, though the evidence tended to show that defendant and his father occupied separate houses, where it also tended to show that the houses were both owned by the father and located on a farm owned by the father; they were 60 to 100 yards from each other; only one road or driveway led to the farm and houses from a public road; there was only one mailbox for the two houses; the parents had access to defendant's house and he to theirs; defendant paid no rent and often took his meals with his parents; his mother regularly washed his clothes; and on an earlier occasion, a deputy sheriff took the drunk defendant to his parents' home.

APPEAL by defendant Billings from *Wood, Judge*. Order entered 11 July 1985 in Superior Court, WILKES County. Heard in the Court of Appeals 6 February 1986.

Porter, Conner and Winslow, by Kurt R. Conner, for plaintiff appellee.

W. G. Mitchell and Ferree, Cunningham & Gray, by George G. Cunningham, for defendant appellant Keith Billings.

PHILLIPS, Judge.

In this civil action for personal injuries arising out of an automobile accident the defendant Keith Billings was duly served with a copy of the summons and an order extending time to serve the complaint on the 7th day of August 1984. Thereafter, on 27 August 1984 plaintiff's complaint was filed in court along with a certificate of service indicating that a copy of the complaint was served on defendant Billings that day at his residence by leaving it with his father, who also resided therein. On 28 September 1984 defendant Billings moved to dismiss the action for insufficient service of process, alleging that the papers were not left at his residence, but at the residence of his father and that he did not receive the papers until nearly a month later. When the motion was denied defendant Billings appealed. The appeal is dismissible because it is from an interlocutory order that affects neither jurisdiction nor a substantial right. G.S. 1-277; *Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141 (1982). Personal jurisdiction over the defendant was established when the summons was served on him, *Childress v. Forsyth County Hospital Authority*, 70 N.C. App. 281, 319 S.E. 2d 329 (1984), and defendant would suffer no injury if the error claimed is not corrected until after the final judgment in the case is entered. *Love v. Moore, supra.* Nevertheless, we choose to resolve the contentions made, lest the plaintiff and the courts be troubled again with them later.

An approved method of serving process and other court papers on a defendant in a civil action is for an authorized process officer to leave the paper "at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." Rule 4(j)(1)a, N.C. Rules of Civil Procedure. That the deputy sheriff left the complaint with defendant Billings' father at the latter's house and that he is a person of "suitable age and discretion" to receive papers from a process server is conceded. The only question for determination is whether in leaving the papers with defendant's father the deputy

sheriff left them "at the defendant's dwelling house or usual place of abode with [one who was] then residing therein." In denying defendant's motion the trial judge found as a fact that he and his parents "lived on one farm which should be considered as one unit." If this finding by the court is supported by competent evidence, that resolves the matter. *Davison v. Duke University*, 282 N.C. 676, 712, 194 S.E. 2d 761, 783 (1973).

The evidence presented shows that: The house defendant Billings resides in is situated on a 63-acre farm in the Trap Hill community of Wilkes County and defendant's parents live in another house situated on the same farm. The houses are about 60 to 100 yards from each other. Both houses and the farm are owned by defendant's parents; only one road or driveway leads to the farm and houses from a public road; it passes the parents' house first and then the house defendant lives in. The farm and the houses have but one mailbox and the parents routinely take defendant's mail to the house he lives in. The parents have access to the house defendant lives in and he has access to the parents' house. Defendant pays no rent; he frequently takes his meals with his parents; and his mother regularly washes his clothes. On an earlier occasion a deputy sheriff took "Keith Billings when drunk to his parents home." In undertaking to serve the complaint on defendant a deputy sheriff went to the farm and left the papers with defendant's father who told him that defendant was not there and that he would give the papers to him. Construing the Rules of Civil Procedure liberally and practically, so as to avoid burdensome, pointless punctiliousness, as the General Assembly obviously intended, *see* J. Sizemore, *General Scope and Philosophy of the New Rules*, 5 Wake Forest L. Rev. 1, 6-7 (1969), we are of the opinion that the evidence before the court tends to show that defendant Billings and his parents do share the same dwelling and place of abode, although they occupy separate houses, and therefore that the service involved met the requirements of Rule 4(j)(1)a quoted above.

Affirmed.

Judges ARNOLD and EAGLES concur.

BILLY O. WILDER v. GEORGE K. HODGES

No. 8510DC1055

(Filed 15 April 1986)

1. **Unfair Competition § 1— unfair and deceptive trade practice—leasing of one lot—business activity**

The leasing of one piece of real estate for use as a restaurant parking lot was a business activity within the meaning of N.C.G.S. § 75-1.1 prohibiting unfair and deceptive trade practices.

2. **Unfair Competition § 1— fraud and unfair or deceptive trade practice—recovery on one claim only**

When the same course of conduct supports claims for fraud and for an unfair and deceptive trade practice, recovery can be had on either claim, but not on both.

APPEAL by defendant from *Payne, Judge.* Judgment entered 3 May 1985 in District Court, WAKE County. Heard in the Court of Appeals 6 February 1986.

Plaintiff sued for damages upon claims of fraud and unfair and deceptive trade practices in violation of G.S. 75-1.1. Both claims are based upon allegations that defendant falsely represented that he had bought a vacant lot adjacent to plaintiff's restaurant, a lot plaintiff had long used for customer parking at no charge by the owner, and induced plaintiff to pay him $1,080 as rent over a three-month period. The jury returned a verdict for the plaintiff on both claims, finding in each instance that his actual damages were $1,080, and on the fraud claim they also awarded $3,000 in punitive damages. The trial judge trebled the Chapter 75 damages to $3,240, as required, and entered judgment against defendant for that amount plus $3,000, or $6,240 altogether. The court also taxed defendant with plaintiff's attorneys fees in the amount of $1,500.

Yeargan, Thompson & Mitchiner, by W. Hugh Thompson, for plaintiff appellee.

Martin & Hayes, by David Ray Martin, for defendant appellant.

PHILLIPS, Judge.

[1] The verdict against defendant is supported by evidence tending to show, in gist, that though he only had an option to buy the lot involved, with no right to rent it, defendant nevertheless induced plaintiff into signing a written lease and into paying him $360 a month for using the lot. Even so, defendant contends that the evidence does not support the unfair or deceptive trade practices verdict and judgment. The argument is that the leasing of the one lot involved was neither in commerce nor had any effect on it, as G.S. 75-1.1 requires. The contention has no merit. G.S. 75-1.1(b) defines commerce to include "all business activities, however denominated," and leasing a piece of real estate for use as a restaurant parking lot is certainly a business activity. Actually, this is no longer an open question, as we held earlier that the leasing of just one commercial lot satisfies the Chapter 75 requirement of being in or affecting commerce. *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E. 2d 176, *modified on other grounds and aff'd*, 303 N.C. 675, 281 S.E. 2d 43 (1981).

[2] Defendant's contentions that the court erred in charging the jury in certain respects cannot be considered because he made no objection to the charge. Rule 10(b)(2), N.C. Rules of Appellate Procedure. But the defendant's contention that the judgment erroneously permits a double recovery for one injury is well taken. When the same course of conduct supports claims for fraud and for an unfair or deceptive trade practice under Chapter 75, recovery can be had on either claim, but not on both. *Borders v. Newton*, 68 N.C. App. 768, 315 S.E. 2d 731 (1984). Thus, in entering judgment against defendant for $3,240 on the Chapter 75 claim and also for $3,000 on the fraud claim, for $6,240 altogether, the court went too far, and the judgment is modified to provide for the recovery of $3,240 along with the costs and attorneys fees as properly taxed under G.S. 75-16.1.

No error in trial; judgment modified.

Judges ARNOLD and EAGLES concur.

DOROTHY P. BRIDGES, EXECUTRIX OF THE ESTATE OF PARKS W. BRIDGES, PLAINTIFF v. UNIVERSAL FOREST PRODUCTS, INC. AND ANDY GENE STRICKLAND, DEFENDANTS v. TIMOTHY D. BRIDGES, THIRD PARTY CLAIMANT

No. 8522SC910

(Filed 15 April 1986)

Appeal and Error § 7— defendants not aggrieved—no right to appeal

In an automobile passenger's wrongful death action against the driver and owner of a tractor trailer, defendants had no right to appeal orders dismissing their claim for contribution and striking their contributory negligence defenses to plaintiff's claim and to third party defendant's counterclaim against them, notwithstanding the appeal could affect a case between defendants and the third party defendant pending in a federal court, where the original parties settled plaintiff's claim for compensatory damages, plaintiff's punitive damages claim was tried to a conclusion in favor of defendants, and the third party defendant voluntarily dismissed his counterclaim against defendants.

APPEAL by defendants from *Collier, Judge.* Orders entered 23 July 1984, 11 December 1984 and 17 May 1985 in Superior Court, IREDELL County. Heard in the Court of Appeals 4 February 1986.

Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Richard R. Reamer, and Jordan, Brown, Price and Wall, by R. Frank Gray, for defendant appellants.

Womble, Carlyle, Sandridge & Rice, by Robert H. Sasser, III, for third party claimant appellee Timothy D. Bridges.

PHILLIPS, Judge.

This wrongful death action for both compensatory and punitive damages arose out of a collision between a tractor trailer operated by the defendant Strickland for the corporate defendant and an automobile in which Parks W. Bridges was a passenger. In answering the complaint defendants denied that they were negligent and pled the defense of sudden emergency. Later, defendants filed a third party claim for contribution against the driver of the car, Timothy D. Bridges, alleging that his negligence contributed to the fatal collision. Still later, by an amendment to their answer, defendants added a defense of contributory negligence, alleging that the negligence of Timothy D. Bridges was im-

putable to plaintiff's decedent, who owned the car. Timothy D. Bridges, after answering defendants' claim for contribution and denying that he was negligent, filed a counterclaim against them for injuries suffered in the fatal collision, in defense of which defendants pled his contributory negligence. The circumstances surrounding the accident, though irrelevant to this appeal, were quite unusual and the validity of the defendants' claim and defenses was challenged by the plaintiff and the third party defendant. Pursuant to their motions Judge Collier, by different orders, struck defendants' claim for contribution and their defenses to both the complaint and counterclaim based on contributory negligence. Then Timothy D. Bridges, the third party defendant who no longer had a contribution claim to defend, voluntarily dismissed without prejudice his counterclaim against defendants. In that setting, defendants settled plaintiff's claim for compensatory damages by paying her $175,000, and the punitive damages claim was tried to a conclusion in favor of the defendants.

Obviously, there is no unresolved issue in *this* case for defendants to appeal and the appeal is dismissed. *Kendrick v. Cain*, 272 N.C. 719, 159 S.E. 2d 33 (1968). The appeal, from the orders dismissing their claim for contribution and striking their contributory negligence defenses to plaintiff's suit and the counterclaim of Timothy D. Bridges, cannot affect this case, which is over and done with. Plaintiff's claims that defendants would resist or obtain contribution for have been judicially resolved to their satisfaction, and the counterclaim of Timothy D. Bridges that they would also resist has been withdrawn and is no longer in the case. The appeal is pursued only because it could affect a case between Timothy D. Bridges and the defendants that is now pending in the federal court. But courts can only determine issues that are before them; they are not licensed to decide abstract questions that may or may not arise in other litigation elsewhere.

Appeal dismissed.

Judges ARNOLD and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 15 APRIL 1986

ANDREWS v. ANDREWS No. 8518DC966	Guilford (82CVD4834)	Vacated
BARNA v. EVANS CONSTRUCTION CO. INC. OF RALEIGH No. 8510SC884	Wake (82CVS3094)	Appeal Dismissed
BOND v. PIEDMONT AVIATION, INC. No. 8521SC1203	Forsyth (84CVS4986)	Affirmed
HINSON v. HINSON No. 8526DC754	Mecklenburg (83CVD7250)	Appeal Dismissed
HOBBS v. HOBBS No. 854DC539	Duplin (84CVD0204)	Vacated & Remanded
HUFFMAN v. SCRONCE No. 8525DC845	Catawba (82CVD1582)	No Error
IN RE CLARK No. 853DC1163	Pitt (85J4 B & C)	Affirmed
IN RE HORNER No. 8515DC1022	Alamance Filed as: (84CVD1082) (84CVD1083) Heard as: (84J122) (84J136)	Affirmed
IN RE LEAK No. 8527DC863	Cleveland (81-J-39-43)	Affirmed
IN RE WARD No. 853DC1162	Pitt (80J90 C & D)	Affirmed
McCONNELL v. McCONNELL No. 8526DC1058	Mecklenburg (82CVD1455)	Affirmed
PARKER v. BROWN No. 859SC836	Person (84CVS16)	Affirmed
PHILBECK v. MORROW No. 8529SC1002	Rutherford (82CVS437)	Affirmed
STATE v. BUTLER No. 858SC744	Wayne (84CRS13060)	No Error
STATE v. COX No. 8526SC1144	Mecklenburg (84CRS53008)	No Error
STATE v. GLADNEY No. 8526SC1007	Mecklenburg (83CRS5381)	No Error

STATE v. PEED No. 852SC464	Beaufort (84CRS1138) (84CRS1140)	No. 84CRS1140, possession of stolen goods, judgment vacated; remanded for entry of judgment of dismissal; all other charges remanded for resentencing. No. 84CRS1138, breaking or entering, no error; possession of stolen goods, judgment vacated, remanded for entry of judgment of dismissal; larceny remanded for resentencing.
STATE v. ROARK No. 8525SC1167	Caldwell (85CRS1396)	No Error
STATE v. WOODARD No. 8510SC805	Wake (84CRS21426)	No Error
STEVENS v. SETZER No. 854SC992	Sampson (83CVS679)	Affirmed
UMSTEAD AND DUNN v. SIMKO AND BORDERS No. 8514DC677	Durham (84CVD1388)	Affirmed in part; reversed in part and remanded for entry of judgment not inconsistent with this opinion.

WESLEY LEIPHART v. NORTH CAROLINA SCHOOL OF THE ARTS

No. 8510SC691

(Filed 6 May 1986)

1. **Public Officers § 12— dismissal of School of Arts employee—leadership role in meeting about superior**

There was substantial evidence to support the dismissal of petitioner as Director of Student Activities at the N. C. School of the Arts on the ground that petitioner's leadership role in assembling a meeting of division directors to discuss complaints about their superior, the Dean of Student Services, in the absence of the Dean constituted personal misconduct resulting in a serious disturbance of the normal operation of the Department of Student Services. N.C.G.S. § 126-35.

2. **Public Officers § 12— discharge of State employee—opportunity to respond to charges—meeting with superior**

A meeting between petitioner and his immediate superior prior to his dismissal as Director of Student Activities at the N. C. School of the Arts satisfied due process requirements of a pretermination opportunity to respond to the charges against him.

3. **Public Officers § 12— dismissal of State employee—statement of reasons given simultaneously with dismissal**

When a State employee is being dismissed for personal misconduct, the N.C.G.S. § 126-35 requirement of timely written notice is met where the written statement of the reasons for dismissal is given to the employee simultaneously with his dismissal.

4. **Public Officers § 12— dismissal of State employee—notice of specific acts**

A notice of dismissal sufficiently identified the specific acts resulting in petitioner's discharge in compliance with N.C.G.S. § 126-35 where it stated that "[t]he specific basis for this decision is your leadership role in assembling the meeting of October [21], 1983, in my office . . . ."

5. **Public Officers § 12— dismissal of State employee—notice of appeal rights**

A letter dismissing petitioner as Director of Student Activities of the N. C. School of the Arts met the requirement of N.C.G.S. § 126-35 that the employee be furnished with a written statement of his appeal rights where it stated, "You may choose to appeal this decision within 30 days in writing to the State Personnel Office, Employee Relations Division," and the letter was accompanied by a copy of the School's Grievance Procedure.

6. **Public Officers § 12— dismissal of State employee—failure to follow internal appeal procedure**

Failure of the N. C. School of the Arts to follow its normal internal administrative appeal procedure in the dismissal of petitioner as Director of Student Activities by failing to provide reviews by the Grievance and Appeal Committee and then by the Chancellor did not violate petitioner's rights

where the Chancellor had approved the discharge of petitioner and the internal review procedure would only have served to provide the Chancellor an opportunity to review a decision he had already made.

7. **Public Officers § 12— dismissal of State employee—consultation with members of State Personnel Commission—representation by daughter of State Personnel Director—fair hearing**

Petitioner was not deprived of a fair administrative hearing of his dismissal as Director of Student Affairs of the N. C. School of the Arts because the Dean of Student Services had consulted with members of the State Personnel Commission before dismissing petitioner or because the daughter of the Director of State Personnel represented the School before the hearing officer, where petitioner failed to show any disqualifying personal bias on the part of the decision makers from familiarity with the facts of the case, and where there was nothing in the record to indicate that the Director of State Personnel had any role in the decision-making process.

8. **Constitutional Law § 18; Public Officers § 12— dismissal of State employee—no violation of free speech right**

Petitioner's First Amendment right of free speech was not violated by his dismissal as Director of Student Activities at the N. C. School of the Arts because of his role in assembling a meeting of division directors to discuss complaints about their superior, the Dean of Student Services, since petitioner's complaints about the Dean were not directed to matters of public concern but focused on petitioner's own personal displeasure with the Dean's internal policies.

Judge BECTON concurring in the result.

APPEAL by petitioner from *Hobgood (Robert), Judge.* Order entered 15 April 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 3 December 1985.

Attorney General Lacy H. Thornburg by Assistant Attorney General Thomas J. Ziko for respondent appellee.

David B. Hough for petitioner appellant.

COZORT, Judge.

Petitioner was fired from his position as Director of Student Activities in the Student Services Department at the North Carolina School of the Arts. The reason given for his dismissal was personal misconduct, specifically, his role in assembling a meeting of other division directors to discuss complaints about their superior, the Dean of Student Services, in the absence of the Dean. On appeal, petitioner raises several procedural and substan-

tive issues, including whether his dismissal comported with the due process requirements of the United States Constitution, and whether his dismissal violated his right to free speech under the First Amendment to the Constitution. We affirm. The pertinent facts follow:

Petitioner Wesley Leiphart was employed as Director of Student Activities in the Student Services Department at the North Carolina School of the Arts (hereinafter School). At the time of his dismissal, petitioner had been continuously employed by the State for approximately six (6) years. The petitioner reported directly to Patricia Harwood, Dean of Student Services. In addition to Student Activities the Student Services Department consisted of four other divisions headed by four directors. All the directors worked closely together with each other and Dean Harwood. Dean Harwood held bi-weekly meetings with the directors in order to discuss and respond to problems, concerns or issues relating to the department.

On 19 October 1983 petitioner and Dean Harwood met to discuss an upcoming job classification study. After the meeting Dean Harwood left campus to attend a workshop at East Carolina University. Dean Harwood had informed her staff that she would be attending this workshop for two days.

On 21 October 1983 petitioner called a meeting to discuss complaints about the Department of Student Services. Prior to the meeting the petitioner compiled a list of complaints he had received about the Department of Student Services and Dean Harwood. Present at the meeting were three directors and Bec Christian, who was filling in for one of the directors while he was away on business. One of the directors objected to having such a meeting because some of the complaints were against persons who were not present at the meeting. As a result, no discussion took place concerning any of the complaints on the petitioner's list and the meeting ended. Dean Harwood was not present at the meeting because she was attending the workshop at East Carolina.

On 24 October 1983 the Dean met with the petitioner in her office. The Dean informed him that she had learned about the meeting that was called in her absence. The Dean questioned petitioner about his involvement in the meeting.

On 18 November 1983, Dean Harwood notified petitioner in writing that he was being dismissed. The dismissal letter stated:

> Dear Mr. Leiphart:
>
> I regret to inform you that I have reached a decision that your services are no longer required, and you are hereby being dismissed immediately for reasons of personal conduct.
>
> The specific basis for this decision is your leadership role in assembling the meeting of October [21], 1983, in my office, the purpose of which was, in my opinion, to totally sabotage my authority as Dean of Student Services and to undermine any authority or leadership I might have with my immediate staff. It has never been my posture to refuse to consider differing viewpoints on the administration of this Division. However, there is a responsible and professional way to bring up these concerns in a productive manner, and there is an irresponsible and unprofessional way to do this. You have chosen the latter route. Your actions in calling this meeting, setting the agenda, and leading the discussion in my absence and without my knowledge was totally disruptive to the normal functioning of this Division and professionally irresponsible. No organization, academic or otherwise, should be expected to tolerate such mutinous behavior. This deliberate act on your part to sabotage my authority and disrupt productive working relationships between me and my staff forces me to the conclusion that you are no longer able to discharge your responsibilities in a professional and productive manner. Because of your actions, I no longer have trust in your integrity, your professionalism, or your ability to perform your duties as Director of Student activities.
>
> Therefore, after a complete discussion of this situation with the Chancellor and with his approval, you are hereby dismissed as Director of Student Activities.
>
> * * * *
>
> You may choose to appeal this decision within 30 days in writing to the State Personnel Office, Employee Relations Division.

On 28 November 1983, petitioner wrote the Personnel Director of the School requesting a hearing before the School Griev-

ance and Appeal Committee. On 30 November 1983, the Personnel Director informed petitioner that he should appeal directly to the State Personnel Commission because the Chancellor had approved his dismissal and the requirements of an internal hearing had been satisfied. Petitioner then timely appealed to the State Personnel Commission.

On 26 January 1984 a hearing was held before a Hearing Officer of the State Personnel Commission. The Opinion of the Hearing Officer was issued on 26 March 1984. The Opinion set forth "Findings of Fact and Conclusions" recommending that the State Personnel Commission affirm the School's decision to dismiss Petitioner for just cause. The full State Personnel Commission, after considering the Hearing Officer's Opinion and Recommendation, ordered that the decision to dismiss petitioner be left undisturbed.

Pursuant to G.S. 150A-43 (recodified 1986) petitioner filed a Petition for Judicial Review on 14 May 1984. The case was heard on 25 March 1984 by Superior Court Judge Robert H. Hobgood. On 15 April 1985 Judgment was entered upholding the School's dismissal of petitioner.

Petitioner's appeal raises three major issues: (1) whether the dismissal of petitioner for personal misconduct is supported by substantial evidence in view of the entire record, G.S. 150A-51(5) (recodified 1986); (2) whether procedural irregularities deprived petitioner of due process; and (3) whether petitioner's First Amendment rights to free speech were violated by his dismissal.

[1] First we consider whether the superior court correctly decided that the School's decision to dismiss petitioner on the grounds of personal misconduct was supported by substantial evidence in light of the whole record. A permanent State employee may be dismissed for (1) inadequate performance of duties or, (2) personal conduct detrimental to State service. *Jones v. Dept. of Human Resources*, 300 N.C. 687, 268 S.E. 2d 500 (1980). Petitioner was dismissed for misconduct. According to State Personnel Commission regulations promulgated pursuant to G.S. 126-4(7a), "participation in any action that would in any way seriously disrupt or disturb the normal operation of . . . [a] department . . ." is one of several activities representative of personal misconduct which constitutes just cause for dismissal under G.S. 126-35. 1 N.C.A.C. 8J .0609(b)

(repealed 1984). The School contends that petitioner's role in assembling the 21 October 1983 meeting constituted an action which seriously disturbed the normal operation of the Department of Student Services. Thus, the question presented for our review is whether there is substantial evidence in the record which would support the Commission's finding that petitioner's action in assembling a meeting to discuss complaints about the Department and the Dean disturbed the normal operation of the Department such that it constituted personal misconduct.

In reviewing an administrative decision to determine whether the decision is supported by substantial evidence, this court, pursuant to G.S. 150A-51(5), must apply the "whole record" test. The "whole record" test requires the court to take into account all the evidence, both that which supports the decision of the Commission and that which in fairness detracts from it. *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977); *see also Faulkner v. New Bern-Craven County Bd. of Educ.*, 311 N.C. 42, 316 S.E. 2d 281 (1984). In essence, the reviewing court determines 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).

With respect to the personal misconduct charge, the Commission, by adopting the Hearing Officer's Order, made the following findings and conclusions:

Findings of Fact

* * * *

2. . . . All of the . . . directors reported directly to Ms. Patricia Harwood, Dean of Student Services. In administering their respective division, [*sic*] all the directors are required to work closely with each other and Ms. Harwood. To this end, Ms. Harwood held bi-weekly mandatory staff meetings with the directors in order for them to discuss and respond to problems, concerns or issues relating to the department. In addition, Ms. Harwood held monthly staff meetings with all of the departments [*sic*] staff members, which consisted of 25 employees.

* * * *

6. Petitioner and Ms. Harwood met on the morning of October 19, 1983 to discuss an upcoming job classification study. The above meeting lasted for about 90 minutes; afterward Ms. Harwood left to attend a workshop at East Carolina University. Ms. Harwood had informed her staff that she would be attending the workshop for two days.

7. On October 20, 1983, Petitioner showed Mr. Johnson, Director of Counseling Services, a list of concerns/complaints about the department which he had compiled. Petitioner indicated that he had heard or received the complaints from other staff members. Petitioner's list of concerns was primarily about Ms. Harwood and Mr. Hackney . . . .

* * * *

9. On October 21, 1983, Mr. Johnson and Petitioner called Ms. Braxton and Ms. Porter, respectively, to inform them of the meeting which had been scheduled for 10:00 a.m. Ms. Harwood and Mr. Hackney were not asked to attend the call [*sic*] meeting because they were out of town attending some workshops. Because Mr. Hackney was unavailable to attend the call [*sic*] meeting, Petitioner asked Ms. Bec Christian of Mr. Hackney's staff to attend the call [*sic*] meeting as Mr. Hackney's representative. Mr. Hackney had asked Ms. Christian to take care of the Residence Life section while he was away. However, according to Mr. Hackney, Ms. Christian was not left in charge to handle his administrative duties, e.g., attend a director [*sic*] meeting.

10. When the call [*sic*] meeting commenced, Ms. Braxton, Ms. Porter, and Mr. Johnson were surprised to see Ms. Christian at the meeting because it was unusual for someone other than the directors to attend a director's [*sic*] meeting. With nonverbal communication, Mr. Johnson indicated to Petitioner that he open the meeting. Petitioner opened the meeting by stating that he had heard and received a lot of complaints, statements, and misconceptions about the department. At that time Ms. Braxton asked Petitioner if any of the complaints were against her. Petitioner said, "No." Ms. Braxton asked Petitioner

if the complaints were against anybody who was not present at the meeting. Petitioner said, "Yes." Ms. Braxton said, "If that's the case then [such] a meeting was inappropriate." The other participants at the meeting, including Petitioner, agreed with Ms. Braxton's latter statement. Although Petitioner agreed with Ms. Braxton's statement, based on his expression while closing his folder, he was not too pleased with it. As a result of Ms. Braxton's statement, no discussion took place on any of the complaints on the Petitioner's list. The call [*sic*] meeting ended with the participants agreeing that Mr. Johnson and Petitioner would meet with Ms. Harwood on October 24th to discuss the complaints with her.

* * * *

14. From October 25, 1983 to Petitioner's dismissal of November 18, 1983, all of the directors, except Mr. Johnson, expressed to Ms. Harwood that they could not trust Petitioner and that their working relationship with him had been strained. They felt like Petitioner's involvement in compiling and presenting the list of complaints was unprofessional and an act of backstabbing.

* * * *

Conclusions

* * * *

3. Next the question on substantive just cause must be addressed. The evidence presented by Respondent at the hearing more than meets the sufficiency standards for just cause to dismiss an employee. The Respondent has shown that Petitioner was dismissed for his leadership role in assembling a call [*sic*] meeting at a time when he knew that his supervisor, Ms. Harwood, would be absent. The purpose of the call [*sic*] meeting was to discuss some complaints that Petitioner had received from other employees about/against Ms. Harwood. Petitioner contends that it was not his idea to assemble the meeting; instead he asserts that he agreed with Mr. Johnson who suggested the meeting on October 20, 1983. . . .

Petitioner had been hearing and receiving complaints about Ms. Harwood for at least six weeks prior to the October 21 call [*sic*] meeting. During that time, Petitioner never informed Ms. Harwood about the complaints against her; instead Petitioner compiled a list of the complaints as he received them. Petitioner's action in not informing Ms. Harwood of the complaints denied her, as well as her staff, an opportunity to address the problems. Petitioner contends that he did not confront Ms. Harwood with these complaints because she was unapproachable. But Ms. Harwood provided regular staff meetings, directors' meetings, and maintained an open door policy for staff members to discuss problems that affected the department. In addition, Ms. Harwood's willingness to try to resolve problems that affected the staff morale was demonstrated during the summer of 1983 when she had a consultant to conduct a conflict management workshop.

Further, Petitioner contends that although the call [*sic*] meeting was held on October 21, 1983 during Ms. Harwood's absence, he did not reveal the content of the list of complaints. Even so, it was Petitioner's intention to discuss the serious accusations about Ms. Harwood, who was not there to defend herself. Petitioner was stopped from carrying out his intentions by the participants at the meeting, who agreed that such a forum was an improper way to discuss Ms. Harwood's administration. Although Petitioner verbally agreed with the group's decision, he was not pleased with it, which he showed by his expressions. Petitioner's action to try to discuss the serious accusations at this meeting in Ms. Harwood's absence was, at the least, unprofessional.

After the other directors, excluding Mr. Johnson, learned of the nature of the Petitioner's list of complaints, they felt and indicated to Ms. Harwood that they could not trust him. The directors felt like Petitioner's involvement in compiling the list of complaints had and would strain their working relationship with him. It is essential that the directors in Student Services work together in order to carry out the functions of the department. Petitioner's

> action in this matter have [*sic*] damaged his credibility and effectiveness with his peers and supervisor.

These findings and conclusions are amply supported by substantial evidence in the record. It is uncontested that a meeting was held on 21 October 1983 to discuss complaints about the Department of Student Services and Dean Harwood, in the absence of Dean Harwood. There is substantial evidence in the record that petitioner played an instrumental role in assembling the meeting. Substantial evidence exists to support the conclusion that the purpose of the meeting was to discuss complaints received from other employees about the Dean. Dean Harwood testified that she lost all trust and confidence in petitioner's ability to fulfill his role in the department after she learned of the meeting held in her absence. Two directors also testified that they could no longer trust the petitioner. There is substantial evidence in the record which indicates that the petitioner had been collecting complaints about the Dean which he compiled in a list prior to the 21 October meeting and that petitioner intended to discuss these complaints at the 21 October meeting.

Based on an examination of the whole record, we conclude that there is substantial evidence to support the Commission's decision to uphold the School's dismissal of petitioner on the ground of personal misconduct resulting in a serious disturbance of the normal operation of the Department of Student Services.

[2] We next consider petitioner's allegations that his dismissal violated his rights to due process of law. We will consider: (1) what pretermination procedures were due petitioner; (2) what notice of termination is due petitioner pursuant to G.S. 126-35; and (3) what post-termination procedures are due the petitioner.

Initially, we note it is uncontested that petitioner had a property interest of continued employment created by state law and protected by the Due Process Clause of the United States Constitution. *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972); *Faulkner v. North Carolina Dept. of Corrections*, 428 F. Supp. 100 (W.D.N.C. 1977). "The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred,

without appropriate procedural safeguards.' " *Cleveland Bd. of Educ. v. Loudermill*, --- U.S. ---, 84 L.Ed. 2d 494, 503, 105 S.Ct. 1487, 1493 (1985), *quoting* from Justice Powell's separate concurring opinion in *Arnett v. Kennedy*, 416 U.S. 134, 167, 40 L.Ed. 2d 15, 94 S.Ct. 1633 (1974). See Comment, *Discharge of Employees Within the State Personnel System: The Due Process Requirements for the Deprivation of Property and Liberty*, 20 Wake Forest L. Rev. 413 (1984) for an excellent discussion of the due process rights afforded state employees.

In *Cleveland Bd. of Educ. v. Loudermill, supra*, the Supreme Court of the United States determined what pretermination procedures must be accorded a public employee who can be discharged only for cause. The Court stated that the Due Process Clause requires " 'an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' (Citation omitted.)" *Loudermill*, at 503-04, 105 S.Ct. at 1493-94. The court went on to hold that a State employee who has a right to continued employment subject to dismissal for just cause is entitled to a pretermination opportunity to respond. *Id.* The pretermination opportunity to respond is "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 506, 105 S.Ct. at 1495.

In this case, petitioner was given a pretermination opportunity to respond to the charges against him. Petitioner was discharged for his leadership role in assembling a meeting on 21 October 1983 in Dean Harwood's office, the purpose of which Dean Harwood perceived was to sabotage her authority as Dean and to undermine her authority or leadership. On 24 October 1983, the Dean met with petitioner in her office to inform him that she knew about the meeting that petitioner and another staff member had called in her absence. At that time the Dean informed the petitioner that calling such a meeting in her absence was inappropriate. Petitioner had the opportunity to respond to the charges against him and deny his involvement in the meeting. Petitioner did not deny his involvement in the 21 October meeting but informed the Dean that the meeting was adjourned because there were objections to discussing complaints regarding the Dean in her absence. At the pretermination stage, due proc-

ess requires the employee be given an opportunity to respond to the charges against him prior to termination. The 24 October meeting between petitioner and Dean Harwood met the pretermination due process requirements.

[3] Petitioner next argues that he was given inadequate notice of his dismissal as required by law. G.S. 126-35 provides:

> No permanent employee subject to the State Personnel Act shall be discharged, suspended, or reduced in pay or position, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the department. . . . However, an employee may be suspended without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons.

G.S. 126-35 establishes a condition precedent that must be fulfilled by the employer before disciplinary actions are taken. *Employment Security Commission v. Wells*, 50 N.C. App. 389, 274 S.E. 2d 256 (1981). The employer must provide the employee with a written statement enumerating specific acts or reasons for the disciplinary action and containing a statement of the employee's appeal rights. *Id.*

Petitioner contends specifically that his notice was inadequate for these reasons: (1) notice under G.S. 126-35 must be given *prior to* the disciplinary action, and his notice was given *simultaneously with* his discharge; (2) the notice of dismissal failed to identify the specific acts committed, thus depriving petitioner of notice of the conduct for which he was dismissed; (3) the notice of dismissal failed to properly advise the petitioner of his right to appeal.

We do not read G.S. 126-35 to *prevent* notice from being given simultaneously with the disciplinary action in this case. The purpose of G.S. 126-35 is to provide the employee with a written

statement of the reasons for his discharge so that the employee may effectively appeal his discharge. *Employment Security Commission v. Wells, supra,* at 393, 274 S.E. 2d at 259. The statute was designed to prevent the employer from summarily discharging an employee and then searching for justifiable reasons for the dismissal. In this case, the petitioner was given a written statement specifying the reasons for his dismissal at the time he was dismissed. This method of providing the employee with the written notice simultaneously with the dismissal prevented the employer from subsequently searching for reasons to justify the discharge. Furthermore, G.S. 126-35 provides for the suspension of an employee "without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons." Petitioner was dismissed for actions disturbing the normal operation of his Department such as to constitute personal misconduct. Under the provisions of G.S. 126-35 quoted above, he could have been suspended without warning on 18 November 1983, later given written reasons, and then dismissed. However, Dean Harwood had the written reasons prepared on 18 November. It is senseless to require that an employee be suspended, the giving of written reasons postponed, and the petitioner's dismissal postponed when the decision to terminate for personal misconduct has been reached and the written basis for the decision is available to be given to the employee. Thus, we hold that when an employee is being dismissed for personal misconduct, the requirement of timely written notice has been met where the written statement of the reasons for dismissal is given to the employee simultaneously with his dismissal.

[4] We further find that the notice of dismissal clearly identified the specific act that resulted in petitioner's discharge. The 18 November 1983 letter of dismissal stated: "The specific basis for this decision is your leadership role in assembling the meeting of October [21], 1983, in my office . . . ." G.S. 126-35 requires that the acts or omissions be described "with sufficient particularity so that the discharged employee will know precisely what acts or omissions were the basis of his discharge. . . . An employee wishing to appeal his dismissal must be able to respond to agency charges and be able to prepare an effective representation." *Em-*

ployment Security Commission v. Wells, supra. There is nothing ambiguous in the notice of dismissal concerning the specific act committed by petitioner which led to his discharge. Petitioner was clearly notified of the specific act which led to his dismissal. He is entitled to no relief on this basis.

[5] We next consider whether the letter given petitioner met the requirement of G.S. 126-35 that the employee be furnished with a written statement setting forth his appeal rights. *See Luck v. Employment Security Commission*, 50 N.C. App. 192, 272 S.E. 2d 607 (1980). The notice of dismissal stated: "You may choose to appeal this decision within 30 days in writing to the State Personnel Office, Employee Relations Division." In addition, the notice was accompanied by a copy of the School's Grievance Procedure. The notice of dismissal need not explain every step in the appeal process. It must inform the employee of his *right to appeal. Id.* The notice of dismissal in this case adequately informed petitioner of his right to appeal. We hold the 18 November 1983 letter of dismissal complied with all the requirements of G.S. 126-35.

[6] Petitioner next argues that he was deprived of due process during the post-termination stage of appeal. He first contends the appropriate internal appellate procedures were not followed. While G.S. 126-35 requires only that the employee be allowed to appeal to the Head of the Department (which, under Chapter 126 means the Chancellor of the School) and then to the State Personnel Commission, the internal review procedures for the School of the Arts provided for much more. Under the appeal procedures established in the School's Grievance Procedure Manual, a four-step process is contemplated. Step one is discussion at the employee's departmental level (in this case, the Student Services Department) with the employee's immediate supervisor or the department head (Dean Harwood), or both. Step two is an appeal from the department level to the Director of Personnel for the School. Step three is an appeal to the Grievance and Appeal Committee, which is to make a recommendation to the Chancellor. The Chancellor is not bound by the recommendation of the Grievance and Appeal Committee in making his decision on the employee's appeal. Step four is an appeal to the State Personnel Commission.

The normal internal administrative appeals process was not followed in this case. When petitioner wrote to the Personnel Di-

rector on 28 November 1983, he requested a hearing before the Grievance and Appeal Committee, which is the first part of step three in the internal process. The Director of Personnel responded to petitioner in writing on 30 November 1983:

> The ultimate authority in the . . . Grievance Process [here] is the Chancellor. Dean Harwood, "after a complete discussion of the situation with the Chancellor and with his approval," dismissed you from your position. As the Chancellor stated to the campus community last week, "I endorsed a discharge process that could lead, at Mr. Leiphart's request, to a formal hearing before the State Personnel Commission." State Personnel Officials indicate that this satisfies the requirements of an internal hearing.
>
> * * * *
>
> You may appeal directly to the State Personnel Commission within 30 days of November 18, 1983.

The School's failure to follow its internal review process does not automatically entitle petitioner to a reversal of the dismissal determination. In order to claim any relief based on a violation of the internal appeal procedures, petitioner must show that there was a substantial chance there would have been a different result in his case if the established internal procedures had been followed. *Farlow v. North Carolina State Board of Chiropractic Examiners*, 76 N.C. App. 202, 208, 332 S.E. 2d 696, 700, *disc. rev. denied*, 314 N.C. 664, 336 S.E. 2d 621 (1985). The School points out that the Chancellor had been consulted by Dean Harwood and had approved the discharge of petitioner. It argues that the internal appeal procedure would only have served to provide the Chancellor with an opportunity to review a decision he had already made. We agree with the position advanced by the School. Although it would have been better practice to allow petitioner to present his case before the Grievance Committee, he has failed to show that the results would have been different had the procedures been followed. Thus, we hold that the failure of the School to follow its internal grievance procedures did not violate petitioner's rights.

[7] Petitioner contends he was deprived of a fair and impartial administrative hearing during the post-termination stage of appeal because Dean Harwood consulted with members of the State

Personnel Commission before dismissing petitioner and because the daughter of the Director of the State Personnel Commission represented the School before the Hearing Officer. A public employee facing an administrative hearing is entitled to an impartial decision maker. *Hortonville Joint School Dist. v. Hortonville Education Assn.*, 426 U.S. 482, 49 L.Ed. 2d 1, 96 S.Ct. 2308 (1976). To make out a due process claim based on this theory, an employee must show that the decision-making board or individual possesses a disqualifying personal bias. *Salisbury v. Housing Authority*, 615 F. Supp. 1433, 1439-41 (E.D. Ky. 1985). There is nothing in the record to indicate that the Director of State Personnel, Harold Webb, had any role in the decision-making process. And while it is true that the North Carolina State Bar has ruled that Ms. Webb's participation in cases which were ultimately reviewed by the State Personnel Commission during the term of her father's appointment "presents an unacceptable appearance of impropriety," that mere appearance of impropriety, standing alone, is not sufficient grounds for disturbing the Commission's decision. The petitioner has failed to show that because of Ms. Webb's participation in the hearing either the hearing officer or members of the Full Commission had the kind of personal stake in the decision which resulted in a disqualifying personal bias.

The petitioner has also failed to show that the Dean's consultation with members of the State Personnel Commission prior to dismissing the petitioner deprived him of an impartial hearing. "Mere familiarity with the facts of a case gained by an agency in performance of its statutory role does not, however, disqualify a decisionmaker [sic]." *Hortonville, supra*, 426 U.S. at 493, 49 L.Ed. 2d at 9, 96 S.Ct. at 2314. The petitioner has failed to show any disqualifying personal bias on the part of the decision makers because of familiarity with the facts of his case.

[8] Lastly, the petitioner contends that his First Amendment rights of freedom of speech and assembly were violated by his dismissal. We disagree. To make out a claim under the First Amendment, the employee must show that his speech was concerning a matter of public concern. *Pressman v. University of North Carolina*, 78 N.C. App. 296, 337 S.E. 2d 644 (1985), *disc. rev. allowed*, 315 N.C. 589, 341 S.E. 2d 28 (1986). Speech is of public concern if when fairly considered it relates " 'to any matter of political, social, or other concern to the community.' " *Pressman*,

supra, quoting Connick v. Myers, 461 U.S. 138, 146, 75 L.Ed. 2d 708, 719, 103 S.Ct. 1684, 1690 (1983). Petitioner's speech, his criticism of Dean Harwood, was not based on public-spirited concern. Instead, it focused on his own personal displeasure with the Dean's internal policies. We hold that the decision to discharge petitioner did not violate his First Amendment rights of free speech.

Affirmed.

Judge WEBB concurs.

Judge BECTON concurs in the result.

Judge BECTON concurring in the result.

Wesley Leiphart's arguments are not insubstantial. Especially appealing are his arguments (a) that Dean Harwood improperly talked to people in the "Hearing Chain" established by the School of the Arts' internal appellate procedures and obtained their approval of her proposed action to dismiss him before she did so; and (b) that the notice of his dismissal under G.S. Sec. 126-35 was inadequate since it was given simultaneously with his discharge. I find the error committed, if any, to be harmless, however. None of the people Dean Harwood talked to ruled on Leiphart's case, and G.S. Sec. 126-35 would have allowed Harwood to suspend Leiphart "without warning for causes relating to personal conduct detrimental to State service . . . ."

ARMISTEAD JARVIS v. COLON LEE POWERS AND WIFE, MAVIS POWERS AND JEFFREY DANIELS AND WIFE, SANDRA DANIELS

No. 852SC336

(Filed 6 May 1986)

1. Highways and Cartways § 11.1— neighborhood public road—roadway treated as one unit—no error

In an action to establish a neighborhood public road, the trial court did not err by treating the old roadway as a single unit even though one portion was kept open and used for ingress and egress while the other part grew in

with trees and other plants in the late 1940s and was claimed under a deed. N.C.G.S. 136-67.

2. **Highways and Cartways § 11.1— neighborhood public road—evidence sufficient**

In an action to establish a neighborhood public road, there was sufficient evidence to satisfy the first definition of N.C.G.S. 136-67 where the old roadway had remained open and in general use in 1933 as a necessary means of ingress to and egress from the dwelling house of one or more families, the entire roadway had remained open until the northern portion grew in in the late 1940s, and the roadway served as a necessary means of ingress and egress from an occupied dwelling house in 1949.

3. **Highways and Cartways § 11.1— neighborhood public road—findings not sufficient**

In an action to establish a neighborhood public road, the trial court's conclusion that the roadway was a neighborhood public road was not supported by the findings where the court found only that the roadway served a public use before 1931 but did not make any findings on whether the roadway served an essentially private use in 1941, when N.C.G.S. 136-67 was amended to provide that no road serving an essentially private use could be declared a neighborhood public road.

4. **Dedication § 1.3— neighborhood public road—evidence of dedication insufficient**

In an action to establish a neighborhood public road, the trial court's finding that the roadway had been dedicated to the public and the conclusion that respondents' land extended only to the edge of the roadway were vacated where two witnesses recalled that respondents' land was on the western side of the roadway but had no apparent knowledge of who owned the underlying title to the land traversed by the roadway; another witness recalled that the previous owners had given the roadway to the community; there was no evidence of an express or implied dedication or of acceptance by the State; and there was no evidence to disturb or modify the description in the deed as extending all the way to petitioners' property line.

Chief Judge HEDRICK dissenting.

APPEAL by respondents from *Beaty, Judge.* Judgment entered 1 November 1984 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 21 October 1985.

Carter, Archie & Hassell, by Sid Hassell, Jr., for petitioner appellee.

Ward, Ward, Willey & Ward, by Joshua W. Willey, Jr., for respondent appellants.

BECTON, Judge.

This case began on 2 December 1983 as a special proceeding before the Clerk of the Superior Court of Beaufort County, in which petitioner Armistead Jarvis sought to establish a "neighborhood public road" pursuant to N.C. Gen. Stat. Sec. 136-67 (1981) across land claimed by respondents Colon and Mavis Powers. After the clerk of court granted the relief sought by Jarvis, the trial court held a trial *de novo*, without a jury. From the trial court's judgment declaring an old roadway a "neighborhood public road," respondents (hereinafter Powers) appeal.

I. Facts and Holding

The evidence presented to the trial court tended to show the following relevant facts: Jarvis and the Powers own separate tracts of land along Muddy Creek in what was formerly the village of South Creek in Beaufort County, North Carolina. *See* Appendix. The Powers claim title to the land through a deed which shows that the boundary of the land owned by their predecessors in title extended all the way to Jarvis' western property line. According to the Powers, their land is directly adjacent to Jarvis' land. Jarvis asserts that an old roadway separates the two tracts of land.

The state-maintained roadway nearest these properties is State Road #1909, known as Berkley Road, which does not abut either property. In 1938, when Jarvis acquired his land, there was a roadway running in a north-south direction connecting Berkley Road to a landing on Muddy Creek. This roadway ran along Jarvis' western property line and either overlapped the Powers' property or ran along their eastern property line. In the 1920s, the county maintained the roadway by keeping clear the ditches on both sides of the road. When the State took over the maintenance of the public road system between 1929 and 1931, the Department of Transportation did not take over maintenance of this roadway.

A. Petitioner's Evidence

Jarvis testified that the old roadway was marked off by ditches and fences; that in the past it was used by the public to gain access to Muddy Creek; and that Foy Hopkins lived off the

old roadway and used it to get to Berkley Road. He also testified that the northern end of the roadway was allowed to grow in with trees, shrubs, vines and other vegetation. He said that from the time he acquired title to his property in 1938 until the time the growth in the road was bulldozed in 1972, the road was never kept open all the way from Berkley Road to Muddy Creek. Jarvis further testified that he could drive his car from Berkley Road onto the roadway and then onto his property (turning right just before the fence erected by the Powers), and that he could drive this route even when the northern portion of the roadway was grown in.

Etles Henries, a neighbor in the South Creek area, testified that the old roadway was used in the 1930s and 1940s by people going swimming in Muddy Creek, but that at least by the late 1940s or early 1950s the northern forty percent of the road had become overgrown with plants. He also testified:

> The condition of the road varied back and forth in relation to the use of the road. There was times it would be growed up. There would be times they would get it down if they were going to have a baptism or something. Immediately it would grow up again. It has never been traveled, shall we say, daily, so to answer your question on the condition of the road in 1964, it had varying conditions.

Andrew Brown testified that "probably 40 or 50 years ago," people used the roadway to get to Muddy Creek to buy oysters from Foy Hopkins, who sold them from his boat. William Snell, whose grandmother and step-grandfather used to own the Powers' land, testified that his grandparents "gave" the roadway to the public or community; that the Powers' land was west of the roadway; that the roadway was used in the early 1930s to access Muddy Creek for baptisms, rafting logs and buying oysters; and that the northern end had grown in by 1955.

B. Respondents' Evidence

Powers presented two witnesses. The testimony of the first, a former South Creek resident, did not materially contradict petitioner's evidence. The second, a registered land surveyor and an expert witness, substantiated the Powers' claim to the land traversed by the northern portion of the old roadway. He

testified regarding a survey he had conducted, showing that the Powers' predecessor in title owned all the land up to Jarvis' property line. He also confirmed Jarvis' testimony that the southern portion of the roadway (the portion not claimed by the Powers) provides adequate access from Berkley Road into the southwestern corner of Jarvis' property. The southern end also provides access to the Hopkins' and Powers' properties.

Jarvis presented no written evidence that is part of the record on appeal to prove that the old roadway had been expressly dedicated to the public or that a dedication had been accepted by the State. He did not contend that it had been impliedly dedicated or that the old roadway is now a public road by virtue of the doctrine of adverse possession, easement by prescription or necessity, or any theory other than that it was a "neighborhood public road" under G.S. Sec. 136-67. Jarvis urged the trial court to preserve public access to the waterfront, which was endangered because the waterfront area had been extensively developed into homesites since the 1940s.

C. Trial Court's Findings and Conclusions

The court made the following findings of fact, among others:

> That along the western boundary of Petitioner's lands there was a road not less than sixteen feet wide which ran from the Berkley Road (S.R. 1909) along the western boundary of the lands of Dolly Hopkins described in that deed of record in Book 256, page 360, Beaufort County Registry and along the western boundary of Petitioner's lands aforesaid to a landing on Muddy Creek and along the eastern boundary of the lands of Respondents.
>
> That said road was dedicated to the public by E. W. Ives and wife, Mary Ives, and the road together with a drainage ditch along its western edge was maintained by Beaufort County as a part of the county road system until the State of North Carolina took over the maintenance of public roads.
>
> That said road was not taken over and placed under maintenance by the Department of Transportation of the State of North Carolina.
>
> That while said road was maintained by Beaufort County it was used by the public for access to and from the public

landing on Muddy Creek for bathing, transporting logs, fishing and baptisms.

That there is and has been for many years a dwelling on Petitioner's lands and said road is and has been a necessary means of access to and from this dwelling and the Petitioner's lands do not border on any other road.

That within the last several years said road has been used by members of the public for access to Muddy Creek for bathing and swimming.

That Dolly Hopkins and the Respondents Colon Lee Powers and Mavis Powers use said road as a necessary means of access to their homes which are located upon lands adjacent to said road.

The court concluded as a matter of law:

That the road described above was at one time a part of the public road system in this State but it has not been taken over and placed under maintenance by the Department of Transportation.

That said road remained open and is in general use as a necessary means of ingress to and egress from the dwelling houses of more than one family.

That said road serves a public use and is outside the boundaries of any incorporated city or town in this State.

That said road is a neighborhood public road within the scope and meaning of G.S. 136-67.

The court then declared that the entire roadway from Berkley Road to Muddy Creek was a neighborhood public road.

D. Respondents' Contentions on Appeal

On appeal, the Powers assign eight errors to the trial court's rulings. They assert that the court erred in finding as facts: (1) that the roadway is a necessary means of access to and from dwelling houses; (2) that within the past several years the roadway has been used by the public for access to Muddy Creek; and (3) that the roadway ran along the eastern boundary of the Powers' land. They also assert error in the conclusions of law: (1)

that the roadway remained open and in general use as a necessary means of access for more than one family; (2) that the roadway serves a public use; and (3) that the roadway is a neighborhood public road. The Powers contend that the judgment should be reversed because the findings and conclusions are not supported by the evidence. And finally, they claim that the court erred in describing the boundaries of the roadway.

E. Summary of Our Holding

Central to the Powers' appeal is the argument that the trial court's treatment of the roadway as a single unit rather than as two portions was error because only one portion serves as ingress and egress for families in the area. We reject this argument and hold that the court did not err in treating the roadway as a single unit or in finding that the roadway is a necessary means of access. We conclude, however, that the court failed to make findings and conclusions as to whether the roadway served an essentially private use in 1941. Because this is necessary to support a judgment under G.S. Sec. 136-67, we vacate the judgment and remand for the court to make this determination. The court may base its findings for this determination solely on the record. We also vacate the findings that the roadway had been dedicated to the public by the Powers' predecessor in title and that the roadway runs along the eastern boundary of the Powers' property. Finally, we note a clerical error in the legal description of the roadway which should be corrected on remand if the court declares that the roadway served an essentially private purpose.

II. ANALYSIS

Our review on appeal is limited to the inquiry whether there was any competent evidence to support the trial court's findings of fact and whether the findings of fact support the conclusions of law. *See Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975); *Woody v. Barnett*, 239 N.C. 420, 79 S.E. 2d 789 (1954); *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). In the case at bar, the evidence before the trial court and the court's findings must support its conclusion that the roadway between Berkley Road and Muddy Creek is a "neighborhood public road" under G.S. Sec. 136-67. The trial court did not rely on any other analysis in its conclusions of law or in its order.

North Carolina General Statute Section 136-67 provides in part:

> [1] All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, and [2] all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Human Resources, and [3] all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incorporated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood public roads . . . . Provided, that this definition of neighborhood public roads shall not be construed to embrace any street, road or driveway that serves an essentially private use, and all those portions and segments of old roads, formerly a part of the public road system, which have not been taken over and placed under maintenance and which have been abandoned by the Department of Transportation and which do not serve as a necessary means of ingress to and egress from an occupied dwelling house are hereby specifically excluded from the definition of neighborhood public roads, and the owner of the land, burdened with such portions and segments of such old roads, is hereby invested with the easement or right-of-way for such old roads heretofore existing.

The Supreme Court recently clarified the statute:

> This statute declares three distinct types of roads to be neighborhood public roads. The first part of the statute concerns only those roads which were once a part of the "public road system." The second part of the statute declares to be neighborhood public roads all those roads that had been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Public Welfare. The third part of the statute declares to be neigh-

> borhood public roads all those roads outside the boundaries of municipal corporations which served a public use and as a means of ingress and egress for one or more families. *See Walton v. Meir*, 14 N.C. App. 183, 188 S.E. 2d 56, *cert. denied*, 281 N.C. 515, 189 S.E. 2d 35 (1972).

West v. Slick, 313 N.C. 33, 39, 326 S.E. 2d 601, 605 (1985). Neither Jarvis nor the trial court attempted to rely on the second part of the statute relating to roads built with unemployment relief funds. The court did make findings relevant to parts one and three, but it did not specify which part formed the basis for its holding. For purposes of our decision, we need only consider the first part of the statute, enacted in 1933, and the proviso, enacted in 1941.

A

[1] Most of the Powers' arguments rely on the divisibility of the old roadway into two portions: the northern portion, which was described by several witnesses as periodically overgrown with trees and other plants beginning in the late 1940s, and the southern portion, which was kept open and used by Jarvis and others as ingress from and egress to Berkley Road. (*See* Appendix.) The Powers claim only the northern portion under a deed, and they erected a fence only along the northern portion. They would have us treat the northern portion as a distinct segment of road not used as ingress or egress and, therefore, not a neighborhood public road.

Support for the argument that the roadway should be viewed as two separate parts arguably is found in the language of G.S. Sec. 136-67. The statute states that roads or *portions* of roads are declared neighborhood public roads if they satisfy the other criteria.

A Supreme Court decision not cited by either party, *Smith v. Moore*, 254 N.C. 186, 118 S.E. 2d 436 (1961), controls this issue. Although that case arose in a different context, the relevant facts in *Smith* are remarkably similar to the facts in the case at bar. A roadway ran from a state highway to the defendant's residence and then continued past the residence to the Neuse River. The Court held that the evidence was sufficient to support a finding

that the roadway served as a necessary means of access to the defendant's residence and that it served a public purpose by providing access to the river. As in the case at bar, the roadway could have been divided into the portion necessary for access to the defendant's residence and the remaining portion which extended past defendant's residence to the river. But the Court treated the roadway as a single unit.

In enacting G.S. Sec. 136-67, the legislature intended to preserve the public right to use roads that would no longer be maintained by any government. The legislature no doubt realized that, in some areas, portions or segments of roads, streets or highways would be left unattended. We believe that these segments are the "portions of roads" referred to in the first statutory definition. The legislature in 1933 did not intend for courts to further whittle down these portions of roads to the bare necessary access routes between dwellings and state roads. Indeed, necessary access routes were already subject to the doctrine of easement by necessity, and the statute would have added the requirement that the necessary access route also serve a public purpose. Although there may be situations, such as a network of separate and identifiable abandoned roads, that call for the treatment of distinct portions of roads in one area as discrete units, that is not the case here. The fact that part of the roadway grew in with trees and other plants in the late 1940s or that a portion is claimed under a deed is immaterial under G.S. Sec. 136-67 in the instant case.

Therefore, the court did not err in treating the old roadway from Berkley Road to Muddy Creek as a single unit, and it should continue to do so on remand.

B

[2] The declaratory language used by the legislature in G.S. Sec. 136-67 indicates the legislature's intention for the status of roadways to be determined as of the enactment dates of the applicable statutory definitions and exceptions. *See Dotson v. Payne*, 71 N.C. App. 691, 323 S.E. 2d 362 (1984) (using 1941 in applying the third definition); *Walton v. Meir*, 14 N.C. App. 183, 188 S.E. 2d 56 (using 1941 and 1949, the enactment dates of the third definition and of the amendment to the proviso), *cert. denied*, 281 N.C. 515, 189 S.E. 2d 35 (1972). *But see Smith* (using 1951, when the parties acquired their rights to the property by deed).

The first statutory definition of neighborhood public road was enacted in 1933. The "private use" exclusion was added by amendment in 1941. *See* 1941 N.C. Sess. Laws Ch. 183. And the remainder of the proviso, beginning after the phrase "essentially private use," was added in 1949. *See* 1949 N.C. Sess. Laws Ch. 1215.

The evidence before the trial court was sufficient to show that in 1933, the old roadway, which had been part of the public road system, remained "open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families. . . ." There was ample evidence that Jarvis, Hopkins and, indeed, the Powers had no other access to Berkley Road. Several witnesses testified that the entire roadway remained open until the northern portion grew in in the late 1940s. Thus, there was sufficient evidence to satisfy the first definition. Based on similar evidence, it is clear that the roadway did serve as a necessary means of ingress to and egress from an occupied dwelling house in 1949. Thus, the second part of the proviso, added in 1949, is not applicable. *See*, G.S. Sec. 136-67. There is no need to consider whether the court properly applied the third definition.

C

[3] In 1941, the legislature added the proviso that no road serving an "essentially private use" could be declared a neighborhood public road. This should be distinguished from the requirement under the third definition that a road must have served a public use. The proviso allows for some public use, but requires a determination whether the road was "essentially" a private or a public roadway. For example, in *Speight v. Anderson*, 226 N.C. 492, 496, 39 S.E. 2d 371, 373-74 (1946) (emphasis added), the Supreme Court reasoned:

> Furthermore the proviso expressly excludes streets and roads which serve an essentially private use. While there is evidence that the mail carrier used the old road during 1906 and 1907 and that members of the public traveled both the old and the new road, all the evidence tends to show that *the road was laid out and maintained primarily as a convenience for those who resided on the Speight and Anderson tracts, an essentially private purpose.* No continuous use for a public purpose is disclosed.

It has been held that a roadway used only as a private driveway for residents on land abutting the roadway serves an essentially private purpose, even though guests and invitees of the residents also use it. *See, e.g., Dotson; Watkins v. Smith*, 40 N.C. App. 506, 253 S.E. 2d 354 (1979); *Walton; see also Raynor v. Ottoway*, 231 N.C. 99, 56 S.E. 2d 28 (1949) (In the absence of a finding that the cartway served as a public way rather than as a private way leading to a family burial ground, the judgment could not be sustained.). But evidence that a roadway is used by the public at its convenience as access to a waterway or, for example, to travel along the Outer Banks is sufficient to support a finding that the roadway is public and not essentially private. *See Smith*, 254 N.C. at 189, 118 S.E. 2d at 437-38; *see also Woody v. Barnett*, 235 N.C. 73, 77, 68 S.E. 2d 810, 813 (1952) (The roadway was public because it was used as access "to and from two important county [educational] institutions.").

We reject Jarvis' argument that the "private use" exception applies to the third, but not the first, type of neighborhood public road. The "private use" part of the proviso was added in 1941 by the same amendment that added the third type of neighborhood public road. Jarvis argues that, because the first definition already has a proviso (that the road must have been part of the State system) and the "private use" exclusion was added concurrently with the third definition, it makes sense to apply the "private use" exclusion to the third definition but not to the first.

Although the statute is not a model of clarity, the position of the proviso at the end of the entire, unified definitional part of the statute indicates the probable intent of the legislature—that the proviso be applied to each definition. *Cf. Raynor* (applying the first part of the proviso to the second definition of neighborhood public road, which was part of the original 1933 statute). There is nothing within the statute to suggest that the use of the words "this definition" were intended to limit the applicability of the first part of the proviso to the third type of neighborhood public road. Moreover, it is clear from the language, "shall not be construed," that the legislature meant simply to guarantee that no reading of the statute would result in an essentially private road being declared a public road. *See Watkins*, 40 N.C. App. at 511, 253 S.E. 2d at 357.

The court below failed to make any findings on whether the roadway served an essentially private use in 1941. The court, apparently applying the third statutory definition, found that the road served a "public use" before 1931 (when the county still maintained the roadway) and also "in recent years." But these findings are insufficient to support a conclusion that the road did not serve an essentially private use in 1941. There is evidence to suggest that the roadway in 1941 served not only as access to the state road, but other purposes as well. Several witnesses testified that in the late 1930s and early 1940s, the roadway extended to a landing on Muddy Creek and was used to some extent by people going swimming, bathing, boating, log-rafting, and to conduct baptisms. Nonetheless, this does not compel a finding that the road did not serve "an essentially private use." Because the trial court failed to make a finding on this issue using the proper time period, the conclusions of law are not supported by the findings and the judgment cannot be sustained. *See Raynor.* The roadway's primary use in 1941 must be determined by the court on remand.

D

[4] The court found that the Powers' eastern boundary ended at the western edge of the old roadway. Perhaps this was related to the finding that the Powers' predecessor in title had dedicated the roadway to the public. The court did not conclude as a matter of law that there had been a dedication, and we find insufficient evidence of dedication in the record.

Two witnesses said they recalled that the Powers' land was on the western side of the roadway, but they had no apparent knowledge of who owned underlying title to the land traversed by the roadway. Another witness recalled that the previous owners (his step-grandfather and grandmother) had given it to the community. This is insufficient evidence to support a conclusion that the previous owners had intentionally relinquished their title to the roadway under the doctrine of dedication. There is no evidence of an express or implied dedication, and there is no evidence of an acceptance by the State. Moreover, there appears no evidence to disturb or modify the description in the deed of the tract (now owned by the Powers) as extending all the way to Jarvis' property line. The ownership of this land may become important if the court finds on remand that the roadway served an essentially private use or if a discontinuance proceeding is initi-

ated subsequent to a final declaration of a neighborhood public road. The finding of dedication and the conclusion that the Powers' land extends only to the western edge of the roadway are vacated.

III

On remand, the trial court must consider whether the old roadway served "an essentially private purpose" in 1941. If the court concludes that it did not, then it should enter final judgment declaring the roadway a neighborhood public road. We note that the description of the old roadway contains an obvious error that should be corrected on remand. According to the description, the roadway begins at an iron stake at the *southwestern* corner of Jeffrey and Sandra Daniels' lot and continues along the *eastern* boundary of the same lot. The correct beginning point appears to be the iron stake at the *southeastern* corner.

For the reasons set forth above, we

Vacate and remand for further findings and conclusions in accordance with this opinion.

Vacated and remanded.

Chief Judge HEDRICK dissents.

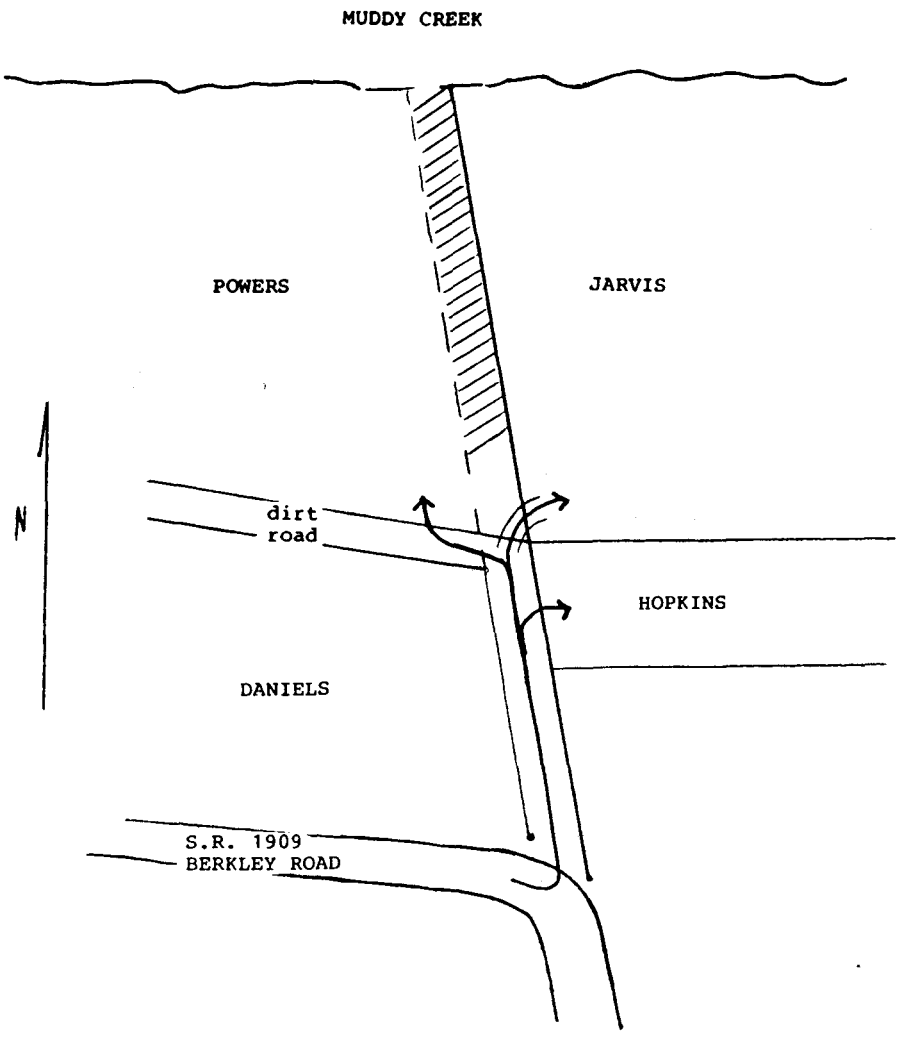
Judge PARKER concurs.

Chief Judge HEDRICK dissenting.

In my opinion the majority misconstrues and misapplies the proviso in G.S. 136-67. Under the circumstances in this case it is my opinion that there is no necessity for the trial judge to find the negative. The trial court need not explicitly find the absence of "an essentially private purpose." In my opinion the findings and conclusions are supported by the evidence, and I vote to affirm the judgment.

This case should be brought to a conclusion. The action commenced in 1983. The judgment appealed from was entered eighteen months ago and was heard in this Court more than six months ago. I vote to affirm.

Jarvis v. Powers



-- NORTHERN PORTION OF OLD ROADWAY; PERIODICALLY OVERGROWN WITH PLANTS

-- ACCESS ROUTES FROM STATE ROAD, USING SOUTHERN PORTION OF OLD ROADWAY

APPENDIX

INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY, PLAINTIFF v. BOYCE R. CHAMPION, DEFENDANT

BOYCE R. CHAMPION, THIRD-PARTY PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, THIRD-PARTY DEFENDANT

INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY, THIRD-PARTY PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, THIRD-PARTY DEFENDANT

No. 8527SC1029

(Filed 6 May 1986)

1. **Insurance § 106.1— insurance company's unjustified refusal to defend—breach of contract—no action defense not available**

The trial court did not err in actions arising from an automobile collision by not permitting Nationwide to offer as a defense that the actions had been brought in violation of the "no action" provision of its policy where Nationwide had unjustifiably refused to defend the action.

2. **Insurance § 108— no coverage defense excluded—no error**

The trial court did not err in an action arising from an automobile collision by not permitting Nationwide to offer the defense of "no coverage" where the record does not contain any evidence offered by Nationwide at a hearing on the third party action and defendant Champion's affidavit supported the court's determination that the vehicle driven by Champion was a utility automobile as defined in Nationwide's policy.

3. **Appeal and Error § 42.2— insurance policy not in record—court's ruling on statute of limitations presumed correct**

The trial court in an action arising from an automobile collision was presumed correct in finding, concluding, and ruling that the three year statute of limitations did not apply to the action where the insurance policy was not made a part of the record on appeal.

4. **Appeal and Error § 6.8; Rules of Civil Procedure § 56.7— denial of summary judgment—no review after trial on merits**

The trial court's denials of Nationwide's motions for summary judgment and judgment on the pleadings were not reviewable on appeal because a final judgment was rendered in a trial on the merits.

5. **Judgments § 37.2— evidence supporting defenses not offered at hearing—judgment entered—defenses precluded at trial**

The trial court did not err in an automobile accident collision case by refusing to allow Nationwide to offer evidence supporting its defenses at trial and by concluding that the judgment against defendant Champion would automatically be a judgment against Nationwide where Nationwide had elected not

to present evidence at a hearing on the third party actions, judgment was entered after the hearing determining that Nationwide was liable if the liability of its insured was established, and that entry of judgment determined the issue.

6. **Automobiles and Other Vehicles § 90.11— brake failure—no instruction on unavoidable accident—error**

The trial court erred in an action arising from an automobile accident by refusing to submit to the jury the issue tendered by defendant Champion concerning a latent defect in his brakes and by not instructing the jury on that issue where the instruction tendered by Champion was a correct statement of the law and the evidence supported the instruction and the issue.

7. **Automobiles and Other Vehicles § 88— automobile accident—contributory negligence—evidence insufficient**

The trial court did not err in an action arising from an automobile accident by refusing to instruct on the contributory negligence of plaintiff Lumbermen's insured and on his duty to keep a proper lookout and to observe ordinary care where the evidence, even when viewed in the light most favorable to defendant Champion, was not sufficient to permit the jury to find that plaintiff's insured failed to use such care as an ordinarily prudent person would have used under similar circumstances.

APPEAL by defendant and third-party plaintiff, Boyce R. Champion, and by third-party defendant Nationwide Mutual Insurance Company (Nationwide) from *Davis, James C., Judge.* Judgment entered 30 April 1985 in CLEVELAND County Superior Court. Heard in the Court of Appeals 6 February 1986.

In December 1982, Indiana Lumbermen's Mutual Insurance Company (Indiana Lumbermen) instituted this civil action against Boyce Champion seeking to recover for monies paid by it to its insured, John Weston, for personal injury and property damage sustained by Weston in an automobile collision allegedly caused by Champion's negligence. In his answer, Champion admitted that he was involved in the collision but denied negligence or liability on his part.

Subsequently, Champion filed an amended answer, in which he pleaded the contributory negligence of Weston as a defense, and a third-party complaint against Nationwide. Champion alleged that Nationwide sold him an automobile liability insurance policy which was in full force and effect on the date of the collision; that Weston made claim for damages arising out of the collision against Nationwide as Champion's insurer; that Nationwide denied coverage under its policy; that thereafter Weston's in-

surer, Indiana Lumbermen, paid Weston's claim pursuant to the uninsured motorist provisions of its policy and instituted the present action against Champion; that Champion made demand upon Nationwide to defend the present action and to pay the claim of Indiana Lumbermen should his liability be established; and that Nationwide has "wilfully, wantonly, negligently, and without legal excuse refused to defend said action and has continued to deny coverage under its policy." Champion requested as relief a judgment declaring that the policy issued to him by Nationwide covers his liability in this action, as well as compensatory damages arising from Nationwide's wrongful refusal to accept coverage under its policy. Champion also set forth a claim for punitive damages which was later stricken by the court.

In response, Nationwide filed an answer and motion in which it denied liability and raised as defenses: (1) that the vehicle driven by Champion at the time of the collision was not one covered by its policy and (2) that Champion had brought the third-party action in violation of the "no action" provision in its policy. Nationwide moved to dismiss the third-party action for failure to state a claim upon which relief can be granted and on the ground the action was premature under the terms of the policy on which it was based and moved for judgment on the pleadings and for summary judgment in its favor.

Thereafter Indiana Lumbermen filed a third-party complaint against Nationwide also seeking a judgment declaring that the policy issued by Nationwide covered Champion's liability arising out of the collision and seeking judgment against Nationwide based on Weston's claim for damages to which it was subrogated. In its responsive pleading, Nationwide denied coverage under its policy and liability on its part and asserted various defenses. Nationwide moved to dismiss the action based on the "no action" provision in its policy and based on the three-year statute of limitations, among other grounds, and moved for judgment on the pleadings and for summary judgment.

The third-party actions and Nationwide's motions came on for hearing on 17 September 1984. By order entered 21 September 1984, the trial court, based on the verified pleadings and the affidavit of Champion, denied Nationwide's motions to dismiss the actions and for summary judgment and judgment on the plead-

ings. With respect to the declaratory judgment requested by Indiana Lumbermen and Champion, the court, in the 21 September 1984 order, found as follows:

> 1. That [Nationwide] issued to Boyce R. Champion its policy of insurance number 61B867364 which was issued to comply with the Financial Responsibility Act, G.S. 20-279 seq. et [sic], and was an owner's policy as defined in G.S. 20-279.21.
>
> 2. That the policy of insurance issued by Nationwide defined an "owned automobile" [as] . . .
>
> "(c) a private passenger, farm or utility automobile ownership of which is acquired by the named insured during the policy period, provided
>
> . . .
>
> "(2) the company insures all private passenger, farm and utility automobiles owned by the named insured on the date of such acquisition and the named insured notifies the company during the policy period . . . or within thirty days after the date of such acquisition of his election to make this and no other policy issued by the company applicable to such automobile, or . . .
>
> " 'utility automobile' means an automobile, other than a farm automobile, with a load capacity of fifteen hundred pounds or less of the pick-up body, sedan delivery or a panaled [sic] truck type not used for business or commercial purposes. . . ."
>
> 3. That on June 4, 1981, Champion acquired a 1954 Dodge truck.
>
> 4. That on June 4, 1981, the date Champion acquired the Dodge truck, he was in a collision with one John K. Weston and Weston received personal injury and his vehicle was damaged.
>
> 5. That [Nationwide] was given notice of the collision and . . . of this action and refused to defend the action and denied coverage under the policy.

6. That on June 4, 1981, the policy of insurance issued by . . . Nationwide . . . insured all private passenger, farm and utility automobiles owned by Boyce R. Champion.

7. That the original action by [Indiana Lumbermen] against Boyce R. Champion alleged that Champion's negligence while operating a motor vehicle, to wit: the 1954 Dodge truck, resulted in personal injuries and property damage to said John K. Weston and his automobile.

The court concluded that the policy issued by Nationwide to Champion afforded coverage to Champion while operating the 1954 Dodge truck on 4 June 1981 and that Nationwide had a duty to defend the action instituted by Indiana Lumbermen against Champion and issued the declaration of law requested by the third-party plaintiffs.

Prior to trial the parties stipulated to the amount of damages recoverable should it be determined that Champion and Nationwide were liable to Indiana Lumbermen. After Indiana Lumbermen and Champion presented their evidence at trial on the issue of negligence, Nationwide moved to be allowed to present evidence as to its defenses including its defense of no coverage. The court denied the motion based on the 21 September 1984 order and the parties' stipulations. The jury found that Weston was injured or damaged by the negligence of Champion and judgment was entered in accordance with the verdict against Champion and Nationwide. From the final judgment entered 30 April 1985, both Champion and Nationwide appealed.

George C. Collie and Charles M. Welling for plaintiff-appellee Indiana Lumbermen's Mutual Insurance Company.

Hamrick, Mauney, Flowers, Martin & Deaton, by Fred A. Flowers, for defendant-appellant Boyce R. Champion.

Horn, West, Horn & Griffin, P.A., by J. A. West, for third-party defendant-appellant Nationwide Mutual Insurance Company.

WELLS, Judge.

Nationwide's Appeal

[1] Nationwide first contends the trial court erred in its order of 21 September 1984 by not permitting Nationwide to offer as a defense that the third-party actions had been brought in violation of the "no action" provision of its policy. In its pleadings, Nationwide alleged as a defense that the third-party actions were brought in violation of Condition Six of the policy it issued to Champion and that such actions were premature because the liability of Champion had not yet been judicially determined or agreed upon by the parties. Condition Six of the policy allegedly provides as follows in pertinent part:

> No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by Judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company.
>
> Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Company as a party to any action against the Insured to determine the Insured's liability, nor shall the Company be impleaded by the Insured or his legal representative.

In the 21 September 1984 order, the trial court concluded that Nationwide was not entitled under the law to plead any policy defenses, relying on *Nixon v. Insurance Co.*, 255 N.C. 106, 120 S.E. 2d 430 (1961), and denied those defenses. Nationwide apparently contends the court's ruling was erroneous with respect to its defense based on Condition Six of the policy, the "no action" provision and argues that *Nixon* is distinguishable. We disagree.

In *Nixon*, our Supreme Court held that where a liability insurer denies liability for a claim asserted against the insured and unjustifiably refuses to defend an action therefor, such refusal

constitutes a breach of the insurer's contract with the insured and the insured is released from certain provisions of the policy including a provision making the liability of the insurer dependent upon a final determination of its insured's obligation to pay either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company. As our Supreme Court recognized in *Nixon*, courts generally hold that where an insurer unjustifiably refuses to defend an action against its insured, the insurer waives its right to enforce a "no action" provision in the policy, such as the one in Condition Six of the policy concerned herein and cannot thereafter successfully invoke that provision. *See also* Annot., 49 A.L.R. 2d 694 (1956); 44 Am. Jur. 2d, *Insurance* § 1420 (1982 and Supp. 1985); 14 Couch, *Insurance* 2d § 51:163 (1982). *See, e.g., Satterwhite v. Stolz*, 79 N.M. 320, 442 P. 2d 810 (1968).

The obligation of a liability insurer to defend an action brought by an injured third party against the insured is absolute when the allegations of the complaint bring the claim within the coverage of the policy. *Insurance Co. v. Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513 (1967); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E. 2d 775 (1984). *See also Waste Management v. Insurance Co.*, slip op. no. 70PA85 (N.C., filed 18 February 1986). The insurer's refusal to defend the action is unjustified if it is determined that the action is in fact within the coverage of the policy. 14 Couch, *Insurance* 2d § 51:156 (1982). This is so even if the refusal to defend is based on the insurer's honest but mistaken belief that the claim is outside the policy coverage. *Id.*

The allegations of the complaint filed by Indiana Lumbermen against Champion were sufficient to bring the claim set forth therein within the coverage of Nationwide's policy; yet Nationwide denied coverage under its policy and refused to defend the action. In the 21 September 1984 order, the court concluded that Nationwide had a duty to defend the action and determined that Indiana Lumbermen's claim was within the coverage of Nationwide's policy. Since the claim was within the coverage of Nationwide's policy, Nationwide's refusal to defend the action was unjustified and therefore Nationwide was not entitled to successfully invoke the "no action" provision in its policy as a defense. *See Nixon v. Insurance Co., supra*; 14 Couch, *Insurance*

2d §§ 51:156 and 51:163 (1982). Accordingly, we find no error in the court's ruling as to this policy defense.

[2] Nationwide contends the court erred in the 21 September 1984 order by not permitting it to offer the defense of "no coverage" and by determining that its policy provided coverage to Champion. Nationwide argues that the 1954 Dodge van truck driven by Champion at the time of the collision was not "a private passenger, farm or utility automobile" as defined in its policy and that therefore its policy did not cover Champion's liability arising from his operation of that vehicle.

The record does not show that the court refused to permit Nationwide to offer the defense of "no coverage"; rather, it tends to show that Nationwide simply elected not to offer any evidence at the 17 September 1984 hearing concerning whether the 1954 Dodge vehicle was one covered by its policy. If any evidence was presented by Nationwide at the hearing on the third-party actions, it has not been included in the record on appeal. When the evidence is not in the record, it is presumed that the court's findings are supported by competent evidence and the findings are conclusive on appeal. *Steadman v. Pinetops*, 251 N.C. 509, 112 S.E. 2d 102 (1960); *Town of Mount Olive v. Price*, 20 N.C. App. 302, 201 S.E. 2d 362 (1973). The record does contain the affidavit of Champion and the verified pleadings of Indiana Lumbermen. These materials were considered by the court in entering the 21 September 1984 order and are either consistent with or support the findings made by the court. The remaining pleadings in the record are unverified.

It is clear from the findings made that the court determined that the 1954 Dodge vehicle driven by Champion at the time of the collision was a utility automobile as defined in Nationwide's policy. The affidavit of Champion supports this determination. We are unable to say based on the record before us that such finding was error. The court concluded that Nationwide's policy covered Champion's liability arising out of his operation of the 1954 Dodge truck on the date of the collision, relying on *Devine v. Casualty & Surety Co.*, 19 N.C. App. 198, 198 S.E. 2d 471, *cert. denied*, 284 N.C. 253, 200 S.E. 2d 653 (1973). The findings made by the court are sufficient to support this conclusion. We therefore find no error in the court's determination that Nationwide's policy provided coverage to Champion in these circumstances.

[3] Nationwide next assigns as error the court's conclusion in the 21 September 1984 order that the three-year statute of limitations is not applicable to the third-party action instituted against Nationwide by Indiana Lumbermen. The insurance policy issued by Nationwide to Champion has not been made a part of the record on appeal. Where the record is silent on a particular point, it is presumed that the trial court acted correctly. *State v. Dew*, 240 N.C. 595, 83 S.E. 2d 482 (1954). In the absence of the policy from the record, we presume the trial court was correct in finding, concluding and ruling that the three-year statute of limitations does not apply to the action.

[4] Nationwide assigns as error the trial court's denial of its motions for summary judgment and judgment on the pleadings. Since material outside the pleadings was presented to and considered by the court, specifically Champion's affidavit, Nationwide's motions for judgment on the pleadings were to be treated as ones for summary judgment. N.C. Gen. Stat. § 1A-1, Rule 12(c) of the Rules of Civil Procedure. Our Supreme Court recently held in *Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985), that "the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits." We find such law controlling in the present case and therefore overrule this assignment of error.

[5] Lastly, Nationwide contends the trial court erred by refusing to allow it to offer evidence supporting its defenses at the jury trial and by concluding that a judgment against Champion would automatically be a judgment against Nationwide. Nationwide had an opportunity to present evidence supporting its defenses at the 17 September 1984 hearing on the third-party actions. It apparently elected not to offer any evidence at that time. By the judgment entered 21 September 1984, the court rejected Nationwide's defenses and in effect determined that Nationwide was liable in the event the liability of its insured, Champion, was established. The entry of that judgment determined that issue in this case. Since Nationwide's liability had been established and the parties had stipulated to the amount of damages recoverable, the entry of judgment against Nationwide upon the establishment of Champion's liability was proper.

Champion's Appeal

[6] Champion assigns as error the trial court's refusal to submit to the jury the issue tendered by him concerning a latent defect in his brakes and to instruct upon such issue as he requested. Champion tendered a written request for the following instruction on brake failure:

> If because of some latent defect, unknown to the operator of an automobile and not reasonably discoverable on proper inspection, he is not able to control movement of his automobile, he is not negligent, and for that reason not liable for injuries resulting from such loss of control of his vehicle.

He further requested that the following issue be submitted to the jury: "Was the loss of control of [Champion's] vehicle because of some latent defect in the brakes, the origin of which was unknown to [Champion] and not reasonably discoverable upon a brake inspection?" The trial court denied both requests.

It is well established that when a party aptly tenders a written request for a specific instruction which is correct in itself and supported by the evidence, the failure of the court to give the instruction, at least in substance, is reversible error. *Bass v. Hocutt*, 221 N.C. 218, 19 S.E. 2d 871 (1942); *Calhoun v. Highway Com.*, 208 N.C. 424, 181 S.E. 271 (1935). It is also error for the trial court to refuse to submit to the jury an issue tendered which is raised by the pleadings and supported by the evidence. *Copening v. Insurance Co.*, 224 N.C. 97, 29 S.E. 2d 33 (1944); *Lewis v. Pate*, 208 N.C. 512, 181 S.E. 623 (1935).

The instruction requested by Champion was a correct statement of the law in this State as set forth in *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39 (1963). *See also Wilcox v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76 (1967). *Compare* N.C.P.I.—Civil 215.80. In *Stephens*, our Supreme Court stated:

> The Legislature did not intend to make operators of motor vehicles insurers of the adequacy of their brakes. The operator must act with care and diligence to see that his brakes meet the standard prescribed by statute; but *if because of some latent defect, unknown to the operator and not reasonably discoverable upon proper inspection, he is not*

> *able to control the movement of his car, he is not negligent, and for that reason not liable for injuries directly resulting from such loss of control.* The injuries result from an unavoidable accident. [Emphasis added.]

The pleadings in this case are sufficient to raise the issue tendered by Champion concerning the latent defect in his brakes; thus, the only question remaining is whether the evidence supports submission and instruction upon this issue.

The evidence presented at trial tends to show the following facts: On the afternoon of 4 June 1981, defendant Champion and his wife purchased a 1954 Dodge van. Before driving the van, Champion checked its brakes and the brake fluid and put a capful of brake fluid in the master cylinder of the vehicle. After purchasing the van, Champion proceeded to drive it home with his wife following behind him in another vehicle. As Champion proceeded south on rural paved road 2044 approaching the intersection of that road with rural paved road 2033, he began trying to apply his brakes when he was approximately 300-500 feet from the stop sign at the intersection. Champion testified that at that point:

> I laid my foot up on the brake pedal, the brake pedal was there. The brake pedal was a full pedal. It didn't go to the floor. . . . [A]s I approached on down the hill I started applying pressure to the brakes. The brake pedal would not mash so at that time I looked to see if there was anything under the brake pedal the reason it wouldn't push and I put enough pressure on the brake pedal that I bent the steering wheel with my hands and it would not mash. That was approximately 200 feet on down the road. I seen the brakes would not mash so I started gearing the vehicle down. I pushed it into third gear and the vehicle just [went] "whoom," you know, in slow motion, like it was slung. Then I tried to come to second gear and it wouldn't come in. It just—gear stripped. It would not come in second gear. And at this time, I was approximately 300 foot when I lost the clutch. I tore the clutch out of the vehicle when I jammed it in third gear. Then at that time, I tried to get it in low gear. I was approaching approximately 150 foot to the intersection and which, at this time, I seen the Weston vehicle coming or I'd seen it before that but I seen we were going to meet so I turned the vehicle to the

> right in an opening . . . but it wouldn't turn. The speed and the force of the vehicle and the friction with the road, it just got in sort of a like this and the truck did not turn where I was trying to turn it. . . . I was trying to estimate it and I was trying to turn my truck behind Mr. Weston's truck.

Champion's efforts to avoid Weston's truck were unsuccessful and the two vehicles collided near the intersection.

Champion's wife testified that as she followed Champion in the vehicle behind him she could see him through the back window of the van; that smoke started boiling up from the van when it was about 300 feet from the intersection; that she saw her husband pulling on the steering wheel of the van; and that upon seeing this, she started blowing her car horn. The evidence further tends to show that Champion had been driving the van for about an hour and had stopped it at least four times without any problem prior to the collision.

The testimony of L. W. Blanton, the highway patrolman who investigated the collision, tends to show that when Blanton arrived on the scene Weston's truck was for the most part on the right shoulder of highway 2033 and Champion's van was partially on the right side of the highway and partially in the roadway; that there was a stop sign at the intersection for traffic travelling south on road 2044; and that Champion told the patrolman that he had tried to apply his brakes but was unable to stop for the stop sign because of some problems with his vehicle. Patrolman Blanton observed damage to the inside of Champion's vehicle and observed 105 feet of scuff and skid marks on the road made by Champion's vehicle as it approached the intersection and Weston's vehicle.

Weston's testimony tends to show that Weston was operating a pickup truck in an easterly direction on rural paved road 2033 on 4 June 1981; that as he approached the intersection of that road with rural paved road 2044, he observed Champion's van coming down road 2044 and saw that it was not going to be able to stop; that upon seeing this, Weston pulled his truck onto the right shoulder of road 2033 approximately 100 feet west of the intersection and stopped, and lay down in the seat of his truck. Prior to the collision, Weston noticed that the tires on

Champion's vehicle were skipping on the road and heard the tires sliding, skipping and squealing.

We conclude that the evidence is sufficient to permit the jury to find that Champion was unable to stop at the intersection and to control his vehicle so as to avoid the collision because of a defect in his brakes, that Champion was unaware of the defect and that the defect was not reasonably discoverable upon proper inspection and did not result from Champion's failure to exercise reasonable care in inspecting, using or maintaining the brakes. Thus, the evidence supports the instruction and issue submitted by Champion concerning a latent defect in his brakes and it was error for the trial court to refuse to submit and instruct upon that issue. *See Stephens v. Oil Co., supra.* Because of such error, Champion is entitled to a new trial on the question of his negligence.

[7] Champion further assigns as error the court's refusal to submit to the jury the issue of Weston's contributory negligence and to instruct upon Weston's duty to keep a proper lookout and to observe ordinary care as he requested. The court concluded that the evidence presented established as a matter of law that Weston was not contributorily negligent and for that reason refused to submit the issue of contributory negligence to the jury and to give the instructions correlative to that issue tendered by Champion. We find no error in the trial court's rulings on this issue. The court's refusal to give instructions and to submit an issue tendered by a party which are not supported by the evidence is proper. *Jordan v. Storage Co.*, 266 N.C. 156, 146 S.E. 2d 43 (1966) (instructions requested); *Hooper v. Glenn*, 230 N.C. 571, 53 S.E. 2d 843 (1949) (issue tendered). The evidence here, even when viewed in the light most favorable to Champion, is insufficient to permit the jury to find that Weston failed to use such care as an ordinarily prudent person would have used under similar circumstances and thus was contributorily negligent. *See Cockman v. Powers*, 248 N.C. 403, 103 S.E. 2d 710 (1958). Champion's assignments of error numbers 2, 3 and 5 are hereby overruled.

In summary, we affirm the judgment entered by the trial court on 21 September 1984 on Nationwide's motions and on the request of Indiana Lumbermen and Champion for a declaratory

judgment but hold that Champion is entitled to a new trial on the question of his negligence.

Affirmed in part; new trial in part.

Judges WHICHARD and COZORT concur.

VIRGINIA ELECTRIC AND POWER COMPANY v. MARSHALL F. TILLETT, JR. AND WIFE, BLYTHE TILLETT

No. 841SC624

(Filed 6 May 1986)

1. **Quieting Title § 2.2— interest in disputed property—judicial admission**

The trial court in an action to quiet title erred in ruling that as a matter of law respondents had no interest in the disputed land where petitioner judicially admitted that respondents have at least some fractional interest in the disputed land.

2. **Judgments § 37.5— title to property—judgment dismissing prior action not res judicata**

A judgment dismissing a prior action between petitioner's and respondents' predecessors in title for failure of respondents' predecessors to prove their title was not a conclusive adjudication of title in favor of petitioner's predecessors and is not *res judicata* as to respondents' claim of title in the present action.

3. **Deeds § 7.3; Registration § 1— State grant—registration not necessary to pass title**

Registration was not required to pass title to property to respondents' predecessors in title under a State grant, and the prior recordation of a subsequent grant of the property to petitioner's predecessors conveyed nothing since the State then had nothing to grant. For petitioner to establish a superior title, it had to show not only that its later grant was duly recorded but that it or its predecessors had exercised some possession of, or other circumstances relative to, the lands described in the grant sufficient to divest respondents and their predecessors.

4. **Quieting Title § 2.2— fitting descriptions to disputed land**

Respondents' forecast of evidence in an action to quiet title sufficiently demonstrated their ability to fit descriptions in their chain of title to the disputed land so as to survive petitioner's motion for summary judgment.

5. **Parties § 8.3— refusal to join additional parties—no abuse of discretion**

The trial court did not abuse its discretion in denying respondents' motion to join additional parties in an action to condemn land and to quiet title since

respondents failed to show that any other parties were necessary to the resolution of questions as to the extent of respondents' rights *vis-a-vis* petitioner and respondents' entitlement, if any, to just compensation.

APPEAL by respondents from *Watts, Judge.* Judgment entered 28 February 1984 in Superior Court, DARE County. Heard in the Court of Appeals 7 February 1985. Opinion filed by this Court 19 March 1985, 73 N.C. App. 512, 327 S.E. 2d 2, vacating judgment and instructing the trial court to dismiss, was reversed by the Supreme Court of North Carolina and remanded for consideration on the merits by opinion and order filed 18 February 1986, 316 N.C. 73, 340 S.E. 2d 62 (1986). Our prior opinion is accordingly withdrawn and we consider this appeal on its merits.

The procedural history of this case appears in detail in the opinion of the Supreme Court, and will not be recounted here. Briefly summarized, it is this: Respondents' predecessors sought to establish their boundary with petitioner VEPCO's predecessor in title, who counterclaimed to quiet title. That action in 1974 resulted in a directed verdict on respondents' predecessors' claim for VEPCO's predecessor, who voluntarily dismissed the quiet title counterclaim. VEPCO acquired its predecessor's interest and began construction of power lines in 1981, which respondents opposed. VEPCO began a condemnation proceeding, which by virtue of respondents' counterclaims became a quiet title action as well. The trial court entered summary judgment quieting title in VEPCO and extinguishing all respondents' claims. Respondents appealed. Further facts and case history are set out as necessary below.

Leroy, Wells, Shaw, Hornthal and Riley, by Dewey W. Wells and Robert W. Bryant, Jr., and Hornthal, Riley, Ellis & Maland, by Robert W. Bryant, Jr. and L. P. Hornthal, Jr., for petitioner-appellee.

Shearin and Archbell, by Roy A. Archbell, Jr., for respondent-appellants.

EAGLES, Judge.

This case is before us on appeal of a grant of summary judgment. Summary judgment is appropriate where there is no genuine issue of material fact and the case presents only questions of

law. G.S. 1A-1, R. Civ. P. 56(c). This is true even if the questions of law are complex. *Thomas v. Ray*, 69 N.C. App. 412, 317 S.E. 2d 53 (1984). The court may grant summary judgment if the movant conclusively establishes every element of its claim or, as appears to have been attempted here, conclusively establishes a complete defense or legal bar to the non-movant's claim. *Ballinger v. N.C. Dept. of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982), *cert. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983). The burden rests on the movant to make a conclusive showing; until then, the non-movant has no burden to produce evidence. *See Perry v. Aycock*, 68 N.C. App. 705, 315 S.E. 2d 791 (1984). The record is viewed in the light most favorable to the non-movant. *See Whitley v. Cubberly*, 24 N.C. App. 204, 210 S.E. 2d 289 (1974). Since the trial court in entering summary judgment rules only on questions of law, a summary judgment is fully reviewable on appeal. *N.C. Reins. Facility v. N.C. Ins. Guaranty Ass'n.*, 67 N.C. App. 359, 313 S.E. 2d 253 (1984).

I

Respondents first assign error to the trial court's ruling that "as a matter of law" they have no interest in the disputed property. That the trial court possessed the authority to entertain such a contention and to rule accordingly was established by the Supreme Court's opinion in this case. 316 N.C. at 76, 340 S.E. 2d at 64-65. Therefore we now examine the merits of the issue, respondents having properly excepted and assigned error.

A

The trial court's ruling was that as a matter of law respondents have no interest in the disputed property; the trial court did not reach the compensation question since if respondents hold no interest and VEPCO owns the land, VEPCO need not condemn its own land. As we held in our initial opinion, the condemnation proceeding would then be moot. 73 N.C. App. at 519-20, 327 S.E. 2d at 7. Therefore in this assignment the only questions involved are questions of title.

B

[1] Respondents argue that VEPCO judicially admitted that respondents have at least some fractional interest in the disputed

land, and that the trial court erred in ruling they had no interest at all. We agree.

In response to a "Request to Admit," VEPCO made the following admission: "For purposes of this action petitioner admits that [grantors' deed] to petitioner did not convey to petitioner a small fractional interest in the property described therein." This admission was conclusive against VEPCO, since it was never withdrawn or amended. G.S. 1A-1, R. Civ. P. 36(b); *Laing v. Liberty Loan Co.*, 46 N.C. App. 67, 264 S.E. 2d 381, *disc. rev. denied and appeal dismissed*, 300 N.C. 557, 270 S.E. 2d 109 (1980). The qualifying language, "for the purposes of this action," does not detract from the conclusive effect of the admission, since it merely restates the express terms of the rule. R. Civ. P. 36(b). Moreover, VEPCO made other similar concessions that respondents owned the fractional interest, in answers to interrogatories and elsewhere, which were also admissible against it. *See* 2 H. Brandis, N.C. Evidence Section 177 (2d rev. ed. 1982); R. Burns, Use of Discovery Under N.C. R. Civ. P., Section 8-11 (1971). Considering this evidence in the light most favorable to respondents, the trial court clearly erred in ruling as a matter of law that respondents had no interest in the property, and its order must be reversed.

II

As to what interest, if any, respondents have beyond the admitted small fractional interest, respondents contend that they own a substantial percentage of the property, and that they have produced sufficient evidence to entitle them to go to trial. VEPCO argues that we should find no error as to the remaining title issues, direct partial summary judgment awarding respondents only their admitted small interest, and remand for a determination of respondents' damages for the condemnation of that small interest.

The trial court's finding that respondents owned no interest at all in the subject property, necessarily includes a finding that respondents failed as a matter of law to prove any larger interest as well. In the interests of judicial economy, we now turn to that issue.

III

In our consideration of this question we face a voluminous and confusing record. Respondents refer repeatedly to certain survey points designated by letter on a court map. There is a court map in the record, but the designated points do not appear on that map. Despite careful examination, we can only *estimate* the location of the disputed areas. Likewise, the documents constituting the respective chains of title leave much to be desired in terms of legibility and clarity. We have cautioned litigants previously of their duty to present the issues clearly in the trial court and on appeal. *Estrada v. Jacques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984); *see* App. R. 28(a). We note again that the trial court has discretionary authority to exclude confusing materials which purport to supplement the affidavits supporting summary judgment. G.S. 1A-1, R. Civ. P. 56(e).

IV

Whether respondents own some interest in the property greater than the admitted fractional interest appears to involve three questions: (1) Whether respondents are barred by *res judicata* from asserting their claim; (2) Whether a grant from the State, the ultimate source of respondents' purported title, is unenforceable and therefore defeats their title; and (3) Whether respondents are able to locate their purported interest on the ground.

V

[2] The *res judicata* question arises out of an action begun in 1973 ("the 1973 action") by respondents' predecessors in title, Marshall Tillett, Sr. *et al.* (referred to hereafter collectively as "Tillett, Sr."), against VEPCO's predecessors, Estelle Gray, *et al.* (referred to hereafter collectively as "Gray"). Tillett, Sr., claiming under the same chain of title as respondents, alleged a boundary line dispute with Gray and that Tillett, Sr. had been in open possession of the disputed areas for more than 21 years. Gray denied any boundary dispute and counterclaimed for trespass and to quiet title as to Tillett, Sr. Gray moved for a directed verdict on the grounds that Tillett, Sr. had failed to show (1) a continuous chain of title or (2) the location of his deed on the ground. By judgment of 27 February 1975, Judge Robert D. Rouse, Jr. al-

lowed the directed verdict motion at the close of Tillett, Sr.'s evidence. Gray elected not to present evidence and took a voluntary dismissal as to the counterclaims.

A

It is undisputed that Tillett, Sr. and Gray are the respective predecessors in title for respondents and VEPCO, with the exception of that small fractional interest previously discussed. To the extent that the judgment in the 1973 action has *res judicata* effect as to the state of the remaining title, it is clear that the parties here are bound by it. *See Weeks v. McPhail*, 128 N.C. 130, 38 S.E. 472, *reh'g denied*, 129 N.C. 73, 39 S.E. 732 (1901); *Yount v. Lowe*, 24 N.C. App. 48, 209 S.E. 2d 867 (1974), *aff'd*, 288 N.C. 90, 215 S.E. 2d 563 (1975).

B

The doctrine of *res judicata*, as applied here, means that once an issue has been litigated and resolved by judgment, it may not be relitigated by the same parties or those claiming through them. *State ex rel. Lewis v. Lewis*, 311 N.C. 727, 319 S.E. 2d 145 (1984). The doctrine also operates to prevent litigation of issues necessarily embraced in the former action and to preclude relitigation of the same facts on different legal theories. *Blanton v. Maness*, 32 N.C. App. 577, 232 S.E. 2d 852, *disc. rev. denied*, 292 N.C. 728, 235 S.E. 2d 782 (1977).

C

VEPCO argues that Tillett, Sr.'s failure to prove title in the 1973 action operates as such a bar to respondents' claims of title. Relying on *Mayberry v. Campbell*, 16 N.C. App. 375, 192 S.E. 2d 27, *cert. denied*, 282 N.C. 427, 192 S.E. 2d 840 (1972), we disagree.

In *Mayberry* plaintiffs alleged that they owned certain land and that defendants were trespassing thereon. Defendants denied plaintiffs' title, alleged ownership in themselves and pleaded a prior judgment as *res judicata*. That prior judgment dismissed a prior action by the same plaintiffs seeking to quiet title as to the same defendants. *Campbell v. Mayberry*, 12 N.C. App. 469, 183 S.E. 2d 867, *cert. denied*, 279 N.C. 726, 184 S.E. 2d 883 (1971). We held that defendants had not put their title at issue in the prior action by way of a counterclaim or otherwise, and that the judg-

ment of dismissal simply meant that plaintiffs had failed to prove title in themselves. Accordingly, the prior judgment did not bar plaintiffs' present action, since a failure of one of the parties to carry the burden of proof on the issue of title does not automatically entitle the adverse party to an adjudication that title to the disputed land is in him. *Mayberry v. Campbell,* 16 N.C. App. at 376, 192 S.E. 2d at 29, *following Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971). In *Cutts* the Supreme Court, stating this rule, recognized that "[t]here are cases involving a disputed title to land in which neither party can carry the burden of proof." *Id.* at 412, 180 S.E. 2d at 308.

D

In the instant case, the judgment in the 1973 action merely indicates that Tillett, Sr. failed to prove title in himself. It does not represent a conclusive adjudication of title in favor of Gray, and therefore could not be employed as such by VEPCO. *Mayberry v. Campbell, supra.* We note that rather than attempt to quiet title or obtain a judicial declaration of the boundary, Gray elected not to produce evidence but chose instead to voluntarily dismiss the counterclaims that could have finally adjudicated the adverse claims of Tillett, Sr. Nothing before us suggests that VEPCO should be in any better position than Gray. Therefore *res judicata* did not justify summary judgment here. The facts (1) that more than seven years have elapsed since the end of the 1973 action and (2) that respondents claim to have been in possession under color of title, further reinforce the appropriateness of our holding.

VI

[3] VEPCO also urges that summary judgment was appropriate because respondents failed until 1973 to record the 1896 grant, the source of their title from the State. This was after recordation of the 1928 grant at the head of VEPCO's chain of title and after the expiration of all statutory grace periods. *See* G.S. 146-60 (1974). While the court below did not rule directly on this issue, and it is not clear what effect the land grants may have had on its decision, VEPCO contends that respondents' failure to timely register their grant makes their title fatally defective, justifying summary judgment for VEPCO.

Before 1959, title to land could be obtained by state grant, provided the grantee made entry and the land entered was vacant and unappropriated. *See* 2 Consolidated Statutes of N.C. Section 7540 *et seq.* (1920); *Walker v. Parker*, 169 N.C. 150, 85 S.E. 306 (1915); 1959 N.C. Sess. Laws c. 683. The law required (and still requires) that land grants be registered within two years in the county where the land lies. G.S. 146-55. Various saving provisions have extended the time for registering grants, with or without retroactive language, most recently for four years from January 1, 1977. 1977 N.C. Sess. Laws c. 701, *codified at* G.S. 146-60.1.

Nevertheless, contrary to VEPCO's contention, registration is not required to pass title under a grant. *Dew v. Pyke*, 145 N.C. 300, 59 S.E. 76 (1907); *Janney v. Blackwell*, 138 N.C. 437, 50 S.E. 857 (1905). In *Dew*, the Supreme Court compared the grant registration provisions with those governing deeds, *see* G.S. 47-18, which make registration of deeds necessary for them to be effective against creditors and purchasers for value. Since no comparable language appeared in the grants registration statute, G.S. 146-55, the court held that legal title passes from the State upon the grant and that prior recordation of the subsequent grant conveyed nothing to the junior grantee since the State then had nothing to grant.

For VEPCO to conclusively establish a superior title, it had to show not only that its later grant was duly recorded but that it or its predecessors had exercised some possession of, or other circumstances relative to, the lands described in the grant sufficient to divest respondents and their predecessors. *See Berry v. W. M. Ritter Lumber Co.*, 141 N.C. 386, 54 S.E. 278 (1906) (elder title preferred unless something divested it). It appears that VEPCO would probably advance the same claims originally put forward by Gray in the 1973 action, which have never been adjudicated upon a full hearing. Against VEPCO's claim respondents can trace a chain of title stretching back to a duly recorded 1897 judgment of the Superior Court of Dare County, which judgment recognized the existence of respondents' grant and confirmed their title in certain land thereunder. The relationship between these conflicting claims does not clearly appear from the face of this record. Both sides allege possession of some disputed area, but at this point neither has offered sufficient evidence to demonstrate or negate possession conclusively. The conflict appears to be a

boundary dispute. We conclude on the record presently before us that summary judgment was inappropriate on the land grant theory.

VII

[4] VEPCO contends, and we agree, that a claimant to title to land must be able not only to establish a good chain of title, but also to fit the descriptions in that chain to the land. *Cutts v. Casey, supra; Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). As we have noted from this record, it is difficult to ascertain *exactly* where the land lies. However, response to a motion for summary judgment only requires a *forecast* of the evidence, *see Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985), and we treat respondents' papers indulgently. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). Accordingly, we hold that respondents have demonstrated sufficiently their ability to locate their claim to survive VEPCO's motion for summary judgment. Summary judgment was therefore improperly granted, and the court's order must be reversed.

VIII

The parties bring forward some additional assignments of error, which we address briefly.

A

[5] Respondents assign error to the denial of their motion to join additional parties. It is not necessary that this action finally determine all rights in the subject property. *Cutts v. Casey, supra.* All that is at issue is the extent of *respondents'* rights *vis-a-vis* VEPCO and *respondents'* entitlement, if any, to just compensation. Respondents have failed to show, other than by conclusory allegations, that any other parties are necessary to the resolution of these questions. The trial court did not abuse its discretion in denying the motion. *See Crosrol Carding Devs., Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 183 S.E. 2d 834 (1971). To the extent that other parties may have an interest in the land subject to condemnation, they have an adequate remedy at law and may choose whether to exercise it. *See* G.S. 40A-51; *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E. 2d 844 (1986).

B

Respondents assign error to the denial of their motions for summary judgment as to their ownership of the small fractional interest and in trespass. As to the first, it appears from the foregoing discussion that the fractional interest is conclusively established, and partial summary judgment for respondents on that question would be appropriate. Absent a grant of relief from VEPCO's admissions, partial summary judgment should be entered on remand. As to the second, it appears that if the fractional interest proves to be the only interest owned by respondents, then they and VEPCO would be tenants in common. As a tenant in common, VEPCO could not be a trespasser. *See* 87 C.J.S. Trespass Section 44a(3) (1954). VEPCO appears to have ample authority to condemn interests of its co-tenants. *See* G.S. 40A-19; G.S. 40A-2(7). This second issue of trespass must await resolution on remand of the status of title to the larger remaining fractional interest in the disputed property.

C

VEPCO assigns error to the denial of its motion to strike certain portions of respondents' affidavits. Since judgment was entered in its favor, any error can hardly have been prejudicial. Nor does it appear that the court relied on the allegedly incompetent matter in any way. VEPCO will have an opportunity to object and cross-examine on remand. This assignment is therefore overruled.

CONCLUSION

The trial court erred in entering summary judgment on all issues in favor of VEPCO. The case is accordingly remanded for further proceedings consistent with this opinion.

Reversed and remanded.

Judges ARNOLD and PARKER concur.

Ballenger v. ITT Grinnell Industrial Piping

GAROLD E. BALLENGER, JR., DEPENDENT CHILD OF GAROLD E. BALLENGER, DECEASED, THROUGH HIS GUARDIAN AD LITEM, BRYAN K. HUSFELT, EMPLOYEE-PLAINTIFF v. ITT GRINNELL INDUSTRIAL PIPING, INC., EMPLOYER, AND INSURANCE COMPANY OF NORTH AMERICA, CARRIER-DEFENDANTS

No. 8510IC964

(Filed 6 May 1986)

1. **Master and Servant § 94.3— workers' compensation—weighing of evidence by full Commission**

The full Industrial Commission properly weighed the evidence in a workers' compensation case and did not act under the mistaken impression that the law required a finding in plaintiff's favor when there is any competent evidence to support such a finding.

2. **Master and Servant § 55.3— workers' compensation—water accident as cause of heart attack**

There was ample evidence to support findings by the Industrial Commission that while the deceased employee was repairing a leak in a commode valve on the cold water line coming out of the wall, he was hit with a full volume of water from the cold water line, and that this occurrence constituted an "accident" which resulted in the employee's heart attack and subsequent death.

3. **Master and Servant § 93.3— workers' compensation—qualifications of experts**

The Industrial Commission did not err in ruling that two physicians were qualified to give expert testimony as to whether a water incident was a cause of an employee's heart attack even though the witnesses were not specialists.

4. **Master and Servant § 93.3— workers' compensation—hypothetical questions**

The Industrial Commission did not err in ruling that hypothetical questions posed to two medical experts assumed only facts established by the evidence either directly or by implication.

APPEAL by defendants from the opinion and award of the North Carolina Industrial Commission entered 20 March 1985. Heard in the Court of Appeals 5 February 1986.

Pfefferkorn, Pishko & Elliott, P.A., by Robert M. Elliott, for plaintiff appellee.

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

BECTON, Judge.

Defendants ITT Grinnell and Insurance Company of North America appeal from an opinion and award of the Industrial Commission (Commission) to plaintiff Garold E. Ballenger, Jr., dependent child of the deceased, Garold E. Ballenger, Sr. The Commission awarded plaintiff's dependent $195.90 per week for four hundred weeks.

Mr. Ballenger was an employee of ITT Grinnell Industrial Piping, Inc., and was working at the ITT Grinnell plant in Winston-Salem, North Carolina on 14 May 1981. Mr. Ballenger, who performed plumbing repairs as a normal part of his job, was instructed to repair a leak in a restroom at the plant. The leak was in a commode valve on a cold water line coming out of the wall. Mr. Ballenger, working alone, apparently neglected to turn the water off before attempting to make the repair. Consequently, when he unscrewed the valve, the full volume of the cold water came gushing out.

James Johnson, Mr. Ballenger's immediate supervisor, came into the restroom shortly thereafter and saw Mr. Ballenger "completely drenched, soaking wet from head to toe," standing by the commode, water flowing from the wall and three to four inches of it on the floor. Mr. Johnson testified that Mr. Ballenger was very upset and excited at this point. Mr. Ballenger was sent home to change into dry clothing. When he returned he appeared quite pale, seemed short of breath, and was still visibly upset. As a result, James Wall, the manager of the maintenance department, instructed one of the employees, Steve Sink, to drive Mr. Ballenger home at approximately 3:00 p.m. Mr. Sink and Mr. Ballenger's niece had to assist Mr. Ballenger into the house. At home, Mr. Ballenger was very slow to respond to questions, and his color was "pale, blue." He complained of a burning sensation in his chest and lack of feeling in his legs.

At approximately 4:00 p.m., Mr. Ballenger was taken to the emergency room at North Carolina Baptist Hospital by the rescue squad and treated for a possible heart attack. He died at approximately 9:35 that night. The immediate cause of his death was an acute myocardial infarction, or heart attack.

The deputy commissioner denied plaintiff's claim that Mr. Ballenger was injured in the course of his employment with de-

fendant by "a sudden break in the water line which caused a substantial torrent of cold water suddenly to pour onto the deceased, resulting in extra exertion due to shock thereby causing his heart attack and death." The deputy commissioner ruled that the accident was not the cause of any injury to Mr. Ballenger and that his subsequent death from a myocardial infarction did not arise out of his employment with defendant.

The Commission found as a fact that the acute myocardial infarction suffered by Mr. Ballenger and which ultimately caused his death occurred on the afternoon of 14 May 1981, and that it was caused or precipitated by the "water incident episode with its associated related stress at defendant employer's plant." Defendants employer and insurance company appeal.

I

[1] Defendants first contend that the Commission applied an improper standard of review and that the Commission erroneously viewed the totality of the evidence in the light most favorable to the plaintiff, impermissibly shifting the burden of proof from plaintiff to defendants. Defendants cite a recent decision of this Court, *Cauble v. The Macke Co.*, 78 N.C. App. 793, 338 S.E. 2d 320 (1986) as authority for the proposition that the Commission acts under a misapprehension of the law if it applies the appellate standard of review by finding in plaintiff's favor when there is *any* competent evidence to support such a finding. *Cauble*, 78 N.C. App. at 795, 338 S.E. 2d at 322.

We do not believe that our holding in *Cauble* dictates the result that defendants would have us reach here. Nor do we believe the Commission acted under a misapprehension of the law in this case. The Commission set out the well-established legal principles which guided its review of the evidence in a very thorough memorandum preceding its findings of fact and conclusions of law. Given the legislative policy underlying the Workers' Compensation Act, which requires the Commission and the courts to construe its provisions liberally in favor of the injured worker, it was entirely proper for the Commission, after considering all of the evidence, to view the expert testimony in the light most favorable to the plaintiff. *See Cates v. Hunt Construction Co.*, 267 N.C. 560, 563, 148 S.E. 2d 604, 607 (1966).

Recognizing that there was conflicting medical testimony regarding the effect of the water episode on the deceased, the Commission required the plaintiff to establish, by competent expert testimony, the causal relationship between the accident and the injury. The Commission stated:

> In the present case, three medical expert witnesses, Dr. Sessler, Dr. Walley and Dr. Reimer all testified that the "water incident" occurring on the afternoon of May 14, 1981, could or might have caused or precipitated decedent's acute myocardial infarction. A fourth medical expert witness, Dr. Gaddy, on cross examination also testified that "the incident at work did play a major role." Of the seven medical expert witnesses who testified in this case, five agreed that the decedent's heart attack which ultimately caused his death occurred on the afternoon of May 14, 1981. These five medical experts were Dr. Sessler, Dr. Walley, Dr. Reimer, Dr. Gaddy, and Dr. Johnston.

On this basis, the Commission held that there was "competent evidence in the record sufficient to establish a causal relationship between the accident and the deceased's injury."

When the evidence before the Commission is such as to permit either of two contrary findings, its determination is conclusive on appeal. *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963). All that *Cauble* requires is that the Commission weigh the evidence before it concludes that there is some evidence to support a finding in plaintiff's favor.

II

[2] Defendants assert that plaintiff offered no competent evidence to establish the circumstances of Mr. Ballenger's alleged accident or that he suffered a compensable injury by accident while performing his job for defendant employer. In particular, defendants except to the Commission's finding of fact that Mr. Ballenger "was hit with a full volume of gushing cold water." It is not disputed that Mr. Ballenger was engaged in a duty (repairing a leak) which he was authorized to undertake and which directly benefited his employer at the time of the water incident. It is also undisputed that when Mr. Johnson arrived on the scene he observed that Mr. Ballenger was "drenched," "soaking wet," "liter-

ally [wet] all over," "on his front and on his back," "totally." According to Mr. Johnson, "there was water gushing out from the hole where the valve is supposed to be." Mr. Johnson was able to infer from his experience in the maintenance department that Mr. Ballenger had "screwed the wrong thing out of the pipeline, screwed the whole valve itself rather than shutting it off" and that with this valve removed, "the full volume [of the water that is in the pipe] is coming out."

The logical inference is that Mr. Ballenger was hit with a full volume of gushing water. Accident and effect do not have to be established by eyewitnesses or to a mathematical or scientific certainty. *Snow v. Dick & Kirkman, Inc.*, 74 N.C. App. 263, 267, 328 S.E. 2d 29, 32, *disc. rev. denied*, 314 N.C. 118, 332 S.E. 2d 484 (1985). Furthermore, inferences from circumstances when reasonably drawn are permissible, and the fact that other reasonable inferences could have been drawn is no indication of error; deciding which permissible inference to draw from evidentiary circumstances is as much within the fact finder's province as is deciding which of two contradictory witnesses to believe. *Id.*

There was ample evidence from which the Commission could reasonably infer that plaintiff was drenched with a full volume of water from the cold water line. This was an interruption of the normal work routine and the introduction of an unusual condition likely to result in unexpected consequences, and was therefore an "accident" within the meaning of the Workers' Compensation Act. *See Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 26, 264 S.E. 2d 360, 363 (1980).

We now turn to defendants' contention that even if Mr. Ballenger were hit with a full volume of gushing water, there was no evidence that it was "cold" water. Defendants assign as error that the Commission took judicial notice "that water from a cold-water line is colder than the temperature of the human body." N.C. Gen. Stat. Sec. 8C-1, Rule 201 (Cum. Supp. 1983) provides:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

It is generally known, as plaintiff asserts, that water from a cold water line is *at least* cool to the touch and therefore colder than body temperature, which is normally 98.6 degrees Fahrenheit. The difference between "cold" and "hot" water, and the various gradations of each, also is generally known. Although one may not know the precise or even the approximate temperature of cold water, one knows it when one feels it. There was no evidence that anything but "cold water," the temperature to the touch of which is commonly known, flowed into the cold water line at the ITT Grinnell plant.

Mr. Ballenger's case does not rise or fall on the precise temperature of the water in the cold water line at the time of the accident. The hypothetical question posed to each of the medical experts required them to consider the effect of Mr. Ballenger's being hit with a full volume of water from the cold water line. Expert witnesses testified that the water incident could have caused the vaso-constriction of the blood vessels or arterial spasm, either of which would have reduced the amount of blood going to the heart and increased the pressure on the heart muscle. This, they say, could have triggered the heart attack. In the alternative, the experts testified that the stress and excitement resulting from the water incident could have placed an increased demand on his already diseased heart, thus precipitating the myocardial infarction. The precise temperature of the water was not material to this determination.

We conclude that the Commission did not err in taking judicial notice, as it did here, and therefore that defendants were not prejudiced.

III

[3] Defendants next challenge the competency of certain medical evidence both as to the qualifications of several of the expert witnesses and the validity of the hypothetical question posed to them. In ruling that the water incident was not a cause or precipitating factor in the myocardial infarction, the deputy commissioner excluded the testimony of Dr. Sessler on the issue of causation and of Dr. Walley entirely.

The Commission, however, found that Drs. Sessler and Walley "surely qualifIied] as experts based upon [the following] well-recognized principles of law . . .":

> "The qualifications of a medical expert are judged in the same manner as those of experts in general. He is not disqualified merely because he belongs to some particular school of medical thought or practice, *or is not a specialist*, or has no license to practice medicine, or has had little or no experience with the precise subject." . . .
>
> "It is enough that, through study or experience, or both, he is better qualified than the jury to form an opinion on the particular subject."

(quoting 1 Stansbury, North Carolina Evidence, Secs. 133, 135 (Brandis Rev. 1982)) (emphasis added).

In addition, the question whether none but a specialist can testify as an expert is not a matter of judicial discretion but rather is a question of law subject to review by the appellate courts. *See Robinson v. J. P. Stevens*, 57 N.C. App. 619, 624, 292 S.E. 2d 144, 147 (1982). A medical witness need not, as a matter of law, be a specialist in a particular subject to give an opinion on it. *Id.*

It was entirely proper for the Commission to include the testimony of Drs. Sessler and Walley in its determination of the facts and evidence. "The plenary powers of the Commission are such that upon review, it may adopt, modify or reject the findings of fact of the Hearing Commissioner, and in doing so may weigh the evidence and make its own determination as to the weight and credibility of the evidence." *Cauble*, 78 N.C. App. at 795, 338 S.E. 2d at 321. The Commission did not err by qualifying Drs. Sessler and Walley and relying in part on their testimony to reach a decision contrary to that of the deputy commissioner.

[4] The defendants also argue that the hypothetical questions on which the expert opinions were based were improper because they assumed facts not in evidence and omitted others that were in evidence. The Commission concluded that the hypothetical question "assumes only facts which were established by the evidence either directly or by fair and necessary implication."

Although under the new evidence code hypothetical questions are not required, they are still permitted. *See* G.S. Sec. 8C-1, Rule 705 (Cum. Supp. 1983). To be acceptable, a hypothetical question must (1) list only such facts as are directly in evidence *or*

may justifiably be inferred therefrom, (2) list enough facts to allow the witness to express an intelligent and safe opinion and (3) make it clear that the opinion is based on the hypothesis that the facts listed will be found by the finder of fact to exist. 1 Stansbury, North Carolina Evidence, Sec. 137 (Brandis Rev. 1982) (emphasis added).

Counsel may form the 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," leaving adversaries to protect themselves on cross-examination. *Id.* (quoting *Dean v. Carolina Coach Co.*, 287 N.C. 515, 215 S.E. 2d 89 (1975)).

Even the omission of a material fact from a hypothetical question does not necessarily render the question objectionable, or the answer incompetent. *See Robinson*, 57 N.C. App. at 622, 292 S.E. 2d at 146; *Dean*, 287 N.C. at 519-20, 215 S.E. 2d at 92.

It is left to the cross-examiner to bring out facts supported by the evidence that have been omitted and thereby determine if their inclusion would cause the expert to modify or reject his or her earlier opinion. *Id.*

We have examined the hypothetical questions posed to the medical witnesses and reject defendants' contention that the answers should have been excluded as incompetent. Defendants reiterate the objection to inferences that may be drawn from the evidence and argue that the medical experts should not have been allowed to give an opinion based on the following recitation of the facts:

> Mr. Ballenger was attempting to repair a leak in a commode when a valve in the . . . cold water line . . . came out and hit [him] with a full volume of water. That immediately following this incident Mr. Ballenger was upset and soaking wet. . . . At approximately two to three o'clock p.m. Mr. Ballenger was unusually quiet, displayed some shortness of breath and was pale.

We hold that the evidence reasonably tends to prove the facts presented by plaintiff in the hypothetical question and that plaintiff's theory of the precipitating events of the deceased's heart attack properly can be deduced from that evidence.

We affirm the opinion and award of the Industrial Commission based on its conclusion that "the deceased Ballenger sustained a compensable injury arising out of and in the course of his employment with defendant employer which resulted in an acute myocardial infarction and his subsequent death" on 14 May 1981.

Affirmed.

Judges JOHNSON and MARTIN concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. LEON KAPLAN AND WIFE, RENEE MYERS KAPLAN; FRANK M. BELL, JR., TRUSTEE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION; KAPLAN'S SCHOOL SUPPLY CORPORATION, LESSEE

No. 8521SC1039

(Filed 6 May 1986)

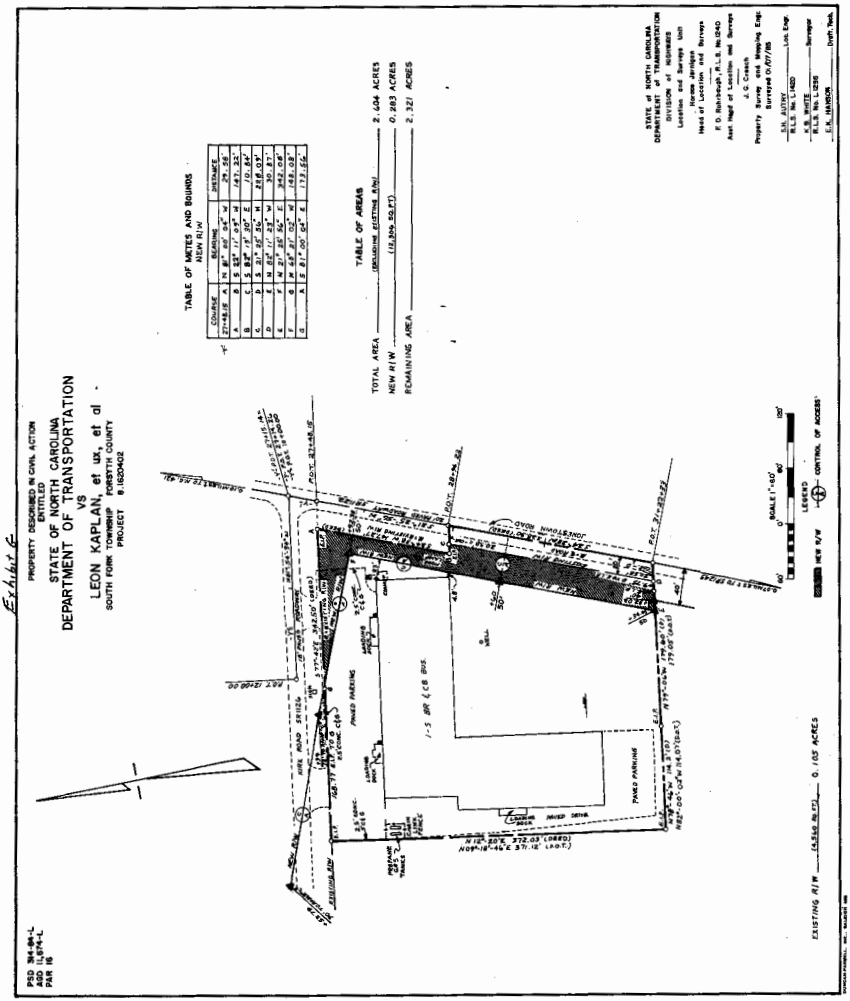
Eminent Domain § 5.1— highway condemnation—two tracts—no unity of use

The trial court did not err in a highway condemnation proceeding by holding that defendant's property consisted of two separate and distinct tracts to be considered separately for the purpose of determining damages even though the property was physically unified and unified in ownership where defendants acquired the two tracts at different times, considered them to be separate tracts, put them to different usages, and neither tract was necessary to the use or enjoyment of the other. N.C.G.S. 136-112(1).

APPEAL by plaintiff from *Morgan, Judge*. Judgment entered 12 May 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 7 February 1986.

On 26 November 1984 plaintiff instituted this condemnation proceeding, pursuant to Article 9, Chapter 136 of the General Statutes, by filing a complaint, declaration of taking and notice of deposit of estimated just compensation in the amount of $222,320.00. Plaintiff sought to condemn for highway right of way purposes fee simple title to two strips of land belonging to defendants Kaplan and being portions of two larger tracts owned by them, as well as control of access to the remaining property. Plaintiff also filed a map, pursuant to G.S. 136-106, depicting all of the defendants' property as one tract and showing the location of

the area of right of way taken and the area remaining, as affected by the taking.



Defendants Kaplan filed answer, denying that the property affected by the taking is a single unified tract and alleging that,

for the purpose of assessing damages, two separate and distinct parcels are affected by the taking. Defendants alleged that the property actually consists of two tracts: a large inverted L-shaped parcel fronting on Kirk Road upon which a building and parking lot are located, and a smaller rectangular parcel located south and east of the larger parcel and fronting on Jonestown Road. Defendants requested a hearing, pursuant to G.S. 136-108 to determine all issues other than damages.

The trial court heard testimony, received exhibits, and considered stipulations of fact submitted by the parties. After making findings of fact, the court concluded and ordered that the two tracts should be considered separately in assessing damages. Plaintiff appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for plaintiff appellant.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by F. Treacy, Jr. and Richard J. Keshian, for Leon Kaplan and wife, Renee Myers Kaplan, defendant appellees.

House, Blanco & Osborn, by John S. Harrison, for Kaplan School Supply Corporation, defendant appellees.

MARTIN, Judge.

Plaintiff's sole contention on appeal is that the trial court erred in holding that defendant's real property, though physically unified and unified in ownership, consisted of two separate and distinct tracts to be considered separately for the purpose of determining damages in this condemnation action. We affirm the order of the trial court.

The trial court made the following findings of fact:

2. The parties have entered into a number of stipulated facts which are contained in a stipulation of the parties filed with the court and incorporated by reference into this order. The stipulations are as follows:

a. The date of taking in this action is November 26, 1984.

b. The deed attached to the stipulation as Exhibit "B", dated June 10, 1983, recorded in Book 1400 at Page 863

of the Forsyth County Registry, ("smaller tract") conveying a certain tract of land to Leon Kaplan and wife, Renee Myers Kaplan is a genuine copy of such deed.

c. The deed attached to the stipulation as Exhibit "A", dated July 10, 1972 recorded in Book 1035 at Page 760 of the Forsyth County Registry ("larger tract") conveying a certain tract of land to Leon Kaplan and wife, Renee Myers Kaplan is a genuine copy of such deed.

d. The plaintiff and the defendants agree that the only two tracts of land affected by the taking in this cause are the two tracts described in the deeds attached to the stipulation as Exhibits "A" and "B". The defendants contend that these two tracts of land are, for purposes of assessing damages under Chapter 136 of the North Carolina General Statutes, two separate and distinct tracts of land. On the other hand, the plaintiff contends that, for purposes of assessing damages under Chapter 136 of the North Carolina General Statutes, the two tracts of land described in Exhibits "A" and "B" attached hereto are in fact one unified tract of land.

e. As of November 26, 1984 (the date of taking), the smaller tract has been vacant.

f. As of November 26, 1984 (the date of taking), the larger tract was in full use with the building situated thereon rented to Kaplan's School Supply, Incorporated. The building is a 32,000 square foot brick and masonry building.

g. As of November 26, 1984, and the day before, Leon Kaplan and Renee Myers Kaplan owned the larger tract as tenants by the entirety with a leasehold interest in Kaplan's School Supply, Incorporated. Leon Kaplan and wife, Renee Myers Kaplan, owned the smaller tract as tenants by the entirety.

h. The larger tract and the smaller tract are physically contiguous.

i. On the date of the taking, the larger tract was zoned B-3 and the applicable Table of Permissible Uses in such a zone is marked as Defendants' Exhibit "E" and incorporated herein by reference as if fully set forth.

j. On the date of taking, the smaller tract was zoned B-3 and the applicable Tables of Permissible Uses in such a zone is marked as defendants' Exhibit "E" and incorporated herein as if fully set forth.

3. The lease agreement dated February 1, 1977, marked as defendants' Exhibit "C" and memorandum of this lease, marked as defendants' Exhibit "D" were in full force and effect immediately prior to the date of taking, November 26, 1984.

4. The lease agreement dated February 1, 1977 marked as defendants' Exhibit "C" applied to the larger tract and in no way concerned the smaller tract of property.

5. On the date of taking, November 26, 1984, the smaller tract of property owned by Leon Kaplan and wife, Renee Myers Kaplan, was not being used in conjunction with the larger tract owned by Leon Kaplan and wife, Renee Myers Kaplan, and leased to Kaplan's School Supply, Inc.

6. Kaplan's School Supply, Inc. had no interest or estate in the smaller tract on or before the date of taking.

7. On the date of taking, the use to which the larger tract was being put was the operation of a school supply business by the lessee, Kaplan's School Supply, Inc. The larger tract was generating income to the owners Leon Kaplan and wife, Renee Myers Kaplan by way of rents.

8. As of the date of taking, the larger tract had uncontrolled access to Kirk Road.

9. As of the date of taking, both the smaller tract and larger tract had uncontrolled access to Jonestown Road.

10. After the taking, the larger tract had no direct access to Jonestown Road and access to Kirk Road was limited by the closing of Kirk Road.

11. After the taking, Kirk Road, the northern boundary of the larger tract, will be closed at the entrance to Jonestown Road, and Kirk Road will be reunited with Kester Mill Road as depicted on the construction plan marked as defendants' Exhibit "F".

12. On the date of taking there was not such a connection or relation of adaptation, convenience and actual and permanent use as to make the enjoyment of the smaller tract reasonably and substantially necessary to the enjoyment of the larger tract, in the most advantageous and profitable manner for which they were used.

Based on these findings, the trial court concluded:

1. As to the smaller tract and larger tract, there existed physical unity on the date of taking.

2. When considered at the time of or immediately after the taking when the lease between Leon Kaplan and wife, Renee Myers Kaplan, and Kaplan's School Supply, Inc. technically terminated, there was unity of ownership in the larger and smaller tracts.

3. On November 26, 1984, the date of taking, there existed no unity of use between the larger tract and the smaller tract.

4. On the date of taking, the smaller tract and larger tract were two separate and distinct tracts which must be considered separately in assessing damages.

Plaintiff excepts and assigns error to the trial court's Finding of Fact No. 12 and to its Conclusions of Law Nos. 3 and 4. Plaintiff contends that the court failed to apply the correct principles of law in arriving at its finding and conclusions that defendants' property was not unified in use.

G.S. 136-112(1) provides that where only a portion of a tract of land is taken for highway purposes, the measure of damages to which the landowner is entitled is the difference between the fair market value of the entire tract immediately before the taking and the fair market value of the remaining portion immediately after the taking. Where portions of more than one parcel of land are taken, a question frequently arises as to whether the parcels are to be treated as one tract or as separate tracts for the purpose of assessing damages. In such cases, our Supreme Court has established unity of ownership, physical unity, and unity of use as factors to be considered in determining the unity of lands for the purpose of measuring damages. *Barnes v. Highway Comm.*, 250

N.C. 378, 179 S.E. 2d 219 (1959). The presence of all of these unities is not always essential to a finding of a single tract; however, unity of use is the more significant of the three factors. *Id.*

> [T]he factor most often applied and controlling whether land is a single tract is unity of use. *Regardless of contiguity and unity of ownership, ordinarily lands will not be considered a single tract unless there is unity of use.* It has been said that "there must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used." *Peck v. Railway Co.* (1887), 36 Minn. 343, 31 N.W. 217. The unifying use must be a *present* use. A mere intended use cannot be given effect. If the uses of two or more sections of land are different and inconsistent, no claim of unity can be maintained. But the mere possibility and adaptability to different uses will not render segments of land separate and independent (emphasis added).

Id. at 385, 109 S.E. 2d at 225. In *Barnes*, the Supreme Court held that two parcels of land which were contiguous, owned by the same owners, and actually similarly used should be treated as one parcel.

In *Board of Transportation v. Martin*, 296 N.C. 20, 249 S.E. 2d 390 (1978), plaintiff brought a proceeding to condemn a portion of a tract of land belonging to the individual defendants. Defendants sought to include another contiguous tract, belonging to a corporation in which one of the defendants was the sole shareholder, as a part of the tract affected by the taking for the purpose of ascertaining severance damages. All of the land had been conveyed to the individual defendants as a single tract by one deed; a portion was later conveyed to the corporation in order that financing might be obtained for a shopping center development. A commercial shopping center was developed. The remaining tract, in which title was retained by the individual defendants, was undeveloped. The Supreme Court held that although the two tracts were physically unified, there was no unity of ownership and no unity of use and therefore the tracts could not be con-

sidered as one for the purpose of determining damages. The Court noted that "even if unity of ownership were proven in this case, it would still be necessary to show unity of use." *Id.* at 30, 249 S.E. 2d at 397. Even though the undeveloped tract had been graded and water and sewer had been extended to it in preparation for its future development in connection with the shopping center, the Court concluded that the land owned by the individual defendants "was not *presently* being used in a manner which made its continued use essential to the tract owned by" the corporation. *Id.*

In the present case, the larger tract, purchased by defendants Kaplan on 10 July 1972, was being used for commercial purposes on 24 November 1984, the date of the taking. That tract was leased to Kaplan's School Supply Corporation, which occupies a 32,000 square foot brick and masonry building on it. The smaller tract, purchased by defendants Kaplan on 10 June 1983 and with which Kaplan's School Supply Corporation has no interest, was vacant. The evidence indicated that the Kaplans had purchased the smaller tract for investment purposes and, although both tracts were zoned similarly, the smaller tract was not being used in conjunction with the larger tract in any manner.

Plaintiff contends, however, that because the two tracts are physically contiguous and unified in ownership, the proper application of the factor of unity of use involved different principles than were applied by the trial court. It contends that under the circumstances of this case the division of the property is merely nominal and that in order for the trial court to conclude that there was no unity of use, it was required to find that the actual usages to which the two tracts were put was so inconsistent as to sever the property. Relying on *Smith Co. v. Highway Comm.*, 279 N.C. 328, 182 S.E. 2d 383 (1971), plaintiff contends that the mere fact that one tract is developed and the other is not does not render the usages distinct and separate.

In our view, *Smith Co.* is distinguishable and does not control. In *Smith Co.*, the plaintiff had acquired a 13 acre tract as a single tract, and had developed approximately half of it. The remaining 6 acres, abutting N.C. Highway 191, were vacant. The Highway Commission converted Highway 191 into a controlled access facility and contended that it should be required to pay com-

pensation only for denial of right of access to the vacant 6 acre portion of the tract, since the developed portion was afforded access to another public road. Although not specifically discussing the factor of unity of use, the Court held that plaintiff was entitled to recover damages to its entire tract.

We hold that the principle of unity of use defined in *Barnes v. Highway Commission, supra,* was appropriately applied to the evidence in this case, rather than the standard proposed by plaintiff. In the present case, defendants acquired the two tracts as separate tracts at different times, considered them to be separate tracts, and put them to different usages. As of the date of taking, neither tract was necessary to defendants' use or enjoyment of the other. The trial court found that there was no connection between the two tracts as would render defendants' enjoyment of the smaller tract necessary to their enjoyment of the larger one. The court's findings support its conclusion that there did not exist, on the date of taking, any unity of use between the two tracts, and such conclusion supports its order that the tracts be considered separately in assessing damages.

Affirmed.

Judges BECTON and JOHNSON concur.

THE TOWN OF WINTON v. JOHN A. SCOTT; MRS. JOHN A. SCOTT; JOHN W. ELEY; JANICE B. ELEY; ARMSTEAD VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER ARMSTEAD VANN; MATILDA VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER MATILDA VANN; SOLOMON VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER SOLOMON VANN; SARAH VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER SARAH VANN; ARZULA VANN; HEIRS, DEVISEES, AND ALL OTHER PERSONS CLAIMING UNDER ARZULA VANN

No. 856SC1155

(Filed 6 May 1986)

1. Adverse Possession § 7— ouster of cotenant—insufficient evidence

Stipulations and documents showing that certain individuals owned a 60-acre tract of land as cotenants with a third party or her successors in interest were insufficient to show ouster by the individuals of their cotenant.

2. Adverse Possession § 17.1— deed not color of title against cotenant

A deed purporting to convey the whole estate was not color of title as against the grantors' cotenant.

3. Eminent Domain § 16— ownership of condemned property—cotenant's successors

The trial court did not err in awarding an interest in the condemned property to a cotenant's successors because it was not proven that any of her successors were in existence when the property was condemned.

4. Quieting Title § 2.2; Trespass to Try Title § 4— Real Property Marketable Title Act—cotenant's interest not extinguished

A cotenant's interest in land was sufficiently disclosed so as to preclude extinguishment of the interest under the Real Property Marketable Title Act where the chain of title under which the challengers claimed their interest in the land specifically refers by book and page number to a deed conveying the property to their predecessors in title and the cotenant. N.C.G.S. § 47B-3(1).

5. Deeds § 6.1— clerk's certification—presumption of proper execution

Evidence that signatures of four of the grantors in a deed were witnessed by a person with a different middle initial than the person who proved execution of the deed to the clerk of court was insufficient to rebut the presumption from the clerk's certification that the document was properly executed.

6. Quieting Title § 2.2; Trespass to Try Title § 4— Real Property Marketable Title Act—cotenant's interest extinguished

A cotenant's claim to title was extinguished under the Real Property Marketable Title Act where the conveyance to the challengers' predecessor in title was more than 30 years prior to the date of this action and did not refer to a muniment of title which would reveal the latent defect in the title. N.C.G.S. § 47B-3(1).

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by defendants from *Small, Judge*. Judgment entered 16 August 1985 in Superior Court, HERTFORD County. Heard in the Court of Appeals 6 March 1986.

This is an eminent domain proceeding instituted by the Town of Winton to obtain certain property for the town's sanitary sewer project. The Scotts, Eleys and Vanns were alleged to have an interest in the subject property. Following title investigation the matter was presented to the court for consideration of all issues other than compensation.

The following evidence was presented to the court by way of title documents and stipulations. On 4 February 1895 James N. Holloman conveyed to Moses Vann a certain tract of land known

as the Island Track which contained 120 acres more or less. The deed was recorded in Book U at Page 138 of the Hertford County Registry. Sometime prior to 13 April 1904 Moses Vann died intestate survived by his widow Fleeta and six children: Annie J., Matilda, Solomon, Sarah, Arzula and Armstead. On 13 April 1904 Annie, Matilda, Sarah, Solomon and Arzula signed a deed which purported to convey their interest in the 120 acres to Albert T. Beverly. Armstead Vann did not sign any document conveying his interest in this property to Beverly. On 30 June 1906 Beverly conveyed 60 acres of the property to Fleeta Vann for life with the remainder interest to Armstead, Matilda, Arzula, Sarah, Solomon and Annie Vann. This deed was recorded in Book 64 at Page 300 of the Hertford County Registry.

Sometime prior to 2 February 1938 Fleeta Vann died. On 2 February 1938 Armstead, Arzula, Sarah, Annie and Solomon conveyed their interest in the 60-acre tract to John Arlie Scott. The deed was recorded in Book 123 at Page 512 of the Hertford County Registry and refers to the deed from Beverly to the Vanns recorded in Book 64 at Page 300. A second deed was executed on 2 February 1938 conveying the same property. This deed was executed because Annie Vann's husband had not signed the earlier deed. This deed also referred to the Beverly deed. Matilda Vann did not sign these documents nor any other documents conveying her interest in this property. It was stipulated that Matilda Vann died sometime after 30 June 1906, however, there was no evidence presented regarding her date of death or the identity of her successors in interest.

On 19 May 1930 Beverly executed a deed of trust on the remaining acreage, described as 70 acres of land, to W. D. Boone, Trustee. This deed of trust was foreclosed and Boone as trustee conveyed the property to Emma Parker on 28 August 1936. The deed was recorded in Book 128 at Page 179 of the Hertford County Registry. Sometime prior to 8 February 1947 Emma Parker died intestate survived by a husband and seven children. The Parker heirs conveyed their interest in the 70 acres of land to C. S. Parker by deed found at Book 164 on Page 364 of the Hertford County Registry. C. S. Parker conveyed the property to John Arlie Scott on 6 March 1947 by a deed found at Book 164 on Page 366 of the Hertford County Registry.

Scott died intestate on 7 February 1970 survived by John A. Scott, Jr., one of the defendants in this action. In August 1972 Scott entered into an oral lease with John W. Eley whereby Eley was leasing approximately 22 acres of the land in question.

Based upon this evidence the court concluded that John A. Scott owned 5/6 of the 60-acre tract of land prior to the taking of the land by the Town of Winton and that Matilda Vann or her heirs owned a 1/6 interest in the 60-acre property. The court also concluded that John A. Scott was the fee simple owner of the 70-acre tract. From this judgment the Scotts, Eleys and the Vanns appealed.

Revelle, Burleson, Lee & Revelle, by L. Frank Burleson, Jr., for the Town of Winton.

Robert C. Jenkins as guardian ad litem for the appellants Vann.

Moore, Wright and Hardison, by Thomasine E. Moore and Paul A. Hardison; and Bowen C. Tatum, Jr., for the appellants Scott and Eley.

ARNOLD, Judge.

First we note that this is an appeal from an interlocutory order and as such is subject to dismissal. Nevertheless, we treat this matter as a petition for a writ of certiorari, and in our discretion allow the same.

SCOTT AND ELEY APPEAL

These appellants contend the court erred by awarding Matilda Vann or her successors any interest in the sixty-acre tract of land. We disagree.

[1] The Scotts first contend that they obtained title to this property by ouster of a co-tenant. In *Collier v. Welker*, 19 N.C. App. 617, 620-621, 199 S.E. 2d 691, 694-95 (1973), Judge (later Justice) Vaughn wrote the following statement regarding what must be shown in order to prove adverse possession as against a co-tenant:

> Even where a co-owner appropriates rents and profits for his sole benefit, silent occupation and exclusive use of the

entire property does not qualify as actual ouster, absent a demand for accounting by the excluded tenants in common. *Cox v. Wright, supra; Clary v. Hatton*, 152 N.C. 107, 67 S.E. 258; *Dobbins v. Dobbins*, 141 N.C. 210, 53 S.E. 870; *Bullin v. Hancock*, 138 N.C. 198, 50 S.E. 621. This position is consistent with the general precept that, regardless of a conflicting rule with respect to persons who are not joint owners, "the entry and possession of one tenant in common are presumed not to be adverse to his cotenants." 4 Thompson, Real Property (1961 Replacement), § 1810, p. 204. The lack of a presumption of adversity as between tenants in common is particularly significant in view of the fact that possession is not adverse unless it is, among other things, notorious. *Newkirk v. Porter*, 237 N.C. 115, 74 S.E. 2d 235; *Locklear v. Savage*, 159 N.C. 236, 74 S.E. 347. One cotenant may not be deprived of his rights by another cotenant unless the allegedly disseized has actual knowledge or constructive notice of a co-owner's intent to dispossess. As the court noted in *Clary v. Hatton, supra*, the adverse nature of a cotenant's possession must be "manifested by some clear, positive and unequivocal act equivalent to an open denial of the co-tenants' rights, and putting them out of seizin." Ordinarily, a particular action or activity falls outside the purview of this test unless it exposes the actor to an action by the cotenants for a breach of fealty. *Cox v. Wright, supra; Clary v. Hatton, supra; Dobbins v. Dobbins, supra; Page v. Branch*, 97 N.C. 97, 1 S.E. 625, *See* Webster, Real Estate Law in North Carolina §§ 260(a) and (b).

Although ouster is required to support a cotenant's claim of adverse possession, our courts have favorably acknowledged the concept of constructive ouster. Ouster is presumed if one tenant in common and those under whom he claims have been in sole and undisturbed possession and use of the land for twenty years when there has been no demand for rents, profits or possession. *Morehead v. Harris*, 262 N.C. 330, 137 S.E. 2d 174; *Brewer v. Brewer, supra; Battle v. Battle*, 235 N.C. 499, 70 S.E. 2d 492; *Williams v. Robertson*, 235 N.C. 478, 70 S.E. 2d 692; *Crews v. Crews*, 192 N.C. 679, 135 S.E. 784; *Lester v. Harward*, 173 N.C. 83, 91 S.E. 698; *Lumber Co. v. Cedar Works*, 165 N.C. 83, 89 S.E. 982; *Shannon v. Lamb*, 126 N.C. 38, 35 S.E. 232. Upon completion of the req-

> uisite 20-year period, ouster relates back to the initial taking of possession. *Cox v. Wright, supra; Lumber Co. v. Cedar Works, supra; Dobbins v. Dobbins, supra;* 1 Mordecai Law Lectures, Chapter XVII, p. 624. Not only does 20 years of exclusive possession raise a presumption of ouster, but it also supplies all the elements necessary to support a finding that the possession was adverse and included elements of notice and hostility.

The only evidence before the trial court was a series of title documents and stipulation. On their face, these documents and stipulation show that the Scotts own the 60-acre tract of land as co-tenants with Matilda Vann or her successor in interest. The documents do not show ouster at any point in time. While the Scotts may have been able to show such ouster had they offered testimony regarding possession of the property, their failure to do so precludes them from showing ouster. Thus, their contention of ouster must fail.

[2] These appellants next contend that they obtained title to the property by adverse possession under color of title. This claim must also fail.

> If the tenant in common gives a deed which purports to convey the whole estate, the grantee therein merely steps into his grantor's shoes. As a result, the deed is not color of title as against the grantor's cotenants, and seven years' possession under the deed will not ripen title to the whole estate in the grantee. *Cox v. Wright,* 218 N.C. 342, 11 S.E. 2d 158 (1940). "In the absence of *actual ouster,* the ouster of one tenant in common by a cotenant will not be presumed from an exclusive use of the common property and the appropriation of its profits to his own use for a less period than twenty years . . . ."

Young v. Young, 43 N.C. App. 419, 427, 259 S.E. 2d 348, 352 (1979). Thus, color of title is inapplicable in this instance as well.

[3] Finally, these appellants argue the court erred in awarding any property to Matilda Vann or her successors because it was not proven that any of her successors were in existence when the property was condemned. We find no support for this position in our law.

The Scotts seek to establish their title to Matilda Vann's interest in this land by adverse possession. The party attempting to establish title by adverse possession has the burden of proof. *See Powell v. Mills*, 237 N.C. 582, 75 S.E. 2d 759 (1953). The proof offered at trial falls short of that necessary to establish title in the Scotts. Thus, with regard to the Scotts' appeal we find that the judgment of the trial court must be affirmed.

[4] Furthermore, we note that Chapter 47B, the Real Property Marketable Title Act, does not extinguish Matilda Vann's interest. G.S. 47B-3(1) provides that any interests in land which are "disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed" are not extinguished by the act. The chain of title under which the Scotts claim their interest in the 60-acre tract of land specifically refers by book and page number to the deed from Beverly to all the Vann heirs. This is sufficient to disclose Matilda Vann's interest in the property. Thus, the Scotts cannot prevail under Chapter 47B of the General Statutes.

VANNS' APPEAL

[5] By their first and second assignments of error the Vanns contend the court erred when it found that Beverly acquired a 5/6 undivided interest in the 120-acre island tract by the original deed from the Vanns to Beverly. The basis for this argument is based upon the premises that the acknowledgment of execution of the deed by the subscribing witness is defective. The deed indicates that the signatures of four of the Vanns were witnessed by John D. Parker, but the person who proved the execution of the deed to the Clerk of Court was listed as John P. Parker. The Vanns argue that this is a defect which divests Beverly of all but 1/6 of the total tract of land. When the Clerk of Court certifies that the execution of an instrument has been properly proven the presumption is that the document was properly executed. *See, Peel v. Corey*, 196 N.C. 79, 144 S.E. 559 (1928). In the case *sub judice* the clerk made the proper certification and the Vanns have failed to rebut the presumption. Thus, we find the argument to be without merit.

By the third and fourth assignments of error the guardian ad litem on behalf of Armstead Vann, his heirs and assigns contends the court erred in denying him a share of the 70-acre tract of

land. First he argues the court erred by concluding that Armstead Vann lost his interest by ouster. The law regarding what must be shown to take property from a cotenant by adverse possession is set forth in the *Collier* case discussed earlier in this opinion. Again, we find that the Scotts failed to place sufficient evidence in the record to support their claim of ouster. While the Scotts may have been able to prove their case by oral testimony that they had held the property exclusive without any demand from the Vanns they failed to do so. The title documents which they submitted were not sufficient to prove their case. Thus, the court erred in awarding the Scotts fee simple title to the 70-acre tract based upon this theory.

[6] The court also awarded the Scotts title based upon the Real Property Marketable Title Act which is denominated as Chapter 47B of the General Statutes of North Carolina. G.S. 47B-2 in pertinent part provides:

> (a) Any person having the legal capacity to own real property in this State, who, alone or together with his predecessors in title, shall have been vested with any estate in real property of record for 30 years or more, shall have a marketable record title to such estate in real property.
>
> (b) A person has an estate in real property of record for 30 years or more when the public records disclose a title transaction affecting the title to the real property which has been of record for not less than 30 years purporting to create such estate either in:
>
> (1) The person claiming such estate; or
>
> (2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate;
>
> with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.
>
> (c) Subject to the matters stated in G.S. 47B-3, such marketable record title shall be free and clear of all rights, estates, interests, claims or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to such 30-year period.

> All such rights, estates, interests, claims or charges, however denominated, whether such rights, estates, interests, claims or charges are or appear to be held or asserted by a person sui juris or under a disability, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

G.S. 47B-2 is subjected to the exceptions set forth in 47B-3. The exception relevant to this controversy is G.S. 47B-3(1) which provides:

> (1) Rights, estates, interests, claims or charges disclosed by and defects inherent in the muniments of title of which such 30-year chain of record title is formed, provided, however, that a general reference in any of such muniments to rights, estates, interests, claims or charges created prior to such 30-year period shall not be sufficient to preserve them unless specific identification by reference to book and page or record be made therein to a recorded title transaction which imposed, transferred or continued such rights, estates, interests, claims or charges.

John A. Scott, the predecessor in interest to the Scott defendants, obtained his title from C. S. Parker on 6 March 1947. The title document referred to the land as being "the same land conveyed to W. D. Boone, Trustee to Erma Parker." This conveyance was more than 30 years prior to the date of this action. Thus, pursuant to the terms of G.S. 47B-2 Scott would have title unless he falls within one of the exceptions. The deed under which John A. Scott took title did not make any reference to a muniment of title which would reveal the latent defect in the title. Thus, the exception set forth by G.S. 47B-3(1) does not protect Armstead Vann's claim. Therefore, we hold the court properly concluded that Vann's claim had been extinguished under the terms of the Marketable Title Act. With respect to the Vanns' appeal the judgment of the trial court is affirmed.

Affirmed.

Judge EAGLES concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part and dissenting in part.

I concur in the decision to deny the appeal of the Vanns, but I dissent from the decision to deny the appeal of the Scotts as well. In my opinion the record establishes that the Scotts are the legal owners of the 1/6th undivided interest in the 60-acre tract, and that Matilda Vann or her successors have been divested of all interest therein, by ouster, adverse possession and registered ownership.

FORBES HOMES, INC., A NORTH CAROLINA CORPORATION v. JOHN G. TRIMPI AND TRIMPI, THOMPSON & NASH

No. 851DC1366

(Filed 6 May 1986)

Contracts § 27.1— existence of contract—conclusion required by evidence and findings

The evidence and findings required a conclusion by the trial court that defendant attorney contracted with plaintiff to reimburse plaintiff from the proceeds of a client's personal injury claim if plaintiff would make monthly mobile home payments on behalf of the client and that defendant breached this contract.

Chief Judge HEDRICK concurring.

Judge MARTIN dissenting.

APPEAL by plaintiff from *Chaffin, Judge.* Judgment entered 10 September 1985. Heard in the Court of Appeals 14 April 1986.

Plaintiff brought this action to recover damages for breach of contract against defendant Trimpi. In its complaint, plaintiff alleged, in summary, that Harley V. Cole, plaintiff's president and general manager, had a conversation with Trimpi concerning a mobile home purchased from plaintiff by Milford Simpson. During the conversation, Trimpi assured Cole that if plaintiff would make monthly payments on the mobile home on behalf of Simpson, Trimpi would see that plaintiff would be reimbursed from the net proceeds of a personal injury claim that Trimpi was handling for Simpson. On the day following the telephone conversation, Trimpi put his assurances in a letter to Cole (the letter being attached to

and incorporated in the complaint). Acting by reason of such assurance by Trimpi, plaintiff made payments on Simpson's behalf from June 1979 through March 1983 in the sum of $4,192.92. In March 1983, Simpson informed Cole that Simpson's personal injury claim had been settled by Trimpi. Plaintiff demanded reimbursement from Trimpi for the payments made for Simpson, but Trimpi refused to make payment to plaintiff. Trimpi paid to Simpson an amount of money sufficient to fully reimburse plaintiff for the payments it made.

Trimpi answered denying some of plaintiff's essential allegations, but admitted the conversation with Cole, the letter to Cole and that Trimpi settled Simpson's claim for $8,500.00, paying Simpson $5,039.76. Trimpi also admitted that he did not advise plaintiff of the settlement and admitted that he had refused to make payment to plaintiff.

After the pleadings were joined, Trimpi moved to dismiss plaintiff's claim for failure to state a claim upon which relief might be granted, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. Defendant's motion was granted by the trial court and plaintiff appealed to this Court. We reversed, holding that plaintiff's complaint stated a claim for breach of contract (Johnson, J., dissenting). *Forbes Homes, Inc. v. Trimpi*, 70 N.C. App. 614, 320 S.E. 2d 328 (1984). Upon appeal by defendant to our Supreme Court, that Court by an equally divided vote affirmed our decision. *Forbes Homes, Inc. v. Trimpi*, 313 N.C. 168, 326 S.E. 2d 30 (1985).

Following a bench trial, the trial court rendered judgment for defendant. The evidence at trial and the findings and conclusions of the trial court will be discussed as necessary in the body of our opinion.

Frank B. Aycock, Jr. for plaintiff-appellant.

Trimpi, Thompson & Nash, by Thomas P. Nash, IV, for defendants-appellees.

WELLS, Judge.

We begin by quoting from our previous opinion in this case:

> We reverse the judgment of the District Court. The plaintiff has alleged facts which if offered in evidence would

> allow a jury to find the defendants promised the plaintiff that if the plaintiff would make certain payments for a third party, the defendants would retain from the proceeds of a claim they were handling for the third party funds with which they would reimburse the plaintiff. The plaintiff accepted this offer by making the payments and the defendants have refused to reimburse the plaintiff from the proceeds of the settlement for the third party. If a jury should find these facts, the defendant would be liable to the plaintiff for breach of contract.

The foregoing statements constitute the law of this case. When this Court decided this question and remanded the case for further proceedings, the question determined by this Court became the law of the case, both in subsequent proceedings in the trial court and on appeal, on the question of whether plaintiff has sufficiently alleged a claim for breach of contract. *See N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E. 2d 629 (1983); *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673 (1956).

The evidence on the question of whether plaintiff was able to prove the contract alleged in its complaint may be summed up as follows. Harley Cole testified:

> Forbes Mobile Homes sold a mobile home to Milford Simpson. . . . When we sold it he started making monthly payments to the finance company. . . . Some time in 1979 Milford Simpson ceased to make payments. . . . I told Simpson we would have to take his home back and prepared to foreclose and was preparing to foreclose when Mr. Trimpi called me. Mr. Trimpi said that he was representing Mr. Simpson in a lawsuit on an accident and he wanted to know if I could help Mr. Simpson in any way to keep him from losing his home. I told him I thought we could help him, that Forbes Homes would make the payments if Mr. Trimpi would insure us we could get our money back when settlement was made. I told him to write me a letter to that effect and I got a letter to that effect.
>
> The letter referred to by Cole was in part as follows:
>
> Dear Mr. Cole:
>
> Confirming our telephone conversation on June 7, 1979, it is our understanding that you will continue to make pay-

ments on the mobile home obligation of Milford Simpson in return for Mr. Simpson's assurance that you will be reimbursed in full for the payments you have made or will make to satisfy the creditor.

Subject to Mr. Simpson's approval, which I feel certain he will give, this firm will make restitution to you out of the net proceeds from any settlement or court recovery we make with regard to Mr. Simpson's personal injury claim arising out of an accident occurring on March 17, 1979. If you do not hear from us within ten days from receipt of this letter, you may assume that Mr. Simpson has given us the authority to make such payment to you. The net proceeds shall be the balance remaining after deducting attorney's fees and costs and medical expenses.

John Trimpi testified:

I became acquainted with Milford Simpson when he came to my office some time in 1979 following an automobile accident in which he was involved. At some point I learned that he was living in a mobile home in Columbia in Tyrrell County. I don't know the circumstances but I also became aware that he was having problems making payments. I believe it was in March 1979 that he was involved in an automobile accident which caused him back problems that kept him from working.

. . .

I had a conversation with Mr. Harley Cole concerning the contract on the mobile home. I am not positive about it but to the best of my recollection Mr. Cole called me and asked me about Mr. Simpson's making payments. I could be mistaken but I believe he called me and I told him I was representing Mr. Simpson in an automobile accident. I don't remember the substance of the phone conversation but I remember the substance of a letter I wrote to him confirming that conversation. Mr. Simpson wasn't able to work and wasn't able to make the payments but we did expect there would be some recovery in the litigation that I had filed for him.

> I told Mr. Cole . . . that the money we received for Mr. Simpson's benefit would be paid in order to keep them from foreclosing or repossessing the mobile home and essentially that is what I told Mr. Cole in the letter I wrote to him back in June. I told him it would be Mr. Simpson's money paid to him out of the settlement of any kind of recovery and I would get Mr. Simpson's reassurances that he would permit the payment to Mr. Cole out of that money.

The trial court's pertinent findings were:

> 5. That defendant Trimpi communicated with plaintiff concerning Mr. Simpson's financial inability to keep current with the payments due plaintiff, and defendant Trimpi requested plaintiff to continue making payments on Simpson's mobile home obligation in return for Simpson's assurance that plaintiff would be reimbursed in full out of the net proceeds from any settlement or court recovery.
>
> 6. That this communication was confirmed by defendant Trimpi's letter dated June 8, 1979, in which it was stated by defendant Trimpi that plaintiff could assume Simpson had given the authority to make such payment if plaintiff did not hear from defendant Trimpi within ten days.

Despite the evidence and the trial court's findings to the contrary, the trial court concluded that there was no contract between plaintiff and defendant because there was no meeting of the minds. We disagree. The trial court's findings, supported by the evidence, reflect an agreement between plaintiff and Trimpi that if plaintiff would make Simpson's payments, Trimpi would reimburse plaintiff for those payments out of the recovery obtained for Simpson. There being no question or dispute that Trimpi did not keep his promise, *i.e.*, that there was a breach, and no question that plaintiff was damaged by that breach, we therefore reverse the trial court's judgment and remand this cause for conclusions and judgment consistent with the opinion.

Reversed and remanded.

Chief Judge HEDRICK concurs.

Judge MARTIN dissents.

Chief Judge HEDRICK concurring.

I concur with Judge Wells and vote to reverse the judgment entered by the district court and remand for the court to enter a judgment for plaintiff. In my opinion, the facts found by the trial judge dictate a conclusion that Trimpi contracted with plaintiff to pay plaintiff if it would advance the funds for Simpson to save his home. Any other result would ignore the previous decision of this Court and would be a travesty of justice.

Judge Martin seems to indicate that the trial judge squarely found and concluded that Trimpi was acting as an agent for Simpson when he, Trimpi, entered into the contract with Forbes Homes. I cannot find such an emphatic finding of fact in the record and if the trial judge intended to make such a definitive finding, in my opinion, the evidence does not support it. The record is replete, of course, with evidence and findings that Trimpi and Simpson had an attorney-client relationship with respect to Simpson's personal injury and social security claims, but there is no evidence in the record that Trimpi purported to represent Simpson when he negotiated and entered into a contract with Forbes Homes regarding payments to be made on Simpson's home. Trimpi himself testified that he insured the payment. Cole testified that Forbes would make the payments if Trimpi would promise to reimburse Forbes for such payment and would write Forbes a letter to that effect. When Cole told Trimpi to write him a letter regarding the matter, Trimpi sent him a letter in which he stated, "If you do not hear from us within ten days from receipt of this letter, you may assume that Mr. Simpson has given us the authority to make such payment to you." This statement related solely to Trimpi's making payment to Forbes Homes from proceeds of Simpson's personal injury claim. It certainly had nothing to do with obtaining Simpson's agreement that Trimpi would make payments himself to Forbes Homes. Trimpi was at all times in a position to protect his own interests. Forbes was at all times at the mercy of the lawyer.

I vote to reverse and remand for entry of judgment for plaintiff.

Judge MARTIN dissenting.

I dissent. In addition to the findings of fact quoted by the majority, the trial court found the following facts:

> 7. That defendant Trimpi continued to represent Simpson in an attorney-client relationship in Simpson's claim for personal injuries as a result of the automobile accident as well as a claim for social security disability benefits. That defendant Trimpi's representation of Simpson was solely in a representative capacity as attorney for Simpson.
>
> 8. That based upon the totality of the circumstances the Court finds that there was no meeting of the minds of plaintiff and defendant Trimpi that defendant Trimpi would be personally responsible for Simpson's debt, nor did defendant Trimpi receive any benefit or good and sufficient consideration to support his or his firm's personal obligation and responsibility to stand for the debt of Simpson.
>
> 9. That the attorney-client relationship existing between defendant Trimpi and Simpson was known to plaintiff, and plaintiff knew that defendant Trimpi and his firm were acting on behalf of Simpson in promising to make reimbursement to plaintiff out of the net recovery. However, that Simpson instructed defendant Trimpi not to pay any of his creditors out of the settlement proceeds when settlement was effected on June 1, 1982. That defendant Trimpi was told by Simpson to disburse the net proceeds to Simpson so that he, Simpson, could deposit same in an Elizabeth City bank and pay creditors himself.
>
> 10. That contrary to Simpson's statements and instructions to defendant Trimpi, Simpson did not pay plaintiff any monies, at that time, received from the settlement proceeds.

Plaintiff has not excepted to any of the foregoing findings of fact; they are supported by competent evidence and are, therefore, binding upon this Court. From these facts it is clear that plaintiff knew that defendant Trimpi was acting solely as agent for Simpson in entering into the contract with plaintiff. The trial court expressly found that defendant Trimpi did not assume Simpson's obligation as a personal liability and that plaintiff did not extend credit to defendant Trimpi personally.

> If a contract is made with a known agent acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone, unless credit has been given expressly and exclusively to the agent, and it appears that it was clearly his intention to assume the obligation as a personal liability and that he has been informed that credit has been extended to him alone. (Citations omitted.)

Jenkins v. City of Henderson, 214 N.C. 244, 247, 199 S.E. 37, 39 (1938). *See* 10 Strong's North Carolina Index 3d *Principal and Agent* § 11 (1977).

The agreement with plaintiff was made by defendant Trimpi as agent for Simpson, his principal. Simpson accepted the benefits of the agreement and, having done so, refused to perform his obligations thereunder or to permit defendant Trimpi to do so. Simpson, not defendant Trimpi, breached the contract. I vote to affirm the judgment of the trial court.

STATE OF NORTH CAROLINA v. WILLIE BEE MILLER, JR.

No. 8526SC1079

(Filed 6 May 1986)

1. **Automobiles and Other Vehicles § 126.2; Criminal Law § 73.2— blood tests for alcohol at hospital emergency room—original report not available—admissible**

In a prosecution for involuntary manslaughter arising from an automobile accident, the results of a blood test done within minutes of defendant's arrival at an emergency room were relevant to the issue of defendant's intoxication, constituted a record made in the usual course of business, were properly identified and authenticated even though the person who actually analyzed the blood in the laboratory was not present to testify, and were inherently reliable even though neither the original laboratory report nor a copy thereof was presented at trial. N.C.G.S. 8C-1, Rules 401, 803(6).

2. **Constitutional Law § 70— blood test report—person performing test not available—admission not unconstitutional**

The admission of blood test results in an involuntary manslaughter prosecution arising from an automobile accident did not violate defendant's right to confront a witness under the Sixth and Fourteenth Amendments to the U. S. Constitution even though the person performing the test did not testify because defendant had the opportunity to vigorously cross-examine the nurse present when the blood was drawn and the attending physician and because the blood test is a reliable source of information.

3. Criminal Law § 82.2— admission of blood test for alcohol—emergency room treatment—no violation of physician-patient privilege

The admission of the results of defendant's blood test in a prosecution for involuntary manslaughter arising from an automobile accident did not violate the physician-patient privilege because the court, in response to the district attorney's motion, found that the results of the test were needed for evidence and ordered the hospital to furnish reports of all tests and treatment of defendant. There was no prejudice from the lack of notice to defendant and from defendant's absence at the hearing on the district attorney's motion because defendant could have appealed the order and defendant had the opportunity to be heard at a pretrial *voir dire* hearing on his motion to suppress the results of the tests. N.C.G.S. 8-53.

APPEAL by defendant from *Sitton, Claude S., Judge.* Judgment entered 30 May 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 February 1986.

Defendant was charged and convicted of involuntary manslaughter.

The State's evidence tended to show the following: On the night of 26 December 1984 at approximately 10:00 p.m. the vehicle driven by defendant overturned on the exit ramp of Brookshire Freeway at Beatties Ford Road in Charlotte, North Carolina. The passenger, Wencella Devon Alexander, died as a result of head injuries sustained in the accident. Defendant was rushed to the emergency room at Charlotte Memorial Hospital for treatment of his injuries. Within one or two minutes of defendant's arrival a "panel of labs," numerous diagnostic tests, were ordered for defendant. Due to defendant's screaming, flailing and generally combative behavior typical of head trauma patients, defendant's limbs were restrained. Defendant received a temporary alphabetical designation, "Mr. Z," for identification. A laboratory technician withdrew a sample of defendant's blood for analysis. A copy of the written report of the results was returned to the emergency room physician attending defendant at approximately 11:15 p.m. to 11:20 p.m. The report indicated, *inter alia,* that defendant's blood alcohol level was 254 milligrams percent or 0.254. The attending physician, Dr. Fogle, testified that he saw the copy of the written report which indicated a blood alcohol level of .254. Dr. Fogle also identified defendant's permanent hospital record, which was admitted into evidence. Neither the original laboratory report nor a copy thereof was available at the time of the trial. The nurse assigned to defendant testified with-

out objection that defendant "smelled strongly of alcohol." Angela Sikes testified without objection that she saw defendant driving down the road before the accident in a weaving manner.

Defendant testified in his own behalf as follows: He admitted that he had two drinks of Canadian Mist at about 7:45 p.m. and 8:30 p.m. before driving to Dobbs Catering Service at 9:00 p.m. to pick up the victim from work. The deceased was not finished with work, so defendant left to drink a half beer and returned approximately forty minutes later. Because defendant had a headache, the victim was driving the vehicle at the time of the accident.

The jury returned a verdict of guilty. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.

Isabel Scott Day, Public Defender, by Assistant Public Defenders Gail M. Phillips and Susan J. Weigand, for defendant appellant.

JOHNSON, Judge.

[1] In one Assignment of Error defendant contends the court erred by admitting into evidence the results of defendant's blood test on the grounds that this information was irrelevant and constitutes inadmissible hearsay. In another Assignment of Error defendant contends that the results of the blood test were inadmissible for lack of authentication. We disagree with these contentions. We will address both Assignments of Error together.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, N.C. Rules Evid. Whether defendant was intoxicated at the time of the accident is a factual issue of consequence to the jury's determination of defendant's guilt or innocence of the charge of involuntary manslaughter. The accident occurred at approximately 10:00 p.m. Defendant's blood was tested one or two minutes after 11:00 p.m. The alcohol level of defendant's blood approximately one hour after the accident is relevant to the issue of defendant's intoxication.

The results of defendant's blood test, even though hearsay, are nonetheless admissible if they fall within the business records exception to the hearsay rule. Rule 803(6), N.C. Rules Evid. Records made in the usual course of business, made contemporaneously with the occurrences, acts and events, recorded by one authorized to make them and before litigation has arisen, are admissible upon proper identification and authentication. *Sims v. Charlotte Liberty Mutual Ins. Co.*, 257 N.C. 32, 35, 125 S.E. 2d 326, 329 (1962). Business records are defined to include the records of hospitals. Rule 803(6) Commentary, N.C. Rules Evid. In *Sims, supra,* the Court specifically applied the business records exception to hospital records.

Ms. Brenda Dasher, a registered nurse in the Emergency Department at Charlotte Memorial Hospital who was assigned to the emergency room the night of 26 December 1984, and Dr. William Fogle, Senior Surgery Resident at Charlotte Memorial Hospital who was on call the night of 26 December 1984, testified at the pre-trial *voir dire* hearing of the motion to suppress the test results and at the jury trial. Ms. Dasher was assigned to defendant when he first arrived in the major trauma area of the emergency room at approximately 11:00 p.m. Ms. Dasher testified, "As soon as he rolled in the door, one of the emergency room doctors saw him and initiated the order, the blood work and everything." Both Ms. Dasher and Dr. Fogle testified that it is part of routine emergency room treatment of trauma victims to order a laboratory panel, which includes the blood test at issue. Ms. Dasher testified, "They were drawing blood from him right after he came in, and that was why I was there assisting him." She testified that she saw the venipuncture technician draw the blood and leave to take the blood to the hospital "stat" laboratory, a special laboratory located close to the emergency room that performs emergency room work on a priority basis. An escort in the emergency room brought a copy of the laboratory report back to the emergency room and posted it on the "lab board." Ms. Dasher got the report from the lab board and took it to defendant's bedside at approximately 11:15 p.m.

Dr. William Fogle testified that he was called to observe defendant in the emergency room for the purpose of making a surgical evaluation. He testified that he first saw defendant at about 11:00 p.m. and was with defendant when the nurse gave

him the results of the laboratory tests at approximately 11:15 p.m. Dr. Fogle testified that he saw the copy of the laboratory report and it indicated a blood alcohol level of .254. Dr. Fogle recorded the results in his admission notes, which are a permanent part of defendant's hospital record. He also stated that there is no record indicating who withdrew the blood or who analyzed the blood in the stat laboratory.

We hold the results of the blood test constitute a record made in the usual course of business, made contemporaneously with the events and recorded by one with authority to do so before litigation arose. Further, we hold the blood test results were properly identified and authenticated. Authentication is not undermined because the person who actually analyzed the blood in the stat laboratory was not present to testify as a witness. *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983). Authentication of records of regularly conducted activity is "by the testimony of the custodian or *other qualified witness*, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Rule 803(6), N.C. Rules Evid. (emphasis added). "Other qualified witness" has been construed to mean a witness who is familiar with the business entries and the system under which they are made. *State v. Galloway*, 304 N.C. 485, 492, 284 S.E. 2d 509, 514 (1981) (Where the ophthalmologist's technician testified regarding the ophthalmologist's medical records). Each, Ms. Dasher and Dr. Fogle, is a qualified witness. Their testimony sufficiently established the chain of custody. The possibility that blood samples were exchanged during the fifteen minutes in the laboratory is too remote to require exclusion of the evidence so obtained. Any weakness in the chain of custody goes to the weight of the evidence, not its admissibility. *Grier, supra*, at 633, 300 S.E. 2d at 354. Trustworthiness is the foundation of the business records exception. 1 H. Brandis on N.C. Evidence sec. 155 (1983 supplement). We find the blood test at issue, which was administered solely for the purpose of treatment, is a reliable source of information. The facts here raise no suspicion of untrustworthiness. Hospital protocol was strictly adhered to.

Defendant further challenges the authenticity of the test results based upon the fact that neither the original laboratory report nor a copy thereof was presented at trial. Under the circumstances to require such proffer is artificial and unduly burden-

some. The laboratory keeps the original of the written report three to four months. However, before the report is destroyed the laboratory enters the results into the hospital computer. Also, the results are immediately recorded in the individual patient's chart. Moreover, the physicians rely upon the accuracy of these entries as the basis for their diagnosis and treatment. The accuracy of the test result entries is adequately safeguarded. Absent an allegation supported by proof that hospital routine was in some manner deviated from, the entries in a patient's permanent hospital record are inherently reliable and admissible under the business records exception upon authentication by the proponent as here.

[2] In defendant's next Assignment of Error, defendant contends that admission of defendant's blood test results violated defendant's right to confront a witness as protected by the sixth and fourteenth amendments to the United States Constitution. We disagree.

The right of confrontation is not absolute and admission of reliable hearsay is not violative of the right of confrontation. *State v. Huffstetler*, 312 N.C. 92, 322 S.E. 2d 110 (1984), *cert. denied*, 471 U.S. 1009, 85 L.Ed. 2d 169, 105 S.Ct. 1877 (1985). In *Huffstetler*, the issue was whether the defendant was deprived of his sixth amendment right to confront his accusers when the court admitted into evidence the opinion testimony of a forensic serologist who based his opinion in part on the results of blood tests and the appellant was unable to cross-examine the person who actually performed the blood tests. Our Supreme Court held that the defendant was not denied his right to confront and cross-examine his accusers guaranteed by the sixth amendment because the information relied upon by the expert was inherently reliable and because the expert was available to be cross-examined. *Id.* at 108, 322 S.E. 2d at 121. Recognizing the factual distinctions between the two cases we are nonetheless persuaded by the Court's reasoning in *Huffstetler*. Because defendant had the opportunity to vigorously cross-examine both the nurse present when the blood was withdrawn and the attending physician concerning the procedures followed in withdrawing and analyzing defendant's blood and because we regard the blood test a reliable source of information, we hold defendant's right to confront his accusers guaranteed by the sixth and fourteenth amendments was not denied.

[3] In defendant's last Assignment of Error, defendant contends that admission of the results of defendant's blood test violates the physician patient privilege protected by G.S. 8-53. We disagree.

G.S. 8-53 protects as privileged:

> any information which [the physician] may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon. . . .

G.S. 8-53. However, G.S. 8-53 also provides that a resident or presiding judge in the district may "compel disclosure if in his opinion disclosure is necessary to a proper administration of justice." G.S. 8-53.

On 1 January 1985, the Office of the District Attorney, Mecklenburg County, filed a motion requesting the court to compel disclosure of defendant's medical records. On 2 January 1985, the court found "the results of the analysis of the Defendant's blood is needed for evidence" and ordered Charlotte Memorial Hospital to furnish the reports of all tests and treatment of defendant for 26 December 1984 and 27 December 1984. We find this constitutes substantial compliance with the statute G.S. 8-53. Defendant maintains that reversible error occurred regarding the 2 January 1985 order because defendant was not given notice of the hearing of the motion to compel disclosure and was not present when the motion was heard. Defendant's challenge is without merit for two reasons. One, defendant could have appealed the 2 January 1985 order. An appeal will lie from an order to compel disclosure of medical testimony and reports. *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E. 2d 67 (1964). Two, any prejudice to defendant was cured when defendant had the opportunity to be heard on this matter at the 28 May 1985 pre-trial *voir dire* hearing of defendant's motion to suppress the results of defendant's blood test.

Each of defendant's Assignments of Error is overruled.

No error.

Judges BECTON and MARTIN concur.

ALVIS T. WEAVER, EMPLOYEE, PLAINTIFF v. SWEDISH IMPORTS MAINTENANCE, INC., EMPLOYER, RELIANCE INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC965

(Filed 6 May 1986)

Master and Servant § 69.2— workers' compensation—successive myocardial infarctions—award for permanent partial disability upheld

The Industrial Commission did not err by awarding permanent partial disability to a plaintiff who had suffered a myocardial infarction while working, suffered another myocardial infarction while in the hospital, suffered a third infarction over a year later during nonworking hours, received compensation for temporary disability, suffered one more myocardial infarction during nonworking hours, was rendered unable to work, and moved for a modification of the prior award due to a change of condition warranting permanent partial disability. The Commission awarded compensation for only that part of plaintiff's disability attributable to the injury previously held to be compensable; the test was not whether the later myocardial infarctions were the direct and natural result of the compensable primary injury. N.C.G.S. 97-47; N.C.G.S. 97-30.

Judge MARTIN dissenting.

APPEAL by defendants from the North Carolina Industrial Commission opinion and award filed 26 March 1985. Heard in the Court of Appeals 5 February 1986.

This is a claim under the Workers' Compensation Act for modification of a prior award due to an alleged change of condition that warrants an award for permanent partial disability. This matter came on for hearing on 13 April 1984 before Deputy Commissioner Elizabeth McCrodden, who found a change of condition but entered an opinion 28 July 1984 denying plaintiff's request for benefits for permanent partial disability. Upon plaintiff's timely appeal, this matter was heard before the Full Commission on 7 February 1985. The Full Commission reversed the order of the Deputy Commissioner and ordered benefits for permanent partial disability pursuant to G.S. 97-30. Defendants appeal.

E. C. Harris, for plaintiff appellee.

Newsom, Graham, Hedrick, Bryson & Kennon, by William P. Daniell, for defendant appellants.

JOHNSON, Judge.

On 12 April 1979, plaintiff was employed as an automobile mechanic by defendant, Swedish Imports Maintenance, Inc., when he suffered a myocardial infarction while in the process of replacing a wheel on an automobile. During plaintiff's hospitalization he suffered a second myocardial infarction. Prior to the 12 April 1979 infarction plaintiff had no history of heart problems, although medical examinations at that time revealed plaintiff had coronary artery disease which predated 1979. Plaintiff returned to the same position of employment on or about 15 July 1979. Plaintiff's claim for compensation resulted in a finding that plaintiff had sustained a myocardial infarction as a result of undergoing an extraordinary exertion. In an opinion and award dated 25 February 1981, plaintiff received compensation pursuant to G.S. 97-29 for total temporary disability. This Court affirmed that order on appeal. *Weaver v. Swedish Imports Maintenance, Inc.*, 61 N.C. App. 662, 301 S.E. 2d 736 (1983).

In August 1980, plaintiff suffered another myocardial infarction while walking through a flea market during nonworking hours. Following a period of recuperation, plaintiff returned to work. In June 1981, plaintiff suffered a fourth myocardial infarction at home while waking from sleep. Since June 1981, plaintiff has been unable to work. Medical studies reveal the presence of a large amount of scar tissue in his heart that severely restricts the amount of blood that is ejected from the heart, as indicated by a left ventricular ejection fraction for plaintiff's heart in the range of sixteen percent (16%) to twenty-eight percent (28%) compared to a normal range between fifty percent (50%) and sixty-five percent (65%).

G.S. 97-47 allows for the modification of a prior award upon the motion of a party on the grounds of a change in condition so long as such motion for review is made within two years from the date of the last payment of compensation. G.S. 97-47. Compensation was last paid under the prior order on or about 13 September 1983; hence, plaintiff made a timely request for review. On 13 April 1984, Deputy Commissioner Elizabeth G. McCrodden, after allowing plaintiff's motion for review based on a change of condition, received evidence. Michael C. Hindman, M.D., testified as an expert witness in behalf of plaintiff; plaintiff also testified. In an

order filed 28 July 1984 denying plaintiff's claim under G.S. 97-30, Deputy Commissioner McCrodden made the following findings of fact:

> 8. Plaintiff has not returned to work since his June 1981 myocardial infarction. He has reached maximum medical improvement at this point. Plaintiff is totally and permanently disabled.
>
> 9. Plaintiff's disability is caused by a combination of the cumulative damage to the heart muscle resulting from the four myocardial infarctions and the continued underlying coronary occlusions that also cause angina.
>
> 10. Plaintiff has failed to show that the myocardial infarctions which occurred in August 1980 and June 1981 were the direct and natural result of the 12 April 1979 and subsequent myocardial infarctions and, therefore, that the 12 April 1979 injury by accident was a significant or measurable causal factor in his subsequent disability.

In the order filed 26 March 1985 reversing the Deputy Commissioner's order, the Full Commission stated:

> In the opinion of the Commission, the issue is not whether plaintiff's original and compensable heart attack caused his subsequent heart attacks but whether plaintiff's total and permanent incapacity to earn any wages was caused in whole or in part by his initial compensable attack.

The Commission stated Finding of Fact 9 was "clearly supported by medical evidence of record." The Commission adopted Finding of Fact 9 in Deputy Commissioner McCrodden's opinion and award, with slight change in wording. The Commission proceeded to point out that this factual finding resolved the determinative issue, whether plaintiff's total disability "was caused in whole or in part" by his initial attack, in plaintiff's favor. Accordingly, the Commission struck Finding of Fact 10, and inserted in lieu thereof "Plaintiff has been permanently and totally disabled from work since 1 June 1981." The Commission struck the order denying plaintiff's claim, ordered compensation for permanent partial disability pursuant to G.S. 97-30 beginning 1 June 1981, not to exceed 300 weeks, and affirmed and adopted the Deputy Commissioner's opinion and award as modified.

Defendants do not refute that a change occurred in plaintiff's condition from the time of the original award to the time plaintiff sought review. Change of condition refers to a substantial change of the injured employee's physical capacity to earn wages or in the earnings of the injured employee. *Swaney v. Newton Constr. Co.*, 5 N.C. App. 520, 169 S.E. 2d 90 (1969). Defendants do not argue their objections to the factual findings of the Commission in their brief. Rather, defendants state in their brief, "In the case at bar, there is no real dispute as to any of the relevant facts." In defendants' sole Assignment of Error presented in their brief, defendants object only to the legal standard applied to the facts. Defendants contend plaintiff cannot receive any additional compensation unless he can demonstrate a causal relationship between the first compensable myocardial infarctions and the subsequent myocardial infarctions. Defendants maintain that the proper test to establish this necessary causal relationship is whether the later myocardial infarctions were the "direct and natural result of the compensable primary injury." We disagree.

The test proposed by defendants does not apply to the facts of this case. The test proposed by defendants applies to a situation where the claimant first suffers a compensable injury by accident and subsequently sustains a second injury. When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, absent an intervening cause attributable to claimant's own intentional conduct. *Starr v. Charlotte Paper Co.*, 8 N.C. App. 604, 611, 175 S.E. 2d 342, 347 (1970). Hence, the second injury that is the proximate result of the first compensable injury is also compensable.

The above is not the situation before us. Plaintiff is not seeking compensation for his subsequent injuries. Further, the defendants' contention that the Full Commission erred in holding that plaintiff is entitled to "compensation for permanent *total* disability" is contrary to the record. (Emphasis added.) The record shows that plaintiff sought a review of his order and award regarding only the *first* compensable myocardial infarction. Although plaintiff was found to be totally disabled at the time of the review he did not seek, nor did he receive, an award of compensation for permanent *total* disability resulting from all four myocardial infarctions, but compensation pursuant to G.S. 97-30 for permanent

partial disability resulting from the first compensable myocardial infarction. Accordingly, the Full Commission struck the conclusion in the order and award and inserted in lieu thereof:

> Plaintiff has been permanently and totally disabled since 1 June 1981, *partially* as a result of his compensable heart attack on 12 April 1979, and is entitled to benefits for permanent *partial* disability. G.S. 97-30.

(Emphasis added.) The Full Commission awarded compensation for only that part of plaintiff's disability attributable to the injury previously held to be compensable.

In *Morrison v. Burlington Industries*, 304 N.C. 17, 282 S.E. 2d 458 (1981), the Court found that: Mrs. Morrison contracted chronic obstructive lung disease, an occupational disease, while employed by Burlington Industries; she was totally incapacitated for work; the occupational disease caused only part of her total incapacity; the remaining part of her disability was caused independently by her other physical disabilities, including chronic obstructive lung disease not caused, aggravated, or accelerated by an occupational disease, as well as bronchitis, phlebitis, varicose veins and diabetes, none of which were job related and none of which had been aggravated or accelerated by her occupational disease. Our Supreme Court held that even though Mrs. Morrison was totally disabled, she was "entitled to compensation *only to the extent of* the occupational disease's contribution," to wit: permanent partial disability as governed by G.S. 97-30. *Id.* at 11, 282 S.E. 2d at 465.

In the instant case, the Commission adopted the Deputy Commissioner's finding that plaintiff's first compensable myocardial infarction was a manifestation of a chronic heart problem which was progressive in nature, namely coronary artery disease causing coronary occlusions. The Commission found that plaintiff's total disability was caused by a combination of the cumulative damage to the heart muscle resulting from the four myocardial infarctions and the continued underlying coronary occlusions that also cause angina. These findings are conclusive on appeal. As in *Morrison, supra*, the Commission's conclusion that the claimant was totally and permanently disabled "*partially* as a result" of his compensable injury supports an award for permanent partial disability pursuant to G.S. 97-30. We note that had the Commission

found conclusively that plaintiff's pre-existing coronary artery disease had been materially aggravated or accelerated by plaintiff's compensable first myocardial infarction, a different result would ensue. *See Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). However, based on the findings in the record on appeal, plaintiff properly received an award of compensation only to the extent of the compensable injury's contribution to his total disability. Therefore, we hold judgment is

Affirmed.

Judge BECTON concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

I respectfully dissent. Although there can be no dispute that plaintiff's condition has changed since he last received compensation for his initial compensable heart attack, there is absolutely no evidence that the compensable heart attack produced his subsequent heart attacks or his continued coronary occlusions that cause his angina. Plaintiff has simply failed to prove that his change in condition is a direct and proximate result of his initial compensable injury.

Although stating that the "direct and natural result of the compensable primary injury" test is not applicable to this case, nowhere does the majority opinion articulate what alternative standard should be applied. In my opinion, both the Commission and the majority have applied, without saying as much, the "significant contribution" test of *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983) to the facts of this case. Unlike *Rutledge*, this case does not involve an occupational disease. Even if *Rutledge* is applicable, however, there has been no evidence that plaintiff's original compensable heart attack "significantly contributed to" his present condition.

Because the Commission's findings and conclusion do not support an award of compensation for plaintiff's present disability, the question of apportionment of disability under *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981), also an

occupational disease case, does not arise. I vote to reverse the Opinion and Award of the Full Commission.

GHIDORZI CONSTRUCTION, INC., A NORTH CAROLINA CORPORATION v. TOWN OF CHAPEL HILL, A MUNICIPAL CORPORATION; JOSEPH L. NASSIF, MAYOR; R. D. SMITH, A COUNCILMAN; NANCY PRESTON, A COUNCILMAN; JONATHAN HOWES, A COUNCILMAN; BEVERLY KAWALEC, A COUNCILMAN; DAVID GODSCHALK, A COUNCILMAN; DAVID PASQUINI, A COUNCILMAN; MARILYN BOLTON, A COUNCILMAN; AND BILL THORPE, A COUNCILMAN

No. 8515SC997

(Filed 6 May 1986)

Municipal Corporations § 30.6— denial of special use permit—traffic congestion and safety

The evidence supported a town council's denial of a special use permit for construction of ninety-one dwelling units on a 15.2-acre tract based on the adverse effect of the proposed development upon traffic congestion and safety in the area. The town council was not required to approve the proposed development because future improvements could eliminate traffic congestion problems.

APPEAL by respondents from *Bowen, Judge*. Order and Judgment entered 25 June 1985 in Superior Court, ORANGE County. Heard in the Court of Appeals 17 January 1985.

Jordan, Brown, Price & Wall by Charles Gordon Brown and M. LeAnn Nease for petitioner appellee.

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

COZORT, Judge.

This appeal arises out of the denial of an application for a special use permit. In August of 1984, petitioner Ghidorzi Construction, Inc., applied to the respondents Town of Chapel Hill for a special use permit for the construction of ninety-one dwelling units on a 15.2-acre tract in Chapel Hill to be known as Windy Hill. On 19 November 1984 respondents met in a regular session to conduct a public hearing concerning petitioner's application. The Planning Board of the Town of Chapel Hill, the Appearance

Commission of the Town of Chapel Hill, and the Town Manager all recommended that the petitioner's application be approved on the condition that Erwin Road be widened by the petitioner. On 10 December 1984, respondents met in regular session to consider the evidence presented at the 19 November meeting. The Town Manager again recommended that the Council approve the application. The Town Council ordered an additional public hearing on the application, which was held on 18 March 1985. Following this hearing, the Town Council voted to refer the proposed development to the Town Manager for additional study. On 9 April 1985, the matter again came before the Town Council. The Town Manager again recommended approval of the development; however, the Town Council adopted a resolution denying the application.

Petitioner appealed the Council's denial by filing a Petition for Writ of Certiorari in the Superior Court of Orange County. After the writ was issued, the superior court judge reviewed the transcripts of hearing and other materials before the Town Council. The superior court reversed the denial of the special use permit. Respondents appealed.

The sole issue presented on appeal is whether the Town Council's denial of the special use permit is supported by substantial, material, and competent evidence when viewed in light of the entire record.

In reviewing a municipality's decision on an application for a special use permit, the court's scope of review includes:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E. 2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980). A denial of a special use permit should be based on findings which are supported by competent, material, and substantial evidence appearing in the record. *Application of Goforth Properties, Inc.*, 76 N.C. App. 231, 233, 332 S.E. 2d 503, 504 (1985). The question before this Court is not whether the evidence before the superior court supported that court's order but whether the evidence before the Town Council supported the Council's action. *Id.* The superior court is not the trier of fact. That is the function of the Town Council. *Id.* In determining the sufficiency of the evidence supporting the Council's decision, we apply the whole record test considering not only the evidence which justifies the Council's decision but also that which fairly detracts from it. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The whole record test does not allow this Court or the superior court to replace the Council's judgment as between two reasonably conflicting views. *Id.*

Sec. 8.3 of the Chapel Hill Development Ordinance provides that no special use permit shall be approved by the Town Council unless each of the following findings is made concerning the proposed special use or planned development:

(a) That the use or development is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare;

(b) That the use or development complies with all required regulations and standards of this chapter, including all applicable provisions of Articles 4, 5, and 6 and the applicable specific standards contained in Sections 8.7 and 8.8, and with all other applicable regulations;

(c) That the use or development is located, designed, and proposed to be operated so as to maintain or enhance the value of contiguous property, or that the use or development is a public necessity; and

(d) That the use or development conforms with the general plans for the physical development of the Town as embodied in this chapter and in the Comprehensive Plan.

The Town Council must find that all of the above exist or the application must be denied. In denying petitioner's application for a special use permit, the Town Council found that the proposed project did not satisfy subsections (a) and (b). The Council stated the following reasons for denying the application:

> (1) [T]he proposal lacks sufficient separation and open areas among buildings and recreation facilities to provide effective livability space that avoids a sense of overcrowdedness, (2) the public traffic safety would not be maintained or promoted on Erwin Road in the vicinity of the proposed development, (3) the site design does not adequately consider the relationship of the development to natural topography . . . .

Petitioner contends that it produced competent, material, and substantial evidence of each of the elements required by the ordinance and that the Council's reasons for denying the application were not supported by competent, material, and substantial evidence. Because all four findings must be made to receive a permit, we need only consider whether any one of the Council's reasons for failing to make a required finding was supported by competent, material, and substantial evidence in order to affirm the Council's decision. *See Application of Goforth Properties, Inc., supra.*

The first condition is "that the use or development is located, designed, and proposed to be operated so as to maintain or promote the public health, safety, and general welfare." In regard to this condition the Council found that public traffic safety would not be maintained or promoted on Erwin Road in the vicinity of the proposed development and that the proposal failed to provide adequate livability space. Petitioner contends it offered evidence showing that the proposed development would maintain and promote public traffic safety. The proposed development would affect primarily three thoroughfares in Chapel Hill: Weaver Dairy Road, Erwin Road, and U.S. 15-501. Petitioner submitted two Traffic Impact Reports in its application for a special use permit. These reports analyzed the effect of the proposed development on traffic. One report stated, *inter alia*, the following:

Existing Traffic Conditions

Analysis of existing morning and afternoon peak hour traffic volumes shows a *high degree of congestion* at the intersection of Erwin Road and U.S. 15-501. . . .

* * * *

Planned or Programmed Improvements

Weaver Dairy Road is proposed to be realigned in the vicinity of Erwin Road to tie into the Sage Road extension. This change, when complete, would relocate a high volume intersection away from the Windy Hill entrance. The portion of this project south of Erwin Road is currently under construction. [Emphasis added.]

The report went on to state, "with the additional traffic generated by Windy Hill and the other approved developments, traffic on Erwin Road will approach the road's capacity, although they will be within the link capacity." The petitioner also submitted a letter from David R. Taylor, Town Manager of Chapel Hill, which outlined the status of developments in the area surrounding the proposed development and the impact of those developments on traffic. The letter stated: "Concerning the capacity of the intersection of Erwin Road, Dobbins Road and U.S. 15-501, this intersection currently experiences congestion and the anticipated increase in traffic from approved projects would increase this congestion. While it would be desirable to have improvements made to this intersection before development of these properties, we do not believe a hazardous traffic condition will result from the increase in traffic. . . . However, the high volume of traffic and traffic speeds at U.S. 15-501 and Erwin Road/Europa Drive provide the potential for serious personal injury and property damage."

At the 18 March 1985 public hearing before the Town Council, Manager Taylor presented a traffic impact analysis prepared by the Chapel Hill Planning Department in March of 1985. The analysis noted that development along Erwin Road and Weaver Dairy Road had increased rapidly during the previous two years and that 737 new dwellings had been approved for the area, most of which were currently under construction. The analysis stated:

Assessment of Impact

Developments along the Weaver Dairy Road/Erwin Road corridor that have been approved during the last few years will significantly affect traffic flows in the area. Generally, levels of service in the vicinity of these projects will drop.

The most significant deterioration in traffic flow will occur (and is occurring now) at the intersection of Erwin Road and U.S. 15-501. The performance of this intersection will drop from level of service C to level of service E [level of service F is the worst] if all of the approved developments are occupied. The capacity of the roadway will be exceeded by 9 percent. Drivers trying to move through the intersection will experience low speeds and long delays brought about by the congested conditions.

* * * *

Windy Hill and Cambridge Place would add about 159 trips to the corridor. The additional trips would do little to worsen the level of service considering problems with this corridor created by previously approved development. . . .

* * * *

All in all, we feel that transportation impacts created by approved and proposed developments would be significant, particulary [*sic*] at the Erwin Road/15-501 intersection.

The Planning Department in conclusion recommended that the town actively pursue road improvements in the area noting that "[m]any years could pass before [these improvements occur] if the Town counts on developers to build [the improvements]." According to the Planning Department the recommended improvements would solve the negative traffic impacts that would occur. Manager Taylor did acknowledge that the Planning Department's traffic analysis did not take into account a proposed extension from U.S. 15-501 to Erwin Road, a portion of which was under construction as of 18 March 1985. Manager Taylor, however, noted that there were no immediate plans for further construction of the extension.

Based on our review of the record, we hold that there was competent, material, and substantial evidence to support the

Council's findings and conclusions. Concerns about the adverse effect of the proposed development upon traffic congestion and safety were valid. Such concerns support the denial of a special use permit. *See Application of Goforth Properties, Inc., supra,* at 238, 332 S.E. 2d at 507. It is true that future improvements could eliminate the traffic congestion in the area; however, the Town Council is not bound to approve a proposed development because the present traffic problems may be solved at some point in the future.

Having determined that there is competent, material, and substantial evidence to support the Council's denial of the special use permit to petitioner on this basis, we need not consider whether all of the Council's findings were supported by such evidence. The decision of the superior court reversing the denial by the Council of petitioner's application for a special use permit is, therefore,

Reversed.

Judges EAGLES and MARTIN concur.

ELIZABETH KANDLER v. THE DEPARTMENT OF CORRECTION

No. 8510SC903

(Filed 6 May 1986)

1. Master and Servant § 10.1; Public Officers § 12— State employee—discharged for insubordination—not justified

The State Personnel Commission erred by concluding that the Department of Correction was justified in discharging the superintendent of a halfway house for level IV female prisoners for insubordination based on a finding that the only specific authority for authorizing two staff members to take an inmate to visit her sick son pertained to emergency leave and that there had not been an emergency leave situation. The Division of Prisons' policies and procedures clearly authorized unsupervised off-site visits between a level IV inmate and that inmate's child, regardless of the child's health. 5 NCAC 2F .0602.

2. Master and Servant § 10.1; Public Officers § 12— State employee—willful failure to comply with policies and procedures—not supported by substantial evidence

The State Personnel Commission erred by determining that petitioner was insubordinate in authorizing an inmate trip to attend the wedding of a staff member because it would have been reasonable for petitioner to conclude that 5 NCAC 2F .0602(f)(2) permitted identical activities supervised by professionally trained members of respondent's staff; petitioner testified that she did not believe that a request for permission was required and that it was not necessary to secure permission from the staff member to bring the inmates because they had been invited; and there was uncontradicted testimony that petitioner's immediate supervisor had told her she could do anything she wanted so long as she did not get caught.

3. Master and Servant § 10.1; Public Officers § 12— halfway house superintendent discharged—not justified

The State Personnel Commission's conclusion that the superintendent of a halfway house for minimum custody female prisoners was insubordinate and that her discharge was justified was not supported by a finding that the superintendent was aware that Department of Correction policies and procedures applied to halfway houses to the same extent as other facilities; that petitioner had been unsuccessful in attempting to change policies and procedures for halfway houses; that the policies and procedures were reasonable; and that plaintiff could have complied with them or sought guidance from her superiors on resolving conflicts.

4. Master and Servant § 10.1; Public Officers § 12— discharge of State employee—statement of supervisor—not hearsay

In the appeal of the discharge for insubordination of the superintendent of a halfway house, the statement of the superintendent's superior that she could do anything she wanted as long as she did not get caught was not hearsay because the issue was whether petitioner willfully failed or refused to comply with known policies and procedures and was admissible not to show the truth of the matter asserted but to show her belief based on her superior's statement.

APPEAL by respondent from *Barnette, Judge.* Judgment entered 24 May 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 16 January 1986.

The respondent has appealed from an order of the superior court. The State Personnel Commission had upheld the dismissal of the petitioner Elizabeth Kandler from her employment with the respondent North Carolina Department of Correction and the superior court reversed the State Personnel Commission.

The petitioner was the superintendent of the Department's Treatment Facility for Women (TFW) in Charlotte from 13 Oc-

tober 1975 until 3 August 1981. The TFW is a minimum custody prison or "halfway house" designed to house female prisoners who are in minimum custody, level IV. On 3 August 1981 the petitioner was notified that she had been suspended from her position pending investigation of charges involving "gross misconduct unbecoming a State officer or employee" and "negligence in the performance of duties." She was informed by letter dated 12 August 1981 that her supervisor had recommended her dismissal as a result of the completed investigation and that the respondent Department of Correction had approved the recommendation. The petitioner appealed that decision to the State Personnel Commission pursuant to G.S. 126-35.

A hearing examiner heard the case and entered an order in which he made findings of fact and conclusions. Based on certain findings of fact he concluded that the dismissal of the petitioner was justified. The State Personnel Commission adopted the findings of fact and conclusions as its own.

Elizabeth Kandler petitioned the superior court for review. The superior court held that considering the whole record there was not sufficient evidence to find facts which would support a conclusion that the petitioner had been insubordinate. It reversed the order of the State Personnel Commission and ordered the Commission to order the petitioner's reinstatement to the same or equivalent position with full back pay. The respondent appealed.

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by John W. Gresham, for petitioner appellee.

Attorney General Lacy H. Thornburg, by Associate Attorney Sylvia Thibaut, for respondent appellant.

WEBB, Judge.

[1] The appellant contends that the hearing officer made two findings of fact which support conclusions that the respondent was justified in discharging the petitioner. The findings of fact and conclusions were to the effect that the petitioner was insubordinate. The first of these findings of fact is as follows:

> 11. On September 24, 1980, Petitioner authorized two staff members to transport an inmate in a State vehicle to a hospi-

tal in Raleigh to visit the inmate's sick son. The inmate's son was not critically ill. The only specific authority for such a trip in Respondent's Policies and Procedures is contained in Section .0403(a) pertaining to emergency leave. Since the inmate's son had not died and was not critically ill, the emergency leave provisions did not authorize the trip in question and Petitioner was aware of this. Petitioner did not request or receive authorization from any of her superiors for the trip. She simply used her own judgment in authorizing the trip in order to avoid a possible escape attempt by the inmate.

Based upon this finding of fact the Commission concluded:

6. Petitioner's actions did, however, reach the level of insubordination when she authorized two staff members to transport an inmate to Raleigh to visit her sick son. The State Personnel Manual defines "insubordination" as "refusal to accept a reasonable and proper assignment from an authorized supervisor." As the term is commonly understood "insubordination" also includes willful failure to comply with known reasonable employer policies and procedures. Petitioner knew that Respondent's Policies and Procedures did not authorize the trip in question, because she knew that it was not an emergency leave situation. Petitioner could have requested special permission for the inmate to be transported to Raleigh, but she took it upon herself to authorize the trip, probably because she sensed that the trip would not have been approved by any of her superiors. Petitioner's motives in authorizing the trip may have been good, but the decision was not hers to make. Her willful failure to comply with known policies and procedures amounted to insubordination and justified her immediate dismissal.

The Division of Prisons' Policies and Procedures 5 NCAC 2F Custody and Security .0602 provides in part:

(g) Level IV Outside Activities. Level IV inmates are eligible to participate in all activities approved for level III inmates. Other activities authorized for level IV include:

(1) Off-site unsupervised activities necessary to contact perspective [sic] employers, secure a suitable residence for

> use when released on parole or upon discharge, obtain medical services not otherwise available, participate in training programs in the community, *visit or attend the funeral of a* spouse, *child* (including stepchild, adopted child, or child as to whom the prisoner, though not a natural parent, has acted in the place of a parent), parent (including a person though not a natural parent who has acted in place of a parent), brother or sister. (Emphasis added.)

This section on its face clearly authorizes even unsupervised off-site visits between a level IV inmate and that inmate's child, regardless of the child's health. Therefore, the Commission's finding of fact #11, that "[t]he only specific authority for such a trip in Respondent's Policies and Procedures is contained in Section .0403(a) pertaining to emergency leave," is not supported by substantial evidence. Conclusion #6, that the petitioner's authorizing this trip amounted to insubordination, was based upon this erroneous finding. Therefore, conclusion #6 was not supported by substantial evidence in the whole record and could not constitute a basis for upholding the petitioner's dismissal.

[2] The respondent also contends that the Commission properly determined that the petitioner was insubordinate in authorizing an inmate trip to Statesville to attend the wedding of a TFW staff member. The Commission made the following finding of fact:

> 17. On February 14, 1981, Barbara Lyon drove the treatment facility's inmates in a State vehicle to Statesville, North Carolina to attend the wedding of one of the facility's program assistants. Petitioner had approved the trip about a week earlier without even submitting a request to her area supervisor, Mr. Ritchie, for authorization. Petitioner never notified the church that the inmates were planning to attend the wedding. Respondent has a policy requiring a unit superintendent to submit a written request to the area supervisor for authorization for inmates to participate in supervised outside group activities such as the attendance of weddings. Respondent's policy further requires prior notification to the sites where such activities are to take place. Petitioner was aware of these policies as she had submitted such requests for authorization on previous occasions.

Based upon this finding of fact the Commission concluded:

> 12. Petitioner approved the inmates' attendance of a staff member's wedding in Statesville, North Carolina. She did so without requesting authorization for the trip from her area supervisor and notifying the church in advance as required by applicable policies and procedures. Petitioner was aware of the required policies and procedures because she had complied with them in similar situations previously. Her willful failure to comply with known policies and procedures constituted insubordination for which her immediate dismissal was justified.

The "policy" referred to in finding of fact #17 is found in an Administrative Letter written to Staff, Area Administrators, Institution Heads and Unit Supervisors. This letter purports "to clarify the authority under which Managers of the respective facilities within the Division of Prisons may authorize outside activities for inmates under General Statute 148-4." The letter cites the provisions of that statute and then states, among other things, "[a]ll off-site activities under the immediate supervision of qualified correctional personnel other than previously specified off-site work programs must have prior approval of the Area Administrator or Institution Head." However, 5 NCAC 2F .0602(f)(2), which relies upon G.S. 148-4 as its statutory authority, states that "[l]evel IV inmates are eligible to participate in all activities approved for level III inmates." Among the activities approved for level III inmates are "[s]pecific off-site activities under the supervision of approved community volunteers for periods not to exceed six hours, never past 12:00 midnight, on a one-volunteer to one-inmate basis (i.e., volunteer-sponsored training programs to develop inmate social skills, civic club programs, religious and church-related programs, arts, crafts, and sporting events). The respondent's regulations require no prior approval for inmate participation in these non work-related volunteer programs. Because it is unclear exactly what the respondent's policies require for a trip like the wedding trip, it would be reasonable for the petitioner to conclude that 5 NCAC 2F .0602(f)(2) permitted identical activities supervised by professionally-trained members of the respondent's staff.

Furthermore, the petitioner testified that although she had previously submitted requests for permission for inmates to attend outside activities she did not believe such a request was required for this trip. She stated that because the inmates were invited to a staff member's wedding she did not think it necessary to secure permission from that staff member to bring inmates to the wedding. Finally, the respondent's Area Administrator Ritchie, who under 5 NCAC 2A .0100 was required to supervise directly the petitioner's TFW, testified that under the chain of command he had instituted, the petitioner was instead to report directly to Major Nance, a district manager, who in turn reported to Ritchie. Mr. Ritchie stated that "[a]ny superintendent that has—daily is placed upon situations that are not covered in the policy manual." The petitioner also offered uncontradicted testimony that Major Nance, her immediate supervisor, told her she could do anything she wanted so long as she didn't get caught.

In light of the free hand apparently accorded the petitioner in interpreting the respondent's policies and procedures, we do not believe the Commission's conclusion that the petitioner willfully failed to comply with known policies and procedures is supported by substantial evidence in the whole record.

[3] The appellant also relies on the following finding of fact to support the conclusion that the petitioner was insubordinate:

> 20. During Petitioner's tenure as Correctional Superintendent of the Treatment Facility for Women in Charlotte, Respondent's Policies and Procedures applied to the facility and other halfway houses to the same extent that the Policies and Procedures applied to Respondent's other confinement facilities. Petitioner was aware of this during the time period in question, for she attempted to get the situation changed so that halfway houses could have their own particular policies and procedures to fit their own particular situation and needs. Petitioner and others were unsuccessful in such attempts. Respondent's written Policies and Procedures were to be strictly adhered to by all of Respondent's employees, including halfway house staff members, unless a particular policy or procedure was superceded by an authorized official of the Department. The policies and procedures at issue herein are reasonable and were so during the time period in ques-

tion and Petitioner could have either complied with the policies and procedures or sought guidance from her superiors in resolving possible conflicts in the policies and procedures.

This finding is not specific enough to support a conclusion that the petitioner was insubordinate. It does not show in what way the petitioner violated any rule or regulation.

[4] At the hearing the petitioner testified that Mr. A. C. Nance, her superior, had told her, "Cookie, I will tell you this. . . . You can do any damn thing you want to. Just don't get caught." The hearing examiner ruled that this was hearsay and that he would not consider it. The superior court ruled that this testimony was admissible and that it would rely on it in its decision. The appellant contends this was error because the court considered hearsay testimony. We believe the superior court was correct in holding this was not hearsay testimony.

The petitioner was dismissed upon charges of insubordination. The issue before the hearing examiner was whether the petitioner willfully failed or refused to comply with known policies and procedures. *Employment Security Commission v. Lachman*, 305 N.C. 492, 290 S.E. 2d 616 (1982). The petitioner's beliefs and motives were relevant to the hearing officer's determination and evidence of statements made by her superior concerning her authority was admissible not to show the truth of the matter asserted but to show Ms. Kandler's belief based on her superior's statements.

Affirmed.

Judges ARNOLD and WELLS concur.

CATHY C. HARTMAN (NOW SOUTHERN) v. WAYNE R. HARTMAN

No. 8521DC1173

(Filed 6 May 1986)

Divorce and Alimony § 30— separation agreement—disposition of property rights—equitable distribution barred

A separation agreement fully disposed of the parties' rights in both real and personal property arising out of the marriage and thus barred equitable distribution, although it contained no specific references to any real property but only to personal property, where the agreement provided that the parties desired "to settle permanently their rights and obligations," that the parties could engage in all real and personal property transactions "as though unmarried," and that each party "waives and relinquishes any and all rights he or she may now have or hereafter acquire under the present or future laws of any jurisdiction to share in the property or estate of the other as a result of the marital relationship . . . ."

APPEAL by defendant from *Burleson, Judge.* Judgment entered 25 June 1985 in District Court, FORSYTH County. Heard in the Court of Appeals 6 March 1986.

Plaintiff-wife and defendant-husband entered a separation agreement on 2 March 1984. The agreement contains no specific references to any real property but only to personal property. It provides that each party waives and relinquishes any and all rights he or she may have or hereafter acquire in the property or estate of the other as a result of the marital relationship.

The release or waiver provisions are as follows:

> THIRD it is agreed that each of said parties may from this date, and at all times hereafter, purchase, acquire, own, hold, possess, encumber, dispose of and convey any and all kinds and classes of property, both real and personal, as though unmarried, and free from the consent, joinder or interference of the other party.
>
> . . . .
>
> SIXTH, Except as herein otherwise provided, each party waives and relinquishes any and all rights he or she may now have or hereafter acquire under the present or future laws of any jurisdiction to share in the property or estate of the other as a result of the marital relationship, including with-

out limitation, statutory allowance, widow's allowance, homestead right, right to take in intestacy, right to take against the other's estate; and each party will, at the request of the other, execute, acknowledge and deliver any and all instruments which may be necessary or advisable to carry into effect this mutual waiver and relinquishment of all such interest, rights and claims.

Defendant-husband now seeks an award of substantially more than one-half of the parties' marital property pursuant to N.C. Gen. Stat. 50-20, the Equitable Distribution Act. The court granted plaintiff-wife's motion for summary judgment. Defendant-husband appeals.

Molitoris and Connolly, by Theodore M. Molitoris and Anne M. Connolly, for plaintiff-appellee.

White and Crumpler, by G. Edgar Parker, Randolph M. James, and Robin J. Stinson, for defendant-appellant.

WHICHARD, Judge.

Defendant-husband contends the court erred in granting summary judgment in favor of plaintiff-wife. Specifically, defendant-husband contends summary judgment was not proper because a genuine issue of material fact existed as to whether the separation agreement disposed of the parties' real property. We disagree.

This Court has 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.

Morris v. Morris, 79 N.C. App. 386, 388, 339 S.E. 2d 424, 425-26 (1986), *quoting 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).

Defendant-husband contends that the parties never intended the agreement to be a final settlement of all property rights. In support of this contention he stresses that the agreement "makes no mention whatsoever of any real estate or its disposition."

Our Supreme Court has recently reaffirmed that:

> 'The heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.' . . . When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law. The court determines the effect of their agreement by declaring its legal meaning. . . .
>
> . . . .
>
> 'Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly, and it is fundamental that that which is plainly or necessarily implied in the language of a contract is as much a part of it as that which is expressed. If it can be plainly seen from all the provisions of the instrument taken together that the obligation in question was within the contemplation of the parties when making their contract or is necessary to carry their intention into effect, the law will imply the obligation and enforce it.'

Bicycle Transit Authority v. Bell, 314 N.C. 219, 227, 333 S.E. 2d 299, 304 (1985), *quoting Lane v. Scarborough*, 284 N.C. 407, 410, 200 S.E. 2d 622, 624-25 (1973).

This Court also recently stated:

> When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court. . . . and the court cannot look beyond the terms of the contract to determine the intentions of the parties. . . . 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. . . .
>
> Whether . . . the language of a contract is ambiguous or unambiguous is a question for the court to determine. [Citations omitted.]

Piedmont Bank & Trust Co. v. Stevenson, 79 N.C. App. 236, 240, 339 S.E. 2d 49, 52 (1986). In making this determination, "words are to be given their usual and ordinary meaning and all the terms of the agreement are to be reconciled if possible . . . ." *Id.*

Our Supreme Court has noted:

> It must be presumed the parties intended what the language used clearly expresses, . . . and the contract must be construed to mean what on its face it purports to mean. . . .
>
> The Court, under the guise of construction, cannot reject what the parties inserted . . . or insert what the parties elected to omit. . . . It has no power to write into the contract any provision that is not there in fact or by implication of law. [Citations omitted.]

Indemnity Co. v. Hood, 226 N.C. 706, 710, 40 S.E. 2d 198, 201-02 (1946).

Applying the above principles to the agreement here, we hold that it clearly and unambiguously establishes that the parties' intention was to dispose fully of their respective property rights, both real and personal, arising out of the marriage. The parties stated in the preamble the reason for executing the agreement as follows: "WHEREAS, the parties hereto wish by this Separation Agreement to settle permanently their rights and obligations . . . ." In the body of the agreement the parties specifically agree that either may hereafter "purchase, acquire, own, hold, possess, encumber, dispose of and convey any and all kinds and classes of *property, both real and personal,* as though unmarried . . . ." (Emphasis supplied.) The parties agree further that each "waives and relinquishes any and all rights he or she may now have or hereafter acquire under the present or future laws of any jurisdiction to share in the property or estate of the other as a result of the marital relationship . . . ."

These provisions clearly reveal the parties' desire for a full and final settlement. An intention to postpone disposition of real property is inconsistent with the operation, effect, and stated purpose of the agreement. If the parties intended to postpone settlement of real property, this agreement would not "settle permanently their rights and obligations" and the parties could not engage in all real and personal property transactions "as though unmarried." The term "property" in paragraph "SIXTH," therefore, when read in the context of the overall agreement, clearly refers to both real and personal property. Likewise, inclusion of specific provisions regarding personal property only does not, in and of itself, create an ambiguity on the face of the agreement concerning the disposition of real property.

Our holding here is consistent with prior decisions. In *Blount v. Blount*, 72 N.C. App. 193, 323 S.E. 2d 738, *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 389 (1985), plaintiff-wife asserted that the parties' separation agreement was a support agreement and was never intended to settle all the property rights which arose out of the marriage. *Blount*, 72 N.C. App. at 194, 323 S.E. 2d at 739. In support of this contention, plaintiff-wife noted that although defendant-husband held assets valued in excess of a million dollars, the only property mentioned in the agreement was the homeplace, the home furnishings, and plaintiff-wife's car. *Id.* In the agreement, however, each party released and relinquished any and all property or interest then owned or thereafter acquired, as if the parties had never been married. *Id.* at 195, 323 S.E. 2d at 740. The Court held that this release language was plain and unambiguous and that plaintiff-wife had relinquished all her property rights which arose out of the marriage. Therefore, the agreement was not susceptible to plaintiff-wife's interpretation, *viz*, that she never intended it to be a final agreement. *Id.* at 196, 323 S.E. 2d at 740. The Court noted that, while the agreement did not enumerate in detail the property of defendant-husband, "the fact that specific property owned by either party was not described in the agreement cannot serve, without more, to avoid the unmistakably clear general provisions of the contract." *Id.* at 195-96, 323 S.E. 2d at 740. For the above reasons, the Court found that the agreement was a bar to equitable distribution and thus affirmed summary judgment in favor of defendant-husband. *Id. See also Cone v. Cone*, 50 N.C. App. 343, 274 S.E. 2d 341, *disc. rev.*

denied, 302 N.C. 629, 280 S.E. 2d 440 (1981) (language in separation agreement unambiguously established that plaintiff-wife relinquished her rights in the properties in question).

In *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979), our Supreme Court considered whether the support and property provisions of the parties' consent judgment were independent and separable or reciprocal. *White*, 296 N.C. at 667, 252 S.E. 2d at 702. Construing the judgment as a contract between the parties, the Court found that:

> The purpose of the consent judgment was apparently to settle "all things and matters in controversy arising out of the actions and pleadings." This language clearly shows that the parties wished to resolve their then outstanding differences. It does not show, however, that they intended to foreclose any future modification of the support payments. That the payments were denominated "alimony" militates against such an intent, but again it is far from conclusive on the issue.

Id. at 668-69, 252 S.E. 2d at 702. The Court thus concluded:

> In summary, it is not clear from the language of the consent judgment, its purpose and its subject matter what the parties intended on the issue of separability. Evidence of the situation of the parties at the time they consented to the judgment is therefore essential to resolution of the issue.

Id. at 669, 252 S.E. 2d at 703.

White is factually distinguishable from this case. Here, unlike in *White*, the agreement clearly shows the parties' intention to reach a full and final settlement from the date of the agreement and at all times thereafter. Accordingly, *White* does not control here.

Because the language of this agreement is clear and unambiguous, construction of the agreement was a matter of law for the court, and it could not consider extrinsic evidence to determine the intention of the parties. *Piedmont Bank, supra*, 79 N.C. App. at 240, 339 S.E. 2d at 52. *See also Cleland v. Children's Home*, 64 N.C. App. 153, 156, 306 S.E. 2d 587, 589 (1983) and *Grocery Co. v. R.R.*, 215 N.C. 223, 225, 1 S.E. 2d 535, 536 (1939). In

contrast to *Century Communications v. Housing Authority of City of Wilson*, 313 N.C. 143, 326 S.E. 2d 261 (1985), extrinsic evidence is neither necessary nor admissible "'in order to explain . . .'" the terms of the agreement. *Century*, 313 N.C. at 146, 326 S.E. 2d at 264.

For the above reasons we hold that the agreement fully disposes of the parties' property rights arising out of the marriage and thus acts as a bar to equitable distribution. Accordingly, there is no genuine issue as to any material fact and plaintiff-wife was entitled to a judgment in her favor as a matter of law. N.C. Gen. Stat. 1A-1, Rule 56; *Morris v. Morris*, 79 N.C. App. 386, 392, 339 S.E. 2d 424, 428 (1986). *See also McArthur v. McArthur*, 68 N.C. App. 484, 315 S.E. 2d 344 (1984). The grant of summary judgment in favor of plaintiff-wife thus was proper.

After entry of the summary judgment order and of defendant-husband's appeal entries thereto, defendant-husband filed a motion pursuant to N.C. Gen. Stat. 1A-1, Rule 60(b)(2) and (6) seeking relief from the order. In support of the motion he filed affidavits from Curtiss Todd, the attorney who represented plaintiff-wife and drafted the separation agreement. Todd states that "the intentions of the parties as related to me and as I understood them at the time of the signing of the . . . [agreement were] that the real estate issue would be either negotiated or resolved at a later date after the signing of the [agreement]." Therefore, Todd concludes, the general waiver provision in paragraph "SIXTH" did not constitute a property settlement of the parties' real property. The court entered an order that noted the pendency of defendant-husband's appeal from the summary judgment order and stated that, if the motion were properly before the court, the court would deny it. Defendant-husband argues that this was error.

The record contains no exception to this order and no assignment of error relating to it. It thus is not properly before us for consideration on appeal. N.C. R. App. P. 10(a). If it were, however, we would find it proper. Again, because the language of the agreement is clear and unambiguous, the court could not consider extrinsic evidence, such as Todd's affidavits, to determine the intention of the parties. *Piedmont Bank, supra.*

Affirmed.

Judges WELLS and COZORT concur.

DR. CLARENCE E. ASH, VIRGINIA N. ASH, BARBARA J. DEAN AND RODNEY A. DEAN v. BURNHAM CORPORATION

No. 8526SC1061

(Filed 6 May 1986)

Process § 9.1— New York corporation—insufficient minimum contacts

The trial court erred by denying defendant's motion to dismiss for lack of *in personam* jurisdiction in an action involving a boiler which was manufactured in Pennsylvania by defendant New York corporation and which allegedly malfunctioned in Ohio and injured a North Carolina resident. Defendant's only contacts with North Carolina were that in 1984 it sold approximately $520,000 worth of boilers to North Carolina customers, accounting for about one-half percent of its total boiler sales for the year; those sales were solicited by independent contractors who acted as sales representatives for defendant and other manufacturers; those representatives were paid by commission only and defendant did not pay workers' compensation or unemployment charges on their behalf; certain offices of those representatives were listed as places through which customers could order repair parts from Pennsylvania; the boilers were subject to a twenty-year limited warranty valid within the continental United States; defendant placed advertisements in national magazines which reached North Carolina; and a wholly owned subsidiary of defendant engaged in the business of greenhouse construction is authorized to do business in North Carolina. The subsidiary's books are separate from defendant's and each files a separate tax return; the sales representatives which solicit orders for defendant's products in North Carolina do not solicit orders for the subsidiary; there is no evidence that defendant and the subsidiary are not separate and independent; and the national advertising, the limited warranties, and the use of independent sales representatives and $520,000 in sales were not sufficient to satisfy the continuous and systematic standard necessary for asserting *in personam* jurisdiction where a claim does not arise out of or relate to a defendant's activities in the forum state.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Grist, Judge.* Order entered 24 July 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 February 1986.

Barbara Dean, a North Carolina resident, was visiting in the Ohio home of Dr. and Mrs. Ash, when a boiler manufactured by

defendant allegedly malfunctioned, injuring Mrs. Dean and the Ashes. Plaintiffs commenced this action in Mecklenburg County Superior Court seeking damages for the injuries suffered. Rodney Dean, husband of Barbara Dean and also a North Carolina resident, seeks damages resulting from the injuries sustained by his wife, including loss of consortium, emotional distress, and costs of providing household services while his wife was incapacitated.

Defendant, a New York corporation with its principal place of business in New York, sought dismissal for lack of personal jurisdiction. The trial court denied defendant's motion to dismiss after hearing arguments of counsel. From the order of the trial court, defendant appeals.

Golding, Crews, Meekins, Gordon & Gray, by Rodney Dean, for plaintiff appellees.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter and William A. Blancato, for defendant appellant.

ARNOLD, Judge.

Determining whether foreign defendants may be subjected to *in personam* jurisdiction in this state involves a two-pronged test. First, the Court must determine whether jurisdiction is proper under the North Carolina "long-arm" statute, G.S. 1-75.4. Second, the Court must determine whether the exercise of jurisdiction violates due process of law. *See Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). Our Supreme Court has stated that the North Carolina "long-arm" statute provides for *in personam* jurisdiction to the full extent permitted by the United States Constitution. *Id.* Defendant does not deny that there are statutory grounds for the exercise of jurisdiction. Therefore, the only question before this Court is whether the North Carolina court's assertion of jurisdiction over defendant is consistent with the Due Process Clause of the Fourteenth Amendment.

Generally, due process requirements demand that defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102, 66 S.Ct. 154, 158 (1945). Within the broad principle of *International Shoe*, different stand-

ards apply in cases where the contact with the state gives rise to the cause of action and where, as in the instant case, plaintiff's claims arise totally outside of the state. *Wolf v. Richmond Cty. Hosp. Authority*, 745 F. 2d 904 (4th Cir. 1984), *cert. denied*, --- U.S. ---, 88 L.Ed. 2d 68, 106 S.Ct. 83, 54 U.S.L.W. 3224 (1985); *accord, Dollar Sav. Bank v. First Sec. Bank of Utah*, 746 F. 2d 208 (3rd Cir. 1984). The sufficiency of contacts threshold is elevated when the cause does not arise in the forum state or derive from the foreign corporation's transactions in the state. *Id.* The United States Supreme Court has characterized the test applied when a plaintiff's claim does not arise out of or relate to a defendant's activities in the forum state as whether the contacts are of a "continuous and systematic" nature. *Wolf*, 745 F. 2d at 909, *citing Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 80 L.Ed. 2d 404, 104 S.Ct. 1868 (1984). Thus, if Burnham conducts "continuous and systematic" corporate activities within this state, those activities are enough to make it fair and reasonable to subject Burnham to proceedings *in personam* in North Carolina, even though the cause of action arises out of an alleged malfunction of a boiler manufactured in Pennsylvania and installed in Ohio. *See Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 96 L.Ed. 485, 72 S.Ct. 413 (1952). Whether the type of activity conducted within the state is adequate to satisfy the due process requirements depends upon the facts of the particular case. *Dillon*, 291 N.C. at 679, 231 S.E. 2d at 632, *citing Perkins, supra.*

The relevant facts in the instant case are as follows: Burnham is a New York corporation with its principal place of business in New York. Burnham is not authorized to do business in North Carolina nor does it have an agent for service of process in this state. Burnham has never owned or leased any real property in North Carolina and has never maintained an office here. Burnham has no bank account or phone listings in this state. In 1984, Burnham sold approximately $520,000 worth of boilers to North Carolina customers accounting for about one-half percent of Burnham's total boiler sales for the year. These sales were solicited by independent contractors who act as sales representatives for Burnham and other manufacturers. These representatives are paid by commission only. Burnham does not pay workers' compensation or unemployment charges on their behalf. In addition Burnham lists certain offices of these representatives as places

through which customers can order repair parts from Lancaster, Pennsylvania. All orders for boilers placed through the representatives are accepted in either New York or Pennsylvania, and payments are mailed directly to a lock box in Pennsylvania. The boilers are shipped by common carrier f.o.b. Lancaster, Pennsylvania and are subject to a twenty-year limited warranty valid within the 48 contiguous United States. At least since 1978, Burnham has placed advertisements in several national magazines which reach North Carolina. Finally, a wholly owned subsidiary of Burnham, which is engaged in the business of greenhouse construction, is authorized to do business in North Carolina.

We find that these contacts with North Carolina are not so "continuous and systematic" as to warrant the exercise of *in personam* jurisdiction in this case. First, "[w]hen a subsidiary of a foreign corporation is carrying on business in a particular jurisdiction, the parent is not automatically subject to jurisdiction in the state. Thus, if the subsidiary's presence in the state is primarily for the purpose of carrying on its own business and the subsidiary has preserved some semblance of independence from the parent, jurisdiction over the parent may not be acquired on the basis of the local activities of the subsidiary." 4 Wright and Miller, Federal Practice and Procedure: Civil § 1069, at 255-56 (1969); *accord, Mills, Inc. v. Transit Co.*, 265 N.C. 61, 143 S.E. 2d 235 (1965). Burnham's subsidiary constructs greenhouses. The subsidiary's books are kept separate from those of Burnham and each files a separate tax return. The sales representatives who solicit orders for Burnham products in North Carolina do not solicit orders for the subsidiary. There is no evidence that Burnham and the subsidiary are not separate and independent, and we thus determine that the subsidiary's presence in this state is not to be considered as a basis for asserting jurisdiction over Burnham.

The national advertising that reaches North Carolina is a factor to be considered; however, it alone does not constitute sufficient contacts to support jurisdiction. *Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300, *disc. rev. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985). The standard of "continuous and systematic" general business contacts requires more. Nor do we find the limited warranties sufficient to meet this elevated standard.

Finally, though it is a close question, we do not believe that Burnham's system of employing independent sales representatives and the resultant $520,000 in sales are sufficient to support jurisdiction. In reaching this decision we rely on the following cases. *Putnam v. Publications*, 245 N.C. 432, 96 S.E. 2d 445 (1957), was a civil action for libel and invasion of privacy in which the defendant, a magazine and newspaper publisher, delivered its magazines by common carrier f.o.b. locations outside North Carolina to 18 independent wholesale dealers in this state for resale. This business transaction included a provision for credit to the dealers for unsold copies. The defendant also employed sales promotion representatives who made several business trips within this state. The court held that these were insufficient contacts for the purpose of *in personam* jurisdiction.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 79 L.Ed. 2d 790, 104 S.Ct. 1473 (1984), also a libel action, the defendant's connection with the forum state consisted of the sale of some 10,000 to 15,000 copies of Hustler Magazine in that state each month. We take judicial notice that the dollar volume of these sales for one year would roughly equal the $520,000 earned by Burnham in North Carolina in 1984. The Court in *Keeton* drew the distinction between contacts sufficient to support jurisdiction when the cause of action arises out of defendant's activity being conducted in the forum state—sometimes referred to in the cases and literature as "specific jurisdiction"—and when the cause of action is unrelated to those activities giving rise to the claim—sometimes referred to as "general jurisdiction." The Court has indicated in other cases that "specific jurisdiction" requires a minimum contacts analysis, whereas "general jurisdiction" requires the heightened analysis of "continuous and systematic" general business contacts. *See generally, Helicopteros*, 466 U.S. 408, 80 L.Ed. 2d 404, 104 S.Ct. 1868 (1984). In this case the Court concluded that the alleged libelous material arose out of magazine sales in the forum state, and that the contacts were sufficient to support this "specific jurisdiction" over the defendant. The Court noted however that the sale of the 10,000 to 15,000 magazines each month "may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities." 465 U.S. at 779, 79 L.Ed. at 801. The Court, in comparing these contacts with those in *Perkins*, stated:

> In *Perkins*, the [defendant] corporation's mining operations, located in the Philippine Islands, were completely halted during the Japanese occupation. The president, who was also general manager and principal stockholder of the company, returned to his home in Ohio where he carried on "a continuous and systematic supervision of the necessarily limited wartime activities of the company." 342 US, at 448, 96 L Ed 485, 72 S Ct 413, 47 Ohio Ops 216, 63 Ohio L Abs 146. The company's files were kept in Ohio, several directors' meetings were held there, substantial accounts were maintained in Ohio banks, and all key business decisions were made in the State. Ibid. In those circumstances, Ohio was the corporation's principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State.

Id. at fn. 11.

Finally, in *Helicopteros*, the defendant made purchases in Texas totalling in excess of $4,000,000 (including approximately 80% of its helicopter fleet), negotiated the contract in that state, and sent its pilots to Texas for training. The Court held, however, that these contacts were not sufficient to subject the defendant to *in personam* jurisdiction in that state pursuant to a wrongful death action relating to a helicopter crash in South America. These cases lead us to believe that the use of independent contractors as sales representatives and the resultant $520,000 in sales are not sufficient to satisfy the "continuous and systematic" standard necessary for asserting *in personam* jurisdiction.

Based upon the reasoning set forth above, we conclude that the due process clause requires more than the aggregate contacts presented in evidence in this case. Thus, we find that the trial court erred in denying defendant's motion to dismiss for lack of *in personam* jurisdiction.

Reversed.

Judge EAGLES concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the court below has *in personam* jurisdiction over the defendant and the order of the trial judge should be affirmed.

STATE OF NORTH CAROLINA v. JAMES CURTIS SOWELL AND LONNIE ALONYA SAMUEL

No. 8516SC1083

(Filed 6 May 1986)

1. **Criminal Law § 75.4— statement involving right to counsel—admission as harmless error**

The trial court erred in permitting a detective to testify that defendant declined to talk with him until he had conferred with an attorney, but such error was not prejudicial in light of the overwhelming evidence of defendant's guilt of the offense charged.

2. **Criminal Law § 114.2— supplemental instruction—no expression of opinion**

The trial court did not express an opinion on the evidence in advising the jury that the recollection of others that the victim had received two gunshot wounds differed from his own recollection of the evidence and that, in any event, the jurors should rely entirely on their own recollections of the evidence.

3. **Criminal Law § 138.26— felonious assault—great monetary loss aggravating factor**

The trial court could properly find as an aggravating factor for assault with a deadly weapon with intent to kill inflicting serious injury that the offense involved "damage causing great monetary loss" based on the victim's medical expenses since (1) the "great monetary loss" aggravating factor does not apply only to cases involving loss or damage to property, and (2) evidence of medical expenses was not necessary to prove serious injury or any other element of the offense. N.C.G.S. § 15A-1340.4(a)(1)m.

4. **Criminal Law § 138.26— great monetary loss aggravating factor—sufficiency of proof**

The "great monetary loss" aggravating factor for felonious assault was proved by a preponderance of the evidence where the victim testified that he had personally seen medical bills totalling from $30,000 to $40,000 and that he had been informed that the total costs of his medical treatment would be between $75,000 and $100,000.

Judge BECTON concurring in part and dissenting in part.

APPEAL by defendants from *McLelland, Judge.* Judgments entered 31 May 1985 in ROBESON County Superior Court. Heard in the Court of Appeals 12 February 1986.

The Robeson County grand jury returned proper bills of indictment charging both defendants with assault with a deadly weapon with intent to kill inflicting serious injury. Both defendants entered pleas of not guilty and the State's motion for joinder was allowed without objection.

At trial, the State presented evidence tending to show that on 14 November 1984, Elbert Owens, the manager of the Days Inn motel on U. S. Highway 301 in Robeson County near the South Carolina boundary line, observed the defendants trying to open the locked door to his office. Mr. Owens refused to open the door and, after some brief conversation, defendants left and walked toward the Family Inns motel. Mr. Owens called Charles Sisk, the manager of the Family Inns motel, to advise him that the men were coming toward his motel and that they were acting suspiciously. Shortly thereafter, Mr. Sisk heard noises which sounded as if someone was rattling the doors to the motel rooms. He armed himself with two pistols and went outside. He saw both defendants and saw that defendant Samuel was wearing a shoulder holster containing a pistol. Defendant Sowell grabbed Mr. Sisk's arm and defendant Samuel pulled out his pistol and pointed it at Mr. Sisk. Mr. Sisk and Samuel exchanged shots; each was struck. Samuel then approached Mr. Sisk and pointed the pistol at him again. Mr. Sisk managed to grab the pistol and divert it in the direction of defendant Sowell, so that when Samuel fired the pistol, Sowell was struck by the bullet. Both defendants fled.

Shortly after midnight, defendant Samuel arrived at the home of Sam Lottie in Dillon, S. C. and told Mr. Lottie that he had been shot. Mr. Lottie drove him to the hospital and law enforcement officials were notified. At approximately 1:15 a.m., a Robeson County deputy found defendant Sowell walking along Highway 301 about a mile and a half from the Family Inns motel. Sowell was also suffering from a gunshot wound.

Mr. Sisk was taken to Southeastern General Hospital where he underwent surgery for gunshot wounds to his head and mouth. He was hospitalized for approximately one month and remains partially paralyzed.

Neither of the defendants offered evidence. The jury found each of them guilty as charged and the court entered judgments sentencing both defendants to active fifteen year prison terms. Defendants appeal.

Attorney General Lacy H. Thornburg by Associate Attorney J. Charles Waldrup, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr. by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant Samuel.

Smith and Jobe, by Bruce F. Jobe, for defendant appellant Sowell.

MARTIN, Judge.

I

[1] In his sole assignment of error relating to the trial, defendant Samuel contends that his constitutional rights were violated when a law enforcement officer, Detective Franklin Lovette, was permitted to testify that Samuel declined to talk with him until he had conferred with an attorney. Detective Lovette testified that he had attempted to interview Samuel while Samuel was in the hospital in Dillon, S. C. The following colloquy occurred between the prosecutor and Detective Lovette:

> Q. All right. Did you have any conversation with him there?
>
> A. After getting approval of the attending physician in charge of intensive care, I went to interview Mr. Samuel for the purpose of trying to find out exactly what happened on the date of November the 14th, or the early morning hours of November 14th.
>
> After being advised of his rights, verbally, to that fact that he had the right to remain silent and have an attorney present, Mr. Samuel stated that he had better wait until he talked to a lawyer.
>
> MR. REGAN: Objection. Move to strike.
>
> THE COURT: Overruled.

We agree with defendant Samuel that the admission of this testimony was error. Samuel's statement that he had "better wait until he talked to an attorney" was clearly an invocation of his right to counsel. *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1880, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984, 101 S.Ct. 3128 (1981). The State may not present evidence that a defendant exercised his fifth amendment right to remain silent or that he exercised his right to counsel. *State v. Ladd*, 308 N.C. 272, 302 S.E. 2d 164 (1983).

The erroneous admission of this testimony does not, however, entitle defendant Samuel to a new trial.

> Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt. [Citations omitted.] Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. [Citation omitted.]

State v. Taylor, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972). Upon the evidence presented in this case, we see no reasonable possibility that the testimony complained of might have contributed to defendant Samuel's conviction. Samuel was seen in the company of Sowell earlier the same night by a Dillon, S. C. police officer. Both defendants were unequivocally identified by Elbert Owens and by the victim. Shortly after Mr. Sisk exchanged shots with his assailants, Samuel appeared at the home of an acquaintance seeking assistance in obtaining medical treatment for a gunshot wound. In the face of such overwhelming evidence of guilt, it is clear beyond any reasonable doubt that the erroneous admission of the evidence that Samuel had invoked his right to counsel was harmless error.

II

[2] Defendant Sowell contends that the trial court impermissibly expressed an opinion as to the evidence by stating, in supplemental instructions to the jury, that Mr. Sisk had received two gunshot wounds. The record reveals that when the court summarized

the evidence in the jury instructions, it stated that Mr. Sisk was shot one time in the mouth. After the jury retired, but before it began deliberations, the prosecutor advised the court that his own recollection of the evidence was that Mr. Sisk had received a second wound to the top of his head. After inquiring of counsel for both defendants, the court stated that it would "make the correction." The court then recalled the jury and gave the following instruction:

> THE COURT: Ladies and Gentlemen, it was called to my attention that my recollection was not correct with respect to the testimony of the State's witness, Charles Sisk.
>
> The others recollection of the testimony is that he was shot twice; once in the face and once in the top of the head.
>
> I mention to you that my reference to the evidence was for illustrative purposes and not to be considered by you in substitution to the evidence, but since the others recalled my recollection being different from theirs, I thought it necessary to call you back and remind you that in that particular and in all others if my recollection does not accord with yours, then, of course, you disregard mine entirely and rely exclusively—not on their recollection or mine, but on your own recollection of what the evidence is.

After the jury had again retired, counsel for defendant Sowell objected to the additional instruction "as a statement of opinion."

G.S. 15A-1232 prohibits the judge from expressing, in the instructions to the jury, any opinion as to whether a fact has been proved. We find no violation of the statute in this case. The court merely advised the jurors that the recollection of others differed from his own recollection of the evidence and that, in any event, the jurors should rely entirely on their own recollections of the evidence. This assignment of error is overruled.

III

Both defendants assign error to the sentencing proceeding. They contend that the trial court improperly found and considered, as a factor in aggravation of punishment, that "the offense involved damage causing great monetary loss." We disagree.

[3] The statutory aggravating factor upon which the court's finding was based is contained in N.C. Gen. Stat. § 15A-1340.4(a)(1)m and reads as follows:

> The offense involved an attempted or actual taking of property of great monetary value *or damage causing great monetary loss*, or the offense involved an unusually large quantity of contraband. [Emphasis added.]

Defendants first contend that the clear legislative intent of the factor was that it apply only to cases involving loss or damage to property. This issue has been resolved against defendants by the opinion rendered by another panel of this Court in *State v. Bryant*, 80 N.C. App. 63, 341 S.E. 2d 358 (1986) (*but see* dissenting opinion by Eagles, J.). For the reasons stated in *Bryant*, we reject this contention.

Secondly, defendants contend that the evidence of "great monetary loss," i.e., the victim's medical bills, was used by the State to prove that the victim had sustained a serious injury, a necessary element of the crime. We reject this contention as well. The State did not offer evidence of the amount of Mr. Sisk's medical expense until the sentencing hearing. Thus, the amount of monetary loss occasioned by the defendant's criminal acts was clearly not used by the State to prove any element of the offenses. Moreover, the uncontradicted evidence of the injuries suffered by Mr. Sisk and the residual disability resulting therefrom was clearly sufficient, standing alone, to prove the element of serious injury. The additional evidence of medical expense was not necessary to prove that or any other element of the offenses for which defendants were convicted. See *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983); *State v. Bryant, supra.*

[4] Finally, defendants contend that the factor was not proven by a preponderance of the evidence. Mr. Sisk testified, without objection, that he had personally seen medical bills totalling from $30,000.00 to $40,000.00 and that he had been informed that the total costs of his medical treatment would be between $75,000.00 and $100,000.00. We find his uncontradicted testimony sufficient to support the trial court's finding of great monetary loss.

The defendants received a fair trial free from prejudicial error.

No error.

Judge JOHNSON concurs.

Judge BECTON concurs in part, and dissents in part.

Judge BECTON concurring in part and dissenting in part.

For the reasons stated in Judge Eagles' dissent in *State v. Bryant*, 80 N.C. App. 63, 341 S.E. 2d 358 (1986), and because I believe the defendants in this case should benefit immediately from any possible favorable ruling by our Supreme Court in the *Bryant* case, I dissent from that portion of the majority opinion relating to the sentencing proceeding.

IN THE MATTER OF THE WILL OF EMMETT J. KING, DECEASED

No. 856SC876

(Filed 6 May 1986)

Wills § 22 — codicil — mental capacity to execute — Rule 59 motion denied — no abuse of discretion

The trial court did not abuse its discretion by denying appellants' motion under N.C.G.S. 1A-1, Rule 59, for a new trial in an action to contest the validity of a codicil to a will where the witnesses to the codicil and the beneficiary of the codicil testified that the testator knew what was going on and had sufficient mental capacity to execute the will; the jury was not obliged to accept the contradictory testimony of the testator's doctor, who did not see the testator at the crucial time; the terms of the codicil were consistent with the testator's expressed intent to give his interest in his business to a grandson who had been helping him in it; the fact that the testator received help in making his mark does not affect the validity of the instrument; whether the testator was too weak to resist his daughter was a question of fact for the jury; and the evidence that the testator made his mark on the will in the presence of witnesses indicates that the instrument was his and is sufficient to imply a request that they attest his signature. N.C.G.S. 31-3.3, N.C. Rules of App. Procedure, Rules 10(a), 10(b)(2).

APPEAL by Thomas J. King and Bradley A. Elliott, guardian *ad litem* for the children of Thomas J. King, from *Hobgood, Hamilton H., Judge*. Order entered 6 September 1984 in Superior Court, HALIFAX County. Heard in the Court of Appeals 15 January 1986.

Emmett J. King, who died on 9 August 1983, left a 4 page will and a 12 page related trust agreement, both executed on 12 February 1982. The will devised all of his estate, except the household property, to the trustee under the trust agreement. Subject to the trustee's discretionary powers in distributing to the testator's wife, children and grandchildren as need arose, the trust agreement, in substance, required the trustee to hold the trust property for the primary benefit of his wife while she lived, and at her death to divide the remainder equally between his living children and grandchildren. The testator was survived by his wife, three children and five grandchildren, one of whom is Jefferson Michael King Crowder. The testator also left the following codicil allegedly executed about an hour and a half before he expired:

> August 9, 1983
>
> This writing is a codicil to the will and trust agreement that I have with Planters National Bank and Trust Company concerning the disposition of my estate and the winding up of my business affairs.
>
> I now abrogate and consider null and void the buy/sell agreement that pertains to Halifax Linen, Inc. It is my intention that Planters National Bank and Trust Company see that grandson, Jefferson Michael King Crowder inherit all of the stock that I own in Halifax Linen, Inc.
>
> Jefferson Michael King Crowder is also to own the real property housing Halifax Linen, Inc., both the land and the buildings.
>
> (sign) X (His Mark)
> E. J. King

The jury found that both the will and codicil are valid and judgment was entered accordingly. Only the validity of the codicil is disputed by the appellants Thomas J. King, son of the testator, and his three children. The appellee is Jefferson Michael King Crowder, the only beneficiary of the codicil.

The appellee's evidence as to the execution of the codicil and the testator's mental capacity was to the following effect: Early on the morning of 9 August 1983 Mr. King was taken to the emer-

gency room at Halifax Memorial Hospital with a leaking abdominal aneurysm. He was in pain and in shock from the loss of blood and Dr. Richard Frazier, after giving him medications to ease his pain and raise his blood pressure, had him moved to intensive care, where he was placed on a respirator with an intratracheal tube down his throat. Just after 1 o'clock that afternoon, Patsy West and Rhoda Joyner were in the intensive care waiting room when Jeff Crowder, who they had never seen before, entered and asked them to witness the execution of the document now in controversy. They went with Crowder to the testator's room where Delores King, one of his daughters, asked them to observe her father as she read the paper to him. They heard Delores King read the codicil to her father, heard her ask him if he understood it and if he wanted Jeff to have the business and the property, and they saw Mr. King nod his head. They also heard her say that he would have to help her, saw her place a pen in his hand, heard her ask him to help, and saw her hold or guide his hand as it made a cross mark on the signature line of the codicil. The two ladies signed the document as witnesses and both expressed the opinion that Mr. King was aware of their presence, knew what was happening around him, and knew that he was executing a codicil to his will. Jeff Crowder was also present when the codicil was executed. Ann King, testator's other daughter, and Jeff Crowder testified that they talked with Mr. King at the hospital off and on during that morning, and that he was able to carry on a normal conversation. Ann King further testified that the testator had spoken earlier of leaving his interest in Halifax Linen to Jeff and she expressed the opinion that in executing the codicil he knew what he was doing and its effect on his estate.

The appellants' evidence consisted of the testimony of Dr. Frazier to the following effect: Mr. King was in a mild state of shock and in pain when he arrived at the hospital and when Demerol did not control his pain morphine was administered intravenously just before 1 o'clock; at the same time he was also given Valium, a sedative, to make him more comfortable with the respirator tube. Both morphine and Valium tend to decrease the mental awareness of the recipient and during the morning Mr. King lapsed into a semi-coma; though occasionally stuporous he could respond to stimuli and be temporarily aroused. When the doctor left for lunch at approximately 12:50 p.m., King was in a

semi-coma and was in a full coma when he returned to King's bedside at 2:15 p.m. In his professional opinion, as a medical expert, Mr. King was incapable of knowingly executing a document at the time involved.

Knox and Kornegay, by Robert D. Kornegay, Jr., for appellant Thomas J. King.

Moseley and Elliott, by Bradley A. Elliott, guardian ad litem for David King, Steven King, and Missy King, grandchildren of Emmett J. King and children of Thomas J. King.

Thomas I. Benton for appellee Jefferson Michael King Crowder.

PHILLIPS, Judge.

Two of the questions posed in appellants' brief cannot be considered because they were not raised in the trial court as required by Rule 10(a) of the N.C. Rules of Appellate Procedure. Appellate courts are courts of errors, and it is fundamental that an action not challenged as erroneous at trial may not be contested on appeal. The first question concerns the propriety of the court receiving testimony that the testator and the other co-owner of Halifax Linen, Inc. had executed a buy-sell agreement; but this testimony was not objected to by the appellants, who thereby waived their right to contest its admissibility. *State v. Lucas*, 302 N.C. 342, 275 S.E. 2d 433 (1981). Furthermore, though the terms of the agreement are not recorded the testimony may have benefited the appellants since it suggests that the testator may have been obligated to sell his interest in the linen business to his co-owner and thus did not have the right to devise it to the appellee or anyone else. The second question concerns the court's instruction to the jury about evaluating Dr. Frazier's expert opinion as to Mr. King's mental condition when the codicil was allegedly executed; but appellants did not object to the instruction before the jury retired, though given the opportunity to do so. Rule 10(b)(2), N.C. Rules of Appellate Procedure.

Following the trial the appellants made several motions, none of which were timely, however, except a motion for a new trial under the provisions of Rule 59, N.C. Rules of Civil Procedure. Since Rule 59 motions are addressed to the sound discretion of

the trial court, *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982), the only question before us is whether the trial court abused its discretion in denying the motion. No abuse appears. Appellants' main argument is that the evidence does not show that the codicil was executed in the manner that the law requires. A codicil must be executed with the same formalities as attend the execution of a will. *Paul v. Davenport*, 217 N.C. 154, 7 S.E. 2d 352 (1940). Those formalities, set out in G.S. 31-3.3, are as follows:

> (a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.
>
> (b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon.
>
> (c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.
>
> (d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other.

Appellants contend that because of his illness and the medications received that the testator could not have had the mental awareness that is necessary for the execution of a testamentary document; and they argue at considerable length, mostly upon the premise that Mr. King did not know what was going on, that there was no evidence, express or implied, that the testator intentionally signed the codicil, that he signified to the attesting witnesses that the instrument was his, or that the codicil was signed by the attesting witnesses in his presence. These arguments will not be discussed in detail as a Rule 59 motion for a new trial is no substitute for timely motions for a directed verdict and judgment notwithstanding the verdict. *Worthington v. Bynum, supra.*

Nevertheless, a review of the record leads us to conclude that though the evidence as to the testator's mental capacity and

awareness might fairly be regarded as weak, it was sufficient to support the verdict and its weight was for the jury. *In re Will of Knowles*, 11 N.C. App. 155, 180 S.E. 2d 394 (1971). The witnesses to the codicil and Jeff Crowder testified that he did know what was going on and had sufficient mental capacity, in their opinion, to execute the will. *In re Will of Cauble*, 272 N.C. 706, 158 S.E. 2d 796 (1968). While Dr. Frazier may have been better qualified than the lay witnesses to testify as to the testator's mental awareness and capacity, the jury was not obliged to accept his testimony over theirs and he did not see the testator at the time crucial to this case, as they did. Too, the terms of the codicil were consistent with the intention, expressed several times according to the testimony, to give his interest in the linen business to his grandson that had been helping him in it. That the testator received physical assistance in making his mark does not affect the validity of the instrument, *In re Knowles, supra*, and whether he was too weak to resist his daughter's actions, as appellants contend, was another question of fact for the jury. The evidence that he made his mark on the codicil in the presence of the witnesses indicates that the instrument was his, G.S. 31-3.3(c), and is sufficient to imply a request that they attest his signature. *In re Will of Kelly*, 206 N.C. 551, 174 S.E. 453 (1934). In short the evidence before the jury tended to show, as they found, that the codicil was executed in accordance with all the requirements of our law and we cannot say that the learned trial judge, who heard the testimony and observed the demeanor of the witnesses, abused his discretion in letting the verdict and the judgment entered thereon stand.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

RICHARD C. TALBERT, JR., AND TALBERT MOTORS, INC. v. ROBERT MAUNEY AND FIRST UNION NATIONAL BANK

No. 8526SC1054

(Filed 6 May 1986)

1. **Appeal and Error § 16; Rules of Civil Procedure § 60— Rule 60(b) motion—jurisdiction of trial court pending appeal**

The trial court retains limited jurisdiction pending an appeal to hear and consider a Rule 60(b) motion to indicate what action it would be inclined to take were an appeal not pending.

2. **Unfair Competition § 1— debt collector—unfair trade practice—intentional harm to credit rating**

Plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint were sufficient to state a claim for relief for unfair and deceptive acts in commerce by a debt collector under N.C.G.S. §§ 75-51 and 75-1.1.

3. **Libel and Slander § 5.4— statements imputing crime—slander per se**

Plaintiffs' allegations that the individual defendant published statements that the individual plaintiff forged his letters of credit and that he is a drug dealer constitute allegations of slander *per se*.

APPEAL by plaintiffs from *Burroughs, Judge*, and *Grist, Judge*. Judgments entered 8 May 1985 and 2 July 1985. Heard in the Court of Appeals 6 March 1986.

Plaintiffs filed this action on 30 November 1984, alleging unfair and deceptive acts in commerce and slander. Defendants answered and moved for dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure. Defendants then served on plaintiffs a set of interrogatories and a Request for the Production of Documents. When no answer was forthcoming, defendants served on 1 May 1985 a Motion to Dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(d) of the Rules of Civil Procedure, or alternatively to compel discovery. This service also included a Motion for Hearing scheduled for 7 May 1985. Plaintiffs delivered a Response to Request for Production and Answers to Interrogatories before the hearing date. The Answers to Interrogatories were unverified.

On 7 May 1985 Judge Burroughs heard defendants' Rule 12(b)(6) and Rule 37(d) motions. He found that, though plaintiffs'

counsel was on notice of the time and place for the hearing, counsel had failed to appear or to communicate with the court or with counsel for the defendants about the hearing; that the interrogatories were properly served on plaintiffs; that plaintiffs had failed to serve answers or objections to the interrogatories within the time limit; that plaintiffs' answers, when served, were not signed by either plaintiff under oath as required and such answers were in many respects evasive, unresponsive and inadequate and did not comply with the requirements of N.C. Gen. Stat. § 1A-1, Rule 34 of the Rules of Civil Procedure. Judge Burroughs found that this failure to comply with Rule 34 and other "requirements of said Rules" constituted sufficient grounds for dismissal with prejudice of plaintiffs' claims under Rule 37(d). He also found that plaintiffs had failed to state a claim upon which relief could be granted, Rule 12(b)(6), and based the judgment upon both rules.

Plaintiffs noticed an appeal to this Court on 15 May 1985. On 12 June 1985 plaintiffs moved the superior court for relief from the judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) of the Rules of Civil Procedure. Judge Grist heard this motion on 2 July 1985 and ruled that he was without jurisdiction to hear the Rule 60(b) motion by reason of the pendency of plaintiffs' appeal to this Court and declined to indicate in the record how he would rule had plaintiffs not appealed from the 8 May 1985 judgment. Plaintiffs appealed this ruling, which appeal has been consolidated with the appeal from the previous judgment.

Barringer, Allen & Pinnix, by Noel L. Allen, William D. Harazin and C. Lynn Calder, for plaintiffs-appellants.

Underwood, Kinsey & Warren, P.A., by C. Ralph Kinsey, Jr. and Kenneth S. Cannaday; Jones, Hewson & Woolard, by Harry C. Hewson, for defendants-appellees.

WELLS, Judge.

[1] As a general rule, an appeal divests the trial court of jurisdiction of a case and, pending appeal, the trial court is *functus officio. Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). However, for the purposes of a Rule 60(b) motion, the trial court retains limited jurisdiction to hear and consider a Rule 60(b) motion to indicate what action it would be inclined to take were an

appeal not pending. *See id.; Bell v. Martin*, 43 N.C. App. 134, 258 S.E. 2d 403 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E. 2d 101 (1980). The legislative intent that there be this limited trial court jurisdiction is evidenced by the fact that the one-year period for filing a Rule 60(b) motion is not tolled by the taking of an appeal from the original judgment. *Bell v. Martin, supra, citing* 11 Wright & Miller, Federal Practice and Procedure: Civil § 2866, p. 233 (1973). A further reason for this practice is that when determination of a Rule 60(b) motion requires the resolution of controverted questions of fact, the trial court is in a far better position to pass upon it than is this Court. *Swygert v. Swygert*, 46 N.C. App. 173, 264 S.E. 2d 902 (1980).

Plaintiffs' Rule 60(b) motion contends that various delays of the parties, misunderstandings and inadequate notice explain plaintiffs' failure to attend the hearing on the Rules 12(b)(6) and 37(d) hearings, depriving them of an opportunity to be heard on these matters. Plaintiffs also contend that the sanction of dismissal was unduly harsh, given the facts of the case. Presentation of the facts surrounding plaintiffs' procedural deficiencies and argument on those facts clearly mandate a resolution of controverted questions of fact and, as such, are appropriate for the trial court to consider on a Rule 60(b) motion. However, the dismissal by Judge Burroughs was jointly based on Rule 37(d) sanctions and a Rule 12(b)(6) failure to state a claim upon which relief can be granted. The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). The function of a motion to dismiss is to test the law of a claim, not the facts which support it. *Id.* The facts surrounding plaintiffs' absence from the Rule 12(b)(6) hearing are thus irrelevant to the Rule 12(b)(6) determination. We therefore examine the sufficiency of the pleadings to determine the propriety of the Rule 12(b)(6) dismissal.

> A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief. The rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.

Property Owners Assoc. v. Curran, 55 N.C. App. 199, 284 S.E. 2d 752 (1981), *disc. rev. denied*, 305 N.C. 302, 291 S.E. 2d 151 (1982). For the purposes of ruling on a motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted. *Id.*

[2] Plaintiffs' first claim is for unfair and deceptive acts in commerce. Among other things, plaintiffs allege that defendant Mauney, as president of defendant First Union National Bank, unjustifiably demanded that all of plaintiffs' loans be paid in full immediately. When plaintiffs instead paid off the loans pursuant to their bank loan agreement, plaintiffs' credit reputation was significantly impaired. In addition, plaintiffs allege that defendant Mauney related to a potential investor of plaintiffs that certain of plaintiffs' credit documents were "probably forged."

The pertinent sections of the statute are as follows:

> (a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.
>
> (b) For purposes of this section, "commerce" includes all business activities, however denominated . . . .

N.C. Gen. Stat. § 75-1.1 (1985). This statute was amended in 1977. It had previously contained the phrase "trade or commerce," which was interpreted to restrict the coverage of the Act to commerce that entailed an exchange of some type. *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The amendment deleted the term "trade" and rewrote section (b) as set out above. 1977 N.C. Sess. Laws, ch. 747. The amendment clearly "constituted a substantive revision intended to expand the potential liability for certain proscribed acts." *United Roasters, Inc. v. Colgate-Palmolive Co.*, 485 F. Supp. 1049 (E.D.N.C. 1980), *aff'd*, 649 F. 2d 985 (4th Cir.), *cert. denied*, 454 U.S. 1054, 102 S.Ct. 599, 70 L.Ed. 2d 590 (1981). A new Article 2 was also added to apply specifically to debt collectors, forbidding coercion to collect payments by "unfair acts" that include:

> (2) Falsely accusing or threatening to accuse any person of fraud or any crime, or of any conduct that would tend to cause disgrace, contempt or ridicule.

(3) Making or threatening to make false accusations to another person, including any credit reporting agency, that a consumer had not paid, or has willfully refused to pay a just debt.

1977 N.C. Sess. Laws, ch. 747; N.C. Gen. Stat. § 75-51 (1985). N.C. Gen. Stat. § 75-56 (1985) provides that "[t]he specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article." We interpret this provision to mean that, though in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in Article 2, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of G.S. 75-1.1.

In the case *sub judice*, we hold that plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint, N.C. Gen. Stat. § 75-16.2 (1985), are of a character clearly meant to be proscribed by the Act and are therefore sufficient to state a claim for which relief can be granted under G.S. 75-1.1.

[3] Plaintiffs' second claim is for slander. Slander is commonly defined as "the speaking of base or defamatory words which tend to prejudice another in his reputation, office, trade, business, or means of livelihood." *Beane v. Weiman Co., Inc.*, 5 N.C. App. 276, 168 S.E. 2d 236 (1969). Accusations of crime or offenses involving moral turpitude or defamatory statements about a person with respect to his trade, occupation or business are slander *per se*; the injurious character of the words and special damage they have caused need not be proved. *Id.* Plaintiffs' allegations that defendant Mauney published the statements that plaintiff Talbert forged his letters of credit and that he is a drug dealer constitute allegations of slander *per se*.

The statute of limitations, N.C. Gen. Stat. § 1-54(3) (1983) bars any slander claim arising from acts committed more than one year prior to the filing of the claim. Plaintiffs have alleged some such acts to have occurred approximately eight months before the claim was filed. Slander has been pleaded sufficiently to survive the Rule 12(b)(6) motion.

In summary, the Rule 12(b)(6) dismissal of plaintiffs' claims is reversed. This cause is remanded to superior court for a determination of whether, considering the circumstances surrounding the Rule 37(d) dismissal of this case, plaintiffs are entitled to relief from the judgment pursuant to Rule 60(b).

Reversed in part; remanded in part.

Judges WHICHARD and JOHNSON concur.

WILLIAM HOWARD LONG v. CAROLYN P. FINK AND BRUCE NELSON FINK

No. 8526SC874

(Filed 6 May 1986)

Rules of Civil Procedure § 41; Limitation of Actions § 12— voluntary dismissal without prejudice—statute of limitations runs out—summary judgment for defendants proper

Summary judgment was properly granted in favor of defendants in an action arising from an automobile accident where the action was commenced on the last day before being barred by the statute of limitations; more than 90 days went by without defendant being served or plaintiff obtaining an endorsement or alias or pluries summons; a voluntary dismissal without prejudice was taken and the order specified that plaintiff could refile within one year of the order; plaintiff refiled within one year; and defendants alleged that the action was barred by the statute of limitations. The failure to obtain service, an endorsement, or an alias or pluries summons effected a discontinuance of the action under Rule 4(e) of the North Carolina Rules of Civil Procedure; the statute of limitations thereafter immediately ran its course; and the voluntary dismissal allowing plaintiff another year within which to refile the action was nugatory. N.C. Rules of App. Procedure Rule 2, N.C.G.S. 1-15(a), 1-46 and 1-52(5), N.C. Rules Civ. P. Rule 41.

APPEAL by plaintiff from *Burroughs, Judge.* Judgment entered 1 April 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 January 1986.

Plaintiff filed a complaint and had a summons issued on 1 August 1979 regarding a collision that occurred on 1 August 1976 between the vehicle driven by defendant Carolyn P. Fink and the motorcycle driven by plaintiff. That complaint (79CVS8081—hereinafter Long I) is not the basis of this appeal. Service of process

was not obtained in that action; the clerk did not endorse the summons; alias and pluries summons were not issued. On 16 May 1980, an order in that action was filed, allowing plaintiff's attorney to withdraw. On 19 May 1980, the court, on its own motion, ordered a voluntary dismissal of Long I without prejudice. This order specified plaintiff could "refile within one (1) year of the date of this order." The subject of this appeal (81CVS5082—hereinafter Long II) was commenced 15 May 1981, within the one year limitations specified in the order of voluntary dismissal of Long I and was based on the same action as Long I. Defendants answered, alleging, *inter alia*, that this action instituted by plaintiff was barred by the applicable statute of limitations. Concomitantly, defendants moved the court to dismiss the action for failure to state a claim upon which relief could be granted. On 25 February 1982, Superior Court Judge William T. Grist allowed defendants' motion and dismissed Long II, concluding that the statute of limitations had run prior to the commencement of Long II. On 2 February 1984, almost two years later, plaintiff moved the court to set aside the order of dismissal of Long II pursuant to Rule 60(b)(6), N.C. Rules Civ. P. On 3 April 1984, Judge Grist, who had previously dismissed the action on 25 February 1982, granted plaintiff's motion to set aside the order of dismissal and ordered "the file of this action [Long II] be placed in 'open' status." Almost one year later, defendants filed a motion for summary judgment, supported by an affidavit by defendants' attorney relating the procedural history of both Long I and Long II. Plaintiff filed an affidavit by his attorney in opposition to summary judgment. On 1 April 1985, Superior Court Judge Robert M. Burroughs granted summary judgment in favor of defendants, concluding plaintiff's claim was barred by the applicable statute of limitations. Plaintiff appeals.

Williams and Ward, P.A., by Robert L. Ward, for plaintiff appellant.

Hedrick, Feerick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo, for defendant appellees.

JOHNSON, Judge.

Plaintiff's sole Assignment of Error is based upon two exceptions taken to the 1 April 1985 order of summary judgment in

favor of defendants signed by Judge Burroughs. In order to prevent manifest injustice we invoke Rule 2 of the North Carolina Rules of Appellate Procedure and expand our review, ordinarily confined to consideration of only exceptions and assignments of error taken, to extend consideration to the whole record before us. Rule 2, Rule 10(a), N.C. Rules App. P.

The record reveals that procedural errors were made by both parties. We note that plaintiff could have appealed the ruling on the voluntary dismissal of Long I, although appeal at that stage was not mandatory. *West v. G. D. Reddick, Inc.*, 38 N.C. App. 370, 248 S.E. 2d 112 (1978). Plaintiff should have appealed the 25 February 1982 order of dismissal of Long II signed by Judge Grist, rather than move to have that order set aside pursuant to Rule 60(b), N.C. Rules Civ. P. Erroneous judgments may be corrected only by appeal; a motion under Rule 60 cannot be a substitute for appellate review. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E. 2d 115, *appeal dismissed and cert. denied*, 303 N.C. 319, 281 S.E. 2d 659 (1981). Further, rather than defendants' subsequent move for summary judgment, they should have appealed the order of 3 April 1984, which set aside the order of dismissal. The motion for dismissal of Long II pursuant to Rule 12(b)(6) took into consideration matters outside the complaint, namely the entire record in Long I; therefore, the 12(b)(6) motion was converted to a motion for summary judgment, *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), with the result that the subsequent summary judgment motion by defendant was improperly taken. To allow an unending series of motions for summary judgment would defeat the purpose of summary judgment procedure. *Am. Travel Corp. v. Central Carolina Bank & Trust Co.*, 57 N.C. App. 437, 440, 291 S.E. 2d 892, 894, *disc. rev. denied*, 306 N.C. 555, 294 S.E. 2d 369 (1982). Each party needlessly contributed to the creation of a procedural tangle.

Now we will address the determinative issue on this appeal, that is, whether Judge Grist erred in allowing defendants' Rule 12(b)(6) motion, dismissing plaintiff's claim with prejudice. A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint discloses that plaintiff's claim is so barred. *Collins v. Edwards*, 54 N.C. App. 180, 282 S.E. 2d 559 (1981). An action for damages for personal injury arising out of an accident between two vehicles must be commenced with-

in three years of the date on which the accident occurred. G.S. 1-15(a), 1-46, 1-52(5).

In the case *sub judice*, the record shows that plaintiff commenced Long I on 1 August 1979. The cause of action accrued 1 August 1976, hence 1 August 1979, the date of filing, was the last day the action arising out of this accident could be commenced before being barred by the applicable statute of limitations. Plaintiff commenced Long I by filing a complaint with the court in accordance with Rule 3, N.C. Rules Civ. P.

While the statute of limitations is tolled when suit is *properly* instituted, and it stays tolled as long as the action is alive, the tolling stops if the suit is discontinued by operation of law because of the plaintiff's failure to keep the action alive in an authorized manner after the original summons has lost its efficacy by not being served within the time allowed. *Ready Mix Concrete v. Thorp Sales Corp.*, 36 N.C. App. 778, 245 S.E. 2d 234 (1978). Under the provisions of Rule 4(d), N.C. Rules Civ. P., "[w]hen any defendant in a civil action is not served within the time allowed for service, the action may be continued in existence as to such defendant" by either obtaining an endorsement upon the original summons extending the time within which to accomplish service or by suing out an alias or pluries summons, as therein provided. Thus, though Long I was properly instituted on 1 August 1979, the record shows that more than ninety days thereafter went by without defendant being served and without plaintiff either obtaining an endorsement upon the original summons or suing out an alias or pluries summons. These failures effected a discontinuance of the case under the express provisions of Rule 4(e), N.C. Rules Civ. P., which reads as follows:

> When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d) [90 days], the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

Plaintiff contends that the 19 May 1980 order of voluntary dismissal of Long I without prejudice pursuant to Rule 41(a)(2),

N.C. Rules Civ. P., "gives the judge the power to reinstate the case under certain circumstances." Plaintiff argues that by specifying in the 19 May 1980 order of voluntary dismissal that the action could be refiled within one year, the judge invoked his discretionary power to override the effect of Rule 4(e), N.C. Rules Civ. P. Plaintiff, in so arguing, relies upon *Gower v. Aetna Insurance Company*, 13 N.C. App. 368, 185 S.E. 2d 722, *aff'd*, 281 N.C. 577, 189 S.E. 2d 165 (1972). Plaintiff's reliance on *Gower* is misplaced. Since *Gower*, this Court has specifically held that *Gower* does not stand for the proposition that plaintiff may be given the opportunity under Rule 41 to refile a new action within a specified time period where the previous action is barred by the statute of limitations. *Ready Mix Concrete, supra*, at 782, 245 S.E. 2d at 237. "Rule 41 does not breathe life into an action already barred by the statute of limitations." *Collins v. Edwards, supra*, at 183, 282 S.E. 2d at 560.

The action having been discontinued by operation of law on 30 October 1979, the statute of limitations having thereafter immediately run its remaining course, the judge's order of voluntary dismissal on 19 May 1980 allowing plaintiff another year within which to refile the action was nugatory. For the reasons set forth above the order appealed from in Long II granting summary judgment in favor of defendants is

Affirmed.

Judges WEBB and PHILLIPS concur.

STATE OF NORTH CAROLINA v. EVELYN GRACE HENSLEY VAUGHT

No. 8517SC1078

(Filed 6 May 1986)

1. Assault and Battery § 14.4; Burglary and Unlawful Breakings § 5.5— felonious assault—breaking or entering—sufficiency of evidence

The State's evidence was sufficient to support defendant's convictions of assault with a deadly weapon inflicting serious injury and breaking or entering where it tended to show that defendant knocked on the front door of the victim's home, thrust a poinsettia at the victim when she opened the door and

then shot her four times with a .22 caliber pistol, and that the victim saw defendant's hand inside her front door.

2. **Criminal Law § 138.21— felonious assault—especially heinous, atrocious or cruel—insufficient evidence**

Evidence that defendant went to the victim's house and shot her four times, leaving her seriously wounded, was insufficient to support the court's finding as an aggravating factor that the assault was especially heinous, atrocious or cruel. N.C.G.S. § 15A-1340.4(a)(1)f.

3. **Criminal Law § 138.24— felonious assault—infirmity of victim improper aggravating factor**

The trial court erred in finding as an aggravating factor for felonious assault that the victim was infirm where the evidence showed that the victim was wearing a heavy cast from her toes to her knee and could walk only with the assistance of crutches, that defendant shot the victim four times after she opened her front door, and that she would have had no opportunity without the cast to escape. N.C.G.S. § 15A-1340.4(a)(1)j.

4. **Criminal Law § 138.29— felonious assault—threat to others improper aggravating factor**

The trial court erred in finding as a nonstatutory aggravating factor for felonious assault that defendant poses a dangerous threat to others where there was no evidence that defendant poses a greater threat to the public than any other defendant convicted of this offense.

Judge PARKER concurring in result.

APPEAL by defendant from *Hight, Judge.* Judgment entered 14 June 1985 in Superior Court, STOKES County. Heard in the Court of Appeals 5 February 1986.

The defendant was tried for assault with a deadly weapon with intent to kill inflicting serious injury and for breaking or entering. The State's evidence at trial tended to show that the defendant was involved in a romantic relationship with Pettyjohn. Pettyjohn ended that relationship in December 1983 and began a relationship with the victim, Shirley Slater. The defendant continued to communicate with Pettyjohn and the victim through numerous phone calls and other contacts. Pettyjohn did not return the defendant's phone calls.

On 5 December 1984 the victim was awakened in her home in King, North Carolina at approximately 7:30 a.m. by a visitor holding a poinsettia outside her door. Thinking this was a floral delivery she opened the door. When she was handed the plant the victim realized that her visitor was defendant whom she had met

and had seen on several occasions. Defendant then shot the victim four times with a .22 caliber pistol. The victim testified that she was absolutely certain that defendant was her assailant.

Defendant presented evidence of an alibi. She was found guilty as charged and sentenced to 20 years for the assault charge and ten years for breaking or entering. The defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General K. D. Sturgis, for the State.

Greeson and Page, by Michael R. Greeson, Jr., for defendant appellant.

HEDRICK, Chief Judge.

[1] In her first assignment of error defendant argues that the trial court erroneously denied her motions to dismiss at the close of the State's evidence and at the close of all the evidence. The State presented unequivocal eyewitness testimony showing that defendant went to the victim's home, knocked on the front door, thrust a poinsettia at the victim and then shot her four times with a .22 caliber pistol. The eyewitness also testified that she saw defendant's hand inside her front door. This evidence is clearly sufficient to permit a rational jury to find defendant guilty beyond a reasonable doubt of assault with a deadly weapon inflicting serious injury and of breaking or entering. The trial court properly denied defendant's motions to dismiss.

Defendant's assignments of error 3 through 12, based upon exceptions 1-13, 17-19, 21-22, 26, 28-31 and 37 relate to the admission and exclusion of evidence. We have carefully examined each of these assignments of error and the exceptions upon which they are purportedly based, and we find no error in the admission or exclusion of any evidence challenged by these exceptions.

We hold that defendant had a fair trial free of prejudicial error.

Defendant next contends that the trial court erred in finding three factors in aggravation at sentencing: that the offense was

especially heinous, atrocious or cruel, that the victim was physically infirm, and that defendant poses a dangerous threat to others.

[2] Defendant first argues that the facts of this case reveal nothing not normally present in the offense of assault with a deadly weapon with intent to kill inflicting serious injury which would support the court's finding that this crime was especially heinous, atrocious or cruel under G.S. 15A-1340.4(a)(1)f. We agree.

As this Court stated in *State v. Medlin*, 62 N.C. App. 251, 253, 302 S.E. 2d 483, 485 (1983):

> [W]e recognize that *any* assault with a deadly weapon with intent to kill inflicting serious injury falls within that classification of offenses which are *mala in se*; thus, such an assault has inherent characteristics of depravity of mind. Heinous, atrocious and cruel are terms, words, or expressions which are significantly synonymous, all reflecting the underlying characteristic of depravity. It must, therefore, be assumed that in setting the presumptive sentence, the General Assembly understood the depraved nature of such an assault; and that in allowing evidence of these inherent characteristics of the offense to be used as a factor in aggravation in sentencing, the legislative intent was that the question be narrowed to whether assault was especially heinous, atrocious or cruel; and further, that the use of the word, "especially" was not merely tautological. (Emphasis in original.)

The Court in *Medlin* held that evidence that the defendant, without provocation, shot the victim five times with a .22 caliber pistol and fled without rendering her assistance was not sufficient to permit the trial court to find that the crime was especially heinous, atrocious or cruel. The Court noted that the evidence in that case did not reflect the requirement of excessive brutality beyond that present in any assault with a deadly weapon with intent to kill inflicting serious injury. In the present case the evidence shows that defendant, without provocation, went to the victim's house and shot her four times with a .22 caliber pistol, leaving her seriously wounded. We believe this evidence was not sufficient under *Medlin* to support the court's finding that the assault was especially heinous, atrocious or cruel.

[3] Defendant next argues that there was insufficient evidence to support the court's finding that the victim was infirm under G.S. 15A-1340.4(a)(1)j. The cases discussing this factor indicate that where the victim's physical or mental condition did not render him or her more vulnerable than the average person to the crime in question this factor may not be found in aggravation. *See State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437 (1984); *State v. Lewis*, 68 N.C. App. 575, 315 S.E. 2d 766, *review denied*, 312 N.C. 87, 321 S.E. 2d 904 (1984). In the present case the evidence shows that at the time of the offense the victim was wearing a heavy cast from her toes to her knee and could walk only with the assistance of crutches. The evidence also indicated that immediately after the victim opened her front door defendant shot her four times and that she had no opportunity, with or without a cast, to escape. The trial court improperly found that the victim was infirm.

[4] Finally, defendant argues that the court erroneously found as an aggravating factor that defendant poses a dangerous threat to others. This factor is not among those enumerated in the Fair Sentencing Act. G.S. 15A-1340.4(a) states in part that "[i]n imposing a prison term, the judge . . . may consider any aggravating and mitigating factors that he finds are proved by a preponderance of the evidence, and that are reasonably related to the purposes of sentencing, whether or not such aggravating or mitigating factors are set forth herein . . . ." One of the purposes of sentencing is "to protect the public by restraining offenders." G.S. 15A-1340.3. However, we must assume that in setting the presumptive sentence the General Assembly was aware that a person convicted of assault with a deadly weapon with intent to kill inflicting serious injury is a person who is dangerous to others. There was no evidence presented that defendant in this case poses a greater threat to the public than any other defendant convicted of this offense. The trial court erred in finding this factor in aggravation. The case must be remanded for sentencing.

No error in trial, remanded for sentencing.

Judge WEBB concurs.

Judge PARKER concurs in the result.

Judge PARKER concurring in result.

I concur in the result only based on footnote one to *State v. Blackwelder*, 309 N.C. 410, 306 S.E. 2d 783 (1983). In the instant case, the victim was shot four times at close range. The victim received two wounds in the heart, one in the neck and one in the back. One of the bullets that entered her heart, passed through her stomach and lodged in her colon. "When proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious or cruel." *Blackwelder*, at 413, n. 1, 306 S.E. 2d at 786, n. 1.

Additionally, the victim did not receive medical attention for approximately two and a half hours. As the result of the gunshot wound to the heart, the victim has a permanent heart condition. Another one of the shots resulted in paralysis of one arm.

Applying the standard stated in *State v. Medlin*, 62 N.C. App. 251, 302 S.E. 2d 483 (1983), which was approved by the Supreme Court in *Blackwelder*, to the facts of the case *sub judice*, I am of the opinion that the trial court did not err in finding as an aggravating fact that the crime was especially heinous, atrocious or cruel.

STATE OF NORTH CAROLINA v. LARRY OSBORNE JENKINS

No. 8526SC1109

(Filed 6 May 1986)

1. **Automobiles and Other Vehicles § 117.1— speeding—evidence not objected to—sufficient for jury**

Defendant's motions to dismiss a speeding charge were properly denied where defendant had not objected to the officer's opinion as to speed or to the introduction of the radar measurement but sought to discredit the evidence. The weight and credibility of the evidence are properly left to the jury.

2. **Automobiles and Other Vehicles § 117.2— speeding—instruction implying radar alone sufficient to convict—new trial**

Defendant was entitled to a new trial on a speeding charge where the jurors asked whether defendant could be convicted on a radar reading alone and

the court's response implied that proof by either radar or observation would be sufficient. N.C.G.S. 8-50.2(a) provides that evidence of radar speed measurement is admissible only to corroborate testimony based on visual observation.

APPEAL by defendant from *Griffin, Kenneth A., Judge.* Judgment entered 10 May 1985 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 10 March 1986.

Defendant was charged in a traffic citation with operating a motor vehicle at a speed of 71 miles per hour in a 55 mile per hour speed zone. He was convicted in the district court and appealed to the superior court. At trial in superior court, the State offered evidence tending to show that on 20 January 1984 Mecklenburg County Police Officer John McElwee observed the defendant's automobile travelling on Billy Graham Parkway at a speed which, in the officer's opinion, approximated 70 miles per hour. The posted speed limit was 55 miles per hour. Using a K55 moving radar unit, Officer McElwee clocked the speed of defendant's automobile at 71 miles per hour. Through his own testimony and that of an expert witness, defendant offered evidence tending to show that Officer McElwee had not had sufficient opportunity to observe the vehicle in order to form an opinion as to its speed. Other evidence was offered to dispute the accuracy of the speed measurement obtained by Officer McElwee in his use of the radar unit.

Defendant was convicted of exceeding the speed limit and was sentenced to an active two day term of imprisonment. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane P. Gray, for the State.

William D. McNaull, Jr. for defendant appellant.

MARTIN, Judge.

In this appeal, defendant contends that the State's evidence was insufficient to overcome his motions to dismiss and that the trial court committed error in responding to a question by the jurors. We find merit in his latter contention and conclude that he is entitled to a new trial.

[1] In his first and second arguments, defendant contends that Officer McElwee had insufficient opportunity to form an opinion

as to the speed of defendant's automobile and that the evidence was insufficient to prove that the radar unit operated by the officer was a reliable indicator of the speed of defendant's vehicle under the facts of this case. Therefore, he contends, the trial court erred in denying his motions to dismiss. We disagree.

Defendant did not object to Officer McElwee's opinion as to speed, nor did he object to the introduction of the radar measurement of the speed of his vehicle. Instead, he sought to discredit the evidence. Thus, his argument is actually addressed to the weight and credibility of the State's evidence, which are properly left to the jury for resolution.

> The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; *contradictions and discrepancies are for the jury to resolve and do not warrant dismissal;* and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion.

State v. Powell, 299 N.C. 95, 99, 261 S.E. 2d 114, 117 (1980). Officer McElwee's testimony, considered in the light most favorable to the State, was sufficient to take the case to the jury. Defendant's motions for dismissal were properly overruled.

[2] Defendant's remaining assignments of error are directed to instructions which the court gave in response to a question by the jury. The record indicates that during jury deliberations, the jurors informed the court, through the bailiff, that they desired an answer to the following question: "Can you be convicted of speeding on a radar reading alone?" Defendant's counsel requested that the jurors be instructed that they could consider the results of the radar measurement only to corroborate Officer McElwee's testimony, and that the radar results, standing alone, were insufficient for conviction. The court declined to give the requested instructions and returned the jury to the courtroom where the following colloquy took place:

> THE COURT: Members of the Jury, the bailiff advised me you have a question. What is it, please?

A JUROR: Do you want me to ask it? Okay. My question is, can you use evidence as the radar detector as evidence of proof of speed? Does he have to be observed doing that speed, or can the radar detection be sole proof?

ANOTHER JUROR: For a conviction.

THE FIRST JUROR: For a conviction.

THE COURT: Put another way, are you saying that just set the machine out in the street and take pictures of cars going by and would that be competent? Is that another way of putting what you are saying?

THE FIRST JUROR: What I am saying is, on a moving record, this is moving, this isn't set up on the side of the street.

THE COURT: Uh-huh.

THE JUROR: Is that allowed as sole evidence that he was speeding?

THE COURT: Sole evidence?

THE JUROR: Yes. If we dispute whether it was visually seen or not, to convict.

THE COURT: The best way I think I can answer the question is, in speeding cases that I have presided over, the State's evidence has been seen by observation of an officer, by radar and by clocking. In this case, there is no evidence of clocking whatsoever, unless you heard it and I didn't.

ANOTHER JUROR: Sir?

THE COURT: The State has offered evidence tending to show that he used a K55 unit and that he, the officer, used observation. The defendant, on the other hand, said and offered evidence tending to show, and he had no burden of proof whatsoever, said that the K55 unit wouldn't operate under this situation properly and that the officer didn't have time to observe. The State says he did, and the defendant says he didn't, but you have observation and radar. The State is saying they have proved both. The defendant is saying they have proved neither. . . .

The Court then reiterated its earlier instruction that it was for the jury to decide what the facts were and whether the defendant was guilty or not guilty.

G.S. 8-50.2(a) provides:

> The results of the use of radio microwave or other speed-measuring instruments shall be admissible as evidence of the speed of an object in any criminal or civil proceeding *for the purpose of corroborating the opinion of a person* as to the speed of an object based upon the visual observation of the object by such person. (Emphasis added.)

By the express provisions of the statute, evidence of radar speed measurement is admissible only to corroborate testimony based on visual observation. 1 Brandis on North Carolina Evidence § 86, at 90 n. 25 (2d rev. ed. Supp. 1983). "Corroborating evidence is supplementary to that already given and tending to strengthen and confirm it." *State v. Lassiter*, 191 N.C. 210, 212-13, 131 S.E. 577, 579 (1926). "The approved definition of the verb 'corroborate' is '(1) To make strong or to give additional strength to; to strengthen. (2) To make more certain; to confirm; to strengthen.' " *State v. Case*, 253 N.C. 130, 135-36, 116 S.E. 2d 429, 433 (1960), *cert. denied*, 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961) (*quoting Lassiter v. Seaboard Air Line Ry.*, 171 N.C. 283, 88 S.E. 335 (1916)). Thus, in our view, the General Assembly has provided that the speed of a vehicle may not be proved by the results of radar measurement alone and that such evidence may be used only to corroborate the opinion of a witness as to speed, which opinion is based upon actual observation.

From the question posed by the jurors, it is apparent to us that at least some of them had doubts about the sufficiency of Officer McElwee's observation of defendant's automobile to form an adequate basis for his opinion as to its speed, but were willing to convict if the radar measurement, standing alone, was sufficient proof. The court's response implied that proof by either means would be sufficient, standing alone. To the extent that the response indicated that defendant could be convicted solely upon the radar measurement of his speed, it was incorrect. The court should have instructed the jury of the limited purpose for which the results of the radar measurement could be considered. Defendant is entitled to a new trial.

New trial.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. BOBBY RAY RAGLAND

No. 859SC782

(Filed 6 May 1986)

1. **Criminal Law §§ 86.1, 162— convictions more than ten years old—necessity for objection**

Since evidence of defendant's convictions more than ten years old was not *forbidden* by N.C.G.S. 8C-1, Rule 609, it was incumbent upon defendant to enter a timely objection to such evidence in order to present the question of its admissibility for review on appeal.

2. **Criminal Law § 138.34— alcoholism—reduced culpability mitigating factor—finding not required**

The trial court was not required to find as a mitigating factor for hit and run personal injury that defendant was suffering from a physical condition, alcoholism, which was insufficient to constitute a defense but significantly reduced his culpability since (1) evidence of defendant's convictions of driving while impaired and of his consumption of alcohol on the day of the crime was insufficient to support a finding that defendant suffers from alcoholism, and (2) although substantial evidence of alcoholism could support a mitigating factor of reduced culpability, it would not compel such a finding.

APPEAL by defendant from *Barnette, Judge*. Judgment entered 14 March 1985 in Superior Court, VANCE County. Heard in the Court of Appeals 6 January 1986.

Defendant was charged, tried and convicted in District Court of driving while impaired. From judgment imposed defendant appealed to Superior Court for trial *de novo*. In Superior Court the district attorney filed an information charging defendant with a related offense arising out of the driving while impaired charge, to wit: hit and run personal injury. Pursuant to N.C.G.S. 15A-642(c) defendant waived "the finding and return" of a bill of indictment and agreed to be tried upon the information accusing him of the felony of hit and run personal injury. The charges were consolidated for trial. Upon his plea of not guilty, the jury returned a verdict of guilty as to both charges. From judgments

sentencing him to imprisonment within the Department of Correction for a term of 5 years on the hit and run personal injury charge and 12 months on the driving while impaired charge (to run consecutively with the 5 year sentence), defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General J. Mark Payne, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

JOHNSON, Judge.

[1] By his first Assignment of Error, defendant contends the court erred in allowing the State to impeach defendant's credibility by the use of prior convictions more than 10 years old where (a) the State failed to give written notice of its intent to use such evidence and (b) the court's failure to determine that the probative value of such evidence substantially outweighed its prejudicial effect as required by Rule 609, N.C. Rules Evid. Rule 609(a) and (b) reads, in pertinent part:

> (a) *General Rule.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime punishable by more than 60 days confinement shall be admitted if elicited from him or established by public record during cross-examination or thereafter.
>
> (b) *Time Limit.* Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 609, N.C. Rules Evid.

On cross-examination defendant was asked about his prior convictions. In addition to a trespass and assault with a deadly weapon conviction, defendant testified to specific traffic convictions in 1968, 1972, 1973, 1980, and 1983. Defendant lodged no objection to any of the questions nor moved to strike any of the answers. It is a well settled principle that, ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection and its admission presents no question for review on appeal unless the evidence is forbidden by statute, in the furtherance of public policy. *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534, *cert. denied*, 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970); *State v. Porter*, 272 N.C. 463, 158 S.E. 2d 615 (1968). *See also* 1 Strong's N.C. Index 3d, *Appeal and Error* sec. 30 (1976) and cases cited therein. We deem that defendant was required to lodge an objection to the evidence in order to present its admission as a question on appeal.

Rule 609 does not render as *forbidden* evidence of a conviction where a period of more than 10 years has elapsed since the date of conviction or from the date of defendant's release from confinement imposed for the conviction, whichever is the later date. To the contrary, the evidence is clearly admissible upon (a) the State giving written notice to the defendant and (b) the court determining that the probative value of the evidence substantially outweighs its prejudicial effect. It seems clear that the legislative intent behind Rule 609 is not to *forbid* the admission of evidence of a prior conviction where a period of more than 10 years has elapsed since the date of conviction or the date of defendant's release from confinement, but rather, as affecting admissibility, to balance the prejudicial effect of the remoteness of the conviction against the probative value of the conviction as evidence.

Since the introduction of evidence of defendant's convictions in 1968, 1972 and 1973 was not *forbidden* by statute, it was incumbent upon defendant to timely object in order to present the question of its admissibility for review on appeal. Defendant's failure to object constitutes a waiver of the right to do so, and its admission is not a proper basis for appeal. *See State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973); *State v. Warren*, 236 N.C. 358, 72 S.E. 2d 763 (1952); *State Bar v. Combs*, 44 N.C. App. 447,

261 S.E. 2d 207 (1980); 1 Strong's N.C. Index 3d, *supra.* Defendant's first Assignment of Error is not properly before us.

[2] By his second and final Assignment of Error defendant contends the court erred in sentencing him on the hit and run personal injury charge to a term in excess of the presumptive sentence of two years. Specifically, defendant contends the court erred for failure to find the statutory mitigating factor that defendant was suffering from a physical condition that was insufficient to constitute a defense, but significantly reduced his culpability. The court must find a particular mitigating factor when the supporting evidence is uncontradicted, substantial and manifestly credible. *State v. Jones*, 309 N.C. 214, 218-19, 306 S.E. 2d 451, 455 (1983). Defendant maintains the record contains uncontradicted and credible evidence to show that defendant suffers from alcoholism. Defendant points to the following evidence in the record in support of the allegation that defendant suffers from alcoholism: defendant was convicted of driving while intoxicated in 1972; defendant was convicted of driving while impaired in 1983; and several witnesses, including defendant himself, testified that defendant either appeared "highly intoxicated" on 10 December 1983, the day the offense occurred, or was known to have consumed alcohol on 10 December 1983.

We note that evidence of prior convictions for driving under the influence could have been properly considered as an aggravating factor in sentencing defendant for hit and run personal injury, impairment not being an element of the offense. *See State v. Mitchell*, 62 N.C. App. 21, 29-30, 302 S.E. 2d 265, 271 (1983). We hold the evidence in the record is insufficient to support a finding that defendant suffers from the disease of alcoholism. Assuming *arguendo* the evidence was sufficient to establish that defendant suffers from alcoholism, the court would not have committed reversible error by failing to find the statutory mitigating factor as maintained by defendant. In *State v. Bynum*, 65 N.C. App. 813, 310 S.E. 2d 388 (1984), the defendant asserted that he was a heroin addict and that this addiction established as a mitigating factor that defendant was suffering from a physical condition that was insufficient to constitute a defense, but significantly reduced his culpability. The court concluded that "[d]rug addiction is not *per se* a statutorily enumerated mitigating factor" and although it "could perhaps be found to mitigate the offense" under the rubric

of the enumerated factor, the evidence did not compel such a finding. *Id.* at 815, 310 S.E. 2d at 390. Applying *Bynum*, we conclude that although substantial evidence of alcoholism could support the above mitigating factor, it does not compel such a finding.

No error.

Chief Judge HEDRICK and Judge PHILLIPS concur.

STATE OF NORTH CAROLINA v. RAYFIELD TAYLOR

No. 8520SC1229

(Filed 6 May 1986)

1. **Constitutional Law § 40— counsel on appeal—compliance with Anders v. California**

Defendant's counsel satisfied the requirements of *Anders v. California*, 386 U.S. 738, in a prosecution for robbery with a dangerous weapon by submitting a statement that he had found no error but that the case was submitted for the court's review; sending defendant a copy of the record, brief and transcript; informing defendant of his right to file written arguments on his own behalf; and providing defendant with the address of the Clerk of the Court of Appeals.

2. **Robbery § 4.5— armed robbery—evidence sufficient**

There was sufficient evidence to convict defendant of robbery with a dangerous weapon where there was substantial evidence that Norbert Melton committed each essential element of the offense and that defendant aided Melton by purchasing a ski mask used to conceal Melton's identity, by accompanying Melton to the vicinity of the robbery, and by remaining sufficiently close to render assistance to Melton in making his escape.

3. **Robbery § 5.2— armed robbery—instructions sufficient**

In a prosecution for robbery with a dangerous weapon, the trial court adequately and correctly explained to the jury the necessary elements which the State was required to prove beyond a reasonable doubt and the instructions complied with N.C.G.S. 15A-1232. N.C. Rules of App. Procedure Rule 10(b)(2).

APPEAL by defendant from *Freeman, Judge*. Judgment entered 26 August 1985 in Superior Court, STANLY County. Heard in the Court of Appeals 9 April 1986.

Defendant was tried upon a bill of indictment charging him with robbery with a dangerous weapon. The jury returned a ver-

dict of guilty and the defendant was sentenced to imprisonment for a term of fourteen years as a committed youthful offender pursuant to G.S. Chapter 148, Article 3B. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David R. Minges, for the State.

Charles B. Lefler, Jr. for defendant appellant.

MARTIN, Judge.

[1] In the record on appeal, filed in this Court on 12 November 1985, defendant's counsel made three assignments of error: (1) the denial of defendant's motions to dismiss made at the close of the State's evidence and at the close of all the evidence; (2) the trial court's jury instructions; and (3) the denial of the defendant's post-verdict motions. In the brief, filed by defendant's counsel on 3 January 1986, each of the foregoing assignments of error was presented for our review, but no argument was made in support thereof. Instead, counsel made the following statement:

> Counsel for Defendant-Appellant has made a thorough and complete examination of the record in this case, and has made what he believes to be a thorough and complete research of the law applicable in this case, and having done so, can find no error. Counsel presents this case to the Court so that in its discretion the Court can review the record to determine if prejudicial error was made.

The record before us discloses that on 16 January 1986, defendant's counsel wrote a letter to defendant advising him that, in the opinion of counsel, no prejudicial error occurred at his trial. Counsel transmitted a copy of the record on appeal, a copy of the brief, and a copy of the transcript; informed defendant of his right to file written arguments in his own behalf; and provided him with the address of the Clerk of this Court. Defendant has filed nothing with this Court. We hold that defendant's counsel has satisfied the requirements imposed upon him by *Anders v. California*, 386 U.S. 738, 18 L.Ed. 2d 493, 87 S.Ct. 1396, *reh'g denied*, 388 U.S. 924, 18 L.Ed. 2d 1377, 87 S.Ct. 2094 (1967). *See State v. Kinch*, 314 N.C. 99, 331 S.E. 2d 665 (1985). In order for this Court to fulfill the duty imposed upon us by *Anders*, we must examine the record before us to determine whether any of the

legal issues raised in the brief or appearing from the record have possible merit or whether the appeal is wholly frivolous.

[2] At trial, the State offered evidence tending to show that on the evening of 28 January 1985, Norbert Melton went to Smith's Food Store in Aquadale, North Carolina, pointed a sawed-off shotgun at an employee of the store, Sylvia McIntyre, and demanded that she give him the money from the cash drawer. She complied, giving him approximately $1,900.00. Ms. McIntyre recognized Melton even though he was wearing a ski mask. On 13 February 1985, Detective Conner of the Stanly County Sheriff's Department interviewed the defendant concerning the robbery. After signing a "Waiver of Rights" form, defendant made a statement in which he related that on 28 January 1985, he, Melton and Taris Colson were at Colson's house when Melton suggested that they rob a store. Shortly thereafter, Colson got a sawed-off shotgun from his bedroom and handed it out of a bathroom window to Melton. The three young men then got into Colson's automobile and drove to a store, where defendant bought a ski mask with money provided by Melton. They then drove to Smith's Food Store in Aquadale and let Melton, who was wearing the ski mask and armed with the shotgun, out of the car. Colson told Melton where they would pick him up after the robbery. Colson and defendant drove to the pre-arranged pickup point and waited; a few minutes later Melton ran to the car and got in. He had a paper bag containing money. Defendant did not get any of the money.

Defendant testified in his own behalf. He denied being with Melton or Colson on 28 January 1985 and denied involvement, in any respect, in the robbery. He admitted making the statement to Det. Conners, but asserted that he had "just made it all up" from ideas and suggestions provided by the officer.

The first and third assignments of error, as set forth in the record on appeal and stated in the brief, challenge the sufficiency of the evidence to sustain defendant's conviction of robbery with a dangerous weapon. Evidence is sufficient to sustain a conviction if, when viewed in the light most favorable to the State, there is substantial evidence to support each element of the offense. *State v. Greer*, 308 N.C. 515, 302 S.E. 2d 774 (1983). "*Substantial evidence* is such relevant evidence as a reasonable mind might ac-

cept as adequate to support a conclusion." *Id.* at 519, 302 S.E. 2d at 777, *quoting State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). In the present case, there is substantial evidence that Norbert Melton committed each essential element of the offense of robbery with a dangerous weapon. There is also substantial evidence, when viewed in the light most favorable to the State, that defendant aided Melton in the commission of the armed robbery by purchasing a ski mask used to conceal Melton's identity and by accompanying Melton to the vicinity of the robbery and remaining sufficiently close to the scene to render assistance to Melton in making the escape after commission of the offense. As such, the evidence was sufficient to support the defendant's conviction as an aider and abettor. *See State v. Davis*, 301 N.C. 394, 271 S.E. 2d 263 (1980). The State having established the commission of the robbery, the *corpus delicti*, by independent evidence, the defendant's inculpatory statement is sufficient, standing alone, to constitute substantial evidence of his connection to the robbery. *State v. Thomas*, 17 N.C. App. 152, 193 S.E. 2d 297 (1972). We hold the first and third assignments of error to be of such inconsiderable merit as to be "wholly frivolous." *See State v. Kinch*, *supra.*

[3] The second assignment of error challenges unspecified portions of the trial court's instructions to the jury. We note that no objection was made at trial to the court's instructions; therefore, defendant is precluded from assigning error thereto, Rule 10(b)(2), N.C.R. App. Proc.; *State v. Fennell*, 307 N.C. 258, 297 S.E. 2d 393 (1982). Nevertheless, in view of the requirements of *Anders*, we have carefully reviewed the charge in its entirety to determine if the court committed "plain error" therein. *See State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). We conclude that the court adequately and correctly explained to the jury the necessary elements which the State was required to prove beyond a reasonable doubt in order to prove the defendant's guilt, and that the instructions complied with the provisions of G.S. 15A-1232 (amended 1985 Session Laws, Chap. 537, sec. 1, effective 1 July 1985). The assignment of error is wholly frivolous.

We have examined the entire record, including the court's ruling regarding the admissibility of defendant's inculpatory statement. We find that no issues of arguable merit have been presented or appear from the record, and conclude that the ap-

peal is wholly frivolous. *Anders v. California, supra.* Having so concluded, we proceed to hold that, in the defendant's trial, there is no error. *Id.*

No error.

Chief Judge HEDRICK and Judge WELLS concur.

ROGER SWINDELL AND WIFE, BETTY L. SWINDELL v. LARRY OVERTON, SUBSTITUTE TRUSTEE, THOMAS EDISON CAHOON AND WIFE, JULIA JONES CAHOON, WALTER G. CREDLE AND WIFE, DONNA S. CREDLE

No. 852SC1010

(Filed 6 May 1986)

1. **Usury § 1— interest exceeding amount allowed by law—corrupt intent as matter of law**

Evidence of a lender's good intentions is not relevant to the issue of "corrupt intent" in determining whether a loan was a usurious transaction. Rather, corrupt intent was present as a matter of law where the agreed upon interest exceeded that allowed by law.

2. **Usury § 5— forfeiture of interest for usury**

Where a usurious rate of interest has been charged by the lender but interest on the loan was not actually paid at the usurious rate, the borrower was entitled to recover only the amount of interest paid rather than double the interest. N.C.G.S. § 24-2.

APPEAL by defendants Thomas Edison Cahoon and Julia Jones Cahoon from *Brown, Judge.* Judgment entered 1 May 1985 in Superior Court, HYDE County. Heard in the Court of Appeals 11 February 1986.

Plaintiffs entered a loan agreement with defendants Thomas and Julia Cahoon (hereafter defendants) which evidenced, in part, a loan of $30,000 "together with interest thereon at the rate of nine and three-quarters per cent (9¾%) . . . per annum from October 14, 1978." This loan was secured by a forty-two acre tract of land in Hyde County through an assignment to defendants of an existing note and deed of trust on this property from plaintiffs to Wachovia Bank and Trust Company.

Plaintiffs defaulted in their obligation to repay defendants under the terms of the loan agreement, and defendants requested that the substitute trustee foreclose the deed of trust securing the note to Wachovia Bank and Trust Company which had previously been assigned to them. Defendants received payment in full for the $30,000 loan plus interest of $3,080 out of the proceeds from the foreclosure sale.

Plaintiffs brought this action alleging, *inter alia*, that defendants had charged a usurious rate of interest on the $30,000 loan and that plaintiffs had actually paid defendants a usurious rate of interest on this loan. The court concluded as a matter of law that the loan was a usurious transaction and only submitted to the jury the question of how much interest plaintiffs had paid to defendants. The jury found that plaintiffs had paid $3,080 in interest. The court then held that plaintiffs were entitled to recover twice this amount pursuant to N.C. Gen. Stat. 24-2. From a judgment awarding plaintiffs $6,160, defendants appeal.

J. Michael Weeks, P.A., by J. Michael Weeks, and Rodman, Holscher and Francisco, by Edward N. Rodman, for plaintiff appellees.

Mitchell S. McLean for defendant appellants.

WHICHARD, Judge.

[1] Defendants contend the court erred in concluding as a matter of law that the loan was a usurious transaction. Specifically, they contend only that the court could not properly hold as a matter of law that the element of "corrupt intent" existed.

> It is well-established in North Carolina that the elements of usury are a loan or forbearance of money, an understanding that the money loaned shall be returned, payment or an agreement to pay a rate of interest greater than that allowed by law, and a corrupt intent to take a greater return than that allowed by law for the use of money loaned.

Auto Supply v. Vick, 303 N.C. 30, 37, 277 S.E. 2d 360, 366 (1981).

> The corrupt intent required to constitute usury is simply the intentional charging of more for money lent than the law allows. . . . Where the lender intentionally charges the borrower a greater rate of interest than the law allows and his

> purpose is clearly revealed on the face of the instrument, a corrupt intent to violate the usury law on the part of the lender is shown. . . . And where there is no dispute as to the facts, the court may declare a transaction usurious as a matter of law. [Citations omitted.]

Kessing v. Mortgage Corp., 278 N.C. 523, 530, 180 S.E. 2d 823, 827-28 (1971).

> [T]he corrupt intention which is required by the line of authority anchored by *Kessing* is not that the offender intended to violate the usury laws. The intent which is required is merely the intention to take the interest which is called for in the loan or forbearance agreement. In the event that the agreed upon interest exceeds that allowed by law under the particular circumstances of the case, the requisite usurious intention exists.

Auto Supply, supra, 303 N.C. at 47, 277 S.E. 2d at 371.

Defendants contend that the court could not properly conclude as a matter of law that the element of "corrupt intent" existed because there was evidence showing defendants' good intentions in making this loan, *viz*, that plaintiff Roger Swindell and defendant Thomas Cahoon were friends and defendants were trying to help plaintiffs. However, under *Kessing* and *Auto Supply*, evidence of a lender's good intentions is not relevant to the issue of "corrupt intent." *See Kessing, supra*, 278 N.C. at 530, 180 S.E. 2d at 827; *Auto Supply, supra*, 303 N.C. at 47, 277 S.E. 2d at 371. Rather, corrupt intent is present where the agreed upon interest exceeds that allowed by law. *Auto Supply, supra*, 303 N.C. at 47, 277 S.E. 2d at 371. This assignment of error is therefore overruled.[1]

1. We note that the "PERSONAL NOTE AND AGREEMENT" is dated 14 October 1978 and provides for payment of the agreed upon interest from 14 October 1978 until paid. The document also recites, however, that it was executed on 19 April 1979. The complaint alleges that the document was executed on 19 April 1979 and provides for payment of interest from 14 October 1978. Defendants admit these allegations in their answer. Defendant Thomas Cahoon testified that the parties entered the agreement in October 1978.

On 14 October 1978 the applicable law restricted interest on a loan to "[e]ight percent (8%) per annum where the principal amount is fifty thousand dollars ($50,000) or less and is secured by a first mortgage or first deed of trust on real

[2] Defendants next contend the court erred by awarding plaintiffs, under N.C. Gen. Stat. 24-2, double the amount of interest paid. We agree.

Given our disposition of the first issue, we assume when considering defendants' second contention that the maximum allowable interest rate was 8% per annum as mandated by N.C. Gen. Stat. 24-1.1 (1977 Cum. Supp.) prior to its amendment in 1979.

N.C. Gen. Stat. 24-2 provides, in pertinent part:

> The taking, receiving, reserving or charging a greater rate of interest than permitted by this chapter or other applicable law, either before or after the interest may accrue, when knowingly done, shall be a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or his legal representatives or corporation by whom it has been paid, may recover back twice the amount of interest paid in an action in the nature of action for debt.

Under this provision only where a usurious rate of interest has been paid by the borrower, rather than merely charged by the lender, may the borrower recover double the interest. *Kessing, supra,* 278 N.C. at 532, 180 S.E. 2d at 828-29. If a usurious interest rate has been charged but not actually paid, the penalty is forfeiture of the entire interest paid; the borrower is not allowed to recover double the interest. *Id.*

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property . . . . N.C. Gen. Stat. 24-1.1 (1977 Cum. Supp.). Effective 12 March 1979, however, the General Assembly amended N.C. Gen. Stat. 24-1.1 to allow parties to contract in writing for the payment of interest at "any rate agreed upon by the parties where the principal amount is more than twenty-five thousand dollars ($25,000)." 1979 N.C. Sess. Laws, ch. 138.

The parties neither litigated below nor raised and argued on appeal the question of whether they entered the loan agreement before or after the effective date of the 1979 amendment to N.C. Gen. Stat. 24-1.1. They have assumed, in the trial court and on appeal, that the law applicable on 14 October 1978 governs. Our review is limited to questions presented in the briefs. N.C. R. App. P. 28(a); *see Harris v. Harris,* 307 N.C. 684, 690-91, 300 S.E. 2d 369, 373-74 (1983) ("when a party fails to raise an appealable issue, the appellate court will generally not raise it for the party"). Defendants have argued under this assignment of error only the issue of "corrupt intent," and we thus have passed upon that issue only.

The jury here found that plaintiffs had paid a total of $3,080 in interest on the $30,000 loan. Interest on this loan began to accrue at 9¾% per annum from 14 October 1978. On 3 November 1980 the substitute trustee disbursed to defendants $30,000 in principal and $3,080 in interest from the foreclosure proceeds.

Interest of $3,080 on a $30,000 loan of over two years duration is far below both the stated interest rate of 9¾% per annum and the allowable legal maximum of 8% per annum under N.C. Gen. Stat. 24-1.1 (1977 Cum. Supp.). The evidence shows that the substitute trustee apparently miscalculated the interest on this loan when disbursing the foreclosure sale proceeds. Presumably because of this error, interest on the loan was not actually paid at a usurious rate. Plaintiffs thus were only entitled to recover the amount of interest paid, or $3,080, rather than double the interest, or $6,160.

Accordingly, we affirm the judgment except insofar as it awards plaintiffs double the interest actually paid on the loan. The judgment is vacated insofar as it provides that plaintiffs recover $6,160, or twice the amount of usurious interest which they paid. *See Kessing* at 536, 180 S.E. 2d at 831. The cause is remanded for modification of the judgment to provide, instead, that plaintiffs recover the sum of $3,080, the amount of interest actually paid. *See id.*

Affirmed in part, vacated in part, and remanded.

Judges WELLS and COZORT concur.

E & E INDUSTRIES, INC. v. CROWN TEXTILES, INC.

No. 8527SC1056

(Filed 6 May 1986)

Corporations § 26— suit against unqualified foreign corporation—compulsory counterclaim allowed

The trial court erred by dismissing defendant's counterclaim in a breach of contract action where plaintiff was a North Carolina corporation, defendant was a South Carolina corporation doing business in North Carolina without a certificate of authority, and defendant's counterclaim was compulsory. By

suing in a forum of this state, a North Carolina corporation effectively waives any protection N.C.G.S. 55-154 affords it from compulsory counterclaims by a foreign corporation which has not obtained a certificate of authority. N.C.G.S. 1A-1, Rule 13(a) and (b).

APPEAL by defendant from *Hyatt, Judge*. Order entered 14 August 1985 in Superior Court, GASTON County. Heard in the Court of Appeals 6 February 1986.

Plaintiff, a North Carolina corporation, brought this action against defendant, a South Carolina corporation, alleging breach of contract by defendant's failure timely to deliver goods and its delivery of defective goods. Defendant denied plaintiff's material allegations and counterclaimed for the balance due for goods delivered to plaintiff pursuant to the contract.

Plaintiff moved to dismiss defendant's counterclaim under N.C. Gen. Stat. 55-154(a), which requires that a foreign corporation transacting business in this State obtain a certificate of authority prior to maintaining any action or proceeding in any court of this State. The court found that defendant is a South Carolina corporation transacting business in North Carolina without a certificate of authority and concluded as a matter of law that "no proceeding can be maintained by the defendant corporation on its counterclaim until it shall have obtained the Certificate of Authority prior to trial." Accordingly, the court granted plaintiff's motion to dismiss defendant's counterclaim.

Defendant appeals.

Caldwell and Planer, by Geoffrey A. Planer, for plaintiff appellee.

Steve B. Dolley, Jr., and Basil L. Whitener for defendant appellant.

WHICHARD, Judge.

Defendant contends the court erred in dismissing its counterclaim for noncompliance with N.C. Gen. Stat. 55-154. We agree.

N.C. Gen. Stat. 55-154 provides, in pertinent part:

(a) No foreign corporation transacting business in this State without permission obtained through a certificate of

authority under this Chapter or through domestication under prior acts shall be permitted to maintain any action or proceeding in any court of this State unless such corporation shall have obtained a certificate of authority prior to trial; nor shall any action or proceeding be maintained in any court of this State by any successor or assignee of such corporation on any cause of action arising out of the transaction of business by such corporation in this State until:

(1) A certificate of authority shall have been obtained by such corporation or by a foreign corporation which has acquired substantially all of its assets, or

(2) Substantially all of its assets have been acquired by a domestic corporation or one or more individuals.

An issue arising under this subsection must be raised by motion and determined by the trial judge prior to trial.

(b) The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action or proceeding in any court of this State.

The issue here is whether a nonqualifying corporation such as defendant, against which an action is brought in this State, may bring a compulsory counterclaim in that action. We hold that it may.

"The weight of authority in states having provisions similar to [N.C. Gen. Stat. 55-154] is that the statutory bar to an unregistered corporation's maintaining an action does not preclude it from asserting a counterclaim arising out of the subject matter of a plaintiff's suit." *Aberle Hosiery Co. v. American Arbitration Ass'n*, 337 F. Supp. 90, 92 (E.D. Penn.), *appeal dismissed*, 461 F. 2d 1005 (3rd Cir. 1972). "A statute merely prohibiting the commencement or maintenance of an action does not prevent a noncomplying foreign corporation from interposing and recovering on a counterclaim arising out of the transaction in suit." 20 C.J.S. Corporations Sec. 1859 at 83. *Accord, e.g., Environmental Coatings v. Baltimore Paint*, 617 F. 2d 110 (5th Cir. 1980); *Johnson & Anderson, Inc. v. Barlow Assoc.*, 528 F. Supp. 417 (E.D. Mich. 1981). *See also* Robinson, *North Carolina Corp. Law*, Sec. 31-8 (3d ed.) at 464

("it would seem that the unqualified foreign corporation could assert a counterclaim in defending an action brought against it in the North Carolina courts."). *Cf., contra, e.g., Kutka v. Temporaries, Inc.*, 568 F. Supp. 1527, 1532 (S.D. Tex. 1983); *Bozzuto's Inc. v. Frank Kantrowitz & Sons Inc.*, 117 N.J. Super. 146, 149, 283 A. 2d 907, 908 (1971).

Defendant's claim is a compulsory counterclaim as defined by N.C. Gen. Stat. 1A-1, Rule 13(a). It is for the balance due on the contract which plaintiff alleges defendant breached and thus is clearly a "claim which . . . arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." N.C. Gen. Stat. 1A-1, Rule 13(a). Ordinarily, failure to assert a compulsory counterclaim will bar future action on the claim. *Hudspeth v. Bunzey*, 35 N.C. App. 231, 233, 241 S.E. 2d 119, 121, *disc. rev. denied*, 294 N.C. 736, 244 S.E. 2d 154 (1978). *See also* 3 Moore's Federal Practice Par. 13.12[1] (2d ed. 1985). Thus, if N.C. Gen. Stat. 55-154 barred a nonqualifying corporation like defendant from asserting a compulsory counterclaim, "it would be permanently deprived of the right to assert this claim against the plaintiff." *Clayton Carpet Mills, Inc. v. Martin Processing*, 563 F. Supp. 288, 290 (N.D. Ga. 1983). We doubt that our General Assembly "intended such a far-reaching consequence when it enacted [N.C. Gen. Stat. 55-154]." *Id.*

N.C. Gen. Stat. 55-154(a) and (b) follow Sec. 124 of the Model Business Corporation Act (MBCA). 2 Model Bus. Corp. Act Ann. 2d Sec. 124, Pars. 1, 2 (pp. 773-74). The avowed purpose of this section of the MBCA is "to provide penalties applicable to foreign corporations which evade [state] regulation by transacting business, other than business constituting interstate commerce, without obtaining [a] certificate of authority . . . ." *Id.* at 774. N.C. Gen. Stat. 55-154(a) allows an unqualified corporation to maintain an action in a court of this State by obtaining a certificate prior to trial. N.C. Gen. Stat. 55-154(b) permits an unqualified corporation to defend an action in a court of this State without obtaining a certificate at all. Logically, therefore, the General Assembly "would not have expressly permitted defense by nonqualifying corporate defendants but impliedly circumscribed the scope of that defense by denying the right to bring compulsory counterclaims . . . ." *Environmental Coatings, supra*, 617 F. 2d at 112. *Accord, Johnson & Anderson, supra*, 528 F. Supp. at 420. By suing

in a forum of this State a foreign corporation which has not obtained a certificate of authority before the commencement of the action, a North Carolina corporation effectively waives any protection N.C. Gen. Stat. 55-154 affords it from compulsory counterclaims asserted by the party sued. *Clayton Carpet, supra,* 563 F. Supp. at 289.

Accordingly, we hold that defendant may maintain its compulsory counterclaim for the balance due on the disputed contract. A different result might obtain for a permissive counterclaim under N.C. Gen. Stat. 1A-1, Rule 13(b). *See Levitt Multihous. Corp. v. District of El Paso Cty.,* 188 Colo. 360, 363-65, 534 P. 2d 1207, 1208-10 (1975). We are not confronted with that issue here, however.

Given our holding that a nonqualifying foreign corporation may maintain a compulsory counterclaim, we do not reach defendant's other argument. The order is reversed, and the cause is remanded for further proceedings on plaintiff's claim and defendant's compulsory counterclaim.

Reversed and remanded.

Judges WELLS and COZORT concur.

LINDA C. ENSLEY v. NATIONWIDE MUTUAL INSURANCE CO.

No. 8530SC1073

(Filed 6 May 1986)

1. Insurance § 110— prejudgment interest—uninsured motorist provision—grounded in tort—no error

The trial court did not err by awarding prejudgment interest to a plaintiff awarded damages under an uninsured motorist provision because plaintiff's action was grounded in tort rather than contract and because plaintiff's claim was covered by liability insurance within the meaning of N.C.G.S. 24-5 because defendant assumed, up to the limits of the motor vehicle liability insurance policy issued to plaintiff, the liability of the uninsured motorist for damages which plaintiff is legally entitled to recover from the uninsured motorist. N.C.G.S. 20-279.21(b)(3).

2. Insurance § 110.1; Costs § 3— action under uninsured motorist provision—costs taxed against insurance company—not reviewable

The trial court's taxing of costs against an insurance company was within the discretion of the court in an action by a policyholder under an uninsured motorist provision because defendant insurance company occupied the status of a litigant in contending that it owed plaintiff no coverage and then defending plaintiff's claim; N.C.G.S. 6-20 provides that the taxing of costs is in the discretion of the court in actions such as this; and the court's authority to tax costs was not dependent on either the insurance policy or on N.C.G.S. 20-279.21(b)(3). The taxing of costs in a discretionary manner is not reviewable.

APPEAL by defendant from *Packnowski, Judge.* Judgment entered 2 June 1985 in GRAHAM County Superior Court. Heard in the Court of Appeals 5 March 1986.

On 7 July 1981, plaintiff was injured when the automobile which she was driving was struck by a hit and run driver. At the time of the collision, plaintiff was insured by an automobile liability insurance policy issued by defendant insurance company which provided, *inter alia,* uninsured motorist coverage applicable to the collision. Plaintiff brought suit to recover for her personal injuries and was awarded $16,500.00 by the jury. In the judgment entered upon the jury verdict, the trial court ordered that the jury award bear interest from the date the suit was filed and further ordered defendant to pay an expert witness fee as a part of the costs. Defendant then filed a motion, pursuant to G.S. 1A-1, Rules 59 and 60, seeking relief from the provisions of the judgment relating to pre-judgment interest and court costs. The motion was denied and defendant appeals.

McKeever, Edwards, Davis & Hays, P.A., by Fred H. Moody, Jr. for plaintiff appellee.

Carter and Kropelnicki, P.A., by Steven Kropelnicki, Jr. for defendant appellant.

MARTIN, Judge.

Defendant raises no issues with respect to the trial, the verdict of the jury, or the award of damages to plaintiff. Its only assignments of error are directed to the award of pre-judgment interest and the taxing of court costs. The thrust of defendant's argument is that its obligations to plaintiff arise strictly out of the contract of insurance providing coverage against damages

caused by uninsured motorists, which does not provide coverage for pre-judgment interest or court costs. Therefore, defendant contends, the pre-judgment interest provision of G.S. 24-5 does not apply and the trial court erred in awarding pre-judgment interest and in taxing defendant with the costs. For the reasons which follow, we affirm the judgment of the trial court.

When judgment was entered in this action, G.S. 24-5 provided:

> All sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, and when a jury shall render a verdict therefor they shall distinguish the principal from the sum allowed as interest; and the principal sum due on all such contracts shall bear interest from the time of rendering judgment thereon until it is paid and satisfied. The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract shall bear interest from the time the action is instituted until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly. *The preceding sentence shall apply only to claims covered by liability insurance.* The portion of all money judgments designated by the fact-finder as compensatory damages in actions other than contract which are not covered by liability insurance shall bear interest from the time of the verdict until the judgment is paid and satisfied, and the judgment and decree of the court shall be rendered accordingly.

N.C. Gen. Stat. § 24-5 (Supp. 1981) (rewritten effective 1 October 1985, Session Laws 1985, ch. 214) (emphasis added).

[1] Defendant first contends that pre-judgment interest is not permitted in this case because the plaintiff's rights arise from the insurance contract and the action, therefore, is not an action "other than contract." We disagree. Although the uninsured motorist coverage under which plaintiff seeks to recover is provided by the insurance contract, her right to recover thereon is grounded in tort. G.S. 20-279.21(b)(3) requires that every motor vehicle liability insurance policy issued in North Carolina provide coverage "for the protection of persons insured thereunder who are *legally entitled to recover damages* from owners or operators

of uninsured motor vehicles and hit-and-run motor vehicles. . . ." (Emphasis added.)

> Plaintiff's right to recover against his . . . insurer under the uninsured motorist endorsement is derivative and conditional. Unless he is 'legally entitled to recover damages' . . . from the uninsured motorist the contract upon which he sues precludes him from recovering against defendant. It is manifest, therefore, that despite the contractual relation between plaintiff insured and defendant insurer, this action is *actually one for the tort allegedly committed by the uninsured* motorist.

Brown v. Lumbermens Mut. Casualty Co., 285 N.C. 313, 319, 204 S.E. 2d 829, 834 (1974) (emphasis added). Plaintiff's action meets the first requirement for an award of pre-judgment interest under G.S. 24-5, *i.e.*, it is an action "other than contract."

Even so, defendant contends, G.S. 24-5, as written when the judgment was entered in this case, permits pre-judgment interest only when a claim is "covered by liability insurance" and that the uninsured motorist coverage under which plaintiff sought damages is not liability insurance. In our view, this argument must also fail. "G.S. 20-279.21(b)(3) provides for a limited type of compulsory automobile *liability coverage* against uninsured motorists." *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 543, 155 S.E. 2d 128, 136 (1967) (emphasis added). Under the terms of the statute, and the policy issued by defendant, coverage was provided for damage which plaintiff "is legally entitled to recover" from the owner or operator of an uninsured motor vehicle. The policy further provides that such owner's or operator's "liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle." Thus, by the uninsured motorist coverage contained in the motor vehicle liability insurance policy issued by defendant, defendant assumed, up to its policy limits, the liability of the uninsured motorist for damages which the plaintiff is legally entitled to recover from the uninsured motorist. We conclude that plaintiff's claim is covered by liability insurance. The award of interest from the date plaintiff instituted this action is affirmed.

[2] Defendant also assigns as error that portion of the judgment taxing it with the costs of court, contending that the costs are

beyond the coverage provided by its policy or required by G.S. 20-279.21(b)(3). The authority of the court to tax costs is not dependent on either the insurance policy or G.S. 20-279.21(b)(3). Defendant occupied the status of a litigant in this action, contending first that it owed plaintiff no coverage and, failing in that contention, defending against her damage claim. G.S. 6-20 provides that in actions such as this one, the allowance of the costs is within the discretion of the court. "Where the court has taxed costs in a discretionary manner its decision is not reviewable." *Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 286, 296 S.E. 2d 512, 516 (1982) (citing *Hoskins v. Hoskins*, 259 N.C. 704, 131 S.E. 2d 326 (1963)).

The judgment appealed from is

Affirmed.

Judges BECTON and JOHNSON concur.

PATRICIA A. MOFFETT AND PM & JD, INCORPORATED v. JOSEPH MACK DANIELS

No. 8511SC1273

(Filed 6 May 1986)

Equity § 1.1; Trusts § 13.5— conveyance to hinder creditors—unclean hands—no trust

Where all the evidence shows that defendant conveyed real property to plaintiff corporation which was owned by the individual plaintiff for the purpose of hindering defendant's creditors, the doctrine of unclean hands will prevent the courts from impressing a trust on the property or ordering plaintiffs to convey to defendant even if defendant did not violate the statute prohibiting conveyances to defraud creditors, N.C.G.S. 39-15.

APPEAL by plaintiff from *Clark (Giles R.), Judge.* Judgment entered 27 September 1985 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 15 April 1986.

The plaintiffs brought this action to eject the defendant from a tract of land owned by the corporate plaintiff and for an accounting for financial transactions involving the property. The de-

fendant filed an answer with six counterclaims. He alleged that the corporation "was formed by Joseph Mack Daniels and the stock issued in the name of Patricia A. Moffett for the benefit of Joseph Mack Daniels for the sole purpose of preventing creditors from being able to take possession of the property due to the cash flow position of Joseph Mack Daniels." The defendant prayed that a resulting or constructive trust be imposed on the stock of the corporation and that Patricia A. Moffett be ordered to convey the stock in the corporation to him.

The plaintiffs made a motion for summary judgment. The papers in support and opposition to the motion for summary judgment showed that for some time before the controversy arose between the parties they were planning to be married. The defendant owned other property on which he was having trouble making the mortgage payments because of business reversals. The only parcel of unencumbered property was a lot containing a convenience store and an apartment building inherited by the defendant. The defendant stated in an affidavit that he decided to form a corporation and deed the unencumbered lot to the corporation so that the store which was on the lot "would be able to continue to operate and would not be seized or tied up by any creditor." He intended to have the stock in the corporation issued to his brother but due to the insistence of Patricia A. Moffett it was issued to her. The defendant stated that she agreed to convey the stock to him when he requested it. The defendant became current in his mortgage payments but Patricia A. Moffett refused his request to transfer the stock in the corporation to him.

The court denied the plaintiffs' motion for summary judgment and entered an order for summary judgment for the defendant on all issues. The plaintiffs appealed.

Narron, O'Hale, Whittington and Woodruff, P.A., by James W. Narron, for plaintiff appellants.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and C. D. Taylor Pace, for defendant appellee.

WEBB, Judge.

The plaintiffs assign error to the denial of their motion for summary judgment and to the judgment which requires Patricia

A. Moffett to convey the stock in the corporation to the defendant. We believe we are bound by *Penland v. Wells*, 201 N.C. 173, 159 S.E. 423 (1931) to sustain this assignment of error.

In *Penland* the plaintiff brought an action to obtain title and possession of real property he had conveyed to his daughter. He alleged that he had been threatened with litigation for alleged wrongs which he had never committed and in order to defeat such litigation and thereby preserve the property for his own use he conveyed it to his daughter by a deed absolute in form. He alleged further that his daughter was to hold the property for him as trustee and reconvey it to him at such time as he might designate. Our Supreme Court held that it was error not to sustain a demurrer to a complaint based on these allegations. It said plaintiff's unclean hands prevented his bringing an action for equitable relief and stated:

> Where both parties have united in a transaction to defraud another, or others, or the public, or the due administration of the law, or which is against public policy, or *contra bonos mores*, the courts will not enforce it in favor of either party.

201 N.C. at 175-176, 159 S.E. at 424. This Court followed *Penland* in *Hood v. Hood*, 46 N.C. App. 298, 264 S.E. 2d 814 (1980).

At a summary judgment hearing if the forecast of evidence is such that it would entitle a party to a directed verdict if the evidence were offered at trial that party is entitled to have his motion for summary judgment allowed. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). In this case all the evidence shows that the defendant conveyed the property to the plaintiff corporation which was owned by the plaintiff Moffett for the purpose of hindering the defendant's creditors. The Court will not under these facts impress a trust on the property or order the plaintiffs to convey it to the defendant. Patricia A. Moffett owns the corporation and the corporation owns the land and the contents of the store. The plaintiffs are entitled to a judgment removing the defendant from the property.

The defendant argues that the record does not show the requisite intent to defraud his creditors. He says that no suit was filed against him and that his intent as shown by his affidavit was to maintain the business so that he could pay his creditors. He

argues that the record shows he had not violated G.S. 39-15 which declares void conveyances to defraud creditors. G.S. 39-15 has no application to this case. Under *Penland* it is not necessary that an action be filed by a creditor or that the person conveying the property intended not to pay his lawful debts. If a conveyance is made to a person with the intent that the grantee will hold the property so that creditors cannot reach it, the parties to the conveyance are *in pari delicto* and the law will not require the grantee to reconvey the property.

The defendant argues further that if the parties are *in pari delicto* the plaintiffs should receive no relief. The plaintiff corporation has the legal title to the property and Patricia A. Moffett owns the stock in the corporation. The defendant has asked for an equitable remedy. Equity will not give the defendant the relief for which he asks because of his unclean hands. The plaintiffs may enforce their legal rights.

For the reasons stated in this opinion we reverse and remand with an order that the plaintiffs be given the relief for which they prayed.

Reversed and remanded.

Judges EAGLES and PARKER concur.

IN THE MATTER OF THE WILL OF MABEL W. DUPREE

No. 8511SC1043

(Filed 6 May 1986)

Wills § 21.4— undue influence—evidence sufficient

The trial court properly denied the propounders' motions for a directed verdict where caveators produced sufficient evidence to establish a *prima facie* case of undue influence in that the testatrix had been hospitalized, was depressed, confused and not mentally clear in the days immediately preceding and following the making of her fourth and last will; she was physically and mentally incapable of managing her own affairs; she was "totally out of her head," "grasping at objects in the air," "living in the past," disoriented and paranoid; the propounders, the Clines, were with the testatrix constantly in her final weeks, moving into her home and not allowing others to be alone with her; the testatrix was very dependent on the propounders, especially on

Ruth Cline, who would often do the testatrix's talking for her; the Clines did not notify some of the testatrix's closest neighbors and relatives of her illnesses or hospitalizations and discouraged others from visiting her; the Clines took the testatrix to an attorney other than the attorney who had handled the legal affairs of the Duprees for many years; caveators had been named as beneficiaries ever since testatrix first made a will but were not in the final will; and there was no evidence that anything had ever happened to change or damage testatrix's good relationship with either of them.

APPEAL by propounder from *W. F. Bowen, Judge.* Judgment entered 15 October 1984 in Superior Court, LEE County. Heard in the Court of Appeals 7 February 1986.

Bryan, Jones, Johnson & Snow, by Robert C. Bryan, for propounder appellants.

Love & Wicker, P.A., by Jimmy L. Love, for caveator appellees.

BECTON, Judge.

This case involves the purported last will and testament of Mrs. Mabel Dupree, who died on 25 July 1982. The propounders of this will, dated 4 June 1982, are Ruth Cline and her husband, Herman Cline, nephew of Mrs. Dupree's deceased husband, William Dupree. The caveators are Larry Woodell, also a nephew of Mr. Dupree, and Steve Dupree, Mr. Dupree's brother.

I

Mrs. Dupree was seventy-two years of age when she died. She had no children. William Dupree had died in 1973, leaving an estate in excess of two hundred thousand dollars ($200,000.00). In the nine years before her death, Mrs. Dupree had executed at least four wills. Three of them were prepared by attorney Kenneth Hoyle. The beneficiaries of the first three wills and the percentages of the inheritances are set out below:

First Will (1973)

The Wickers (Mrs. Dupree's relatives)	approx. 33⅓%
The Clines	approx. 33⅓%
Steve Dupree	approx. 16¾%
Larry Woodell	approx. 16¾%

Second Will (1974)

The Clines	70%
Larry Woodell	20%
Steve Dupree	10%

Third Will (1978)

The Clines	70%
Larry Woodell	20%
Steve Dupree	10%
The Clines	Home worth $47,789.00

The fourth will, which is the object of this dispute, was prepared by attorney W. W. Seymour in 1982, and purported to devise 100% of her estate to the Clines.

A Lee County jury found that the deceased had sufficient mental capacity to execute a will, but that the fourth will had been procured by undue influence and was therefore not the last will and testament of Mrs. Dupree.

The Clines raise one question on appeal—whether there was sufficient evidence to present the issue of undue influence to the jury. We find that there was, and we affirm the judgment entered according to the jury's verdict.

II

The Clines assign error to the trial court's denial of their motions for a directed verdict at the close of the caveators' evidence and again at the close of all the evidence.

In determining whether caveators have made out a *prima facie* case sufficient to withstand a motion for a directed verdict, the evidence must be viewed in the light most favorable to caveators, deeming their evidence to be true, resolving all conflicts in their favor, and giving them the benefit of every reasonable favorable inference. *See In re Andrews*, 299 N.C. 52, 261 S.E. 2d 198 (1980); *In re Will of Fields*, 75 N.C. App. 649, 650-51, 331 S.E. 2d 193, 194 (1985).

Undue influence is the substitution of the mind of the person exercising the influence for the mind of the one executing the instrument, causing her to make a will which she otherwise would

not have made. *See Hardee v. Hardee*, 309 N.C. 753, 756, 309 S.E. 2d 243, 245 (1983). To prove undue influence, the caveators must show more than mere influence or persuasion. They must show some controlling force sufficient to destroy the free agency of the testatrix, such as to make the will properly the expression of the wishes of one other than the testatrix. *See In re Fields*, 75 N.C. App. at 651, 331 S.E. 2d at 194.

Although the North Carolina Supreme Court has enumerated certain factors which may be probative on the issue of undue influence, the very nature of undue influence prevents a court from establishing precise tests by which to determine its existence. *Id.*; *see also Hardee*, 309 N.C. at 756-57, 309 S.E. 2d at 245 (listing seven factors which bear on the question of undue influence). Therefore, caveators must ordinarily rely on circumstantial evidence and the inferences which may be drawn from it. *See Andrews*, 299 N.C. at 54, 261 S.E. 2d at 199.

The caveators in this case produced sufficient evidence to establish a *prima facie* case of undue influence. Caveators' evidence tended to show that in the days immediately preceding and following the making of the fourth will, Mrs. Dupree had been hospitalized, was depressed, confused and not mentally clear; that she was physically and mentally incapable of managing her own affairs; and that she was "totally out of her head," "grasping at objects in the air," "living in the past," disoriented and paranoid.

Caveators' evidence was also that the Clines were with Mrs. Dupree constantly in her final weeks, moving into her home and not allowing others to be alone with her. Mrs. Dupree was very dependent on the Clines, especially on Ruth Cline, who would often do Mrs. Dupree's talking for her. The Clines did not notify some of Mrs. Dupree's closest neighbors and relatives of her illnesses or hospitalizations and discouraged others from visiting her.

Further, the Clines took Mrs. Dupree to attorney Seymour to make the fourth will, even though they knew that attorney Hoyle had handled the legal affairs for William and Mabel Dupree for many years. Mr. Seymour had done no legal work for the Duprees for twenty years prior to the making of the fourth will. Mr. Seymour testified that he had not been aware of Mrs. Dupree's deteriorating physical and mental condition in the days and weeks

prior to the making of the fourth will. Had he known that she was having delusions about her doctor and Mr. Hoyle wanting to steal her money and put her in a nursing home, he would have inquired further into her mental state.

Moreover, Larry Woodell and Steve Dupree had been named as beneficiaries ever since Mrs. Dupree first made a will in 1973. There is no evidence that anything had ever happened to change or damage Mrs. Dupree's good relationship with either of them.

We have outlined only some of the evidence on which caveators relied. Although propounders produced some contradictory evidence, caveators' evidence was sufficient to go to the jury, and the verdict was not so against the greater weight of the evidence as to require its being set aside. *See In re Fields*, 75 N.C. App. at 651, 331 S.E. 2d at 194.

No error.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. WILLIAM COKER DAVIS

No. 858SC1318

(Filed 6 May 1986)

1. **Receiving Stolen Goods § 5.1— knowledge shotgun was stolen—sufficient evidence**

There was sufficient evidence in a prosecution for possession of stolen property for the jury to find that defendant knew or had reasonable grounds to know that a shotgun he possessed was stolen where the evidence tended to show that defendant was in a tavern with a person who made a call to a pawnshop; defendant left the tavern with this person; the shotgun was taken from a truck in the tavern parking lot at approximately this time; and defendant pawned the shotgun a short time later at a price much below its worth.

2. **Receiving Stolen Goods § 5.1— possession of stolen property—dishonest purpose**

Evidence that defendant had possession of stolen property and pawned it rather than attempting to return it to its rightful owner would constitute evidence of dishonest purpose sufficient to support a conviction for possession of stolen property.

State v. Davis

APPEAL by defendant from *Tillery, Judge.* Judgment entered 18 July 1985 in Superior Court, WAYNE County. Heard in the Court of Appeals 17 April 1986.

The defendant was tried for breaking or entering a motor vehicle, felonious larceny, felonious receiving of stolen goods, and felonious possession of stolen goods. The State's evidence showed that Tommy Newsome was in the Berkeley Tavern in Goldsboro on 16 January 1985. He had parked his pickup truck outside with his shotgun mounted on the inside of the rear window.

The defendant and Bill Vaughn came into the Berkeley Tavern while Mr. Newsome was there. They left but returned approximately twenty minutes later. Vaughn then made calls to Boulevard Pawn Shop and Swap Shop. Shortly thereafter the defendant and Vaughn left the tavern and did not return. When Mr. Newsome left the tavern he found that the back glass in his truck had been broken and his shotgun was missing. Mr. Newsome found the shotgun at the Boulevard Pawn Shop whose records indicated it had been pawned by the defendant on the day it was taken from the truck.

The defendant testified that he did not break into the truck or take the shotgun. He said that after he and Vaughn left the tavern they separated. He went behind a building and met a man who told him his name was Doug English. He bought the shotgun from Doug English for $50.00 and pawned it for that amount. He said that the man who called himself Doug English gave him a telephone number but when he called it he was told that he had the wrong number.

The defendant was found guilty of possession of stolen property and not guilty of the other charges. He appealed from the imposition of a prison sentence.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Archie W. Anders, for the State.

Vickory & Hawkins, by C. Branson Vickory, Jr., for defendant appellant.

WEBB, Judge.

The defendant contends it was error not to dismiss the charge of possession of stolen property at the close of the State's

evidence and at the close of all the evidence. When the defendant put on evidence he waived his motion to dismiss at the end of the State's evidence. G.S. 15-173. In considering a motion to dismiss made at the close of all the evidence the defendant's evidence as well as the State's evidence may be considered. *State v. Harper*, 51 N.C. App. 493, 277 S.E. 2d 72 (1981).

[1] The defendant contends there was not sufficient evidence to submit to the jury as to two elements of the offense of possession of stolen property, these elements being that the defendant knew or had reasonable grounds to believe the shotgun was stolen and that he acted with a dishonest purpose in the possession of the shotgun. *See State v. Davis*, 302 N.C. 370, 275 S.E. 2d 491 (1981), for a discussion of the elements of this crime. We hold the State's evidence that the defendant was in a tavern with a person who made a call to a pawnshop, the defendant left the tavern with this person, the shotgun was taken from the truck at approximately this time and the defendant then had possession of the shotgun a short time later which shotgun he pawned is substantial evidence from which a jury could conclude the defendant knew or had reasonable grounds to know the shotgun was stolen. It is too much of a coincidence for the jury to be required to believe that the defendant happened to be on the scene when the shotgun was stolen and that he somehow came into possession of it at that time and immediately pawned it for much less than its value without any knowledge that it was stolen. If we consider the defendant's testimony, it strengthens the State's case. If the defendant happened to meet a man behind a building who offered to sell him a shotgun at a price much below its worth, this is evidence from which a jury could conclude he had reasonable ground to believe the shotgun was stolen. *See State v. Haywood*, 297 N.C. 686, 256 S.E. 2d 715 (1979).

[2] We also hold there was sufficient evidence that the defendant possessed the shotgun for a dishonest purpose. In *State v. Parker*, 316 N.C. 295, 341 S.E. 2d 555 (1986), our Supreme Court said, "We now hold that the 'dishonest purpose' element of the crime of possession of stolen property can be met by a showing that the possessor acted with an intent to aid the thief, receiver, or possessor of stolen property." *Id.* at 305, --- S.E. 2d at ---. We do not believe our Supreme Court intended that this be the exclusive definition of a dishonest purpose. If, as in this case, the

defendant had possession of the property and rather than attempting to return it to its rightful owner he pawned it, this would be possession for a dishonest purpose.

No error.

Judges EAGLES and PARKER concur.

SOUTHERN EQUIPMENT COMPANY, INC., D/B/A READY MIXED CONCRETE COMPANY v. CECIL WINSTEAD, MORRIS NEWKIRK, RAYMOND SMITH, PRESTON WELLS, JR., AND JOHN K. SYKES, MEMBERS OF THE BOARD OF ADJUSTMENT OF THE TOWN OF MOUNT OLIVE, NORTH CAROLINA, AND THE BOARD OF ADJUSTMENT OF THE TOWN OF MOUNT OLIVE, NORTH CAROLINA

No. 858SC833

(Filed 6 May 1986)

Municipal Corporations § 30.19— nonconforming use—failure to operate—not a forfeiture

Petitioner did not "cease" operation of its concrete mixing facility and lose its nonconforming use under a Mount Olive zoning ordinance where petitioner did not operate the plant for more than six months due to a slump in business but maintained the plant, equipment, and inventories as before, could have resumed operations within two hours, and filled orders received during that time at its nearby plant in Goldsboro. The law does not favor forfeitures and statutes authorizing them must be strictly construed; a subsection of the same ordinance making discontinuance another ground for forfeiture would serve no purpose if the failure to operate a nonconforming business for six months is a ceasing which automatically forfeits the nonconforming use.

APPEAL by respondents from *Reid, Judge*. Judgment entered 11 March 1985 in Superior Court, WAYNE County. Heard in the Court of Appeals 13 January 1986.

The petitioner owns and operates a concrete mixing facility within the zoning jurisdiction of the Town of Mount Olive. The plant was built in 1963 by another company which operated it until selling it to petitioner in 1980. In 1974 the Town adopted a zoning ordinance that prohibits manufacturing on the property involved except as a nonconforming use. By Section 9-3-115(a) of the ordinance nonconforming uses are forfeited when any of several conditions occur, one of which is as follows:

(2) If a nonconforming use of land and/or structures ceases for any reason for a period of six (6) months;

There is no dispute about the facts. The record shows and the parties concede that: Due to a slump in business the plant was not operated for more than six months immediately preceding January, 1983. During that time petitioner continued to maintain the plant, equipment, inventories and utilities as before, and could have resumed operations within two hours after deciding to do so; all orders received during that period were filled at its other plant in nearby Goldsboro. In January of 1983 petitioner began operating the plant again and on 28 February 1983 the Town Zoning Officer advised petitioner that because of its failure to operate the plant for more than six months its nonconforming use had been lost under the terms of the above ordinance. This ruling was upheld by the Town's Board of Adjustment. The Superior Court, pursuant to a writ of certiorari, reversed, noting that:

6. The zoning ordinance does not use the language "if the operation is not active for a period of six months." The ordinance uses the word "ceases."

7. It is apparent that the Zoning Enforcement Officer and the Board of Adjustment concluded that the Petitioner "ceased" the nonconforming use of its land and/or structures for more than six (6) months. The uncontradicted evidence is that the nature and use of the land and structure did not change during the period in question, even though, for economic reasons, the Petitioner did not load concrete mixing trucks at this plant for a period of six (6) months.

Dees, Smith, Powell, Jarrett, Dees & Jones, by William A. Dees, Jr., for petitioner appellee.

Vickory & Hawkins, by C. Branson Vickory, for respondent appellants.

PHILLIPS, Judge.

This appeal turns upon the sense in which the word "ceases" is used in the foregoing ordinance, which forfeits the right to use nonconforming property under the conditions stated therein. As is commonly known the word "cease" has two meanings; one of which indicates a final condition, but the other does not. The

definition most frequently given by the dictionaries in widest use is "[t]o come to an end; to stop." Webster's New International Dictionary (2d ed. 1953) at page 429. Terminate is a synonym of the first, discontinue of the second. The difference between the two definitions in the context of this case is both significant and decisive; for while the manufacturing of cement on the premises involved was stopped for more than six months it did not end. Thus, if the word cease was used in the sense of just stopping the forfeiture lies; otherwise it does not. There is nothing in the provision quoted or in the zoning ordinance as a whole to indicate that in enacting the ordinance the Town legislative body equated the mere failure to operate a nonconforming business with its cessation. On the other hand, there is a strong indication in a companion subsection of the same ordinance that the word cease was used in a more stringent sense. We therefore hold that petitioner's valuable property right was not forfeited by mere inactivity for six months and affirm the judgment of the Superior Court. This conclusion is in keeping with the time honored maxim that the law does not favor forfeitures and statutes authorizing them must be strictly construed. 37 C.J.S. *Forfeitures* Sec. 4, p. 8 (1943); *U. S. v. One 1936 Model Ford Coach*, 307 U.S. 219, 226, 83 L.Ed. 1249, 1255, 59 S.Ct. 861, 865 (1939). Subsection (4) of the same ordinance makes *discontinuing* the use of nonconforming property another ground for forfeiture as follows:

> (4) If a nonconforming use of a building and/or land is discontinued or abandoned for 12 consecutive months or for 24 months during any four (4) year period. (As used herein, the word "discontinued" means that the owner or party responsible for the use of the property cannot demonstrate that he had a clear intent to continue using the property for the nonconforming purpose and that he had augmented that intent by making every reasonable effort to continue to have the property so used. A demonstration of intent would be a reasonable and continuous effort to sell or rent the property for the nonconforming purpose.)

Obviously, if the legislative body regarded the mere failure to operate a nonconforming business for 6 months as a *ceasing* within the purview of subsection (2) that automatically forfeited the right to operate in the future, the above enactment permitting forfeitures under some circumstances for a failure to use the

nonconforming property for 12 consecutive months would serve no purpose whatever.

Affirmed.

Chief Judge HEDRICK and Judge JOHNSON concur.

BARBARA STEWART v. DAN HERRING

No. 8518SC1202

(Filed 6 May 1986)

Attorneys at Law § 5.1; Election of Remedies § 4— malpractice action barred by election of remedies

Plaintiff's claim against defendant attorney for negligent representation in negotiating a separation agreement in which plaintiff relinquished her claim to alimony after a divorce was barred by an election of remedies when plaintiff pursued her claim for alimony by hiring another attorney who filed a counterclaim for alimony and negotiated a new alimony agreement.

APPEAL by plaintiff from *Collier, Judge*. Judgment entered 15 July 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 March 1986.

This is an action for legal malpractice. The plaintiff alleged that she retained the defendant, an attorney practicing in High Point, to represent her in an action against her husband for alimony. She alleged that the defendant was negligent in that he did not properly investigate the possibility of obtaining alimony and he persuaded her to sign a separation agreement in which she relinquished a claim for alimony after a divorce. She alleged that she retained other attorneys who negotiated a new separation agreement which was more favorable to her.

The defendant filed an answer in which he pled that the plaintiff was barred by an election of remedies. He based this plea on allegations that in an action by the plaintiff's husband for divorce she had counterclaimed to set aside the first separation agreement and to obtain permanent alimony. She negotiated a new agreement for alimony. She settled her claim against her husband under a consent judgment for distribution of the marital

property in which she obtained substantially greater benefits than she had obtained in the first separation agreement. She then submitted to a voluntary dismissal of her counterclaim.

The defendant made a motion for summary judgment. The papers filed in support and opposition to the motion for summary judgment supported the allegations in the pleadings.

The court granted the defendant's motion for summary judgment and the plaintiff appealed.

Meyressa H. Schoonmaker for plaintiff appellant.

Haworth, Riggs, Kuhn, Haworth and Miller, by John Haworth, for defendant appellee.

WEBB, Judge.

The parties to this appeal agree that the issue is whether the plaintiff has made an election which prevents her from suing the defendant. Our cases have held that if a person has inconsistent claims against two separate people, the claimant cannot pursue one of the claims to judgment and then pursue the inconsistent claim against the other person. *See Pete Wall Plumbing Co. v. Harris*, 266 N.C. 675, 147 S.E. 2d 202 (1966); *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 79 S.E. 2d 880 (1954); *Irvin v. Harris*, 182 N.C. 647, 109 S.E. 867 (1921). This rule was applied in *Davis v. Hargett*, 244 N.C. 157, 92 S.E. 2d 782 (1956). In that case our Supreme Court held that a demurrer was properly sustained when the plaintiff alleged that he had a claim for personal injury based on negligence and the defendant by undue influence forced him to accept a settlement which was much less than the claim was worth. The defendant was not a party to the plaintiff's negligence claim. The plaintiff accepted payment on the settlement agreement and sued the defendant for the difference between the amount he was paid and what he contended his negligence claim was worth. The Supreme Court said that when the plaintiff was no longer subject to the undue influence of the defendant and elected not to attempt to rescind the settlement agreement he could not then sue the defendant. The Court said that to hold otherwise would allow the plaintiff to keep the benefit of the settlement he had negotiated and to recover indirectly on the same claim against the defendant.

This Court dealt with an election in *Douglas v. Parks*, 68 N.C. App. 496, 315 S.E. 2d 84, *disc. rev. denied*, 311 N.C. 754, 321 S.E. 2d 131 (1984). In that case the plaintiff sued the defendant for legal malpractice based on what he alleged was the defendant's negligence in prosecuting a personal injury claim. The evidence showed that a directed verdict had been entered against the plaintiff on his personal injury claim. An attorney was then associated with the plaintiff's attorney, a motion was made to vacate the judgment and the case was settled by the payment of $4,452. The plaintiff then brought the action against the defendant for his negligent representation of him. This Court affirmed a directed verdict for the defendant stating that the plaintiff had the option either to rescind or to affirm the settlement and by electing to affirm he was barred from suing the defendant.

We believe we are bound by *Davis v. Hargett, supra*, and *Douglas v. Parks, supra*, to affirm the judgment of the superior court. As we read those cases if a party contends that he or she was deprived of a legal claim because of the action of another and he pursues the claim against the original defendant he cannot then make a claim against the party he says caused him to lose all or part of the original claim. This is so even if the settlement the plaintiff is able to make on the original claim is not as good as it would have been if there had been no wrongful action by the third party. In this case the plaintiff contends she had a claim for permanent alimony which was lost by the negligence of the defendant. She then retained another attorney who filed a counterclaim for alimony. The alimony agreement negotiated by the defendant was rescinded and a second alimony agreement signed. By pursuing her claim for alimony against her husband the plaintiff lost her right to make a claim against the defendant for his negligence in representing the plaintiff in her original alimony claim.

The appellant contends that by negotiating a new alimony agreement she was merely mitigating her damages. She argues that it should not be the law that she should have to relinquish her claim for alimony entirely in order to bring an action against the defendant. If this were a case of first impression we might agree with the plaintiff but we are bound by *Davis* and *Douglas*.

Affirmed.

Judges EAGLES and PARKER concur.

JACK S. DAVIS AND WIFE, MABLE GREER DAVIS v. RALPH G. HALL AND WIFE, BRYMO HALL

No. 8525DC887

(Filed 6 May 1986)

1. **Boundaries § 15.1— referee's findings adopted by court—supported by evidence**

The court's findings in a boundary dispute adopting a referee's findings were supported by competent evidence where plaintiff's argument that there were discrepancies in the deed descriptions relied upon by the referee and that the testimony of the court appointed surveyor was confused went to the weight of the evidence rather than its sufficiency.

2. **Boundaries § 15.2— refusal to appoint new surveyor and remand to referee—no error**

The trial court did not err in a boundary dispute by refusing to appoint another surveyor and to remand the matter to the referee where the case was sixteen years old, the case had not been persistently prosecuted by the plaintiffs, and plaintiffs had had ample opportunity to gather and present any evidence they chose.

APPEAL by plaintiffs from *Noble, Judge.* Judgment entered 10 April 1985 in District Court, CALDWELL County. Heard in the Court of Appeals 15 January 1986.

Ted S. Douglas for plaintiff appellants.

Robbins & Flaherty, by David T. Flaherty, Jr., for defendant appellees.

PHILLIPS, Judge.

This is an action to establish the boundary line between lands owned by the parties. In their pleadings both parties described the dividing line as they contend it is but neither asked for a jury trial. Eventually the court appointed a surveyor to survey the line according to the different contentions of the parties and after the survey was done the court ordered that the single

issue raised be tried by a compulsory reference. In two different hearings held several weeks apart the referee received into evidence the many old deeds in each chain of title and several survey maps, as well as testimony from the plaintiff Jack S. Davis, two local surveyors that surveyed plaintiffs' land at one time or another, and a surveyor employed by the company that did the court-appointed survey. In his report the referee found that plaintiffs had failed to establish their claim by the greater weight of the evidence, as they had the burden to do, and concluded that the true dividing line between the lands of the parties is the line that defendants rely upon. Plaintiffs excepted to the report generally and requested that the court appoint another surveyor to survey the line and remand the matter to the referee for further findings; but they submitted no issues for determination and made no request for a jury trial on them, thereby waiving their right to a jury trial if they still had one. Rule 53(b)(2), N.C. Rules of Civil Procedure. Upon hearing plaintiffs' exceptions and request the trial judge denied them, made findings and conclusions similar to those of the referee, and entered judgment for the defendants.

[1] The findings of fact of a referee approved by the trial judge must be sustained on appeal if they are supported by any competent evidence. *Anderson v. McRae*, 211 N.C. 197, 189 S.E. 639 (1937); *Cummings v. Swepson*, 124 N.C. 579, 32 S.E. 966 (1899). In appeals of this kind we do not weigh the evidence and determine whether the findings of fact are correct, as weighing evidence is the duty and function of the finder; our duty is merely to determine if the record contains competent evidence to support the finder's findings. *Kenney v. Balsam Hotel Co.*, 194 N.C. 44, 138 S.E. 349 (1927). Here, the record does contain competent evidence which supports the judge's findings and we affirm the judgment appealed from. Indeed, plaintiffs do not really argue in their brief that the findings are not so supported. Of the several exceptions taken to the court's findings only one is based upon insufficiency of evidence and the brief contains no argument that that or any other finding is not supported by some competent evidence. Instead, plaintiffs argue that there were discrepancies in the deed descriptions relied upon by the referee and judge and that the testimony of the court-appointed surveyor indicates that he was confused and his testimony should not be relied upon. These argu-

ments go to the weight of the evidence, rather than its sufficiency, and we reject them.

[2] The plaintiffs also assign as error the court's refusal to appoint another surveyor and remand the matter to the referee for further hearings. This ruling is not erroneous and we affirm it. Without reciting all the melancholy details that led to the present day, we note that this is a relatively simple, one issue case that should have been ended long ago. It was filed more than sixteen years ago and though nearly half of that period went by before the reference was ordered, the case's course thereafter almost proves the truth of the old courthouse saw that the best, though not the quickest, way to kill a live lawsuit is to refer it. For after the referee was appointed another three and one-half years went by before any hearing was held, and after the referee's report was eventually filed a like period expired before a hearing on plaintiffs' exceptions was had. Though most of this appalling delay is not attributable to the plaintiffs—the dilatoriness of the defendants, the surveyor, and the referee all contributed to it, and a small part was due to illness, conflicting schedules and other unavoidable causes—the record nevertheless leaves no room for doubt that the case was not persistently prosecuted by the plaintiffs and that during the long period that passed before the referee's hearings were concluded they had ample opportunity to gather and present any evidence they chose, and that no good reason now exists for postponing the demise of this aged case to a later time.

Affirmed.

Chief Judge HEDRICK and Judge JOHNSON concur.

ALLAN D. THOMPSON v. GEORGE EARL JAMES

No. 8528SC1066

(Filed 6 May 1986)

Automobiles and Other Vehicles § 45.3— actions after accident—relevancy on credibility and severity of injuries

In an action to recover for injuries allegedly sustained when plaintiff was struck by defendant's car in a parking lot, evidence that plaintiff contacted his lawyer before he did his doctor following the accident and that between the time of the accident and the trial defendant brought two actions against other persons claiming serious injuries from his foot being run over by a car and from a beating was relevant on questions of defendant's credibility and the severity of his injuries. N.C.G.S. § 8C-1, Rule 608(b).

APPEAL by plaintiff from *Ferrell, Judge.* Judgment entered 15 May 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 13 February 1986.

Plaintiff sued to recover for injuries allegedly sustained when struck by defendant's car in a shopping center parking lot. The evidence concerning both the accident and plaintiff's alleged injury was in sharp conflict: While plaintiff testified that he was injured when defendant's car suddenly backed into him, a disinterested eyewitness testified that plaintiff, not watching where he was going, walked into defendant's barely moving car, but did not lose his balance. Defendant testified that his car did not hit plaintiff and that he refused to go to the hospital or to permit an ambulance to be called; and the doctor who examined plaintiff a few hours after the incident testified that though plaintiff said he was knocked down by the car and complained of pain in his hip, back and neck that no bruise, abrasion, or tenderness was detected. The jury rendered verdict for the defendant on the negligence issue and judgment was entered thereon.

Robert G. Karriker for plaintiff appellant.

Roberts, Cogburn, McClure & Williams, by Isaac N. Northup, Jr. and Glenn S. Gentry, for defendant appellee.

PHILLIPS, Judge.

In appealing plaintiff contends that the court erred to his prejudice in permitting defendant to elicit irrelevant, inflam-

matory information from him during cross-examination and in not instructing the jury as he requested. Neither contention has merit in our opinion and we overrule them.

The testimony given over objections as to relevancy was that: (1) Following the parking lot accident plaintiff contacted his lawyer before he did his doctor; (2) between the time this accident occurred and the trial, five years later, he sued Scott Wilson and Randall Wilson, alleging that they ran their car over his foot and injured him, and he also sued the county sheriff, alleging that his deputy gave him a severe beating and seriously injured him. The testimony objected to was relevant to an issue being tried, in our opinion, and it was also admissible for the purpose of impeaching plaintiff's credibility and showing his bias as a witness. Furthermore, all his objections were lost because substantially the same testimony was given by others without objection. *Shelton v. Southern Railway Co.*, 193 N.C. 670, 139 S.E. 232 (1927). An important issue in the case was the extent of plaintiff's injury and even if he had one, and contacting his lawyer before he did his doctor could indicate that his injury was not as severe as he claimed; it could also indicate, along with the other evidence discussed below, that he has an unduly litigious nature, a proper ground for impeachment, we believe, in a case based on circumstances that suggest exaggeration. 1 Brandis N.C. Evidence Sec. 43, p. 164 (2d rev. ed. 1982); G.S. 8C-1, Rule 608(b), N.C. Evidence Code. In all events the court's ruling was harmless since plaintiff's wife testified without objection that "[h]e called his lawyer before his doctor because it's customary for him to check with his attorney before he makes any move." Plaintiff's claims against the Wilsons and the sheriff are also relevant to this claim because the injuries that they allegedly caused could be partially or entirely responsible for plaintiff's present condition. Dr. Berkey, one of plaintiff's doctors, testified that:

> Mr. Thompson did tell me about Mr. Wilson's case and it is impossible for me to weed that case from this one and also the sheriff's case. He stated that Mr. Wilson ran over his foot. I have not seen the Complaint in that case.

The other evidence that bore on plaintiff's credibility and the severity of his injuries and helped make the evidence complained of relevant was that (a) following the parking lot incident his doc-

tor did not "find a single bruise, skin mark, cut or blotch"; (b) following his alleged beating by the sheriff plaintiff's emergency room record stated that there were no abrasions on his body; and (c) in both instances plaintiff sued claiming to be seriously injured.

Plaintiff's requested jury instruction concerned the duty of a motorist in backing his vehicle. While the instruction could have been properly given the refusal to give it was not error because the instruction that the court gave on this issue was both adequate and correct. *Anderson v. Smith*, 29 N.C. App. 72, 223 S.E. 2d 402 (1976).

No error.

Judges ARNOLD and EAGLES concur.

PARK AVENUE PARTNERS, A NORTH CAROLINA PARTNERSHIP; JMT ASSOCIATES, A NORTH CAROLINA PARTNERSHIP; G. WARE TRAVELSTEAD; WILLIAM E. MAYER; AND FRANCIS P. JENKINS, JR. v. ROBERT E. JOHNSON, INDIVIDUALLY; R. E. JOHNSON ADVISORS, INC., A NEW YORK CORPORATION; RICHARD M. IMPERATORE, INDIVIDUALLY; AND RUBIN, QUINN & MOSS, A PENNSYLVANIA PARTNERSHIP

No. 8521SC1215

(Filed 6 May 1986)

Constitutional Law § 24.7— nonresident individual and partnership—drafting of North Carolina partnership agreement and supervision of closing within North Carolina—application of long arm statute constitutional

The participation of defendants in the drafting of a North Carolina partnership agreement and the supervision of the closing of a transaction by the partnership within the state of North Carolina was conduct in this state which invokes the protection of the law of this state to such an extent that traditional notions of fair play and substantial justice are not offended by requiring defendants to defend in this state an action growing out of the partnership. N.C.G.S. 1-75.4.

APPEAL by defendants Richard M. Imperatore and Rubin, Quinn & Moss, a Pennsylvania partnership, from *Morgan, Judge*. Order entered 23 June 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 March 1986.

This is an action for fraud. The plaintiffs alleged that they entered into a partnership agreement with Robert E. Johnson for the purpose of purchasing an airplane. They alleged further that Robert E. Johnson defrauded them in the purchase of the airplane and that Richard M. Imperatore joined in the fraud against them. Richard M. Imperatore and Rubin, Quinn & Moss moved to dismiss the action as to them on the ground that the Superior Court of Forsyth County did not have in personam jurisdiction.

At a hearing on the defendants' motion to dismiss the plaintiff filed affidavits by G. Ware Travelstead and G. Emmett McCall which said that Mr. McCall, a member of the North Carolina bar, was counsel for Park Avenue Partners. In August 1982 a partnership was formed between Robert E. Johnson and the individual plaintiffs for the purchase of an airplane. Richard Imperatore, a member of the Pennsylvania bar, was retained to assist in preparing the partnership agreement and the papers for the purchase of the airplane. On 8 October 1982 Messrs. Johnson and Imperatore delivered the airplane to the Smith-Reynolds Airport in Winston-Salem. Mr. McCall signed a receipt for the airplane upon the advice of Mr. Imperatore. Mr. Travelstead did not review the documents in connection with the sale of the airplane because Mr. Imperatore advised Mr. Travelstead that he had reviewed the documents and they were in order.

The court found facts consistent with the affidavits filed by the plaintiffs and denied the motion to dismiss. The defendants Imperatore and Rubin, Quinn & Moss appealed.

Petree, Stockton, Robinson, Vaughn, Glaze & Maready, by Daniel R. Taylor, Jr., for plaintiff appellees.

Bell, Davis & Pitt, P.A., by William Kearns Davis and Stephen M. Russell, for defendant appellants.

WEBB, Judge.

The appellants assign error to the denial of their motion to dismiss on the ground that the superior court does not have personal jurisdiction over them. They concede that G.S. 1-75.4 confers jurisdiction on the superior court. They contend that this statute is unconstitutional as applied to them. If the contacts of a party with a state are sufficient so that the maintenance of a

lawsuit against that party does not violate "traditional notions of fair play and substantial justice," the long arm statute is not unconstitutional as applied. A relevant inquiry is whether the defendant engaged in some act or conduct by which he may be said to have invoked the benefits and protections of the law of the forum. *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

We hold that the participation in the drafting of a North Carolina partnership agreement and the supervision of the closing of a transaction by the partnership within the state of North Carolina is conduct in this state which invokes the protection of the law of this state to such an extent that traditional notions of fair play and substantial justice are not offended by requiring the defendants to defend in this state an action growing out of the partnership. It was not error to deny the defendants' motion to dismiss.

We believe the holding of this case is consistent with *Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300, *appeal dismissed and disc. rev. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985); *Sola Basic Industries v. Electric Membership Corp.*, 70 N.C. App. 737, 321 S.E. 2d 28 (1984); *Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E. 2d 859, *disc. rev. denied*, 300 N.C. 373, 267 S.E. 2d 677 (1980) and *Andrews Associates v. Sodibar Systems*, 28 N.C. App. 663, 222 S.E. 2d 922, *disc. rev. denied*, 289 N.C. 726, 224 S.E. 2d 676 (1976), upon which the appellants rely.

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA v. ROBERT WESLEY ALSTON AND STANLEY LEE ROY McCLOUD

No. 853SC800

(Filed 6 May 1986)

1. **Bills of Discovery § 6— documents of car ownership—provision to defendants—failure to provide other documents**

The trial court did not err in admitting a bill of sale and an odometer statement for a car used in a robbery, although the court had previously suppressed other documents of ownership because the State had failed to provide defendants with copies as requested, where the admitted documents were not in the possession of the State prior to trial and were promptly made available to defendants when they were obtained by the State.

2. **Criminal Law § 62— impeachment of witness—inadmissibility of offer to take polygraph test**

The trial court did not err in refusing to allow defendants to impeach a State's witness with a recording of his offer to take a polygraph test in support of the story he told defense counsel.

3. **Robbery § 3— competency of evidence**

Testimony by a bank teller that one robbery defendant came into another bank on the day of the robbery and got change for a one hundred dollar bill was properly admitted to show that defendants were in town on the day of the robbery and to corroborate another State's witness. N.C.G.S. § 8C-1, Rules 105 and 404(b).

4. **Criminal Law § 102— last argument to jury**

The trial court properly permitted the State to argue last to the jury where one defendant introduced a tape recording of statements by a State's witness during cross-examination of the witness.

5. **Assault and Battery § 1; Robbery § 5.1— assault charge not merged into armed robbery**

A charge of assault with a deadly weapon with intent to kill was not merged into an armed robbery charge since "intent to kill" is not an element of armed robbery. N.C.G.S. 14-87.

APPEAL by defendants from *Reid, Judge.* Judgments entered 12 December 1984 and 12 February 1985 in Superior Court, CRAVEN County. Heard in the Court of Appeals 6 January 1986.

The defendants and Ricardo Punch were tried together for several offenses arising out of the robbery of First Citizens Bank in New Bern. Punch was acquitted of all charges, but both defendants were convicted of armed robbery, conspiracy to commit

armed robbery, and assault with a deadly weapon with intent to kill.

The State's evidence, which included the testimony of Melvin Jenkins, a confessed participant in the robbery, tended to show that: On 27 August 1982, the defendants and Jenkins visited Branch Bank and Trust on Glenburnie Road in New Bern with the intention of robbing it, but changed their minds after seeing what appeared to be a plainclothes policeman inside. Later that day they went to First Citizens Bank to rob it. While Jenkins waited outside the defendants burst into the bank wearing stocking masks. One of them pointed a gun at teller Ira Morgan, said "Don't touch that button, bitch," and fired a bullet that struck her ear. The robbers then filled a bag with money and as they ran from the bank a red dye pack inside the bag exploded. They drove away in a four-door "Chrysler type" sedan and split the money at a farm near Jenkins' father's home. Several items connected with the robbery, including a stolen automobile license plate, the red dye pack, pieces of nylon stocking, and a bank money wrapper, were recovered by the police upon information from Jenkins. Other facts pertinent to our decision are included in the opinion.

Attorney General Thornburg, by Assistant Attorney General Marilyn R. Mudge, for the State.

Calvin R. King for defendant appellant Robert Wesley Alston.

Acting Appellate Defender Hunter, by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant Stanley Lee Roy McCloud.

PHILLIPS, Judge.

The defendants jointly contend that the trial court erred in four respects and defendant Alston contends that he was prejudiced by five other rulings. None of these contentions have merit, in our opinion, and several of them require no discussion, though all have been considered. First we discuss two of the joint contentions.

[1] Their first contention is that the court erred in allowing the State to introduce a document to show that defendant Alston

owned the car allegedly used in the bank robbery, the contents of which had been suppressed by a prior order. Early in the trial, pursuant to the provisions of G.S. 15A-907, certain certified documents from the Washington, D. C. Department of Motor Vehicles indicating that Alston owned the car were suppressed by the judge because the State had failed to promptly provide the defendants with copies as requested. Later the court permitted a used car dealer from the District of Columbia to testify that he sold a car similar to the robbery car to a man named Robert Alston and a bill of sale and an odometer statement for the car were received into evidence as business records under G.S. 8C-1, N.C. Rules of Evidence 803(6). The defendants argue that the State was thereby permitted to circumvent the discovery rules; but applying those rules strictly, as *State v. Williams*, 29 N.C. App. 319, 224 S.E. 2d 250 (1976) requires, the argument has no merit. Before the trial started the bill of sale and the odometer statement were not within the "possession, custody, or control of the State." G.S. 15A-903(d); *State v. Crews*, 296 N.C. 607, 252 S.E. 2d 745 (1979). When the car dealer arrived in court with the documents they were promptly made available to defendants; and since defendants had no right to learn ahead of time, by discovery, who would testify against them and the substance of their testimony, *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977), G.S. 15A-907 was not violated.

[2] Their second contention is that the trial judge improperly restricted cross-examination of State's witness Melvin Jenkins, who both before trial and at trial described in detail the part each defendant played in the bank robbery. Before trial Jenkins also conferred with McCloud's attorney in Washington, D. C., told him that his statements implicating the defendants were the result of threats by the police, and in support of his story offered to take a polygraph test. The defendants had a recording of the conversation and the court permitted them to use it in cross-examining and impeaching Jenkins about the different statements made implicating the defendants; but the court refused to let the jury hear Jenkins' offer to undergo a polygraph test. That ruling was not erroneous, in our opinion, and was harmless in any event since it is commonly known that polygraph tests are not admissible under our law for any purpose. *State v. Grier*, 307 N.C. 628, 300 S.E. 2d 351 (1983).

[3-5] As to the further contentions of defendant Alston: The court did not err in permitting Diane Manley, a teller at another New Bern bank, to testify that one of the defendants came into that bank on the day of the robbery and got change for a one hundred dollar bill; for this testimony was offered and received for the limited but proper purpose of showing that the defendants were in New Bern on the day of the robbery and to corroborate the testimony of Jenkins. G.S. 8C-1, N.C. Rules of Evidence 105 and 404(b). Nor did the court err in permitting the State to argue last to the jury, since his co-defendant McCloud introduced a tape recording of Jenkins' statement during his cross-examination of Jenkins. *State v. Raper*, 203 N.C. 489, 166 S.E. 314 (1932); *State v. Baker*, 34 N.C. App. 434, 238 S.E. 2d 648 (1977). The argument of the prosecutor that he now claims was prejudicial was not objected to and thus is not properly before us, Rule 10(a), N.C. Rules of Appellate Procedure, and in our opinion was neither improper nor prejudicial in either event. The testimony of Detective Warren on redirect examination that a document defendant Alston cross-examined him about was obtained from the Treasury Department during a criminal records check of him, even if error, was clearly invited. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984). And the charge of assault with a deadly weapon with intent to kill was not merged with the armed robbery charge since "intent to kill" is not an element of armed robbery. G.S. 14-87; *State v. Richardson*, 279 N.C. 621, 185 S.E. 2d 102 (1971).

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

IN THE MATTER OF: THE APPEAL OF HIGHLANDS DEVELOPMENT CORPORATION, CHESTER WRIGHT, SARA NELL WRIGHT, AND COOLIDGE AND CHRISTINE MASON CHALLENGING THE REAPPRAISAL CONDUCTED BY MACON COUNTY FOR 1983

No. 8510PTC1266

(Filed 6 May 1986)

1. **Taxation § 25— appeal of valuation—class action denied—no error**

The Property Tax Commission properly denied petitioners' request to prosecute an appeal of a valuation as a class action because petitioners failed to show how they were aggrieved by the valuation of the other property owners' property. N.C.G.S. 105-290.

2. **Taxation § 25.4— valuation—right to actual visit and observation of property—no notice—no error**

There was no error in the Property Tax Commission's holding that the failure to give each property owner written notice of the right to an actual visit to and observation of his property did not invalidate the revaluation because petitioners failed to carry their burden of showing that the result was property valuations which were unreasonably high. N.C.G.S. 105-317(a)(1).

3. **Taxation § 25.6— revaluation—valuation factors—no error**

The Property Tax Commission did not err by holding that a revaluation complied with N.C.G.S. 105-317(a)(1) where the record reveals that the relevant factors set forth in the statute were considered. This statute is directory and failure to consider each and every *indicia* of value recited in the statute does not vitiate the appraisal.

APPEAL by petitioners from decision of the North Carolina Property Tax Commission. Decision entered 24 July 1985. Heard in the Court of Appeals 15 April 1986.

In 1983 Macon County conducted its statutorily mandated octennial revaluation of all the real property and improvements thereon located in Macon County. Petitioners appealed the County's assessment of their property to the Macon County Board of Equalization and Review. The Board upheld the valuation and petitioners appealed to the North Carolina Property Tax Commission (hereinafter Commission). Before the Commission the petitioners attempted to prosecute the appeal as a class action suit. In September 1984, the Commission denied petitioners' request to prosecute the appeal as a class action. An evidentiary hearing was conducted in May 1985. On 24 July 1985, the Commission entered an order sustaining the decision of the County Board

of Equalization and Review. From this decision, petitioners appealed.

Herbert L. Hyde for the appellants.

Jones, Key, Melvin & Patton, by R. S. Jones, Jr., and Chester Marvin Jones, for the appellee.

ARNOLD, Judge.

[1] The appellants first contend the Commission erred in refusing to allow them to present their appeal as a class action suit. We disagree.

The appellants concede that the tax valuation statute does not expressly authorize class action appeals. However, they contend that G.S. 105-290 should be read to permit class action appeals. In *Brock v. Property Tax Comm.*, 290 N.C. 731, 228 S.E. 2d 254 (1976), our Supreme Court stated that in order for a property owner to contest the valuation of the property of others he must be some way aggrieved by that valuation. The appellants have failed to show how they were aggrieved by the valuation of the other property owners' property; thus, the Commission properly refused to allow them to appeal those valuations as a class action.

[2] The appellants next contend the Commission "erred in holding that the failure to give each property owner written notice of entitlement to an actual visit to and observation of his property was not a denial of the rights of appellants and did not invalidate the revaluation." G.S. 105-317(b) in pertinent part provides:

> (b) In preparation for each revaluation of real property required by G.S. 105-286, it shall be the duty of the tax supervisor to see that:
>
> . . . .
>
> (7) Notice is given in writing to the owner that he is entitled to have an actual visitation and observation of his property to verify the accuracy of property characteristics on record for that property.

The appellee admits that it failed to follow the requirements set forth in the statute. However, in order for the appellants to have

the valuation set aside they must show more than a failure to follow the statutory procedures. In *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975), our Supreme Court set forth the following test for setting aside a tax valuation. "Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e. that the valuation was *unreasonably high. Id.* at 563, 215 S.E. 2d at 762 (emphasis in original). Even though the appellee admits it failed to follow the procedure set forth in the statute, we believe that the appellant has failed to carry its burden of showing that the result reached by this procedure led to property valuations which were unreasonably high. In fact we are unable to find any evidence that the value placed on the appellants' property was too high. Thus, we find no error in the Commission's actions.

[3] Finally, appellants argue the Commission erred in holding that the revaluation complied with G.S. 105-317(a)(1). G.S. 105-317(a)(1) states:

> (a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:
>
> (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature. Acreage or poundage allotments for any farm commodity shall not be listed as a separate element for taxation in the appraisal and assessment of real property for ad valorem taxes, but may be considered as a factor in determining true value.

The appellants argue that some of these factors were not considered in valuing their property. G.S. 105-317(a)(1) is directory and failure to consider each and every *indicia* of values recited in the statute does not vitiate the appraisal. *See, In re Appeal of*

Broadcasting Corp., 273 N.C. 571, 160 S.E. 2d 728 (1968). The record reveals that the appraisal was done in accordance with the statute, and that the relevant factors set forth in the statute were considered.

The decision of the Commission is in all respects

Affirmed.

Judges WHICHARD and JOHNSON concur.

STATE OF NORTH CAROLINA v. CHARLES FRAZIER

No. 8520SC842

(Filed 6 May 1986)

1. **Larceny § 7.4— felonious possession of stolen property—evidence sufficient**

In a prosecution for felonious possession of stolen copper wire, defendant was precluded from challenging the sufficiency of the evidence by his failure to make a motion to dismiss at trial; however, even if he had made such a motion, the evidence was sufficient in that the State presented evidence showing that defendant sold United Scrap Processors 1,040 pounds of copper wire, all of the wire was placed in or beside a bin in a warehouse, the owner of American Rewinding identified the wire as being that stolen from American Rewinding, the owner estimated that there were approximately 2,200-2,500 pounds of copper in or about the bin, and the wire was valued at 45¢ per pound.

2. **Criminal Law § 138.28— aggravating factor—criminal record—prosecutor's unsworn statements—insufficient**

In a prosecution for felonious possession of stolen property, the prosecutor's unsworn statements as to defendant's prior criminal record were not competent to support a finding of an aggravating factor and, because no other factors in aggravation or mitigation were found, the case was remanded for entry of the appropriate presumptive sentence.

ON remand from the Supreme Court of North Carolina.

Appeal by defendant from *Collier, Judge.*

Defendant was indicted and convicted of felonious possession of stolen goods, namely, copper wire. He received a four-year prison sentence which exceeded the presumptive term of three years.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas D. Zweigart, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr. for defendant-appellant.

WELLS, Judge.

[1] Defendant first contends that there was insufficient evidence that defendant, on 4 February 1985, possessed more than $400 worth of copper wire which was taken from American Rewinding, Inc. between 2 February and 4 February 1985 because the owner of American Rewinding failed to identify all of the copper wire he saw at United Scrap Processors on 6 February 1985 as being that stolen from American Rewinding. Defendant, however, is precluded from challenging the sufficiency of the evidence on appeal by his failure to make a motion to dismiss at trial. Rule 10(b)(3) of the Rules of Appellate Procedure. Even if he had made such a motion, his contention has no merit. The State presented evidence tending to show that defendant, on 4 February 1985, sold United Scrap Processors 1,040 pounds of copper wire, valued at $.45 per pound, all of which was placed in or beside a bin in a warehouse; that the owner of American Rewinding identified the wire in the bin on 6 February 1985 as being that stolen from American Rewinding; that all of the wire in or beside the bin had been purchased by United Scrap Processors from defendant on 4 February 1985 and 6 February 1985; and that the owner estimated that there were approximately 2,200-2,500 pounds of copper in or about the bin. We hold that the foregoing evidence was sufficient to withstand a motion to dismiss, had one been made.

[2] Defendant's remaining contention is that the prosecutor's unsworn statements as to defendant's criminal record were not competent evidence to support a finding of an aggravating factor that defendant had prior convictions. We agree and remand for entry of the appropriate presumptive sentence. In the sentencing phase of defendant's trial, the only presentation made by the State was the prosecutor's unsworn statement to the court as to defendant's records of prior convictions. "Under the Fair Sentencing Act, a trial court may not find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that it exists." *State v. Swimm*, 316 N.C. 24, 340 S.E. 2d 65 (1986), *citing*

State v. Thompson, 309 N.C. 421, 307 S.E. 2d 156 (1983). The trial court erroneously found this factor. The trial court found no other factors in aggravation and none in mitigation. Under these circumstances, we remand for entry of the appropriate presumptive sentence.

This opinion supersedes our unpublished opinion in this case filed 17 December 1985.

No error in the trial;

Remanded for resentencing.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. JOHNNY LEE ALLEN

No. 8527SC1240

(Filed 6 May 1986)

Criminal Law § 35— similar robbery by another person—evidence properly excluded

The trial court properly excluded evidence offered by defendant that two months after the fast food restaurant robbery in question another person resembling defendant and utilizing a similar *modus operandi* robbed another fast food restaurant since such evidence does not point directly to another person's guilt of the crime with which defendant was charged and does not rebut the identification of defendant by eyewitnesses as the perpetrator of the robbery in question. N.C.G.S. 8C-1, Rule 402.

APPEAL by defendant from *Kirby, Judge*. Judgment entered 11 July 1985 in CLEVELAND County Superior Court. Heard in the Court of Appeals 14 April 1986.

Defendant was convicted of robbery with a dangerous weapon. The State's evidence tended to show that shortly after 10:00 p.m. on 13 January 1985 a man brandishing a gun forced his way inside the rear door of a Hardee's restaurant in Shelby. The robber pointed the gun at one of the employees and said, "Let's go for the money." He then made his way to the office area where he ordered four of the five employees to lie face down on the floor. He then pulled out the receiver from the office telephone and

ordered the assistant manager to "stuff my pockets." After receiving the money, the robber fled the scene.

Subsequent to the robbery, defendant was identified by the five eyewitnesses as the robber.

Defendant presented evidence which tended to show that at the time of the robbery he was in Kings Mountain watching movies and playing cards with friends. Evidence was proffered by defendant that another individual resembling defendant used a *modus operandi* similar to that in the Hardee's robbery committed later in Shelby. This evidence was excluded after a *voir dire* hearing.

Attorney General Lacy H. Thornburg, by Associate Attorney Angeline M. Maletto, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender David W. Dorey, for defendant-appellant.

WELLS, Judge.

In his sole assignment of error, defendant contends that the trial court erred in not allowing him to offer evidence of a similar robbery. He argues that evidence that another robbery perpetrated by a man resembling defendant and utilizing an almost identical *modus operandi* was directly and substantially relevant to the sole issue in dispute, *i.e.*, identity of the perpetrator of the robbery. He argues also that the exclusion of this evidence violated the Rules of Evidence and denied him the right to present a full defense. We disagree.

As a general rule, evidence that another person committed a crime with which a defendant is charged is admissible when "it points directly to the guilt of the third party." *State v. Hamlette*, 302 N.C. 490, 276 S.E. 2d 338 (1981); *State v. Jenkins*, 292 N.C. 179, 232 S.E. 2d 648 (1977). Evidence tending to show that the crime was committed by another is inadmissible, however, when such evidence creates only an inference or conjecture as to the other's guilt. *State v. Hamlette, supra; State v. Baggett*, 61 N.C. App. 511, 301 S.E. 2d 116 (1983).

In the present case, the proffered evidence was, in essence, that another person, bearing a resemblance to defendant and util-

izing a *modus operandi* similar to that used in the Hardee's robbery, robbed another fast food restaurant two months after the Hardee's robbery. There was no evidence, however, that the other person committed the crime with which defendant was charged. Stated another way, the proffered evidence does not point directly to the other person's guilt of the crime with which the defendant was charged. Neither does the proffered evidence in any way refute the identification of the defendant by the eyewitnesses as the perpetrator of the robbery. Therefore, the proffered evidence could do nothing more than create an inference or conjecture as to another's guilt of the crime charged and it was therefore properly excluded.

Defendant contends, however, that despite the decisional law to the contrary, on which we have relied, his proposed evidence was admissible under N.C. Gen. Stat. § 8C-1, Rule 402 of the Rules of Evidence. Rules 401 and 402 in pertinent part provide:

> Rule 401. *Definition of "relevant evidence."* "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
>
> Rule 402. *Relevant evidence generally admissible; irrelevant evidence inadmissible.* All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible.

The Advisory Committee's Commentary to Rule 401 notes: "Problems of relevancy call for an answer to the question of whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence." This view is in accord with the decisional law of this State. *See, e.g., State v. Silhan*, 302 N.C. 223, 275 S.E. 2d 450 (1981) (Evidence is relevant if it has any logical tendency, however slight, to prove the fact in issue); *see also* 1 Brandis, *N.C. Evidence* § 77 (2d rev. ed. 1982). Defendant's proffered evidence, having been offered to refute the eyewitnesses' identification of defendant as the robber, was so weak, so speculative and uncertain, that it did not possess sufficient probative value to justify receiving it in evidence. The Rules of Evidence simply do not help defendant on this issue.

We hold that defendant had a fair trial free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge MARTIN concur.

BERTIE-HERTFORD CHILD SUPPORT ENFORCEMENT AGENCY, EX REL., BARBARA SCOTT SOUZA v. IRVIN RAY BARNES

No. 856DC1214

(Filed 6 May 1986)

1. **Evidence § 51; Trial § 6.1— blood-grouping tests—chain of custody—stipulation**

Testimony of the results of blood-grouping tests was not improperly admitted because there was no showing of the chain of custody of the test samples where the parties stipulated that "the chain of evidence and possession of said blood samples shall be deemed proper and secure."

2. **Bastards § 10; Equity § 2— paternity and child support—laches—no statute of limitations**

Defendant waived the defense of laches in a paternity and child support action by failing to plead such defense. Furthermore, no statute of limitations barred the action since the father's duty to support his illegitimate children continues throughout the minority of the children.

APPEAL by defendant from *Williford, Judge*. Judgment entered 24 June 1985 in BERTIE County District Court. Heard in the Court of Appeals 9 April 1986.

Plaintiff, the Child Support Enforcement Agency for Bertie and Hertford Counties, brought this action to determine the paternity of Irvin Ray Scott and Evelyn Nicole Scott, both born 13 January 1973, alleged to be the illegitimate children of defendant, and to require defendant to contribute to the support of said children. Defendant answered, denying plaintiff's allegations of paternity and pleading the statute of limitations as a defense.

Following a trial, judgment was entered finding and concluding that defendant was the father of said children and ordering defendant to contribute to their support. Defendant appeals from that judgment.

Smith and Daly, P.A., by Lloyd C. Smith, Jr. and Roswald B. Daly, Jr., for plaintiff-appellee.

Perry W. Martin; and Taylor & McLean, by Donnie R. Taylor, for defendant-appellant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in admitting evidence of the blood-grouping tests carried out to determine the paternity of the children named in plaintiff's complaint. This evidence was presented through the testimony of G. L. Ryals, Director of Paternity Testing at Roche Biomedical Laboratories and an expert in Human Leucocyte Antigen (HLA) Tissue Testing, a test to determine the probability of paternity. Dr. Ryals testified that his test results showed the probability of defendant's paternity of Irvin Ray Scott to be 98.98 percent and Evelyn Nicole Scott to be 95.10 percent. Defendant now contends that a proper foundation was not laid for Dr. Ryals' testimony because there was no showing of the chain of custody of the test procedures. The record shows that prior to trial, plaintiff and defendant, through counsel, stipulated that the blood-grouping tests would be conducted and that the results would be admissible in evidence. In addition, the parties stipulated that "the chain of evidence and possession of said blood samples shall be deemed proper and secure." Courts in this State look with favor upon stipulations designed to simplify and shorten litigation. *Thomas v. Poole*, 54 N.C. App. 239, 282 S.E. 2d 515 (1981), *disc. rev. denied*, 304 N.C. 733, 287 S.E. 2d 902 (1982). Where stipulations have been entered of record and there is no contention that the attorney for either party was not authorized to enter into such stipulations, the parties are bound and cannot take a position inconsistent with their stipulations. *Id.* We deem defendant's argument on this issue to be wholly without merit and overrule it.

[2] In his second assignment of error, defendant contends that plaintiff's action should be barred by the doctrine of laches and by operation of the statute of limitations. Laches is an affirmative defense which must be specifically pleaded by answer. N.C. Gen. Stat. § 1A-1, Rule 8(c) of the Rules of Civil Procedure. Defendant failed to plead this defense and has therefore waived it. Even if

there had been no waiver, defendant, having offered no evidence, has obviously failed to meet his burden at trial of establishing this defense. *See Young v. Young*, 43 N.C. App. 419, 259 S.E. 2d 348 (1979). There is no statute of limitations as such affecting a father's duty to support his illegitimate children. *Cogdell v. Johnson*, 46 N.C. App. 182, 264 S.E. 2d 816 (1980). That duty continues throughout the child's minority. *Id.* This assignment is overruled.

For the reasons stated, we find no error in defendant's trial.

No error.

Chief Judge HEDRICK and Judge MARTIN concur.

VIRGINIA A. BASINGER v. A. MARSHALL BASINGER, II

No. 8526DC1298

(Filed 6 May 1986)

Rules of Civil Procedure § 13— prior action pending—compulsory counterclaim

Where the wife's prior action concerning child custody and support was pending at the time plaintiff husband filed a motion in the cause in a divorce action pertaining to child custody and support, the compulsory counterclaim provisions of N.C.G.S. § 1A-1, Rule 13(a) required dismissal of the husband's motion.

APPEAL by defendant from *Jones (William G.), Judge.* Order entered 17 October 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 16 April 1986.

Tucker, Hicks, Moon, Hodge & Cranford, by John E. Hodge, Jr., Fred A. Hicks and Edward P. Hausle, for plaintiff, appellee.

A. Marshall Basinger, II, defendant, appellant, pro se.

HEDRICK, Chief Judge.

The record before us discloses the following: On 22 April 1983, in the case entitled *Virginia A. Basinger v. A. Marshall Basinger, II*, No. 83CVD3911, judgments were entered granting plaintiff absolute divorce from defendant and equitably distributing

marital property pursuant to G.S. 50-20. No mention was made in these judgments regarding the custody and support of any children born to the marriage between plaintiff and defendant.

On 9 September 1985, defendant filed what purports to be a motion in the cause wherein he alleged that pursuant to a separation agreement between the parties, custody of the parties' two minor children was awarded to plaintiff, and defendant agreed to pay support. Defendant also alleged that by agreement of the parties, the parties' daughter moved to the care and custody of defendant and that defendant ceased making child support payments to plaintiff. Defendant further alleged the following:

> Although the plaintiff initially agreed with this, although reluctantly, she nevertheless filed an action on July 8, 1985 in case number 85-CVD-6992, in which she asked for specific performance of the child support provisions of the initial separation agreement, alleging an arrearage of $8,900 as of the amendment to her pleadings filed on August 26, 1985. Plaintiff's position in that action is that defendant continued to be liable under the support provisions of the separation agreement even after the custody of one of the children was changed.

On 1 October 1985 plaintiff, Virginia A. Basinger, filed a motion to dismiss defendant's motion in the cause on the grounds that there was a prior pending action seeking the same relief. Plaintiff's motion was allowed.

The motion filed by defendant in this case discloses that the wife, the plaintiff herein, had commenced in the district court in Mecklenburg County, on 8 July 1985, an action with respect to the custody and support of the children. Plaintiff's action, described as case number 85-CVD-6992, was pending at the time defendant filed his motion. Our Supreme Court in *Gardner v. Gardner*, 294 N.C. 172, 240 S.E. 2d 399 (1978) held that:

> Any claim which is filed as an independent, separate action by one spouse during the pendency of a prior claim filed by the other spouse and which may be denominated a compulsory counterclaim under Rule 13(a), may not be prosecuted during the pendency of the prior action but must be dismissed with leave to file it as a counterclaim in the prior ac-

tion or stayed until final judgment has been entered in that action.

Id. at 181, 240 S.E. 2d at 406.

We hold the trial court properly dismissed defendant's motion.

Affirmed.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. BOBBY GENE McCABE

No. 852SC1077

(Filed 6 May 1986)

Criminal Law § 22— superseding indictment—trial on same day as arraignment—new trial

Defendant was granted a new trial where he was originally charged with rape and first degree kidnapping by use of force, a superseding indictment was obtained charging defendant with first and second degree rape of a person mentally incapacitated or physically helpless, defendant was not served with the indictment, his first notice of it was when his case was called for trial, defendant was arraigned on the superseding indictment following selection of the jury, defendant's request for a continuance was denied, and defendant proceeded to trial. N.C.G.S. 15A-943.

APPEAL by defendant from *Beaty, Judge.* Judgment entered 30 January 1985 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 4 March 1986.

Defendant was originally charged with rape and first degree kidnapping in two indictments returned on 29 May 1984. The rape indictment was sufficient to charge both first and second degree rape of a person when force was used, but was not sufficient to charge second degree rape of a person mentally incapacitated or physically helpless. Defendant was arraigned on these charges and entered a plea of "not guilty." On 2 October 1984, a superseding indictment was obtained charging defendant in two counts with first degree rape and second degree rape of a person mentally incapacitated or physically helpless. Defendant however was

not served with this indictment, and was first given notice of it on 29 January 1985 when his case was called for trial. Following the selection of the jury, defendant was arraigned on the superseding indictment and pled "not guilty." Defendant then objected to proceeding to trial on the new indictment and requested a continuance. This motion was denied. The jury found defendant guilty of first degree kidnapping and second degree rape. From the judgment imposing imprisonment for two consecutive twelve-year terms, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General R. Bryant Wall, for the State.

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

ARNOLD, Judge.

Defendant contends that the trial court erred in compelling defendant to proceed to trial on the same day he was arraigned on a superseding indictment because such action by the court violated G.S. 15A-943. We agree, and therefore grant defendant a new trial.

General Statute 15A-943 provides in pertinent part:

> (a) In counties in which there are regularly scheduled 20 or more weeks of trial sessions of superior court at which criminal cases are heard, . . . the prosecutor must calendar arraignments in the superior court on at least the first day of every other week in which criminal cases are heard. No cases in which the presence of a jury is required may be calendared for the day or portion of a day during which arraignments are calendared.
>
> (b) When a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned.

We take judicial notice that Beaufort County is a county having twenty or more regularly scheduled weeks of trial sessions of superior court at which criminal cases are heard. *See State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977). General Statute

15A-943 is therefore applicable to defendant in this case. From the record presented, it appears that the superseding indictment was never calendared for arraignment in violation of G.S. 15A-943(a). Furthermore, the trial court violated the provisions of G.S. 15A-943(b) by proceeding with defendant's trial over his objection on the same day as his arraignment on the superseding indictment. These violations of G.S. 15A-943 constitute reversible error and necessitate a new trial. *State v. Shook*, 293 N.C. 315, 237 S.E. 2d 843 (1977).

New trial.

Judges PHILLIPS and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 MAY 1986

ATHEY v. ATHEY No. 8526DC1191	Mecklenburg (83CVD10316)	Affirmed
BRITT v. BRITT No. 857DC986	Wilson (84CVD162)	Affirmed in part, vacated and remanded in part.
COOPER v. COOPER No. 8516DC1136	Robeson (83CVD599)	Appeal Dismissed
DUNN v. DUNN No. 8514DC545	Durham (81CVD3555)	Affirmed
GODWIN v. JOHNSON No. 8512DC1025	Cumberland (84CVD4584)	No Error
HAMMOND v. BLADENBORO COTTON MILLS No. 8510IC1181	Ind. Comm.	Reversed & Remanded
HAPONSKI v. WILLIAM C. VICK CONSTRUCTION CO. No. 8510IC1322	Ind. Comm.	Affirmed
HILENSKI v. HILENSKI No. 8526DC540	Mecklenburg (76CVD1470)	Vacated & Remanded
IN RE THOMPSON No. 8512DC1248	Cumberland (85J309)	Reversed & Remanded
KILPATRICK v. CANNON MILLS CO. No. 8510IC1168	Ind. Comm.	Reversed & Remanded
ROUTH v. ROUTH No. 8518DC1210	Guilford (83CVD5812)	Vacated & Remanded
SHELTON v. SHELTON No. 8517DC1217	Surry (85CVD361)	Affirmed in part, remanded in part.
STATE v. BEANE No. 8520SC1131	Moore (84CRS4466)	No Error
STATE v. BROOKS No. 8530SC1396	Haywood (85CRS1845)	No Error
STATE v. CLAYTON No. 8515SC958	Orange (85CRS147)	No Error
STATE v. DALTON No. 8515SC988	Chatham (84CRS3944) (84CRS3979)	No Error

STATE v. DIAL No. 8516SC1303	Robeson (85CRS12443)	Affirmed
STATE v. FORTNER No. 8512SC1225	Cumberland (85CRS9643)	No Error
STATE v. GENTILE No. 8528SC1312	Buncombe (85CRS1242) (85CRS9997)	Affirmed
STATE v. GRAGG No. 8525SC1277	Caldwell (83CRS5398)	Affirmed
STATE v. HARBIN No. 8522SC1270	Iredell (85CRS160)	No Error
STATE v. HINES No. 851SC1261	Currituck (84CRS1933)	No Error
STATE v. NEFF No. 8527SC1288	Gaston (85CRS12130)	No Error
STATE v. SUTHERLAND No. 8528SC1238	Buncombe (85CRS2315) (85CRS3431) (85CRS5726)	No Error
STATE v. TAYLOR No. 853SC1183	Craven (78CVS804)	Affirmed
STATE v. THOMAS No. 855SC1301	New Hanover (83CRS21791)	No Error
STATE v. TRAVIS No. 857SC1174	Nash (85CRS1162)	No Error
STATE v. WASHINGTON No. 8526SC1300	Mecklenburg (84CRS60562)	No Error
WEST v. BRYAN No. 853SC1008	Craven (83CVS1782)	No Error

BON C. HINSON, JR. v. HARRY LEE HINSON AND WIFE, CAROL HINSON

No. 8526SC918

(Filed 20 May 1986)

1. Wills § 60— renunciation—reasonable time

A devisee may disclaim or renounce a right under a will, but he or she must do so within a reasonable time.

2. Wills § 60— renunciation—motion to set aside for lack of timeliness

Plaintiff could not successfully argue that his renunciation should be set aside as to his testate interest because it was not made within a reasonable time and as to any intestate interest because it was not made within the time limitations set out in N.C.G.S. § 29-10 (1966), since the clerk, who had exclusive original jurisdiction of the administration of testatrix's estate, allowed plaintiff's petition to renounce; the judgment was regular and valid on its face; as a party to the original action, plaintiff could not subsequently collaterally attack it; and plaintiff could not prevail on his contention that the court erred as a matter of law where he failed to appeal in due time.

3. Wills § 60; Trusts § 13.2— renunciation of testamentary interest—engrafting parol trust on renounced interest not permitted

Where plaintiff sought and obtained an order allowing him to renounce any interest under the will of his mother, he could not thereafter engraft a parol trust upon his renounced interest, since to recognize a renouncer's right to engraft a parol agreement upon an order of the court would severely undermine the integrity of personal and property rights acquired on the faith of judicial proceedings, and since a renunciation relates back to the death of the testator so that the renouncer never actually holds legal title to the property.

4. Wills § 60; Trusts § 14.2— renunciation of testamentary interest—constructive trust—undue influence

Plaintiff could maintain an action seeking the declaration of a constructive trust on his interest under his mother's will which he had renounced, and his forecast of evidence created a genuine issue as to whether defendant unduly influenced his decision to sign the renunciation where such evidence tended to show that, at the time he signed the renunciation, plaintiff was physically ill, suffering from diabetes; his business had recently gone bankrupt; he and his wife had planned to move from Charlotte where the property in question was located, to Greenville, S. C. and as a result he needed someone to attend to the rental property in his absence; plaintiff and defendant were brothers and plaintiff "trusted him implicitly"; plaintiff turned the management of the property over to defendant and defendant began to collect rents, pay the mortgage and see that the property was maintained; the petition to renounce which plaintiff signed was drafted by defendant's lawyers who were present when plaintiff signed it; the lawyers informed plaintiff that defendant could not continue to manage the property unless he signed; defendant's lawyers filed the petition and obtained the "Order of Renunciation"; and plaintiff was not represented by counsel.

5. Trusts § 14.2— constructive trust—confidential or fiduciary relationship—sufficiency of evidence

Evidence was sufficient to create a genuine issue as to whether a confidential or fiduciary relationship existed between plaintiff and defendant where such evidence tended to show that they were brothers who inherited rental property from their mother, and defendant agreed to manage the property for plaintiff.

6. Wills § 60; Equity § 1.1— renunciation of testamentary interest—attempt to defraud creditors—clean hands

A genuine issue of fact existed as to whether plaintiff renounced his interest under his mother's will in an attempt to defraud his judgment creditors, and therefore whether his claim for equitable relief was barred by the clean hands doctrine; furthermore, plaintiff's false declarations to the court at the time he renounced constituted unclean hands which would bar his equitable remedies, unless he acted under undue influence so that his guilt was less than that of defendant, and a genuine issue of fact existed as to whether defendant's wrongdoing sufficiently reduced plaintiff's culpability to the point that plaintiff was entitled to equitable relief.

7. Fraud § 12; Cancellation and Rescission of Instruments § 10.1— quitclaim deed obtained by fraud—sufficiency of evidence

A genuine issue of fact existed as to whether defendant obtained through fraud a quitclaim deed to plaintiff's interest in property left to the parties by their mother where plaintiff's evidence tended to show that defendant represented that a new roof was required in order to continue renting the property; because of plaintiff's outstanding judgments and the questions surrounding the validity of plaintiff's renunciation, defendant could not obtain financing, using the property as collateral, without the quitclaim deed; plaintiff relied upon defendant's representations and agreed to sign the deed; defendant's lawyers drafted the deed and sent it to plaintiff for his signature; and plaintiff subsequently learned that, at the time defendant requested the deed, the roof did not need replacing.

APPEAL by plaintiff from *Burroughs, Judge*. Order entered 1 July 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 January 1986.

On 26 December 1970 Lula D. Hinson, mother of plaintiff and defendant-husband, died testate. On 24 May 1972 her holographic will was probated. The will devised "the land and real property of 2014 Greenway . . . [to plaintiff]." It further provided: "However he shall share and share alike with his brother [defendant-husband] the rents from the upstairs Apts. in the big house, after taxes & insurance and [repairs] on roof." The will contained no residuary clause.

On 10 January 1974 plaintiff sought and obtained an Order of Renunciation. Tracking the language of plaintiff's "Petition to Renounce," the order provides:

> 1. That [plaintiff] be hereby authorized to renounce all his rights in and to the bequest under the Will of Lula D. Hinson; and
>
> 2. That the provision of said Will directing distribution of property to [plaintiff] be of no effect; and
>
> 3. That the Executor of the Estate . . . be directed to hold and administer said estate as if [plaintiff] had died immediately preceding Lula D. Hinson.

In addition to the renunciation, plaintiff conveyed whatever right or interest he retained in the Greenway Avenue property to defendant-husband by a quitclaim deed dated 29 October 1975. The deed was recorded, and defendant-husband subsequently executed a deed transferring the property to himself and defendant-wife.

Plaintiff filed this action seeking a declaration that defendants hold the Greenway Avenue property in trust for plaintiff and an order requiring defendants to reconvey the property. The trial court granted defendants' motion for summary judgment. Plaintiff appeals.

Ray Rankin for plaintiff appellant.

William G. Robinson for defendant appellees.

WHICHARD, Judge.

I.

The sole question is whether the court erred in granting defendants' motion for summary judgment. Defendants are entitled to summary judgment pursuant to N.C. Gen. Stat. 1A-1, Rule 56 if the record shows "that there is no genuine issue as to any material fact and that [defendants are] entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party. *Valdese General Hosp., Inc. v. Burns*, 79 N.C. App. 163, 164, 339 S.E. 2d 23, 25 (1986).

We hold that the evidence, viewed in the light most favorable to plaintiff, raises genuine issues of material fact. Accordingly, we reverse.

II.

The forecast of evidence, viewed in the light most favorable to plaintiff, *Burns, supra*, tends to establish the following:

In 1973 defendant-husband began to "manage" the Greenway Avenue property for plaintiff. According to plaintiff's affidavit, "[h]e was to collect the rents, pay the mortgage payments and generally keep the property up."

Plaintiff's business failed, and as of 31 January 1974 judgments totalling $64,973.30 had been entered against him personally. In addition to his financial problems plaintiff was physically ill. He and his wife, then residents of Mecklenburg County, decided to move to Greenville, South Carolina.

The Greenway Avenue property was in disrepair. Defendant-husband, apparently concerned about preserving his interest in the property and the money he would have to advance to maintain the property, informed plaintiff that he could not continue to manage the property unless plaintiff renounced the interest he had received under his mother's will. While plaintiff was aware that the effect of the renunciation, if valid, would be to defeat any rights his creditors had to the property, he thought he had sufficient assets to satisfy his debts. Plaintiff, concerned about finding someone else to manage the property and wanting to move, agreed to sign the "Petition to Renounce."

Prior to signing the renunciation, however, plaintiff and defendant-husband orally agreed that defendant-husband would hold the property in trust for plaintiff and in ten years, when the judgments expired "or whatever happened," they would have an accounting and defendant-husband would get half the property. Plaintiff signed the "Petition to Renounce" and an "Order of Renunciation" was obtained. It is not clear from the record whether the judgments against plaintiff ultimately were paid, were renewed, or have expired.

Shortly before 24 October 1975, defendant-husband informed plaintiff that he needed to obtain a loan using the property as col-

lateral in order to finance needed repairs on the roof. Relying on defendant-husband's representations, plaintiff signed a quitclaim deed to defendant-husband, not for the purpose of vesting ownership in him, but to make it possible for defendant-husband to obtain a loan. Plaintiff subsequently discovered that prior to defendant-husband's request for a quitclaim deed a new roof had already been put on the property.

III.

RENUNCIATION

Plaintiff sought and obtained an order allowing him to renounce all interest in the property bequeathed to him under his mother's will and instructing the executor of her estate "to hold and administer said estate as if [plaintiff] had died immediately preceding [the testatrix]." If the order is given effect, plaintiff would have no interest in the property and the transactions involving the quitclaim deed would be of no consequence.[1]

A beneficiary's right to renounce exists irrespective of statutory authority. *Keesler v. Bank*, 256 N.C. 12, 19, 122 S.E. 2d 807, 813 (1961). In 1974, when plaintiff renounced all interest under his mother's will, there was no statutory authority for the renunciation of testate interests. Subsequently, the General Assembly enacted Chapter 31B of the General Statutes. N.C. Gen. Stat. 31B-5, however, provides that Chapter 31B "does not abridge the right of a person to waive, release, disclaim or re-

1. While it is clear that should the renunciation be given effect and the testatrix's estate be distributed as if plaintiff had predeceased her, plaintiff would have no interest in the property, it is not clear what interest, if any, defendant-husband obtains. N.C. Gen. Stat. 31B-3(b) and N.C. Gen. Stat. 31-42(a), effective 1 October 1975, provide that a renounced gift passes first by substitution to such issue of the renouncer as would have been an heir to the testator under the provisions of the Intestate Succession Act had the renouncer died before the testator. If no such heir exists, the gift lapses and passes under the residuary clause of the will. N.C. Gen. Stat. 31-42(c)(1)(a). If, as here, there is no residuary clause, the gift passes as if the testator had died intestate. N.C. Gen. Stat. 31-42(c)(1)(b). Arguably, the law applicable to plaintiff's renunciation, N.C. Gen. Stat. 31-42 (1966), and the express mandate of the order requiring testatrix's estate to be distributed as if plaintiff had predeceased her, dictate the same results.

As plaintiff may have heirs qualified to take under N.C. Gen. Stat. 31-42 (1966), our decision regarding the effect of the renunciation, if valid, is limited to plaintiff, and any resolution reached in this action determines only the relative rights of plaintiff and defendants.

nounce property or an interest therein under any other statute or as otherwise provided by law." *See also Sedberry v. Johnson*, 62 N.C. App. 425, 302 S.E. 2d 924 (1983).

[1] A beneficial bequest or devise gives rise to a presumption of acceptance by the beneficiary. *Perkins v. Isley*, 224 N.C. 793, 798, 32 S.E. 2d 588, 591 (1945). A devisee may disclaim or renounce a right under a will, but he or she must do so within a reasonable time. *Id.*

N.C. Gen. Stat. 29-10 (1966) governs the renunciation of intestate interests prior to 1 October 1975. 1975 N.C. Sess. Laws, ch. 371, sec. 2 and sec. 6. N.C. Gen. Stat. 29-10 (1966) provides, in pertinent part:

> (a) An heir may renounce the succession to his share of the estate of an intestate, and such renunciation shall be retroactive to the date of the death of the intestate. The renunciation shall be by a signed and acknowledged writing, executed by the heir in person, or by his duly authorized attorney, guardian, or next friend when approved by the clerk of the superior court and the resident judge of the superior court, and shall be delivered to the clerk of the superior court of the county in which the administrator or collector qualifies.
>
> (b) Such renunciation must be filed within four months after the death of the intestate if letters of administration are not issued within that period, or if letters of administration are issued during that period, then within two months after the date of such issuance, or if litigation that affects the share of the heir in the estate is pending at the expiration of such period for filing the renunciation, then within such reasonable time as may be allowed by written order of the clerk of the superior court.
>
> . . . .
>
> (d) *If no renunciation is made in the manner and within the time provided for in subsections (a) and (b) hereof, the heir shall be conclusively deemed to have waived his or her right to renounce.* [Emphasis supplied.]

[2] Plaintiff initially argues that the renunciation should be set aside as to his testate interest, which was renounced in para-

graphs one and two of the order, because it was not made within a reasonable time, and as to any intestate interest, which was renounced in paragraph three of the order, because it was not made within the time limitations set out in N.C. Gen. Stat. 29-10 (1966). The legality of plaintiff's renunciation was a matter before the Clerk, who, having exclusive original jurisdiction of the administration of testatrix's estate, *In re Estate of Adamee*, 291 N.C. 386, 398, 230 S.E. 2d 541, 549 (1976), allowed plaintiff's "Petition to Renounce." *See Jeffreys v. Snipes*, 45 N.C. App. 76, 78, 262 S.E. 2d 290, 292, *disc. rev. denied*, 300 N.C. 197, 269 S.E. 2d 624 (1980). The judgment is regular and valid on its face. As a party to the original action, plaintiff may not now collaterally attack it. *Jeffreys*, 45 N.C. App. at 77-78, 262 S.E. 2d at 291 (1980); *see also Lumber Co. v. West*, 247 N.C. 699, 705, 102 S.E. 2d 248, 252 (1958). In essence plaintiff argues that the court erred as a matter of law. A party may only be relieved of a judgment entered upon a mistake of law "by appeal or proceedings equivalent thereto taken in due time." *Menzel v. Menzel and Williams v. Blade*, 250 N.C. 649, 654, 110 S.E. 2d 333, 337 (1959); *Lumber Co.*, 247 N.C. at 701, 102 S.E. 2d at 249. Thus, plaintiff is not entitled to relief from the order of renunciation on grounds of error of law.

Liberally construed, plaintiff's complaint and the evidence forecast by plaintiff suggest two equitable theories upon which plaintiff could seek recovery of that portion of his renounced interest now held by defendants.

[3] First, plaintiff has alleged and forecast evidence of a parol trust which would alter the effect of the "Order of Renunciation." "North Carolina is one of a minority of states that has never adopted the Seventh Section of the English Statute of Frauds which requires all trusts in land to be manifested in writing." *Bryant v. Kelly*, 279 N.C. 123, 129, 181 S.E. 2d 438, 441 (1971). Accordingly, a parol trust engrafted upon a deed or conveyance in the " 'A to B to hold in trust for C' situation" is always upheld, *id.* at 129, 181 S.E. 2d at 442, and a parol trust engrafted upon a deed or conveyance in the A to B to hold in trust for A situation is upheld when induced by fraud, mistake or undue influence. *Willetts v. Willetts*, 254 N.C. 136, 143, 118 S.E. 2d 548, 553 (1961); *High v. Parks*, 42 N.C. App. 707, 711, 257 S.E. 2d 661, 663-64, *disc. rev. denied*, 298 N.C. 806, 262 S.E. 2d 1 (1979). Analogizing the order to a deed, arguably plaintiff can engraft a parol trust upon

any interest defendant-husband obtained by virtue of plaintiff's renunciation upon a showing of fraud, mistake or undue influence.

While the order of renunciation is similar to a deed in that it may have effected a transfer of title to plaintiff's intended trustee, in all other respects it is different. Plaintiff sought and obtained an order allowing his renunciation. To recognize a renouncer's right to engraft a parol agreement upon an order of the court would severely undermine "the integrity of personal and property rights acquired on the faith of judicial proceedings, as well as the public interests involved in the finality and conclusiveness of judgments." *See Shaver v. Shaver*, 248 N.C. 113, 120, 102 S.E. 2d 791, 797 (1958).

In *Taylor v. Addington*, 222 N.C. 393, 23 S.E. 2d 318 (1942), the Court held that a parol trust could not be engrafted upon an intestate inheritance. The Court reasoned:

> In considering the effect of the parol promise or agreement, we must not forget that the principal role in the creation of an express trust is taken by the owner with that intent; the parol promise is complementary and incidental to such action as is taken by the owner and in furtherance thereof. It is effectual only when made in connection with the transfer of title and, by necessary inference, to the party who makes the transfer. . . . *It presupposes that such party has control of the subject matter of the trust which he desires to create, and contributes it by conveyance of the land with that intent* . . ., the grantee, at the same time, accepting the title as affected by his agreement. . . . Devolution of title in a case of intestacy is no more the voluntary act of the decedent owner than is his own dissolution. *It is a thing that will happen if let alone; the resulting inheritance is a gift of the law and not the grant of the decedent.* The inheritance law is certainly innocent of any purpose to create a trust in determining the succession, and it imposes no condition of acceptance other than inheritability. There is nothing, in the legal sense, upon which a parol trust may be engrafted. [Citations omitted. Emphasis supplied.]

Taylor, 222 N.C. at 397, 23 S.E. 2d at 321. For similar reasons, a parol trust may not be engrafted upon a renounced interest. A renunciation is not a grant of legal title by the renouncer. It

merely triggers a set of statutorily defined legal rights which ultimately determine ownership. *See* footnote 1, *supra.* In addition, a renunciation relates back to the death of the testator or intestate. *Perkins*, 224 N.C. at 798, 32 S.E. 2d at 591; N.C. Gen. Stat. 29-10(a) (1966). The renouncer never actually holds legal title to the property.[2] Thus, we reject plaintiff's contention that he may engraft a parol trust upon his renounced interest.

[4] The second equitable remedy suggested by plaintiff's complaint and forecast of evidence is a constructive trust. A constructive trust is a broad remedy

> imposed by courts of equity to prevent the unjust enrichment of the holder of title to, or of an interest in, property which such holder acquired through fraud, breach of duty or some other circumstance making it inequitable for him to retain it against the claim of the beneficiary of the constructive trust.

Wilson v. Development Co., 276 N.C. 198, 211, 171 S.E. 2d 873, 882 (1970). Unlike a parol trust, which arises by agreement of the parties, a constructive trust arises by operation of the law irrespective of the parties' intent. *Id.; Ferguson v. Ferguson*, 55 N.C. App. 341, 344, 285 S.E. 2d 288, 291, *disc. rev. denied*, 306 N.C. 383, 294 S.E. 2d 207 (1982). Constructive trusts are imposed in a virtually unlimited variety of situations, *Wilson*, 276 N.C. at 211, 171 S.E. 2d at 882, and under certain circumstances a constructive trust may be imposed despite the fact that it tends to alter or invalidate a judgment. *See Johnson v. Stevenson*, 269 N.C. 200, 204-05, 152 S.E. 2d 214, 217-18 (1967). In such instances the fraud or wrongdoing upon which the injured party relies must be extrinsic or collateral to the judgment, operating " 'not upon matters pertaining to the judgment itself but [relating] to the manner in which it is procured.' " *Id.* at 205, 152 S.E. 2d at 218, quoting A. Freeman 3 *Judgments*, sec. 1233 (1925).

Plaintiff asserts that defendant-husband unduly influenced his decision to sign the "Petition to Renounce." Whether plaintiff's petition is the result of his freely-made decision to renounce or of defendant-husband's undue influence pertains to the

2. The relation back of a renunciation is more than a legal fiction. As long as the renouncer receives no fraudulent benefit, his motives for renouncing are immaterial and a valid renunciation will defeat the interests of his judgment creditors. Annot., 27 A.L.R. 472, 477; 80 Am. Jur. 2d Wills Sec. 1598 (1975). *See also Perkins*, 224 N.C. at 798, 32 S.E. 2d at 591; *Reese v. Carson*, 3 N.C. App. 99, 103, 164 S.E. 2d 99, 101 (1968).

manner in which the petition was obtained and is extrinsic to the "Order of Renunciation." Accordingly, plaintiff may maintain an action seeking the declaration of a constructive trust. *Johnson, supra.*

In *Link v. Link*, 278 N.C. 180, 179 S.E. 2d 697 (1971), the Court adopted the following statements regarding equitable relief from transactions based on undue influence:

> "In equity there is no rule defining inflexibly what kind or what amount of compulson shall be sufficient ground for avoiding a transaction. * * * The question to be decided in each case is whether the party was a free and voluntary agent. Any influence brought to bear upon a person entering into an agreement or consenting to a disposal of property, which, having regard to the age, capacity of the party, the nature of the transaction, and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by courts of equity to be undue influence, and is a ground for setting aside the act procured by its employment." Pollock on Contracts, 524.
>
> "Where there is no coercion amounting to duress, but a transaction is the result of a *moral, social* or *domestic* force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances, undue influence naturally has a field to work upon in the conditions or circumstances of the person influenced, which renders him peculiarly susceptible and yielding; his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessities, his ignorance, lack of advice, and the like." Pomeroy, Equity Jurisprudence, 951.

Link, 278 N.C. at 195-96, 179 S.E. 2d at 706, *quoting Edwards v. Bowden*, 107 N.C. 58, 62-63, 12 S.E. 58, 59 (1890). Thus, whether a party has been unduly influenced is a flexible inquiry based on the facts of each case. Factors relevant to that determination are: (1) the age, health and capacity of the person allegedly unduly in-

fluenced, (2) the nature of the transaction, and (3) the nature of the relation between those involved in the transaction.

Plaintiff's forecast of evidence, viewed in the light most favorable to him, creates a genuine issue as to whether defendant-husband unduly influenced his decision to sign the renunciation.

According to plaintiff, when he signed the renunciation he was physically ill; he was "really suffering with diabetes." His business had recently gone bankrupt. He and his wife had planned to move from Charlotte, North Carolina, where the property in question is located, to Greenville, South Carolina, and as a result he needed someone to attend to the rental property in his absence.

Plaintiff and defendant-husband are brothers and plaintiff "trusted him implicitly." When defendant-husband moved to Charlotte in 1972 he and his wife lived with plaintiff and his wife for several months. Toward the end of 1972 or the beginning of 1973 plaintiff turned the management of the Greenway Avenue property over to defendant-husband, at which time defendant-husband began collecting the rents, paying the mortgage and seeing that the property was maintained.

The "Petition to Renounce" which plaintiff signed was drafted by defendant-husband's lawyers. They were present when plaintiff signed the petition, and they informed him that defendant-husband could not continue to manage the property unless he signed. Defendant-husband's lawyers filed the petition and obtained the "Order of Renunciation." Plaintiff was not represented by counsel.

[5] In addition, while plaintiff does not allege actual fraud, he does allege that a confidential relationship existed between him and his brother and that by virtue of defendant-husband's agreement to manage the Greenway Avenue property for plaintiff, a fiduciary relationship also existed. When a confidential or fiduciary relationship exists, upon the complaint of the party to whom a duty of loyalty is owed a presumption of fraud arises and it becomes incumbent upon the party owing loyalty to demonstrate good faith and fair dealing in the transaction. *Curl v. Key*, 311 N.C. 259, 263-64, 316 S.E. 2d 272, 275; *Link*, 278 N.C. at 192,

179 S.E. 2d at 704; *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E. 2d 615, 616-17 (1943); *Stilwell v. Walden*, 70 N.C. App. 543, 546, 320 S.E. 2d 329, 331 (1984); *Rauchfuss v. Rauchfuss*, 33 N.C. App. 108, 114, 234 S.E. 2d 423, 427 (1977). "Any transaction between persons so situated is 'watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party.'" *Link*, 278 N.C. at 192, 179 S.E. 2d at 704, *quoting Rhodes v. Jones*, 232 N.C. 547, 548, 61 S.E. 2d 725, 726.

"A confidential or fiduciary relation can exist under a variety of circumstances and is not limited to those persons who also stand in some recognized legal relationship to each other, such as attorney and client, principal and agent . . . [or] guardian and ward . . . ." *Stilwell*, 70 N.C. App. at 546-47, 320 S.E. 2d at 331. A confidential relationship arises "in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931).

In *Curl*, 311 N.C. 259, 316 S.E. 2d 272, the trial court, sitting as finder of fact, had found that no confidential or fiduciary relationship existed between the parties. The Supreme Court reversed, finding that none of the evidence contradicted the conclusion that there was a fiduciary or confidential relationship. The Court described the relationship between the defendant, Jack Key, and plaintiffs, the Curl children, as follows:

> At the time of these events, the Curl children were 16, 17, 18 and 21 years of age . . . .
>
> The plaintiffs had been closely acquainted with Jack Key all of their lives. Known to them as "Uncle Jack," Key had been their father's best friend. They continued to regard him as "a special friend of the family." Key offered to help plaintiffs with their problems in dealing with harassment from outsiders, claiming he could keep troublemakers away if each of the plaintiffs would sign a paper—"a peace paper giving him the right to kick anybody off the land that come there causing any disturbance." . . .
>
> . . . .

> The plaintiffs had confidence in Jack Key; he was their friend; they all trusted and believed that he wanted to help them live in peace in their home.
>
> Jack Key himself testified that he had known the Curl family for years. Mr. Curl had taught him to lay brick and they worked together. After Mr. Curl died, Jack Key lived for some time in the house with Lottie Curl and the children. He was a friend of the family's.

Curl, 311 N.C. at 261-63, 316 S.E. 2d at 274-75.

Based on the foregoing, we find plaintiff's forecast of evidence, viewed in the light most favorable to him, sufficient to create a genuine issue as to whether a confidential or fiduciary relationship existed between plaintiff and defendant-husband.

[6] Defendants maintain that plaintiff's claim for a constructive trust is barred by the equitable maxim which requires that "he who comes into equity must come with clean hands." "The clean hands doctrine denies equitable relief . . . to litigants who have acted in bad faith or whose conduct has been dishonest, deceitful, fraudulent, unfair or overreaching in regard to the transaction in controversy." *Collins v. Davis*, 68 N.C. App. 588, 592, 315 S.E. 2d 759, 762, *aff'd per curiam*, 312 N.C. 324, 321 S.E. 2d 892 (1984). Thus, " 'where both parties have united in a transaction to defraud another, or others, or the public, or the due administration of the law, or which is against public policy, or *contra bonos mores*, the courts will not enforce it in favor of either party.' " *Hood v. Hood*, 46 N.C. App. 298, 300, 264 S.E. 2d 814, 816 (1980), *quoting York v. Merritt*, 77 N.C. 213, 215 (1877).

Defendant correctly contends that if plaintiff signed the renunciation in an attempt to defraud his judgment creditors, his claim for equitable relief is barred by the clean hands doctrine. *Turner v. Eford*, 58 N.C. (1 Jones Equity) 106 (1859); *Moffett v. Daniels*, 80 N.C. App. 516, 342 S.E. 2d 925 (1986). *See also, Penland v. Wells*, 201 N.C. 173, 159 S.E. 423 (1931); *Powell v. Ivey*, 88 N.C. 256, 261 (1883); *Hood v. Hood*, 46 N.C. App. 298, 264 S.E. 2d 814 (1980). While much of the evidence supports such a conclusion, plaintiff maintains that when he signed the renunciation he believed he had assets which would satisfy the claims of his judgment creditors and that he signed the renunciation so that de-

fendant-husband would continue to manage the property. Plaintiff's averments create a genuine issue of material fact to be determined at trial. *High*, 42 N.C. App. at 711, 257 S.E. 2d at 663.

While plaintiff denies any attempt to defraud his creditors, he admits that at the time he petitioned the court declaring his desire to renounce all interest in the Greenway Avenue property he and defendant-husband had orally agreed that he should retain an equitable interest in the property. Plaintiff's false declarations to the court constitute unclean hands and, standing alone, would bar his equitable remedies. *See Sherner v. Spear*, 92 N.C. 148, 150-51 (1885); *Presnell v. Presnell*, 59 N.C. App. 314, 317, 296 S.E. 2d 519, 521 (1982). However, where a party seeking relief has acted " 'under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition, or age, so that his guilt may be far less in degree than that of his associate in the offense,' " equitable relief is not foreclosed. *Pinkston v. Brown*, 56 N.C. (1 Jones Equity) 494, 496 (1857), *quoting* J. Story, 1 *Equity Jurisprudence* Sec. 300 (1846). We thus hold that—given plaintiff's ill health and financial difficulties, as well as the possibility of a confidential or fiduciary relationship between plaintiff and defendant-husband—there is a genuine issue of material fact as to whether defendant-husband's wrongdoing reduces plaintiff's culpability sufficiently that plaintiff is entitled to equitable relief.

IV.

QUITCLAIM DEED

[7] Plaintiff asserts that defendant-husband fraudulently obtained the quitclaim deed by maintaining that its only purpose was to allow him to obtain a loan to make repairs on the roof. A genuine issue as to whether a confidential or fiduciary relationship existed between plaintiff and defendant-husband is again raised by plaintiff's forecast of evidence. If such a relationship is found, defendant-husband carries the burden of demonstrating his good faith and fair dealing.

In addition, plaintiff's forecast of evidence, viewed in the light most favorable to him, creates a genuine issue as to whether defendant-husband procured the quitclaim deed by fraud. The essential elements of fraud are as follows:

> "(1) That defendant made a representation relating to some material past or existing fact; (2) that the representation was false; (3) that when he made it, defendant knew that the representation was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that defendant made the representation with intention that it should be acted upon by plaintiff; (5) that plaintiff reasonably relied upon the representation and acted upon it; and (6) that plaintiff thereby suffered injury."

Lamm v. Crumpler, 240 N.C. 35, 44, 81 S.E. 2d 138, 145 (1954), *quoting Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E. 2d 131, 133 (1953); *Childers v. Hayes*, 77 N.C. App. 792, 794, 336 S.E. 2d 146, 148 (1985).

According to plaintiff, defendant-husband represented to him that a new roof was required in order to continue renting the property and that because of plaintiff's outstanding judgments and the questions surrounding the validity of plaintiff's renunciation, defendant-husband could not obtain financing, using the property as collateral, without the quitclaim deed. Plaintiff relied upon defendant-husband's representations and agreed to sign the deed. Defendant-husband's lawyers drafted the deed and sent it to plaintiff for his signature. Plaintiff was subsequently informed by the realtor who handled the property that at the time defendant-husband requested the deed the roof did not need replacing. Plaintiff has visited the property and, although the roof has not been replaced since defendant-husband's request for the deed, in plaintiff's opinion a new roof is not needed. The foregoing, if proven, is sufficient to establish a claim for fraud.

V.

In sum, plaintiff's forecast of evidence, viewed in the light most favorable to him, raises the following genuine issues of material fact:

(1) Did defendant-husband procure plaintiff's renunciation of the property through fraud or undue influence?

(2) If so, is plaintiff entitled to equitable relief from the order of renunciation?

(3) Did defendant-husband obtain plaintiff's quitclaim deed through fraud?

If plaintiff prevails on each of these issues, he is entitled to a declaration that defendants hold the Greenway Avenue property in trust for him. Thus, defendants' motion for summary judgment was improperly granted.

Upon remand for trial allocation of the burden of proof on the first issue depends upon whether a confidential or fiduciary relationship existed between plaintiff and defendant-husband when plaintiff renounced his interest in the property. If the finder of fact determines that such a relationship existed, defendant-husband carries the burden of establishing his good faith and fair dealing. If not, plaintiff carries the burden of demonstrating defendant-husband's undue influence.

If the finder of fact answers the first issue in the affirmative, finding that defendant-husband procured plaintiff's renunciation through fraud or undue influence, it must then decide whether plaintiff's intent in renouncing the property was to defraud his creditors and whether, given his intent and his false declarations in the "Petition to Renounce," he is entitled to equitable relief. In so deciding, it must consider whether, under the circumstances, defendant-husband's wrongdoing reduces plaintiff's culpability sufficiently that plaintiff is entitled to equitable relief.

If the finder of fact answers both the first and second issues in the affirmative, it must then determine whether defendant-husband procured the quitclaim deed through fraud. If at the time plaintiff signed the deed a fiduciary or confidential relationship existed between the parties, defendant-husband carries the burden of demonstrating his good faith and fair dealing regarding the procurement of the deed. Absent such a relationship, plaintiff carries the burden of demonstrating defendant-husband's fraud.

Reversed and remanded.

Judges BECTON and PARKER concur.

STATE OF NORTH CAROLINA v. FLOYD RUFUS FIE AND STEVE HARVERSON

No. 8530SC1236

(Filed 20 May 1986)

1. **Conspiracy § 4.1— conspiracy to commit larceny—insufficiency of indictment**

Indictments were insufficient to charge defendants with conspiracy to commit larceny.

2. **Criminal Law § 171.1— error relating to one charge—only one sentence imposed**

Where defendants were convicted of both conspiracy to commit breaking and entering and conspiracy to commit larceny, two crimes of the same grade, and only one sentence was imposed against each of them, any error regarding the conspiracy to commit larceny indictments could not have affected the verdict on the conspiracy to commit breaking or entering charges.

3. **Criminal Law § 11— removal of truck from scene after crimes committed—no accessory after the fact**

Evidence that defendant removed his truck from the scene of the crimes after the truck had been used to facilitate the crimes was insufficient to support the verdict of guilty to accessory after the fact of breaking and entering and larceny.

4. **Criminal Law § 92.1— defendants charged with same offense—consolidation proper**

Where both defendants were convicted of conspiracy to commit the same instance of breaking or entering and larceny, joinder was proper under N.C.G.S. § 15A-926(b) and did not deprive defendant of a fair trial.

5. **Criminal Law § 10; Conspiracy § 3— conviction for accessory before the fact and conspiracy proper**

Defendant could be convicted of both accessory before the fact and conspiracy, since accessory before the fact requires actual commission of the contemplated felony while conspiracy does not, and conspiracy requires an agreement while an accessory need not agree to anything.

6. **Criminal Law § 34.2— defendant's guilt of other offenses—admission of evidence harmless error**

In a prosecution of defendant for conspiracy to commit breaking or entering, accessory before the fact to breaking or entering and accessory before the fact to larceny, the trial court's error in allowing an SBI agent to testify that marijuana was found in defendant's house was not prejudicial to defendant in light of the direct evidence against defendant and the utter irrelevance of marijuana possession to the charges on which defendant was ultimately convicted. N.C.G.S. 8C-1, Rule 404(b).

7. Criminal Law § 75.2— voluntariness of confession—statements by officers

There was no merit to defendant's contention that it was error for the trial court to find that there was no inducement for defendant to admit ownership of marijuana when the State's own evidence indicated that police told defendant that both defendant and his girlfriend would be arrested for possession of marijuana based on constructive possession, since there was no evidence in the record indicating that the motivation for defendant's confession originated with anyone other than defendant.

Judge MARTIN concurring.

Judge WELLS dissenting.

APPEAL by defendants from *Burroughs, Judge.* Judgments entered 29 August 1984 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 14 April 1986.

At trial the State presented evidence tending to show the following: On 15 September 1978, defendant Floyd Fie discussed breaking into Doctor Guy Abbate's office with David Chambers, Mitchell Pakulski, Elliot Rowe, III, and Donna Rowe Porietis. Floyd Fie agreed to fence property stolen from the office. After the discussion with Floyd Fie, Chambers, Pakulski, Rowe and Porietis discussed the plan to break into Doctor Abbate's office with defendant Steve Harverson. Harverson lent his truck to Chambers, Pakulski and Rowe and agreed to break into Doctor Abbate's office. Ultimately Harverson did not directly participate in the break in but did allow his truck to be used. Chambers, Pakulski and Rowe broke into Doctor Abbate's office while Porietis acted as a lookout. During the break in, Willard Setzer, a security guard, was murdered. On the day after the break in, defendant Harverson drove his truck away from the scene of the crime.

Pakulski, Rowe and Porietis were tried separately from defendants in the present case. Chambers was granted immunity for his testimony. From judgments convicting him of conspiracy to commit breaking or entering, conspiracy to commit larceny, accessory before the fact to breaking or entering, accessory before the fact to larceny, accessory after the fact to breaking or entering and accessory after the fact to larceny, defendant Harverson appealed. From a judgment convicting him of conspiracy to commit breaking or entering, conspiracy to commit larceny, and accessory before the fact to breaking or entering and accessory before the fact to larceny, defendant Fie appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Joan H. Byers, for the State.

John E. Shackelford for defendant, appellant, Floyd Rufus Fie.

Assistant Appellate Defender Geoffrey C. Mangum for defendant, appellant, Steven Harverson.

HEDRICK, Chief Judge.

[1] Both defendants contend the trial court erred in submitting the conspiracy to commit larceny charges to the jury because defendants were never properly indicted for these crimes. The indictments in question are identical except for defendants' name:

> THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That [defendant], Mitchell, John Pakulski, Elliott Clifford Rowe III, Donna Rowe (now Porietis), David Chambers and others, late of the County of Haywood on the 17th day of September 1978, with force and arms, at and in the County aforesaid, did unlawfully, wilfully, and feloniously agree, plan, combine, conspire and confederate, each with the other, to unlawfully, wilfully, and feloniously break and enter into a building occupied by Dr. Guy Abbate at 122 Church Street, Waynesville, N.C., used as a doctor's office with the intent to commit a felony therein, to-wit: Larceny.

The indictment form used gives reasonable notice of the conspiracy to commit felonious breaking and entering charge. It does not, however, charge defendant with conspiracy to commit larceny. It is elementary that a valid bill of indictment is essential to the jurisdiction of the trial court. *State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981). Therefore, the conspiracy to commit larceny judgments against both defendants must be arrested.

[2] Arresting the conspiracy to commit larceny judgments does not affect the ten-year prison sentences imposed when the trial court consolidated the conspiracy to commit larceny judgments with the conspiracy to commit breaking and entering judgments. The circumstances before us are analogous to the circumstances in *State v. Daniels*, 300 N.C. 105, 265 S.E. 2d 217 (1980). In *Daniels*, our Supreme Court held that "[w]here the jury renders a verdict of guilty on each count of a bill of indictment, an error in

the trial or in the charge of the court as to one count is cured by the verdict on the other count where the offenses which are charged are of the same grade and punishable alike, only one sentence is imposed, and the error relating to one count does not affect the verdict on the other." *Id.* at 115, 265 S.E. 2d at 222-23. In the present case, defendants Harverson and Fie were convicted of both conspiracy to commit breaking and entering and conspiracy to commit larceny, two crimes of the same grade, and only one sentence was imposed against each of them. Any error regarding the conspiracy to commit larceny indictments could not have affected the verdict on the conspiracy to commit breaking or entering charges. The conspiracy to commit larceny judgments are arrested. We find no prejudicial error in the ten-year prison sentences entered on the conspiracy verdicts.

Defendant Harverson contends the trial court committed three more reversible errors. Defendant Harverson first argues that the trial court committed plain error in instructing the jury on conspiracy to commit larceny. Because the conspiracy to commit larceny judgment has been arrested, we need not address this issue.

[3] Defendant Harverson next contends that the evidence supporting charges of accessory after the fact of breaking or entering and larceny is insufficient as a matter of law. The evidence shows that Harverson removed his truck from the scene of the crimes after the truck had been used to facilitate the crimes. This evidence is insufficient to support the verdict. *See State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). Although we must reverse defendant Harverson's conviction for acting as an accessory after the fact, we do not reverse the ten-year sentence imposed on Harverson. The trial court consolidated the judgments for acting as an accessory before the fact and acting as an accessory after the fact. The judgment for acting as an accessory before the fact is sufficient to support the sentence imposed. *See State v. Daniels*, 300 N.C. 105, 265 S.E. 2d 217 (1980).

We need not address defendant Harverson's final contention, that the trial court committed plain error in instructing the jury on the charge of accessory after the fact because the conviction for acting as an accessory after the fact is reversed.

[4] Defendant Fie raises fourteen issues on appeal. Fie first contends that the trial court erred in consolidating the trial of Fie and Harverson. Joining the charges against multiple defendants for a consolidated trial rests within the sound discretion of the trial judge. *State v. Porter*, 303 N.C. 680, 281 S.E. 2d 377 (1980). Both defendants were convicted of conspiracy to commit the same instance of breaking or entering and larceny. Thus, joinder was proper under G.S. 15A-926(b) and did not deprive defendant of a fair trial. *State v. Slade*, 291 N.C. 275, 229 S.E. 2d 921 (1976).

[5] Fie next contends that a defendant cannot be convicted of both accessory before the fact and conspiracy. Our Supreme Court has held that conspiracy and accessory before the fact are separate crimes which do not merge because accessory before the fact requires actual commission of the contemplated felony while conspiracy does not, and conspiracy requires an agreement while an accessory need not agree to anything. *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978).

Fie also argues that he was denied a fair trial because the trial court allowed the district attorney's office to represent the State, and because Judge Downs failed to disqualify Judge Burroughs from presiding. Fie asserts that the trial court erred by allowing Assistant District Attorneys Jerry Townson and Bert Neal to represent the State when Roy Patton, another Assistant District Attorney, had at one time represented defendant Harverson on the charges at issue. Assistant District Attorney Patton took no part in the State's investigation and prosecution of the defendants in this case. Defendant's assignment of error is overruled.

Fie contends that Judge Downs should have disqualified Judge Burroughs because Judge Burroughs wrote a letter to the District Attorney suggesting a grand jury investigation of Fie and Harverson because of evidence which came to light during the Willard Setzer murder trial. Judge Downs concluded that the letter did not constitute "such direct action against [the defendants] so as to warrant a recusal." We agree. *See Lowder v. All Star Mills, Inc.*, 60 N.C. App. 699, 300 S.E. 2d 241 (1983).

Defendant Fie asserts that the trial court erred in not allowing defense counsel to examine a juror concerning possible misconduct after jury selection. 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 scope of the trial court's discretion regarding investigations of possible jury improprieties is particularly wide. *State v. Selph*, 33 N.C. App. 157, 234 S.E. 2d 453 (1977).

In the present case, the trial court conducted a voir dire of the juror suspected of misconduct. It was not an abuse of discretion for the trial court to question the juror instead of allowing defense counsel to conduct the questioning.

Defendant Fie's arguments regarding errors made during the opening statements are also without merit. The trial court was well within its discretion to limit each defense counsel's opening statement to fifteen minutes. Defendant's contention that the trial court erred in "permitting the Prosecuting Attorney to tell the jury in his opening statement what a witness would testify to" borders on the frivolous.

[6] By his twelfth assignment of error defendant argues that the trial court erred in allowing State Bureau of Investigation Agent Crawford to testify that there were ladies' shoes, handbags and marijuana in defendant's house when it was searched. Defendant's contention with respect to the marijuana has merit. Evidence of other crimes such as possession of marijuana is not admissible to prove the character of a defendant although it may be admissible to prove such factors as motive, intent or identity. G.S. 8C-1, Rule 404(b). At trial, the following colloquy occurred:

> Q. (Prosecutor) Did you see anything else there at Mr. Fie's?
>
> MR. SHACKELFORD: Objection.
>
> THE COURT: Overruled.
>
> A. Yes, sir, some marijuana.
>
> Q. Where did you find the marijuana?
>
> A. In the basement.
>
> MR. SHACKELFORD: Objection.
>
> THE COURT: Overruled.

The first question drawing an objection was not improper. Only the answer to the question was improper. The second objection was made late. Technically, by failing to make a motion to strike the first answer regarding the marijuana, defendant waived any objection based on G.S. 8C-1, Rule 404(b). H. Brandis, *Brandis on North Carolina Evidence* Sec. 27 (2d ed. 1982). We do not base our holding on this technicality. Instead, in the light of the direct evidence against defendant and the utter irrelevance of marijuana possession to the charges on which defendant was ultimately convicted, we hold that no prejudicial error occurred.

[7] By his next assignment of error defendant contends it was error for the trial court to find that there was no inducement for defendant to admit ownership of the marijuana when the State's own evidence indicated the police told defendant that both defendant and defendant's girlfriend would be arrested for possession of marijuana based on constructive possession. Mental or psychological pressure brought to bear against a defendant so as to overcome his will and induce a confession can render such a confession involuntary and inadmissible. *State v. Morgan*, 299 N.C. 191, 261 S.E. 2d 827, *cert. denied*, 446 U.S. 986, 64 S.Ct. 2971, 64 L.Ed. 2d 844 (1980). "Confession or admissions have not been held inadmissible in evidence merely because the accused in making the confession or admission be motivated by a desire to protect a relative threatened with arrest or in custody when such motivation originated with the accused and was not suggested by law enforcement officials." *State v. Branch*, 306 N.C. 101, 108, 291 S.E. 2d 653, 658 (1982). There is no evidence in the record indicating that the motivation for defendant's confession originated with anyone other than defendant. Defendant's assignment of error is therefore overruled.

Defendant cited no law in support of his four remaining assignments of error. We have reviewed these assignments of error and find them to be without merit.

The judgments against both defendants concerning conspiracy to commit larceny are arrested. The judgment against defendant Harverson concerning acting as an accessory after the fact is reversed.

In the cases wherein defendants were tried for conspiracy to commit breaking or entering and accessory before the fact to

breaking or entering and larceny, we find no error. We find no prejudicial error in the sentences imposed.

No error in part, judgment arrested in part and reversed in part.

Judge MARTIN concurs.

Judge WELLS dissents.

Judge MARTIN concurring.

In his dissent, Judge Wells suggests that the appropriate standard to be applied to a motion to disqualify a trial judge is whether the actions of the judge give rise to a reasonable perception in the mind of the defendant that the judge cannot be fair. I disagree. In my view, the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially. *See Love v. Pressley*, 34 N.C. App. 503, 239 S.E. 2d 574 (1977), *disc. rev. denied*, 294 N.C. 441, 241 S.E. 2d 843 (1978). Such personal bias is not shown by the mere fact that the judge has presided over other proceedings in which evidence tending to incriminate the present defendant was offered, absent evidence that the prior trial would have a prejudicial effect on the present case. *State v. Duvall*, 50 N.C. App. 684, 275 S.E. 2d 842, *rev'd on other grounds*, 304 N.C. 557, 284 S.E. 2d 495 (1981).

The only evidence offered by defendants in the present case was the letter written by Judge Burroughs requesting grand jury consideration of indictments against these defendants. The letter was based on evidence which Judge Burroughs heard in another trial. The letter indicates no personal bias or prejudice on the part of Judge Burroughs nor does it express any opinion on his part as to the defendants' guilt or innocence of the charges which he requested that the grand jury consider. At most, the letter suggests that some evidence indicating defendants' involvement with the crimes was introduced at the previous trial and that Judge Burroughs, in the exercise of his judicial obligation to pro-

mote the administration of justice, sought to secure grand jury consideration of that evidence.

If, as Judge Wells asserts, Judge Downs used the wrong standard in disposing of defendants' motions, defendants are still not entitled to a new trial, as they have failed to show that they have been prejudiced in any respect by the fact that Judge Burroughs presided at their trial. I concur with the result reached by Chief Judge Hedrick.

Judge WELLS dissenting.

I agree with the majority opinion in all but one respect: the defendants were tried before the wrong judge.

Prior to trial, defendants filed written motions requesting that Judge Burroughs recuse himself. The motions were as follows:

> By this Motion the Defendant moves the Honorable Robert M. Burroughs, Judge of the Superior Court of Mecklenburg County, to recuse or disqualify himself and shows the following:
>
> 1. That subsequent to the trial of Donna Rowe (79CRS711), a co-defendant to the defendant herein, a letter was written from the presiding judge, Robert M. Burroughs, to Marcellus Buchanan, the District Attorney for the Thirtieth Judicial District (a copy of said letter attached hereto as Exhibit "A", and incorporated herein by reference) requesting that seven (7) charges be brought before the grand jury against this defendant based upon testimony presented during the trial of Donna Rowe. That the bulk of the State's case against Donna Rowe was testimony elicited from a third co-defendant, David Hugh Chambers, who was granted immunity from prosecution in these matters in exchange for his testimony. That the presiding judge's request for the charges to be brought against this defendant would be sufficient evidence for a reasonable man to determine that the presiding judge had (1) predetermined the guilt of this defendant, and (2) granted more right to testimony of David Hugh Chambers and the other State's witnesses than to the testimony of various defense witnesses, all of which would show evidence

of partiality and the absence of objectivity by the trial court to this defendant. That upon information and belief the defendant believes that the witnesses for the State and defense in the Rowe matter will be the same witnesses called in the various cases of the defendant indicated above. That by virtue of the above, Judge Burroughs has shown himself to be prejudiced against the moving party or in favor of the adverse party and/or prejudiced in favor of the State's witnesses or against the defense witnesses in this action.

That the conduct complained of in Paragraph 1 above has caused or would give an appearance of partiality in favor of the State contrary to the case law now existing in this state. That judges should disqualify themselves not only when their impartiality may be questioned but even when their conduct only gives an appearance of impropriety or partiality.

WHEREFORE, the Defendant herein respectfully prays that Judge Burroughs will recuse or disqualify himself or that in the alternative that an evidentuary [sic] hearing be had to determine the facts alleged herein and that the said Judge then recuse or disqualify himself.

The letter referred to in defendants' motions was as follows:

To: Marcellus Buchanan

From: Judge Robert M. Burroughs

Subject: Floyd Fie and Steve Harverson

Based upon the evidence, in the case of State vs Donna Rowe 79CRS711, I would request that the Grand Jury be asked to consider the following charges arising out of the death of Willard Setzer and the breaking or entering and larceny of Dr. Abbatt's office on or about 17 September 1978.

Floyd Fie

1. Murder

2. Accessory before the fact of murder

3. Accessory after the fact of murder

4. Conspiracy to commit murder

5. Accessory before the fact to commit breaking or entering and larceny

6. Accessory after the fact to commit breaking or entering and larceny

7. Conspiracy to commit breaking or entering and larceny

8. Possession (NOT receiving) of stolen property

Steve Harverson

1. Murder

2. Accessory before the fact of murder

3. Accessory after the fact of murder

4. Conspiracy to commit murder

5. Accessory before the fact to commit breaking or entering and larceny

6. Accessory after the fact to commit breaking or entering and larceny

7. Conspiracy to commit breaking or entering and larceny

I hope these matters can be presented to the Grand Jury when they meet in Haywood County on May 8, 1984 or as soon thereafter as possible.

s/R. BURROUGHS

Judge Burroughs referred the motion to Judge Downs for decision. Following a hearing, Judge Downs entered an order denying defendants' motions in which he entered the following conclusion of law:

In making a request of the District Attorney to have the grand jury consider charges against an individual the then presiding trial judge has not taken such direct action against such individual so as to warrant a recusal or disqualification of the said judge from presiding at the eventual trial of the

said defendant for the same said charges, because the Court is required to instruct the then trial jury that the defendant is innocent until his guilt has been proven beyond a reasonable doubt and further, that the charges against the defendant is no evidence of guilt.

In my opinion, Judge Downs (1) used the wrong standard in disposing of defendants' motions and (2) was in error in denying defendants' motions. The appropriate standard in these matters is whether Judge Burroughs by actively seeking the indictment of these defendants had cast a reasonably founded doubt in the minds of the defendants as to whether he could give them a fair and impartial trial. *See Ponder v. Davis*, 233 N.C. 699, 65 S.E. 2d 356 (1951). In my opinion, Judge Burroughs' action in seeking indictments against them would rationally and reasonably give defendants the impression that Judge Burroughs had formed an opinion as to their guilt before their day in court came to pass. For these reasons, I vote to award defendants a new trial.

Although defendant Harverson assigned error to Judge Downs' ruling, his appellate counsel, the appellate defender, did not bring forward that assignment in his brief. Nevertheless, in my opinion, it would be fundamentally unfair not to award Harverson a new trial for the same reason.

STAN D. BOWLES DISTRIBUTING COMPANY v. PABST BREWING COMPANY

No. 858SC1154

(Filed 20 May 1986)

1. Contracts § 29.2— breach of franchise agreement—right to sell product not exclusive—calculation of damages improper

In an action to recover for breach of contract where defendant allegedly breached its franchise agreement with plaintiff by refusing to fill plaintiff's order for a particular product, the trial court erred in awarding plaintiff the sum of $195,000 as compensatory damages because the award was based on the erroneous assumption that plaintiff's right to sell the product in question was exclusive.

2. Contracts § 29.1— breach of franchise agreement—damages—consideration of margins of profit proper

In an action to recover for breach of a beer franchise agreement, there was no merit to defendant's contention that the trial court erred in admitting into evidence and making findings of fact based upon or related to plaintiff's lost profits in violation of the parties' distributorship agreement that, "Under no circumstances shall [defendant] be liable for any loss of profits by distributor," since the trial court considered "margins of profit," that is, the price to defendant plus taxes and freight reduced by the selling price, while "lost profits" are usually defined as lost net profits with all costs being deducted.

Judge PHILLIPS dissenting.

APPEAL by defendant from *Reid, Judge*. Judgment entered 7 June 1985 in Superior Court, WAYNE County. Heard in the Court of Appeals 6 March 1986.

Plaintiff, Stan D. Bowles Distributing Company (Bowles), is a North Carolina corporation that engaged in the wholesale distribution of alcoholic malt beverage products from 1975 to 1980. Defendant, Pabst Brewing Company (Pabst), is a national brewer "engaged in the manufacture and sale of Pabst beer and Pabst ale." On 23 January 1975 Bowles and Pabst entered into a written distributorship agreement granting Bowles "the right to sell Pabst beer and ale" in Wilson, Greene, Wayne and Lenoir counties.

In August 1979 Bowles placed an order with Pabst for 2,184 cases of Olde English 800 Malt Liquor, a product that Pabst had earlier acquired the right to sell. Pabst did not fill Bowles' order and granted the right to sell Olde English 800 to another distributor in the area, Jeffreys Beer and Wine Company (Jeffreys). Bowles then sued Pabst for breach of contract.

At trial, the court, sitting without a jury, found that Pabst had breached its agreement with Bowles by refusing to fill Bowles' order for Olde English 800 and awarded to Bowles $168,000 for the diminution in value of the franchise after breach and $150,000 in punitive damages. Pabst appealed the judgment and award to this Court. In *Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 317 S.E. 2d 684 (1984) we affirmed the trial court's findings and conclusion that Pabst breached its contract with Bowles. However, we reversed and vacated the

award of punitive damages and reversed and remanded the case for further proceedings on the issue of compensatory damages.

At retrial on the compensatory damages issue, judgment was entered in favor of Bowles in the amount of $195,000. Pabst appeals.

Brown, Fox & Deaver by Bobby G. Deaver and Kornegay & Head by Janice S. Head for plaintiff-appellee.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan by Michael E. Weddington and Martha Jones Mason for defendant-appellant.

EAGLES, Judge.

I

[1] By its first assignment of error Pabst contends that the trial court erred in awarding to Bowles the sum of $195,000 as compensatory damages because the award is based on the erroneous assumption that Bowles' right to sell Olde English 800 was exclusive. We agree.

On 24 January 1975 Bowles and Pabst entered into an amendment to the distributorship agreement which amended paragraphs two and four of the basic contract. Paragraphs two and four restricted the distributor's area of distribution to particular counties and provided that Pabst would not sell to other distributors within that territory. The amendment gave Pabst the right to sell its products to any distributor within Bowles' territory. In *Bowles, supra,* we held that the agreement required Pabst to sell Olde English 800 to Bowles but that the express terms of the agreement provided that Bowles' franchise rights with Pabst were not exclusive. Pabst breached its agreement with Bowles by refusing to sell Olde English 800 to Bowles, not by selling the product to Jeffreys. *Id.* at 349, 317 S.E. 2d at 689.

At the time of breach the Bowles distributorship consisted of a Champale franchise, a Country Club franchise and the Pabst franchise (which included three products—Pabst Blue Ribbon, Red, White and Blue, and Andeker). We held in *Bowles, supra,* that Pabst was liable only for the diminution in value of the Pabst franchise resulting from Bowles' inability to sell Olde English 800.

At retrial on the compensatory damages issue the trial court found as fact that the diminution in value equaled the difference between the value of the Pabst franchise with the ability to sell Olde English 800 less the value of the Pabst franchise without the ability to sell Olde English 800. In computing these values, the trial court adopted the method of evaluation used by Stan Bowles:

> [T]he Court finds, by the greater weight of the evidence, that one of the methods acceptable within the trade for evaluating beer wholesale franchises, is to base the offered sales price on a formula which provides that the estimated or actual sales of cases of beer for one year multiplied by its "margin-of-profit" ("margin-of-profit" being the difference between selling price to a retailer and the "laid in" costs to the wholesaler) multiplied by the "year factor" ("year factor" being negotiated according to the expected demand for the product to be distributed both present and future).

Using this formula the trial court made the following valuations:

> (7) The value of the Pabst franchise to the Plaintiff prior to the breach and without Olde English 800 was estimated at prior year sales of approximately 40,000 cases times the margin-of-profit of $1.81 per case; utilizing the acceptable formula within the trade, the Court finds its value to have been $70,000.00 at the time of the breach.
>
> (8) Utilizing the same formula and applying it to all of the evidence before the Court, the Court finds as a fact, by the greater weight of the evidence, that the value of the Pabst franchise, had it not been breached and had the Plaintiff the ability to distribute Olde English 800 Malt Liquor, to be $265,000.00. This sum was found from the evidence and by its greater weight by multiplying the sales for one year which the Court determines to be 100,000 cases times the margin-of-profit which the Court finds to be $2.12 per case times the year factor, which the Court finds to be one and one-quarter years.

The difference between these two values is $195,000 which represents the diminution in value of the Pabst franchise and is the amount awarded to Bowles as compensatory damages.

Since the court was sitting without a jury, these 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. Insurance Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 371 (1975). There is sufficient evidence to support finding of fact number seven. Stan Bowles testified that prior year sales of Pabst products (Blue Ribbon, Red, White and Blue, and Andeker) totaled 40,000 cases with a margin of profit of $1.81 per case. There is not sufficient evidence to support finding of fact number eight. Both Stan Bowles and Robert Pohle, plaintiff's expert witness, testified that the estimated potential sales of Olde English 800 for one year were 128,806 cases at a margin of profit of $2.12 per case. Further, Mr. Bowles used a year factor of one and one-half years. Though there was no contradictory evidence, the trial court reduced total annual sales to 100,000 cases and reduced the year factor to one and one-quarter years. We are mindful that the trial court as finder of the facts may believe or disbelieve all or any part of the testimony of a witness, but we note that here there is no evidence of record to support modifications in the year factor or the annual sales estimate. In finding of fact number eleven the trial court does indicate that the projected sales of Olde English 800 were obtained from plaintiff's exhibit number eighteen. However, plaintiff's exhibit number eighteen, a Pabst Brewing Company Market Data Survey, shows that the number of cases of Olde English 800 sold within the four county area by Jeffrey's in 1980 was 116,317 cases. On the face of the judgment there is no other explanation for the figures used by the trial court and no other explanation as to why they were reduced.

Plaintiff's evidence consisted of the testimony of four witnesses, three of whom analyzed the diminution in value of the Pabst franchise. All three witnesses stated that their valuations were based on the assumption that Bowles had the exclusive right to sell Olde English 800 within the four county market area. However, we have already determined that Bowles' right was not exclusive. *Bowles, supra.* Therefore, plaintiff's evidence failed to take into consideration the effect of competition within the four county market area. For example, plaintiff's expert witness Pohle testified on cross-examination as follows:

Q. Now one of the assumptions that you have made, Mr. Pohle, in, in arriving at the valuations that you have testified to is that this right to distribute Old [sic] English 800 would be an exclusive right for that company; isn't it?

A. Yes, that's right.

Q. And if in fact it were a nonexclusive right, that would have, have an effect on your valuation; wouldn't it?

A. It certainly would. One of the—when we do evaluate a beer wholesalership among the things we give consideration to are the strength of the guy's, if you will, the beer wholesaler's franchise agreement, the strength of the franchise laws of the state and how well protected is he as a franchisee, how well protected is he as to the territory he covers and so on.

Q. And if it were a, a nonexclusive right, that would, would depress the valuation which you would arrive at; wouldn't it?

A. Well, it would. Yes.

Mr. Pohle further testified that he had not made any calculations of damages based upon the assumption of a nonexclusive right. When asked what he would have to do to make such a calculation Mr. Pohle responded:

That would be I think a relatively difficult thing to assess but I would want to know, I would imagine would be trying to arrive at some data which would give us an idea of how much of the share of the market that would be Old [sic] English could, could be maintained by this wholesalership versus the other wholesalership what would be distributing Old [sic] English. I don't know as that would be a particularly easy exercise but I certainly would want to dig into some data regarding both operations and their nature of their accounts and how well they cover their accounts and their percentage of the market and the, like how well they're set up to sell the product, what each person is going to devote to sale of product such as brand manager, present selling, what kind of other advertising they might put into the product, what other kind of promotional type of things they are going

to do in terms of discounting. Are they going to mark trucks, the usual things you do to, to market a brand of beer, which one would be more aggressive than the other or can one be more aggressive than the other.

Stan Bowles testified that he projected the selling price potential of Olde English 800 within his four county market area over a one and one-half year period to be $409,603.00. However, on cross-examination Mr. Bowles explained that his calculations were based on the assumption that only his company would be selling the product within that market area.

Q. Let me ask you this, Mr. Boles [sic], with respect to the, excuse me the computation, the computation that you made that's labelled selling price on Plaintiff's Exhibit No. 12, $409,603.00, that's based solely on one distributor selling that product; isn't it?

A. The 8 percent was based on all North Carolina.

Q. No, no, I mean the, that's what you contend it would have been worth if you had gotten Old [sic] English 800 and your company was the only one selling it; isn't that right?

A. It would have been worth at least that or more to me, yes.

Q. All right, sir, and that does not take into account in any way, does it, the fact that George Jeffreys Company was selling Old [sic] English 800 and would have been selling Old [sic] English 800 under its contract at the same time?

A. No, it does not.

Mr. Vassos an employee of Carlton Importing Company with eleven years experience in the beer and ale industry testified that he had reviewed the evaluation method used by Mr. Bowles and found it to be an acceptable method of evaluating a particular brand of beer or ale for sale within the industry. However, on cross-examination Mr. Vassos admitted that whether or not Bowles' right to sell Olde English 800 was exclusive would have an effect on the valuations.

Q. Now in, in making your evaluation, Mr. Vassos, and follow the, either the method you have described or the

method that you had demonstrated to you, there are some assumptions that you engage in in making those evaluations; aren't there?

A. Yes, there are.

Q. And one would be like brand potential? Brand potential is something that you have to make an informed horseback type judgment about; is that right?

A. Then that becomes a negotiation between the buyer and seller and what the buyer thinks it is worth and what the seller thinks it is worth.

Q. All right, and, and it also assumes that that particular brand is being sold by one wholesaler only in the market; doesn't it?

A. Yes. I'm trying to think. In general it does.

Q. And if there were more than one wholesaler selling the same brand in the market, it would freeze that price?

A. Correct, correct. If the brand were dual, meaning two wholesalers handling it in the same market place, it would freeze the selling price.

. . .

Q. In any event if two wholesalers in that particular market were handling the brand, then it would have dramatic effect on the valuation of the brand for either of them; wouldn't it?

A. Yes. Correct. I agree a hundred percent.

As to the fact that Bowles' right to distribute Olde English
800 was not exclusive, the trial court found as fact that:

(14) The Court carefully considered the Defendant's contention that the right to distribute Pabst products was nonexclusive. This portion was ably and strenuously argued by counsel; however, no evidence can be found that Pabst ever intended to exercise this contractual right. To the contrary, all the evidence tends to show that such was not the practice in North Carolina. The granting of the franchise to Jeffreys Beer and Wine Company of the right to distribute Olde Eng-

lish 800 rather than a joint franchise to both Jeffreys and the Plaintiff supports the Court's finding, by the greater weight of the evidence, that the non-exclusive provision in the franchise had not been exercised by Pabst.

Damages are never presumed and the burden is on the plaintiff to present evidence that supports the assessment of damages. *SNML Corp. v. Bank*, 41 N.C. App. 28, 254 S.E. 2d 274, *disc. rev. denied*, 298 N.C. 204 (1979). Bowles did not present any evidence that Pabst would have granted the right to distribute Olde English 800 to only one distributor within the four county market area. No representative of Pabst ever testified. The only evidence of record which relates to dual distributorships pertains solely to a purported custom in the beer industry that a manufacturer usually appoints only one distributor within a given area. However, in *Bowles, supra*, we held that industry customs do not control over the express terms of the contract. By the express terms of the contract between Pabst and Bowles, Pabst had the undisputed right to appoint more than one distributor within the four county area. The nonexclusive provision of the contract controls. It is an exercise in speculation to infer that because Pabst appointed Jeffreys and not Bowles that Pabst would not have created a dual distributorship in the area. "Provable damages must be reasonably certain and not rest upon doubt or speculation." *Chesson v. Container Co.*, 216 N.C. 337, 339, 4 S.E. 2d 886, 887 (1939). Plaintiff's evidence makes it clear that the issue of nonexclusivity would greatly affect the value of the Pabst franchise. However, there was no evidence before the trial court that valued the franchise in light of the fact that another distributorship was selling the same product within the same market area. Without this evidence there was no way for the trial court to accurately determine the value of the Pabst franchise with the ability to sell Olde English 800. Bowles must either prove that Pabst would not have created a dual distributorship or prove its damages taking into consideration the effect of competition in the market on the value of the Pabst franchise with the ability to sell Olde English 800. Accordingly, this assignment of error is sustained.

II

[2] By its second assignment of error Pabst contends that the trial court erred in admitting into evidence and making findings of fact based upon or related to Bowles' lost profits. We disagree.

Paragraph eleven of the distributorship agreement between Pabst and Bowles provides in part: "Under no circumstances shall Pabst be liable for any loss of profits by distributor. . . ." We held in *Bowles, supra,* that the contract clearly prohibited an award for lost profits and that the trial court properly denied such an award. At retrial on the compensatory damages issue evidence was presented as to certain "margins of profit" from the sale of Pabst products. As explained by the attorney for Bowles, the margin of profit is the price to the brewery plus taxes and freight reduced by the selling price. It is an evaluation principle used in the industry to value a particular franchise and does not equate to whether a company is operating at a profit or a loss. Operating costs are not included. On the other hand lost profits damages are usually defined as lost net profits, with all costs being deducted. "For breach of contract, this means the contract price less cost of performance, or cost of completion, or, as it is sometimes put, 'expenses saved' as a result of being excused from performance by the other party's breach." R. Dunn, Recovery of Damages for Lost Profits Section 6.1 (2d ed. 1981).

The significance of the margins of profit in evaluating the value of the Pabst franchise was explained by Stan Bowles:

> Q. (Mr. Deaver) Does the, does the margin of profit have any bearing on the value of the franchise, Mr. Bowles?
>
> A. Yes.
>
> Q. And how does it relate to it?
>
> A. Well, a product that has a higher margin would be worth more.
>
> Q. But it would be worth more if you had low volume or high volume?
>
> A. It would be worth more if you had high volume.
>
> Q. So you use this factor in conjunction with the volume of sales; do you not?

A. Certainly enters into it, yes.

Q. To determine the value of the franchise?

A. Of course.

Further, in ruling on Pabst's objections the trial court stated that evidence concerning profits and margins of profit was admitted for the limited purpose of valuing the Pabst franchise.

The trial court found as fact that:

> (12) The Court considered carefully Defendant Pabst's argument that the evidence relating to damages rested essentially upon a lost profit theory and the Court recognizes that the law of the case expressly forbids awarding damages on lost profits; however, the Court finds that the *potential* for profit is an essential ingredient in determining the value of a beer franchise, but that the Court's award in this case is not an award for lost profits, but rather what this Court determined from the competent evidence to be a reasonable valuation of the damages sustained by the Plaintiff by reason of its inability to sell Olde English 800.

We hold that the trial court can properly consider "the potential for profit" as a factor in evaluating the values of the Pabst franchise with and without the ability to sell Olde English 800. The evidence presented supports the finding that the margins of profit were factors to consider in determining the value of the franchise. Bowles did not receive an award of damages for lost profits as proscribed by the distributorship agreement. Accordingly, this assignment of error is overruled.

III

Having addressed those issues which dispose of the case on appeal, we find it unnecessary to consider Bowles' cross-assignment of error.

The judgment is vacated and remanded for further proceedings consistent with this portion of our opinion.

Vacated and remanded.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the evidence recorded supports the court's findings and judgment, and I would affirm. That the contract in question was non-exclusive and that Pabst had the right thereunder to establish competing dealerships, as was ruled in the previous appeal, does not mean to me, as it seemingly does to the majority, that Pabst *would have* established competing distributorships and that damages testimony not based thereon is, therefore, without foundation. The evidence that Pabst and other brewers customarily and usually did not maintain competing distributorships, though they had a right to do so, supports the finding, in my opinion, that competing dealerships would not have been established in this instance, and the expert testimony based on that premise supports the damages that the court awarded plaintiff. If the court had found that Pabst would have maintained competing dealerships the damages award would have no support; but the court did not so find, nor was it obliged to do so, in my opinion. Nor does it matter that no testimony was offered by or extracted from Pabst as to whether it would or would not have established competing dealerships, for such evidence would not have been binding on the fact finder in any event.

STATE OF NORTH CAROLINA v. MARTHA JEAN ISLEIB

No. 851SC1132

(Filed 20 May 1986)

Searches and Seizures § 11— warrantless search of vehicle improper

Where a confidential informant, who had provided reliable information on three occasions within the past year, informed officers that, at a given time, defendant would drive her car down a certain road to deliver marijuana, that the car was a certain make and color, and that defendant would have a male passenger with her, and where officers had twenty hours to obtain a warrant for the search of defendant's car, their failure to obtain the warrant required the exclusion of evidence obtained by their warrantless search.

State v. Isleib

APPEAL by the State from *Barefoot, Judge.* Judgment entered 5 September 1985 in DARE County Superior Court. Heard in the Court of Appeals 4 March 1986.

Defendant was indicted for felonious possession of marijuana and possession of marijuana with intent to sell and deliver. Defendant then filed a motion to suppress all evidence seized in a warrantless search of her automobile.

At the hearing on the motion to suppress, the sole witness was Deputy C. H. Midgette of the Dare County Sheriff's Department. His testimony is summarized as follows: On 5 April 1985, between 2:00 and 4:00 p.m., Deputy Midgette and another deputy spoke to a confidential informant at the Dare County Courthouse. The informant had provided information pertaining to marijuana violations three times within the previous year, each time leading to arrests and convictions. On this occasion the informant told Deputy Midgette that a woman named Martha would be coming to Hatteras Island the following day. He stated that she would be driving from the beach area north of Oregon Inlet in an "Army green" station wagon, either a Dodge or a Plymouth, with some type of decal on the door, to deliver quarter-ounce bags of marijuana. An unidentified white male would be riding with her. Deputy Midgette testified that he knew who Martha was, that she lived at the beach north of Oregon Inlet and that she owned a green station wagon. No search warrant was obtained.

Over twenty hours later, at 12:35 p.m. on 6 April, Deputy Midgette spotted the station wagon driving south on N.C. Highway 12 north of Waves on Hatteras Island. He contacted Deputy Gray, who intercepted the defendant in Avon. When Deputy Midgette arrived at the scene, defendant was standing outside of her station wagon. He told defendant that he had information that she was delivering marijuana and that he was going to search her car pursuant to an "emergency stop." Defendant asked Deputy Midgette if he had a warrant and he replied that he did not. Defendant did not consent to a search of the car. Deputy Midgette retrieved defendant's pocketbook from the front seat in which a bag with less than a quarter-ounce of marijuana was found. Midgette then asked defendant's companion to get out of the car. The companion then pulled a bag out of his pocket that contained "a few grams" of marijuana. Deputy Midgette then proceeded to

search the vehicle and found six individually wrapped quarter-ounce bags of marijuana. During this time Midgette never informed defendant that she was under arrest. There was never any contraband within plain view of the officers from outside the automobile.

After hearing this testimony and the arguments of counsel, Judge Barefoot held that the search of the vehicle was illegal and ordered that all evidence obtained from the search be suppressed. The State appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John H. Watters, for the State.

Aldridge, Seawell & Khoury, by G. Irvin Aldridge, for defendant-appellee.

WELLS, Judge.

The State contends in its sole assignment of error that the trial court erred in concluding as a matter of law that the warrantless search of defendant's automobile was illegal and that the evidence seized pursuant to the search be suppressed. The State concedes on the record that this evidence is essential to its case against defendant.

The relevant findings of fact and conclusions of law of the trial court are set forth below:

. . .

4. That the Officer received reliable information from an informant on April 5, 1985 between 2:00 and 4:00 p.m. at the Courthouse in Manteo, North Carolina. The information that the Officer received indicated that the person was the defendant and described the vehicle.

5. That the Deputy Sheriff, C. H. Midgett[e], knew the defendant and was familiar with the automobile and recognized the information as being information about the defendant and the automobile being an automobile owned by the defendant.

6. The reliable informant told Deputy C. H. Midgett[e] that the defendant and her automobile were travelling on

N. C. Highway 12 toward Hatteras somewhere North of Oregon Inlet, and said vehicle contained several one-fourth ounce packages of marijuana.

7. That the Deputy Sheriff recognized said vehicle and the defendant going South toward Waves around 12:35 p.m. on April 6, 1985, 20 or more hours after Deputy Midgett[e] had received said information in Manteo.

8. That Deputy Midgett[e] stopped and called Deputy Gray and asked him to intercept the car and same was intercepted by Deputy Gray in Avon.

9. That Deputy Midgett[e] arrived in Avon within a few minutes after Deputy Gray had detained the defendant and her automobile along with another person who was in her automobile.

10. That Deputy Midgett[e] told the defendant he was going to search her vehicle. The defendant asked if he had a search warrant to search her vehicle. She was told that he did not have a search warrant.

11. The defendant did not consent to the search of her automobile or her personal effects within the automobile. Deputy Midgett[e] told the defendant that he could search the automobile because of the emergency situation.

12. That there was no controlled substance or suspected controlled substance which was in plain view from outside of the automobile prior to the search of said automobile.

13. That Deputy Midgett[e] did not secure a search warrant for said vehicle even though he had the information some 20 hours or more prior to the time of the search and was in a position to secure a search warrant for when said automobile was stopped in Avon.

Based upon the foregoing finding of facts, the Court concludes as a matter of law that the search was illegal and the evidence should be suppressed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the evidence identified as marijuana and all paraphernalia associated therewith be hereby suppressed.

Though there are exceptions in the record to findings of fact numbers 6 and 13, the exception to finding of fact number 6 is not brought forward in the brief and is therefore deemed abandoned. Rule 28(a) of the Rules of Appellate Procedure. The exception to finding of fact number 13 is brought forward in the brief, but is not argued and is also deemed abandoned. Rule 28(b)(5) of the Rules of Appellate Procedure. Insofar as finding of fact number 13 constitutes a conclusion of law, it has been preserved for review.

> There are certain exceptions to the general rule that a valid search warrant must accompany every search or seizure.
>
> These exceptions arise when the exigencies of the situation call for unorthodox procedures. Such is the case when it is determined to be impracticable, in light of all the circumstances, to obtain a search warrant. The courts have recognized three situations which justify application of this principle to a course of conduct ordinarily forbidden by the Fourth Amendment . . . .
>
> First, a warrantless search and seizure may be made when it is incident to a valid arrest. [Citations omitted.]
>
> Second, evidence obtained by officers without a search warrant is admissible in evidence where the articles are seized in plain view without necessity of search. [Citations omitted.]
>
> Third, a warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and exigent circumstances make it impracticable to secure a search warrant. [Citations omitted.]

State v. Allen, 282 N.C. 503, 194 S.E. 2d 9 (1973). There is nothing in the record to indicate when defendant was arrested and the State does not argue that the evidence was seized pursuant to a search incident to an arrest. The record is clear and the judge found that the evidence was not in plain view of Deputy Midgette before he entered the vehicle. Therefore, the search and seizure were valid, if at all, based on probable cause to search and exigent circumstances that made it impracticable to secure a search warrant.

Probable cause must arise before a search may be deemed reasonable. *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); *State v. Johnson*, 29 N.C. App. 534, 225 S.E. 2d 113 (1976). In order to determine if and when probable cause arose, we must first discuss the requirements of probable cause as they relate to the circumstances of the case below.

The leading case on determining probable cause from the information of an informant is *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983). In *Gates*, an anonymous letter was sent to the police informing them that Lance and Susan Gates were drug dealers. The letter stated that their *modus operandi* was for Susan Gates to drive their car down to Florida, leave it and then fly back to Illinois. The car trunk would be filled with drugs in Florida, then Lance Gates would fly down and drive the car back to Illinois. The police learned that "L. Gates" made a reservation to fly to West Palm Beach, Florida, stayed in a motel room registered to Susan Gates and then left the next morning in an automobile bearing Illinois license plates, traveling north on an interstate highway frequently used by travelers to the Chicago area. An affidavit setting out these facts was signed by a police officer, who attached the anonymous letter. A warrant to search the Gates' house and automobile was obtained and the police stopped the Gates as they were driving on the interstate, searched their automobile and retrieved 350 pounds of marijuana. The circuit court suppressed this evidence on the basis that the affidavit failed to support the necessary determination of probable cause. The Illinois Appellate and Supreme Courts affirmed, based on the previous United States Supreme Court cases of *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637 (1969). The *Aguilar* and *Spinelli* cases established a two-pronged test to determine the sufficiency of evidence from an informant to establish probable cause: (1) that underlying circumstances exist to independently support the validity of the informant's statement and (2) that some support is shown for the informant's reliability or credibility. *Spinelli, supra. Gates* concluded that the *Aguilar/Spinelli* test was too restrictive, though an informant's veracity and reliability are highly relevant in determining the value of his report. *Gates, supra.* The Court substituted a laxer standard, the "totality of the circumstances,"

a "common-sense," "fluid" concept in which the strength of one factor could overcome the weakness of another. The Court supported its argument by stating that too restrictive a test to obtain a warrant might lead police to

> resort to warrantless searches, with the hope of relying on consent or some other exception to the Warrant Clause that might develop at the time of the search. In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Chadwick*, 433 U.S. 1, 9, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1977).

Gates, supra. The North Carolina Supreme Court has adopted the "totality of the circumstances" test to determine the sufficiency of probable cause to issue a warrant under Article 1, § 20 of the North Carolina Constitution. *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984). Though the *Aguilar/Spinelli* test has been abandoned, its prongs are still useful in determining whether an informant's statement gives rise to probable cause. *Gates, supra; State v. Walker*, 70 N.C. App. 403, 320 S.E. 2d 31 (1984); *see also* 1 LaFave, *Criminal Procedure* § 3.3, p. 194 (1984). Underlying circumstances supported the validity of the informant's statement: Deputy Midgette knew the "woman named Martha," had known her for seven or eight years, knew that she owned a green station wagon and that she lived at the beach north of Oregon Inlet, the area from which the informant said she would be coming. Thus, there was independent corroboration of some of the non-criminal details of the informant's story.

Ample support was shown for the informant's reliability: three times in the previous year this informant had provided Deputy Midgette with information on marijuana-related charges that subsequently led to arrests and convictions.

Counsel for the State suggested at oral argument that probable cause may not have arisen until the station wagon was sighted on the highway, which sighting gave rise to exigent circumstances and a proper warrantless search. The State's argument proves too much. There was already confirmation of

non-criminal details of the informant's story. That defendant actually drove down the predicted highway on 6 April 1985 with a white male in her car can in no way be deemed evidence of criminal activity that would give rise to probable cause theretofore unsolidified. If probable cause did not arise from the informant's story, it did not arise at all, and the State has conducted an unreasonable search. However, given the totality of the circumstances, including independently verifiable facts and the reliability of the informant, we hold that probable cause did arise upon acquisition of the informant's information.

The State argues in its brief that "[t]he question of whether Deputy Midgett[e] had probable cause immediately prior to the search or some twenty hours earlier is interesting, but is of no legal consequence." In support of this statement, the State cites *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed. 2d 325 (1974):

> [W]e know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. . . . The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.

Cardwell is inapplicable to the case at bar for several reasons. In *Cardwell*, the evidence seized was paint scrapings from the outside of an automobile. Employing an "expectation of privacy" analysis, *see Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 2d 576 (1967), the United States Supreme Court concluded that the exterior paint of an automobile, "knowingly expose[d] to the public, [*was*] *not a subject of Fourth Amendment protection*" (emphasis supplied). *Cardwell* was not decided on Fourth Amendment grounds and the State's quote must therefore be regarded as dictum. Further, the *Cardwell* court distinguished the case from previous automobile search cases and, in so doing, from the instant case as well, because "nothing from the interior of the car and no personal effects, which the Fourth Amendment traditional-

ly has been deemed to protect, were searched or seized and introduced into evidence." Finally, should circumstances arising after the solidification of probable cause present a question of exigency, even though the availability of a previous warrant and the knowledge of the police with regard to the circumstances leading up to the search and seizure may not "foreclose" the existence of exigent circumstances, these factors should logically be taken into account in determining whether the events at the time of the search and seizure were truly exigent.

Cardwell did not overrule a venerable line of cases that stress the importance of the warrant requirement.

> The Supreme Court has long expressed a strong preference for the use of arrest warrants and search warrants. Resort to the warrant process, the Court has declared, is preferred because it "interposes an orderly procedure" involving "judicial impartiality" [*United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1951)] whereby "a neutral and detached magistrate" [*Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948)] can make "informed and deliberate determinations" [*Aguilar, supra*] on the issue of probable cause. To leave such decisions to the police would allow "hurried actions" [*Aguilar, supra*] by those "engaged in the often competitive enterprise of ferreting out crime." [*Johnson v. United States, supra.*]

1 LaFave, *Criminal Procedure* § 3.3, p. 185 (1984). "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman. . . ." *Johnson v. United States, supra; State v. Hayes*, 291 N.C. 293, 230 S.E. 2d 146 (1976). In *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), the Court explained that the warrantless search of an automobile stopped on the highway is justified by exigent circumstances because the car is movable, the occupants are alerted and the car's contents may never be found again if a warrant must be obtained; that is, *the opportunity to search is fleeting* and it becomes *not practicable* to secure a warrant. *Coolidge, supra; State v. Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973); *State v. Johnson*, 29 N.C. App. 534, 225 S.E. 2d 113 (1976). Though an automobile has a diminished expectation of privacy when compared to that of a home, *United States v.*

Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977), the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. *Coolidge, supra.*

In *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed. 2d 572 (1982), the Court restated language from the original "automobile exception" case, *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925):

> "On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid. . . ."

This and other language in the *Ross* opinion introduced an ambiguity into the law concerning the Supreme Court's view on the necessity of exigent circumstances to justify a warrantless automobile search. Some post-*Ross* opinions of our Court seem to follow an interpretation of *Ross* that exigent circumstances were no longer required. *See State v. Schneider*, 60 N.C. App. 185, 298 S.E. 2d 432 (1982), *disc. rev. denied*, 307 N.C. 701, 301 S.E. 2d 394 (1983) (Hill, J.) and *State v. Bennett*, 65 N.C. App. 394, 308 S.E. 2d 879 (1983) (Hill, J.). *But see State v. Carr*, 61 N.C. App. 402, 301 S.E. 2d 430, *disc. rev. denied*, 308 N.C. 545, 304 S.E. 2d 239 (1983) (Johnson, J.); *see also* Note, *Search and Seizure—Warrantless Container Searches Under the Automobile and Search Incident to Arrest Exceptions—United States v. Ross*, 18 Wake Forest L. Rev. 1145 (1982).

However, in the recent decision of *California v. Carney*, 471 U.S. ---, 105 S.Ct. ---, 85 L.Ed. 2d 406 (1985), the Supreme Court returned to its previous language that the mobility of an automobile creates the exigencies that render vigorous enforcement of the warrant requirement impossible. The requirement of exigent circumstances to render a warrantless search reasonable continues to be the law of this State, *see State v. Carr, supra.* In our opinion, an automobile does not *per se* create exigencies. The exigency derives from the fear that "the vehicle and its occupants [will] become unavailable." *Carney, supra.* In the case *sub judice*, there was no such fear. At the time probable cause arose, the

"availability" of the car and its occupants was predicted for the next day. The highway on which they would travel, the color and model of their vehicle and the driver's identity were known. At this time, when all information necessary for the procurement of a warrant was known, there existed no exigent circumstances. This *prior knowledge* negates the State's argument that exigent circumstances existed at the time of search. This *prior knowledge* rendered the procurement of a warrant "reasonably practicable." *See Carroll, supra; State v. Allen, supra; State v. Johnson, supra.*

The State had the burden at the suppression hearing of demonstrating with particularity a constitutionally sufficient justification of the officer's search. *State v. Crews*, 66 N.C. App. 671, 311 S.E. 2d 895 (1984); *State v. Cooke*, 306 N.C. 132, 291 S.E. 2d 618 (1982). And one who seeks to justify a warrantless search has the burden of showing that the exigencies of the situation made search without a warrant imperative. *State v. McCloud*, 276 N.C. 518, 173 S.E. 2d 753 (1970). Law enforcement officers should not rely on the possibility that fate or their attempt to apprehend the subject will provide exigent circumstances. *See, e.g., United States v. Collazo*, 732 F. 2d 1200 (4th Cir. 1984), *cert. denied*, --- U.S. ---, 105 S.Ct. 777, 83 L.Ed. 2d 773 (1985); *Chadwick, supra.* The only argument for exigency put forward by the State concerns the automobile traveling on a public highway. The facts before us—the prior knowledge of the make and color of the automobile, of where, when and by whom it was to be driven—rendered non-exigent the vehicle's presence on a public highway. No other showing of exigency is argued by the State. There is no showing that, at the time probable cause arose from the informant's information, no magistrate was available or other emergencies prevented the procurement of a warrant by a limited staff. Indeed, no evidence was presented to show that the police ever considered that a warrant might be needed. The State has failed to meet its burden on this issue.

We hold that a warrant should have been obtained to search defendant's car and that the failure to procure a warrant demands the exclusion of the evidence obtained by the warrantless search. To hold otherwise would be to relax impermissibly the protections of the Fourth Amendment of the Constitution of the United States and Art. I, § 20 of the Constitution of North Carolina. We are not convinced that either the United States

Supreme Court or our Supreme Court has taken the position that when citizens make use of their motor vehicles they waive or forego all Fourth Amendment or Art. I, § 20 rights and we are unwilling to so hold.

Affirmed.

Judges WHICHARD and COZORT concur.

PAULINE MORRISON PRESLAR, EXECUTRIX OF THE ESTATE OF GLYN G. PRESLAR, EMPLOYEE, PLAINTIFF v. CANNON MILLS COMPANY, EMPLOYER, SELF-INSURED CARRIER-DEFENDANT

No. 8510IC705

(Filed 20 May 1986)

1. **Master and Servant § 68— workers' compensation—occupational disease—inability to work in dusty environment—finding of partial disability proper**

A finding of fact by the Industrial Commission that an employee was partially disabled as a result of his occupational disease was supported by competent expert medical testimony that he could not work in a dusty environment.

2. **Master and Servant § 68— workers' compensation—connection between occupational disease and disability**

Evidence that a workers' compensation claimant's environmental restriction (caused by an occupational disease) significantly limits the scope of potential employment in his or her usual vocation, when combined with other factors such as a lack of training in any other vocation, is competent to establish a causal nexus between the occupational disease and the partial or total inability to earn wages in the same or any other employment.

3. **Master and Servant § 71.1— computation of average weekly wage**

Though a workers' compensation claimant actually worked 25 hours per week and earned $83.75, the Industrial Commission could properly find, on the basis of competent evidence, that the claimant was capable of working a full 40-hour week, and the Commission therefore properly concluded that $134 was the average weekly wage claimant was capable of earning after working for defendant.

APPEAL by defendant from the opinion and award of the North Carolina Industrial Commission filed 5 April 1985. Heard in the Court of Appeals 3 December 1985.

Lore & McClearen, by R. James Lore, for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr. and Caroline Hudson, for defendant appellant.

BECTON, Judge.

In this workers' compensation case, plaintiff's decedent, Glyn Preslar, was awarded partial disability compensation under N.C. Gen. Stat. Sec. 97-30 (1985). On appeal, defendant Cannon Mills does not contest the finding and conclusion that Glyn Preslar had an occupational lung disease. Cannon Mills contends only that the Commission erred in finding and concluding that Mr. Preslar's disease caused any disability.

I

Mr. Preslar was born in 1910. In 1933, with a ninth-grade education, he started working for Cannon Mills and continued there until April 1980. During his last twenty-five years, he was a weave room foreman, which required the same physical exertion as running looms. Before Mr. Preslar left in April 1980, he was given a pulmonary function test which showed abnormal pulmonary function and reactivity to cotton dust over the work shift.

Mr. Preslar returned to work for Cannon Mills in January 1981. On 20 January 1981, as part of his application for re-employment, he completed two questionnaires and submitted to a physical examination. The examiner reported that Mr. Preslar's lungs were clear and that there was no problem with his respiratory system. But the results of the pulmonary function tests were "unsatisfactory"—they showed "evidence of reduced ventilatory capacities." Dr. Vernon A. Burkhart, Director of Health and Occupational Environment at Cannon Mills, approved Mr. Preslar for employment notwithstanding the test results.

On 21 January 1981, Dr. Burkhart signed a memorandum which reads in its entirety:

> Name Glyn George Preslar
> SSN 243-01-8810
>
> The results of your pre-employment respiratory tests conducted at Cannon Mills Company are interpreted to be

> within normal range. You have been found medically qualified for employment in a dust environment and to be able to wear a respirator when required.

According to Mr. Preslar, however, when he kept an appointment with Dr. Burkhart, the doctor told Mr. Preslar that he should not work in a dusty environment. Mr. Preslar quit his job as a spare weaver after only four days, but he testified at the hearing that he quit because he could not meet production. In Cannon Mills' medical file for Mr. Preslar, the following notations appear:

> Patient okayed for employment on 1/20 with unsatisfactory PFT's. Discussed with Dr. Stephens. Scheduled to see me tomorrow. V.A.B.
>
> Patient retired on 1/26. V.A.B.
>
> This 70 year old retired weave room foreman is seen with PFT evidence of reduced ventilatory capacities. He recently returned to work as spare weaver but quit after 4 days because of technical difficulty running the looms. He had a severe bout of flu in mid-January and decided to stop smoking with 55 pack year history. His exercise tolerance is excellent for his age. He denies cough. There was no recall of work related symptoms. PFT shows COPD. In the absence of a bronchitic history I assume this to be due to emphysema. I have advised him to take flu shots annually and will give pneumovax 0.5cc today; usual early treatment for URI. He should not be employed in a dusty area. V.A.B.

After leaving his job as a spare weaver, Mr. Preslar applied for other jobs at Cannon Mills in dust-free environments, but without success. He continued to reapply for about one year, but he was never called back to Cannon Mills. Meanwhile, Mr. Preslar found work through the unemployment office as a part-time janitor cleaning and waxing floors. Mr. Preslar testified that he worked four hours per day, five days per week, for an hourly wage of $3.35. He also received social security payments. Mr. Preslar testified that he could have worked eight hours per day, but only four hours were needed to do the job each day, and no additional hours were available. He stopped working after about one year because the janitorial company went out of business.

Mr. Preslar testified before the deputy commissioner that he enjoyed good health while at Cannon Mills and rarely missed work. He also stated, "I retired [in 1980] because I was 70 years old. I could have retired at age 65, but I elected to work on until I was 70." His general health remained good at the time of the hearing, except for an irregular heartbeat.

Dr. Douglas Kelling, Jr., testified as an expert witness. With regard to whether Mr. Preslar's occupational disease caused his inability to work, Dr. Kelling testified that Mr. Preslar's 1980 retirement was not a result of medical problems and that "he could have continued to work at his job at Cannon Mills." Dr. Kelling also testified that Mr. Preslar had indicated that he first experienced shortness of breath in about 1964, but that he was never so short of breath that he could not work. It was Dr. Kelling's opinion that Mr. Preslar's ability to work was limited to some extent in 1984, that he had a thirty to forty percent respiratory impairment, and that there was no significant change in his ability to work from 1980 to 1984 when Dr. Kelling examined him. Mr. Preslar was just "a little older." Dr. Kelling also testified that "I would not recommend that Mr. Preslar return to work in an area in which he would be exposed to respirable cotton dust."

II

[1] The now-familiar task for the Industrial Commission was stated in *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E. 2d 682, 683 (1982) (citation omitted):

> [I]n order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

The Commission is the sole judge of the credibility of the evidence. Although its legal conclusions are reviewable on appeal, the Commission's findings of fact are conclusive if there is competent evidence to support them. *Id.* This Court's inquiry is limited to two issues: whether the Commission's findings of fact are supported by competent evidence and whether its conclusions of law

are justified by the findings of fact. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981).

Cannon Mills contends that the finding of fact that Mr. Preslar is partially disabled as a result of his occupational disease is not supported by competent evidence and that, therefore, the conclusion of law to the same effect cannot stand. We disagree.

A

As Cannon Mills correctly points out, a finding or conclusion of disability must be based on the inability to earn wages, not on physical infirmity, and the degree of disability is measured by wage-earning power. *Hall v. Thomason Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 (1965); *Hill v. DuBose*, 234 N.C. 446, 67 S.E. 2d 371 (1951). There is ample evidence that Mr. Preslar was unable to earn the "same wages he had earned before his injury in the same employment" at Cannon Mills. Although Mr. Preslar apparently retired in 1980 because of his age, and again in 1981 because of his inability to meet production, both Dr. Kelling and Dr. Burkhart (of Cannon Mills) were of the opinion that Mr. Preslar should not work in a dusty environment. The fact that he was able to do physical work does not necessarily mean that he was able to earn the same wages he could earn before he was restricted to working in dust-free areas. *Hilliard.*

Even though Mr. Preslar retired for other reasons, he was *unable*, based on expert medical testimony, to safely resume his employment in a dusty environment. We would indulge an unrealistic abstraction to rule as a matter of law that an individual with an occupational lung disease still has the capacity to earn wages at a certain job, despite evidence that to earn those wages the individual would have to disregard medical advice and seriously risk his or her health, simply because that individual still has the ability physically to perform the required tasks. Expert medical testimony that a person with an occupational lung disease should not continue to work in cotton dust is sufficient to prove inability to earn wages in a job necessarily entailing exposure to cotton dust. We do not require claimants to continue working until the occupational lung disease advances to a crippling stage causing sufficiently extensive permanent damage to prevent physical movement. In short, we hold that there was evidence that Mr. Preslar's environmental constraint, which clearly was substantial-

ly caused by his occupational disease, caused his inability to work at his old job at Cannon Mills.

B

[2] There was also competent evidence that Mr. Preslar was unable to earn the same wages at any other employment. In making this determination, characteristics peculiar to the claimant, such as age, education, experience and health, may be considered. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E. 2d 798 (1986); *Hilliard; Armstrong v. Cone Mills Corp.*, 71 N.C. App. 782, 785, 323 S.E. 2d 48, 50 (1984). The claimant must show that he or she is unable to find other employment at the same wages. *Hundley v. Fieldcrest Mills*, 58 N.C. App. 184, 292 S.E. 2d 766 (1982); *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E. 2d 743 (1982).

Mr. Preslar applied for work in dust-free areas at Cannon Mills for about one year. And although Mr. Preslar had worked in the textile industry for forty-seven years, he looked for employment outside the textile industry, where he found a job as a janitor. The discrepancy between his wages as a janitor and his wages as an experienced weave-room worker is explained by competent evidence showing Mr. Preslar's age, education, experience and health. His environmental constraint—the inability to work in a dusty environment—clearly was one reason Mr. Preslar had to search for employment for which he was inexperienced.

Cannon Mills' main argument in this case is that Mr. Preslar failed to prove causation. Cannon Mills suggests that a claimant who physically is able to work and who retires for reasons other than his or her occupational disease cannot recover workers' compensation.[1] The argument is that because Mr. Preslar physically was able to work at his old job and did not retire because of breathing problems, he cannot prove that the occupational disease

1. Cannon Mills relies partly on *Mills v. J. P. Stevens & Co., Inc.*, 53 N.C. App. 341, 280 S.E. 2d 802, *disc. rev. denied*, 304 N.C. 196, 285 S.E. 2d 100 (1981). We find *Mills* inapposite to the facts of this case. *Mills* involved a claimant with a preexisting condition which was aggravated temporarily by cotton dust. The Court upheld the Commission's decision denying benefits. The precedential value of *Mills* has been limited to cases involving claimants "who suffer occupational diseases due to personal sensitivities." *Hilliard v. Apex Cabinet Co.*, 54 N.C. App. 173, 175, 282 S.E. 2d 828, 829, *rev'd on other grounds*, 305 N.C. 593, 290 S.E. 2d 682 (1982).

caused his inability to earn the wages he earned at his old job. In its brief, Cannon Mills asserts the following:

> Significantly, Mr. Preslar never testified that the reason that he could not do that production job was because he was having any reaction to working in the cotton dust, or because his inability to work was restricted in any way by any type of respiratory impairment. To the contrary, Dr. Burkhart's records reveal that Mr. Preslar told him that the reason he quit after four days was because of "technical difficulty running the looms."

Cannon Mills discounts the medical testimony that Mr. Preslar should not work in dusty areas by arguing that there is no evidence that this environmental restriction was the *reason* Mr. Preslar was not rehired for work in a dust-free area:

> From all that appears in the record, it is just as probable that Cannon Mills simply was not hiring any new employees in 1981, due to general economic conditions in an industry which has been plagued by rising unemployment and layoffs of workers.

In *Donnell v. Cone Mills Corp.*, 60 N.C. App. 338, 343, 299 S.E. 2d 436, 439, *disc. rev. denied*, 308 N.C. 190, 302 S.E. 2d 243 (1983) this Court upheld the Commission's disability award and rejected the argument that the effects of the occupational disease must be the reason the claimant left his or her former employment:

> Our decision does not ignore that plaintiff's job with the defendant ended because the plant where he worked was closed. But we do not believe this to be dispositive on the disability issue. The crucial fact is that plaintiff's earning capacity was diminished because he developed the occupational disease of byssinosis during his employment with the defendant.
>
> The Workers' Compensation statutes in North Carolina should be liberally construed to effect their purpose of compensating injured claimants and recovery should not be denied by a technical or narrow construction. *Stevenson v. Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). We believe that this decision and its interpretation of "disability" under G.S.

> 97-2(9) is in accord with that general rule and does not enlarge the statute beyond its limits.

Although in *Donnell* there was evidence that the claimant was not given a new job with the defendant-employer because of claimant's breathing problems, we do not believe such evidence was necessary. When, as in *Donnell* and in the case at bar, there is both expert testimony that the claimant "should not work in a dusty environment . . . [and] evidence of permanent impairment of [claimant's] pulmonary functions," *id.* at 342, 299 S.E. 2d at 438, we will not require the claimant to prove that the employer's refusal to rehire the defendant was specifically because of the environmental restriction. We may assume that, at a minimum, an employer would not rehire a dust-sensitive former employee "with PFT evidence of reduced ventilatory capacities" to work in a dusty environment. And this restriction, which is clearly caused by the occupational disease, may significantly limit the employability of a long-time textile worker with little education and no other experience or training.

We do not hold that any employee with an occupational disease, who decides to retire or change jobs but cannot find comparable employment, may recover for disability so that the former employer is liable for the wage discrepancy. But we also do not require proof that the retirement or job change was a direct consequence of the occupational disease. *See Donnell.* Evidence that a claimant's environmental restriction (caused by an occupational disease) significantly limits the scope of potential employment in his or her usual vocation, when combined with other factors such as a lack of training in any other vocation, is competent to establish a causal nexus between the occupational disease and the partial or total inability to earn wages in the same or any other employment. *See Peoples.*

In *Donnell*, this Court said:

> Given plaintiff's physical condition, the limits on his ability to work [restricted to dust-free areas] and his lack of training in any job except the textile industry, we hold that there was competent evidence before the Industrial Commission to find that plaintiff was disabled from byssinosis.

60 N.C. App. at 342, 299 S.E. 2d at 438. Although Mr. Preslar did not suffer from a poor outward physical condition as did Mr. Don-

nell, they both were limited specifically in their abilities to work in their usual vocations and had no other training. Outward physical health is only one relevant factor to show the extent of disability. It is not a necessary factor to prove that an occupational disease has caused permanent partial disability; other factors—such as age, education and experience—may demonstrate an inability to earn the same wages. *See Armstrong*, 71 N.C. App. at 785, 323 S.E. 2d at 50.

There is evidence in the case at bar that Mr. Preslar's earning capacity was diminished at least partly because of his inability to work in an occupation at which he had forty-seven years of experience. Thus, Mr. Preslar's diminished earning capacity is causally linked to his occupational disease. Even assuming Cannon Mills refused to rehire Mr. Preslar because of his advanced age or limited education and experience (only in dusty weave rooms) or because economic conditions were forcing layoffs, this would be no different fron a non-textile employer making the same refusal. *Hilliard* does not require a claimant to prove that each potential employer denied employment to the claimant specifically because he or she had an occupational disease.

We are mindful of this Court's split decision in *Hendrix v. Linn-Corriher Corp.*, 78 N.C. App. 373, 337 S.E. 2d 106 (1985). *Hendrix* involved facts similar to those in the case at bar, and this Court reversed an award of permanent partial disability. The basis for the majority opinion in *Hendrix* was the decision in *Lucas v. Burlington Industries*, 57 N.C. App. 366, 291 S.E. 2d 360, *disc. rev. allowed*, 306 N.C. 385, 294 S.E. 2d 209 (1982), *remanded by order* (9 November 1982) (settled by parties before argument in Supreme Court). As explained more fully in the dissent in *Hendrix*, the precedential value of *Lucas* is questionable because it relied on cases that were later limited to their facts and it failed to consider the Supreme Court's decision in *Hilliard*. Specifically, the *Hilliard* Court, applying the principle established in *Little v. Food Services*, 295 N.C. 527, 246 S.E. 2d 743 (1978) (involving a spinal cord injury), recognized that it is the Industrial Commission's role to make the factual determination whether claimant is unable to find work in a pollutant-free environment, even though physically able to work, considering the claimant's age, education and experience. This precedent from *Hilliard*, not mentioned in *Lucas* or in *Hendrix*, was recently reaffirmed by the Supreme

Court in *Peoples*. Therefore, we are bound to base our holding on the principle in *Peoples, Hilliard* and *Donnell* that an occupational lung disease claimant may be disabled even though physically able to work.

III

[3] Cannon Mills correctly asserts that actual wages earned does not necessarily prove wage-earning capacity. As this Court said in *Donnell*, 60 N.C. App. at 342, 299 S.E. 2d at 438:

> Although comparing before and after earnings is not the method to show diminished earning capacity, *Hill v. DuBose*, 234 N.C. 446, 447-48, 67 S.E. 2d 371, 372 (1951), we believe that it is a factor to be considered.

In any event, the Commission used actual wages as only one factor. Mr. Preslar was earning $3.35 per hour, and the Commission found that he worked twenty-five hours per week. This amounts to a weekly wage of $83.75. But the Commission found, and the evidence shows, that Mr. Preslar was capable of working a full forty-hour week. On this basis, the Commission concluded that $134.00 was the average weekly wage Mr. Preslar was capable of earning after working for Cannon Mills. These findings and conclusions are supported by the record. We decline Cannon Mills' invitation to draw contrary inferences and conclusions from the evidence.

For the reasons set forth above, the Commission's opinion and award is

Affirmed.

Judges WEBB and COZORT concur.

STATE OF NORTH CAROLINA v. MARVIN CARSON

No. 8526SC987

(Filed 20 May 1986)

1. **Criminal Law § 66.4— lineups which never took place—evidence improperly admitted—defendant not prejudiced**

In a prosecution of plaintiff for robbery with a dangerous weapon, testimony by two victims and the investigating officer as to scheduled lineups which never took place was irrelevant and inadmissible, but because the State never offered evidence that defendant was identified at a lineup, there was no reasonable possibility that this error contributed to the verdict.

2. **Criminal Law § 34.5— evidence of other offense—admissibility to show identity of defendant**

In a prosecution for robbery with a dangerous weapon, testimony about defendant's arrest on an unrelated charge was properly admitted for the limited purpose of explaining the robbery victim's initial identification of defendant from a television broadcast.

3. **Criminal Law § 66; Robbery § 5— instructions on single eyewitness identification—instructions substantially like request**

In a prosecution for robbery with a dangerous weapon where conviction was based upon a single eyewitness identification, the trial court's instruction on identification testimony was sufficiently similar in substance to the one requested by defendant; defendant failed to sustain the burden of proving that his requested instruction was correct in law, supported by the evidence, and that a different result would likely have been reached had the instruction been given; and the court was not required to instruct that "a conviction based solely on one eyewitness identification represents the greatest single threat to the achievement of our ideal that no innocent person shall be punished."

APPEAL by defendant from *Beaty, Judge.* Judgment entered 14 March 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 February 1986.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Shirley Fulton, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

BECTON, Judge.

From a judgment imposing a twenty-five-year sentence for robbery with a dangerous weapon, defendant Marvin Carson appeals. We find no prejudicial error.

I

Pamela Hill and Larry Pierce were working at the International House of Pancakes (IHOP) in Charlotte, North Carolina, on 4 November 1984. After closing the restaurant, Ms. Hill unlocked the door so that Mr. Pierce could go to a nearby hotel for change. When Mr. Pierce came back into the IHOP, two men followed him. The taller of the two men, later identified as the defendant, pointed a shotgun at Ms. Hill, and the shorter man demanded the orange bag containing the money from the cash register. When Ms. Hill informed them that it was in the safe, the shorter man rummaged through the cash register.

Mr. Pierce peered out from the kitchen and heard Ms. Hill say they were being robbed. One of the robbers ordered Mr. Pierce to come out front, but he refused and went upstairs to hide in the air conditioning room. Apparently believing that Mr. Pierce had gone to call the police, the taller man urged the shorter man to leave. The shorter man continued looking for the money, then grabbed Ms. Hill's purse, took the wallet, turned and ran out after the taller man.

Ms. Hill testified that she observed both men at a distance of approximately three feet for at least six to eight minutes. She also testified that the area in which the robbery occurred was well lit and that she remembered what the men were wearing. She described the taller man as 6'2" to 6'7" with big, soft eyes and the shorter man as 5'1" to 5'2" with a "little pumpkin head," "squared off chin" and "crazy eyes." Ms. Hill testified that she later recognized the taller man in a television news broadcast on 9 November 1984. Unbeknownst to Ms. Hill, defendant was being arrested on an unrelated charge. She had picked the shorter man out of a photographic array a few days before. She did not notify the police department that she had recognized the taller man on the news broadcast until 29 November 1984 when she went to the police station to give a written statement. She first made a corporeal identification of the defendant at his probable cause hearing, when he was the only black man seated at the defendant's table.

Defendant offered evidence of an alibi. Dawn Franklin testified that she and defendant traveled to Morganton, North Carolina on 3 November 1984 and did not return to Charlotte until 5

November 1984. This was corroborated by the testimony of Belinda Bass, who said that the defendant and Dawn Franklin had stayed with her at her house in Morganton. The defendant also introduced Ms. Franklin's work records, which revealed that she was off that weekend.

The defendant has brought forward eleven exceptions, contained in three assignments of error. The thrust of the defendant's argument is that the State's identification evidence was extremely weak and that the State failed in its attempt to bolster its case with certain pre-trial line-up evidence because that evidence was never linked to the defendant. Consequently, defendant argues that the trial court erred in admitting in evidence for substantive purposes, testimony that the eyewitness recognized defendant on a television broadcast being arrested for an unrelated offense, and further erred by failing to instruct the jury on the perils of a single eyewitness identification.

Defendant, whose defense was alibi, asserts that the State would not have met its substantial burden of proving identity if not for the erroneous admission of the tainted testimony and the omission of a proper jury instruction.

II

[1] We agree that the testimony by the two IHOP employees and the investigating officer as to scheduled line-ups which never took place was irrelevant and inadmissible; however, the admission of this irrelevant evidence did not so infect the total evidentiary picture as to require a reversal. Indeed, defendant failed to object to two of the several attempts by the State to show that no line-up occurred. Consequently, under *State v. Hammonds*, 307 N.C. 662, 666, 300 S.E. 2d 361, 363 (1983), we could also find that defendant waived his right to challenge this evidence. Because the State never offered evidence that defendant was identified at a line-up, we are convinced that there is no reasonable possibility that this error contributed to the verdict. *See State v. Knox*, 78 N.C. App. 493, 496, 337 S.E. 2d 154, 157 (1985).

III

[2] Defendant also assigns as error the trial court's failure to suppress references to the circumstances surrounding the defendant's apprehension and arrest on an unrelated charge. Defendant

correctly states the general rule that evidence of mere accusations of wrongdoing, without a resulting criminal conviction, is not admissible either as substantive or impeaching evidence. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). This rule is an application of the principle that the evidence must be confined to the point in issue in the case on trial. *Id.*

The trial court made an effort to limit the testimony about defendant's arrest on another charge to that necessary to elicit evidence about Ms. Hill's identification of him from the television broadcast. Officer Alsbrook was allowed to testify that the arrest broadcast on television, from which Ms. Hill made her identification, was in no way related to the present case.

We do not agree with the defendant's contention that the only purpose of this testimony was to prejudice the jurors against the defendant and to encourage them to convict the defendant because he had been accused of other, unrelated, criminal acts. We conclude that the admission of this testimony does not require a reversal.

Directing us to the following excerpts from the transcript, the defendant insists that the district attorney made "numerous references to defendant's arrest on the unrelated charge and the circumstances surrounding it."

Q. And were you involved in any way in that newscast?

A. Uh, yes, I was.

Q. Did you participate in that arrest?

A. Uh, yes, I did.

Q. Where did that arrest take place?

A. The arrest took place at the Coliseum Mart, uh, Hotel on Independence Boulevard. It's about a block or two within the, uh, International House of Pancakes on Independence Boulevard. The, uh, incident took, uh, made quite a stir and, uh . . .

MR. BENDER: OBJECTION Your Honor.

THE COURT: SUSTAINED.

Q. Do you recall what date that, uh, arrest at the Coliseum Hotel, or the Coliseum Mart Hotel took place?

A. Yes. It was on the 11th of November.

Q. The 11th of November?

A. I mean, I [sic] sorry, the 9th of November.

Q. Now, was that arrest made on November 9th at the Coliseum Mart Hotel in any way related to the, to this case?

MR. BENDER: OBJECTION.

THE COURT: OVERRULED. Answer that question.

A. No, it was not.

MR. BENDER: Your Honor, MOVE TO STRIKE.

THE COURT: Motion DENIED.

Q. Do you see the person here in the courtroom that you arrested on the 9th of November—

A. —uh, yes—

Q. —at the Coliseum Mart?

A. Yes, I do.

Q. Now, when Ms. Hill came down to see you at the Law Enforcement Center on either the 29th or 30th of November, had you charged Marvin Carson with armed robbery in this particular case at that point?

MR. BENDER. OBJECTION, Your Honor.

THE COURT: OVERRULED.

At this point, defense counsel requested a bench conference. The trial court stated that the questioning had not violated its earlier ruling on defendant's motion *in limine*, which prohibited the State from asking questions about the incidents underlying defendant's arrest on the unrelated charge. The trial court felt, and we agree, that Ms. Hill's identification of the defendant from the television broadcast was relevant. In addition, Ms. Hill had already testified without objection about how she had first iden-

tified the defendant. The only additional information elicited during Officer Alsbrook's testimony was that the arrest on 9 November 1984 was not related to the case being tried.

We hold that this additional evidence was not so prejudicial as to require a new trial. The testimony about the defendant's arrest was admitted for the limited purpose of explaining Ms. Hill's initial identification of the defendant.

IV

[3] Defendant's final assignment of error is that the trial court failed to give defendant's written requested instruction on the perils of a single eyewitness identification and that this constituted prejudicial error. Defendant cites *State v. Bradley*, 65 N.C. App. 359, 309 S.E. 2d 510 (1983) for the proposition that the trial court must give a requested instruction in substance when it is correct in law and supported by the evidence. The defendant bears the additional burden, when challenging a jury instruction, to show that the jury was misled or misinformed by the charge as given, *State v. Sledge*, 297 N.C. 227, 235, 254 S.E. 2d 579, 585 (1979) or that a different result would have been reached had the requested instruction been given. N.C. Gen. Stat. Sec. 15A-1443(a) (1983); *State v. Miller*, 69 N.C. App. 392, 402, 317 S.E. 2d 84, 91 (1984).

The trial court is not required to charge the jury in the exact language requested by the defendant. *State v. Smith*, 311 N.C. 287, 290, 316 S.E. 2d 73, 75 (1984). However, when a certain instruction is warranted, the trial court must give the requested instruction at least in substance. *State v. Monk*, 291 N.C. 37, 54, 229 S.E. 2d 163, 174 (1976). Determining whether a requested instruction was given in substance is undeniably a very subjective undertaking. Our appellate courts have been loath to find reversible error based on failure to give a requested jury instruction when in the court's opinion the "in substance" requirement has been fulfilled. *See, e.g., State v. Corn*, 307 N.C. 79, 86, 296 S.E. 2d 261, 266 (1982); *State v. Silhan*, 302 N.C. 223, 252, 275 S.E. 2d 450, 472 (1981); *State v. Rhinehart*, 68 N.C. App. 615, 618, 316 S.E. 2d 118, 121 (1984); *State v. Smith*, 61 N.C. App. 52, 61, 300 S.E. 2d 403, 409 (1983); *State v. Mebane*, 61 N.C. App. 316, 319, 300 S.E. 2d 473, 476 (1983); *State v. Guy and State v. Yandle*, 54 N.C. App.

208, 213, 282 S.E. 2d 560, 563 (1981), *cert. denied*, 304 N.C. 730, 288 S.E. 2d 803 (1982).

Error was found, however, when the trial court gave a general credibility instruction after the defendant had requested an interested-witness instruction. *State v. Puckett*, 54 N.C. App. 576, 581, 284 S.E. 2d 326, 329-30 (1981). The *Puckett* Court noted that it would be error for the trial court to change the sense or to so qualify the requested instruction as to weaken its force. *Id.* Even so, the general rule remains intact: the trial court is not required to use the same language as requested by counsel, even when the language used could have included more details. *State v. Willis*, 61 N.C. App. 23, 39, 300 S.E. 2d 420, 429, *modified and aff'd*, 309 N.C. 451, 306 S.E. 2d 779 (1983).

In this case, the trial court instructed the jury in pertinent part:

> I instruct you that the state has the burden of proof of the identity of the defendant as the perpetrator of the crime charged beyond a reasonable doubt. This means that you, the jury, must be satisfied beyond a reasonable doubt that the Defendant, Marvin Carson, was the perpetrator of the crime charged before you may return a verdict of guilty. The main aspects of identification is the observations of the offender by the witness at the time of the offense.
>
> In examining the testimony of the witness, Pamela Hill, as to her observation of the perpetrator at the time of the offense, you should consider the capacity of the witness to make such an observation, through her senses, the opportunity of the witness had [sic] to make an observation, and details, such as, the lighting of the scene of the crime at the time of the incident. You are to consider the mental and physical condition of the witness, the length of time of the observation and any other contention, condition or circumstance which might have tainted or hindered the witness in making her observation.
>
> However, your consideration must go further. The identification of the defendant by the witness, as the perpetrator of the offense, must be purely the product of the witness' recollection of the Defendant and derived only from the

observation made at the time of the offense. In making this determination, you should consider the manner in which the witness was confronted by the defendant after the offense and any circumstances or pressures which might have influenced the witness in making an identification and which might have cast doubt upon, or re-enforced the accuracy of the witness' identification of the Defendant.

I further instruct you that the identification witness is just like any other witness. That is, you should assess the credibility of the identification witness in the same way you would with any other witness. That is, in determining the adequacy of her observation in her capacity to observe. You may take this into account in your consideration of the credibility of the identification witness.

You may consider any occasion upon which the witness failed to make an identification of the Defendant or any occasion upon which the witnesses, witness made an identification that was not consistent with her in-Court identification. Above all, as I have earlier instructed you, the State must prove beyond a reasonable doubt that the Defendant was the perpetrator of the crime charged. If, after weighing all of the testimony, you are not satisfied beyond a reasonable doubt that the Defendant was the perpetrator of the crime charged, it would be your duty to return a verdict of not guilty.

The defendant requested that the following instruction be given:

A conviction based solely on "one eyewitness" identification represents the greatest single threat to the achievement of our ideal that no innocent man shall be punished. Thus, I instruct you that the State has the burden of proving the identity of the Defendant as the perpetrator of a crime charged beyond a reasonable doubt. Although "one eyewitness" identification may be sufficient to satisfy you beyond a reasonable doubt that the Defendant is the perpetrator of the crime charged, you should scrutinize carefully this testimony. You should consider whether or not this testimony is corroborated by known or admitted facts.

If, after weighing the testimony with great caution and careful scrutiny, you are satisfied beyond a reasonable doubt

that the Defendant was the perpetrator of the crime charged, you may return a verdict of guilty. However, if you are not so satisfied, or have a reasonable doubt that the Defendant was the perpetrator of the crime, you will return a verdict of not guilty.

We hold that the trial court's instruction was sufficiently similar in substance to the one requested by defendant. In addition, given the facts of this case, we find that defendant has failed to sustain the burden of proving that his requested instruction was correct in law, supported by the evidence, and that a different result would likely have been reached had the instruction been given. Although some judges and psychologists have noted that "[a] conviction based solely on 'one eyewitness' identification represents the greatest single threat to the achievement of our ideal that no innocent [person] shall be punished," we hesitate to adopt this as an accurate statement of the law as applied to the facts in this case.

This instruction may well have been appropriate had defendant offered expert testimony on the perils of a single eyewitness identification. Expert testimony on the reliability of eyewitness identification is an increasingly popular defense trial strategy. Indeed, our Court has held its exclusion in the proper case reversible error. *See, e.g., Knox*, 78 N.C. App. at 496, 337 S.E. 2d at 157, and the authority cited therein.

Misidentification is a possibility in almost every case. Not surprisingly, it may be more possible in a case in which five eyewitnesses get a glimpse of the perpetrator of a crime than in a case in which a single eyewitness views the perpetrator for an extended time. Great care must therefore be taken in every case to ensure that the identification process is free from unnecessary suggestiveness, error or bias, and trial courts should alert juries to these hazards. We believe that the trial court in this case adequately performed this task. Interestingly, the instruction given by the trial court here contains almost the verbatim language this Court suggested might "guard against the baleful effects of [misidentification]" in *State v. Smith*, 65 N.C. App. 684, 687, 309 S.E. 2d 695, 697 (1983), *rev'd*, 311 N.C. 287, 316 S.E. 2d 73 (1984) (Trial court's instruction was adequate in substance on the facts of the case.).

No error.

Judges JOHNSON and MARTIN concur.

CHRISTINE PROPST McDANIEL, LIBBY ANN LOWMAN AND HUSBAND, TEDDY R. LOWMAN, AND SADIE IRENE PROPST v. BASS-SMITH FUNERAL HOME, INC.

No. 8525SC1146

(Filed 20 May 1986)

1. **Dead Bodies § 2— breach of contract for funeral and burial—sufficiency of evidence**

In an action for breach of contract to provide funeral and burial services where plaintiffs sought to recover compensatory damages for mental anguish, the trial court erred in granting defendant's motions for directed verdict as to the claims of three of the plaintiffs, since plaintiffs alleged that they contracted with defendant to provide a casket, funeral service and burial for their deceased relative; defendant admitted that allegation, thereby conclusively establishing that the contract was between all of the plaintiffs and defendant; the evidence tended to show that the casket lid did not close properly so that the deceased's remains were visible during the funeral service; there was evidence that one of defendant's employees attempted to force the lid shut in such a manner as to jostle and disturb the deceased's remains; and there was evidence that each plaintiff experienced emotional upset in varying degrees as a result of the alleged breach of contract. Furthermore, the trial court erred in granting defendant's motion for judgment n.o.v. where the jury awarded the fourth plaintiff $5,000 for mental anguish.

2. **Dead Bodies § 2— breach of contract for funeral and burial—claim for punitive damages properly dismissed**

In an action for breach of contract to provide funeral and burial services for plaintiffs' deceased relative, the trial court properly granted defendant's motions for directed verdict dismissing plaintiffs' claims for punitive damages where the evidence offered by plaintiffs disclosed no identifiable tortious conduct on the part of defendant accompanying its alleged breach of contract, nor was there evidence of the requisite element of aggravated conduct.

3. **Dead Bodies § 2— breach of contract for casket and funeral—obligation to pay contract price**

Defendant's breach of contract to provide a casket and funeral and burial services was not so substantial as to relieve plaintiff of any obligation to pay the contract price.

McDaniel v. Bass-Smith Funeral Home, Inc.

APPEAL by plaintiff from *Kirby, Judge.* Judgment entered 30 May 1985 in Superior Court, CATAWBA County. Heard in the Court of Appeals 14 February 1986.

Plaintiffs brought this civil action alleging that defendant breached a contract to provide funeral and burial services for Mattie Pollard Propst and alleging also that defendant had breached express and implied warranties with respect to a casket which it provided. Christine Propst McDaniel and Sadie Irene Propst are the daughters of Mattie Pollard Propst; Libby Ann Lowman is her granddaughter and Teddy Lowman is Libby Ann Lowman's husband. Plaintiffs sought to recover compensatory damages for mental anguish and punitive damages. Defendant answered, denying the material allegations of the complaint, and asserted a counterclaim for the amount of the funeral bill.

At trial, plaintiffs' evidence tended to show that Mattie Pollard Propst died on 14 May 1983. On the next day, Sadie Propst, Libby Ann Lowman and Teddy Lowman went to defendant's funeral home to make funeral and burial arrangements. They selected a casket and Sadie Propst signed a "Funeral Purchase Agreement" agreeing to pay for the funeral services. The funeral service was conducted on 17 May 1983. Immediately before the service, witnesses observed defendant's employees experiencing difficulty in attempting to completely close the casket. According to the testimony, during the funeral service the casket lid was open at one corner to the extent that a portion of Mattie Propst's remains were visible. After the funeral service at defendant's chapel, a graveside service was conducted at the cemetery. The casket lid was still not completely closed. After the graveside service was completed, and as the family was being driven from the cemetery, Mrs. Lowman informed Russell Teague, one of defendant's employees, that the casket was open at one end. Mr. Teague returned to the gravesite and, with assistance from two gravediggers, attempted unsuccessfully to close the casket. Mrs. Lowman testified that during these attempts, the casket lid was raised and slammed several times, that Mr. Teague twisted the lid, and that Mrs. Propst's body was jostled about to the extent that Mrs. Lowman became extremely upset and insisted that the efforts be terminated. Mr. Teague told Mrs. Lowman that the casket was not right. Mr. Teague then drove the family back to defendant's funeral home and arrangements were made for another

funeral home to return the casket to defendant's funeral home. Defendant provided another more expensive casket at no additional cost and plaintiffs then returned to the cemetery where the burial was completed. As a result of the incident, Mrs. Lowman, Sadie Propst and Christine Propst McDaniel were nervous and distraught and suffered mental distress for some period of time thereafter. Plaintiffs did not pay for the funeral services.

At the close of plaintiffs' evidence, defendant's motions for directed verdict were allowed as to all claims for punitive damages and as to the claims of all plaintiffs except Sadie Propst for compensatory damages. The court also directed a verdict in favor of defendant against Sadie Propst on defendant's counterclaim for the cost of the funeral services.

Defendant then offered evidence tending to show that the casket selected by plaintiffs was a "non-sealer type" casket which was the least expensive casket available and had no rubber gasket between the lid and the bottom of the casket. According to defendant's evidence, such caskets do not have a flush fit between the lid and lower portion. Defendant also presented evidence that the gap between the lid and lower portion of the casket selected by plaintiffs was approximately one-quarter to one-half inch and that such a gap was normal for the type of casket selected by plaintiffs. According to defendant's evidence, the casket lid was fully latched at the funeral home and at the cemetery and the casket was not defective. Mr. Teague denied having slammed or twisted the lid and stated that he did not observe any of the plaintiffs become ill or emotionally upset.

The jury answered the issue of breach in favor of Sadie Propst and awarded her $5,000.00 in compensatory damages. Thereafter, the trial court granted defendant's motion for judgment notwithstanding the verdict. From the orders granting defendant's motions for directed verdict and judgment notwithstanding the verdict, plaintiffs appeal.

Randy D. Duncan for plaintiff appellants.

Golding, Crews, Meekins, Gordon & Gray, by Ned A. Stiles and Terry D. Horne, for defendant appellee.

MARTIN, Judge.

Plaintiffs Christine Propst McDaniel, Libby Ann Lowman and Teddy R. Lowman contend on appeal that the trial court erred when it directed verdicts against them. Plaintiff Sadie Propst assigns error to the entry of judgment notwithstanding the verdict as to her claim and to the entry of a directed verdict against her with respect to defendant's counterclaim. All plaintiffs contend that the trial court erred in granting defendant's motion for directed verdicts as to their claims for punitive damages. For the reasons which follow, we conclude that the jury verdict in favor of Sadie Propst must be reinstated and that the remaining plaintiffs are entitled to have their claims for compensatory damages submitted to the jury. We affirm, however, the directed verdicts dismissing plaintiffs' claims for punitive damages and awarding defendant a judgment upon its counterclaim.

A motion for directed verdict made pursuant to G.S. 1A-1, Rule 50(a) and a motion for judgment notwithstanding the verdict made pursuant to G.S. 1A-1, Rule 50(b) present essentially the same question, i.e., whether the evidence, taken as true and considered in the light most favorable to the non-movant, is sufficient for submission to the jury. *Hunt v. Montgomery Ward and Co.*, 49 N.C. App. 642, 272 S.E. 2d 357 (1980). The motion may be granted only if the evidence, when so considered, is insufficient as a matter of law to support a verdict for the non-movant. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

[1] Plaintiffs' action is essentially one for breach of contract. They allege that they contracted with defendant to provide a casket, a funeral service, and a burial for their deceased relative and that defendant breached the contract by conducting the services while the casket was not fully closed, by providing a defective casket that could not be fully closed, and by attempting to force the casket lid shut in such a manner as to jostle and disturb the deceased's remains. They seek damages for mental anguish suffered by reason of the breach.

In North Carolina, a contract to provide funeral and burial services has been held to imply an agreement that the funeral and burial services will be provided and performed "in a good and workmanlike manner." *Lamm v. Shingleton*, 231 N.C. 10, 13, 55 S.E. 2d 810, 812 (1949). Such a contract is so personal in nature as

to give rise, upon a breach thereof, to a claim for damages for mental anguish. *Id.*

> Where the contract is personal in nature and the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the contract that such suffering will result from its breach, compensatory damages therefor may be recovered.

Id. at 14, 55 S.E. 2d at 813.

Plaintiffs presented evidence through the testimony of several witnesses that defendant's employees experienced difficulty in closing the casket before the funeral service was conducted, that one corner of the casket was not closed so that, during the service, the deceased's remains were visible through the gap between the lower portion and the lid of the casket. Mrs. Lowman testified that after the graveside service, she complained to Mr. Teague that the casket was not closed and that he "slammed" the lid, "got up on the casket and started beating the lid and twisting it" and was "rocking and shaking" the casket and the deceased's remains inside of it to the extent that Mrs. Lowman became physically ill. After his attempts were unsuccessful, Mr. Teague told Mrs. Lowman that "the casket is not right." Mrs. McDaniel testified that Jack Bass, Sr., then defendant's president, told her that the casket was "wrong from the manufacturer."

In our view, considering this evidence as true and in the light most favorable to plaintiffs, the jury could have found that the casket was defective and that the conduct of defendant's employees amounted to a breach of defendant's implied obligation to conduct the funeral services in a good and workmanlike manner. Defendant argues, however, that as to Mr. and Mrs. Lowman and Mrs. McDaniel, directed verdicts were appropriate because the evidence disclosed that only Sadie Propst signed the "Funeral Purchase Agreement." We disagree. Plaintiffs alleged in their complaint that "plaintiffs contracted with defendant" for the funeral and burial services and, in its answer, defendant admitted that allegation. Defendant's judicial admission conclusively established, for the purposes of this case, that the contract was be-

tween all of the plaintiffs and defendant. H. Brandis on North Carolina Evidence, § 177 (1982). "[I]f a fact is alleged by one party and admitted by the other, no issue arises therefrom, but both parties are bound by the allegation so made, and evidence offered in relation thereto is irrelevant." *State ex rel. Lee v. Martin*, 191 N.C. 401, 403, 132 S.E. 14, 15 (1926).

Finally, we note that there is evidence that each plaintiff experienced emotional upset, in varying degrees, as a result of the alleged breach of contract. Even in the absence of such evidence of damages, a directed verdict should not be granted where plaintiffs have offered sufficient evidence of a breach of the contract because proof of a breach of the contract entitles plaintiffs to at least nominal damages. *Cole v. Sorie*, 41 N.C. App. 485, 255 S.E. 2d 271, *disc. rev. denied*, 298 N.C. 294, 259 S.E. 2d 911 (1979). We hold that the trial court erred in granting defendant's motions for directed verdict as to the claims of Mrs. McDaniel and Mr. and Mrs. Lowman for compensatory damages.

For the same reasons, we conclude that the trial court erred in granting defendant's motion for judgment notwithstanding the verdict as to the claim of Sadie Irene Propst. Moreover, since neither defendant nor Sadie Propst moved for a new trial pursuant to G.S. 1A-1, Rule 50(c), and defendant has not assigned error to any aspect of the trial, we have no alternative but to remand this case for reinstatement of the verdict in favor of Sadie Irene Propst and entry of judgment thereon. *Musgrave v. Mutual Savings and Loan Assn.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970).

[2] Plaintiffs further contend that the trial court erred in granting defendant's motions for directed verdict as to plaintiffs' claims for punitive damages. We reject this contention. Punitive damages are not recoverable for breach of contract, except contracts of marriage, unless the breach also constitutes identifiable tortious conduct, accompanied by some element of aggravation. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Examples of aggravated conduct sufficient to support punitive damages include "fraud, malice, such a degree of negligence as indicates a reckless indifference to consequences, oppression, insult, rudeness, caprice, wilfulness. . . ." *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E. 2d 297, 301 (1976), *quoting Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). The evidence offered by

plaintiffs discloses no identifiable tortious conduct on the part of defendant accompanying its alleged breach of contract nor do we find evidence of the requisite element of aggravated conduct. Indeed, once the plaintiffs complained to defendant's employees, defendant made a reasonable effort to remedy the breach by substituting a more expensive casket at no additional cost. The granting of defendant's motions for directed verdict dismissing plaintiffs' claims for punitive damages was appropriate.

[3] Plaintiff Sadie Irene Propst also assigns error to the directed verdict against her and in favor of defendant on its counterclaim and to the entry of judgment against her in the amount due defendant under the contract. She contends that defendant's breach of the contract was so substantial as to relieve her of any obligation to pay the contract price.

The evidence is uncontradicted that defendant rendered funeral and burial services under the burial contract, including many services in addition to providing the casket, and that defendant has not been paid. A substantial breach of contract, so as to relieve the non-breaching party from his or her own obligations thereunder, occurs when the breach is "such an essential part of the bargain that the failure of it must be considered as destroying the entire contract." *Wilson v. Wilson*, 261 N.C. 40, 43, 134 S.E. 2d 240, 242 (1964). Plaintiffs' evidence did not disclose a "substantial breach" of contract so as to "destroy" the entire contract and permit Sadie Irene Propst the option to rescind it and avoid payment for the services rendered. Defendant's breach merely gave her the right to seek relief by an award of damages. This assignment of error is overruled.

In summary, we reverse the entry of directed verdicts against Christine Propst McDaniel, Libby Ann Lowman and Teddy Lowman and remand their claims for a new trial. We also reverse the judgment entered for defendant notwithstanding the verdict as to the claim of Sadie Irene Propst and remand this case for reinstatement of the jury verdict and entry of judgment thereon. With respect to the entry of directed verdicts dismissing plaintiffs' claims for punitive damages and awarding defendant a judgment against Sadie Irene Propst on the counterclaim, we affirm the judgment of the trial court.

Affirmed in part, reversed in part, and remanded.

Judges BECTON and JOHNSON concur.

LORI P. SMITH, PETITIONER-APPELLANT v. SPENCE & SPENCE, ATTORNEYS, AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLEES

No. 8511SC623

(Filed 20 May 1986)

Master and Servant § 108.1— unemployment compensation—discharge based on fault not amounting to misconduct

Plaintiff employee's delinquency in her personal financial affairs which caused a detrimental effect on her employer's relationship with his clients who were creditors of the employee constituted substantial fault on the employee's part connected with her work not rising to the level of misconduct for which the employee could be terminated, and the Employment Security Commission could therefore disqualify plaintiff secretary from receiving unemployment benefits for a period of four weeks pursuant to N.C.G.S. § 96-14(2A).

APPEAL by petitioner from *McConnell, Judge.* Judgment entered 12 February 1985 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 21 November 1985.

East Central Community Legal Services by Reynauld M. Williams for petitioner appellant.

Employment Security Commission of North Carolina Chief Counsel T. S. Whitaker by Staff Attorney Jane H. Dittmann for respondent appellee, Employment Security Commission.

COZORT, Judge.

The question presented by this appeal is whether an employee's delinquency in her personal financial affairs which caused a detrimental effect on her employer's relationship with his clients who were creditors of the employee constitutes "substantial fault on the employee's part connected with her work not rising to the level of misconduct" for which the employee may be terminated. We hold the conduct of the secretary does rise to the level of substantial fault, and we affirm the superior court's Judg-

ment upholding the Decision of the Employment Security Commission of North Carolina to disqualify the secretary from receiving unemployment benefits for a period of four weeks, pursuant to G.S. 96-14(2A). The pertinent facts and procedural history follow.

Claimant Lori P. Smith was employed as a legal secretary for the Johnston County law firm Spence and Spence. As of 8 June 1984 she had been employed by the firm for five years and one month. Claimant had encountered personal financial difficulties the entire time of her employment. The senior partner of the law firm, Robert A. Spence, Sr. (hereinafter "employer"), knew of her financial difficulties and had many times assisted her by paying her early. On one occasion, he endorsed a bank note for her for $1,000 to enable her to help straighten up her affairs. When the claimant defaulted on the note, the employer paid it off, and while he obtained about $500 from the man living with the claimant who also endorsed the note, he made no effort to get claimant to repay him the remaining $500, choosing instead to forgive her debt to him. On another occasion, the sheriff's office called on the claimant at the employer's office to collect on a judgment against claimant and her former husband. Outside of her financial difficulties, claimant was an excellent employee, one of the best secretaries the employer had employed in his 34 years of practicing law.

On Friday, 8 June 1984, the employer was on his way to the courthouse when he encountered Ms. Margaret Lassiter, a public accountant described by the employer as a "very close client" and a business associate. Ms. Lassiter told the employer that she had rented an apartment to the claimant and that the claimant had moved out to rent a more expensive apartment, owing Ms. Lassiter about $1,600 in delinquent rent payments and advancements Ms. Lassiter had made to pay claimant's electric bill. When the employer returned to his office, he asked claimant about the debt to Ms. Lassiter. Claimant told employer she believed the amount she owed Ms. Lassiter was around $1,100-$1,200. The employer told claimant she had ten days to straighten up her financial affairs, or she would have to look for another job. He told her he was afraid her creditors might start taking their business elsewhere instead of dealing with the employer's law firm. The claimant worked the following Monday and Tuesday. She asked

for and received vacation for Wednesday, Thursday and Friday. She attempted to arrange some financial assistance to help pay off her debts; however, her efforts were unsuccessful. On Monday, 18 June, claimant returned to the office. She was asked by Robert Spence, Jr., employer's son and partner, whether she had any prospects for a job. Upon hearing that she did not, he offered the law firm as a reference. Claimant boxed up her personal belongings, left her keys with another secretary, and left.

Claimant registered for work and filed a claim for unemployment benefits at the Goldsboro Local Office of the North Carolina Employment Security Commission. The Claims Adjudicator for the Commission determined that claimant was disqualified from receiving benefits because her reason for leaving employment did "not constitute with good cause attributable to the employer." Claimant appealed to an Appeals Referee, who issued a decision upholding the disqualification of benefits, modified to provide that claimant was "disqualified for unemployment benefits for a period of nine weeks," because her discharge was for "substantial fault connected with the work." On appeal, the Commission affirmed the decision of the Appeals Referee, further modifying the decision to reduce the disqualification of benefits to four weeks, finding that "the claimant's conduct was not intended to harm the employer." Claimant appealed to the Superior Court of Johnston County where the presiding judge affirmed in its entirety the decision of the Commission. Claimant appeals that decision to this Court.

Claimant presents three issues for consideration by this Court: (1) whether certain findings of fact made by the Commission are supported by competent evidence; (2) whether the Commission's decision is correct as a matter of law; and (3) whether the decision of the Commission violates the claimant's constitutionally protected right to privacy. We affirm.

Our scope of review is:

> In considering an appeal from a decision of the Employment Security Commission, the reviewing court must (1) determine whether there was evidence before the Commission to support its findings of fact and (2) decide whether the facts found sustain the Commission's conclusions of law and its resulting decision. *Employment Security Comm. v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950).

Intercraft Industries Corp. v. Morrison, 305 N.C. 373, 376, 289 S.E. 2d 357, 359 (1982).

In her first assignment of error, claimant challenges four findings of fact made by the Appeals Referee, subsequently affirmed by the Commission and the trial court:

> 2. Claimant was discharged from this job because her personal financial affairs adversely affected and caused embarrasment [*sic*] to the employer's business.
>
> * * * *
>
> 4. During this period of time, claimant has on a continuing basis experienced financial difficulties occasionally resulting in creditors contacting her at the employer's place of business. In addition, the employer had been contacted by the sheriff's department in reference to the service of a summons for the execution of a judgment.
>
> 5. Claimant had been previously advised of the embarrasing [*sic*] nature of her personal financial problems and had made attempts, though [*sic*] the assistance of the employer via the co-signing of a note, to straighten out her affairs.
>
> * * * *
>
> 7. Claimant was substantially indebted to a client of the employer.

At the hearing before the Appeals Referee, the employer testified that the claimant "had had financial problems throughout her employment." He testified that the sheriff's office came to his office once to collect a judgment against claimant and her former husband. He testified that he helped her borrow money from a bank by endorsing a note for her and that the banker called him because claimant defaulted on the note. The employer paid off the note, received $500 from a co-endorser, and forgave the remaining $500 claimant owed him. The employer testified that he was told by Ms. Lassiter that claimant owed her $1,600, and he further testified, "I have done a lot of work with Ms. Lassiter. She did a lot of referrals." The employer further testified:

> [T]hese people called in the office, the sheriff collecting judgments in the office, and a very close client complaining

about it, and knowing they had to go through Lori to get to me, so feeling that they would hesitate to even come to me anymore, they had to go through Lori, I had to have it straightened out, I asked her to have it straightened out. . . .

* * * *

[S]he had become indebted to so many people who were making demands through court and otherwise, and through the sheriff's office in the execution of judgments, some of the people being very close business associates, that it was reflecting upon the office, the credibility of the office, and could not be allowed to continue, and I wanted her to do something about it . . . straighten them up so there wouldn't be demands from the office, and to the office, so that the office wouldn't suffer adversely for it and the practice wouldn't suffer, and the integrity of the practice wouldn't suffer.

* * * *

I told her I couldn't, that we couldn't allow that. I don't know my exact wording . . . I don't mean to misrepresent anything but to me she knew the relationship between Margaret Lassiter and me, I mean professional relationship, but it, it wasn't one isolated incident. This has been building up and building up and I had asked her before to get her affairs straightened out. That was one of the purposes of my signing that note, was to help her, and I was disappointed at that time, but I was told that everything would be cleared up . . . .

* * * *

[S]he knew . . . that Ms. Lassiter and I had a good professional relationship, and any adverse conduct on her part with Ms. Lassiter would reflect upon the relationship I had with Ms. Lassiter and that affected my firm . . . .

A review of the testimony of the employer shows there was ample evidence to support each of the findings challenged here by the claimant. The claimant's first assignment of error is overruled.

Claimant's second contention is that her conduct did not rise to the level of substantial fault connected with her work because

her conduct was not in relation to her employer's interest or her duties and obligations to her employer. She argues further that there was no requirement in her job concerning the management of her personal financial affairs; thus, it was not "connected with her work." We do not agree with claimant's argument.

Claimant was disqualified for benefits under G.S. 96-14(2A), which provides that an individual shall be disqualified for benefits

> [f]or a period of not less than four nor more than 13 weeks . . . if it is determined by the Commission that such individual is, at the time the claim is filed, unemployed because he was discharged for substantial fault on his part connected with his work not rising to the level of misconduct.

G.S. 96-14(2A) is a recent addition to the Employment Security Law of North Carolina. Subsection (2A) was added to Section 96-14 in the 1983 Session of the North Carolina General Assembly, to become effective 1 August 1983 (1983 N.C. Sess. Laws, ch. 625, Secs. 6, 17). While G.S. 96-14(2A) does not give a precise definition of or clear examples of what constitutes such "substantial fault," it offers the following guidelines:

> Substantial fault is defined to include those acts or omissions of employees over which they exercised reasonable control and which violate reasonable requirements of the job but shall not include (1) minor infractions of rules unless such infractions are repeated after a warning was received by the employee, (2) inadvertent mistakes made by the employee, nor (3) failures to perform work because of insufficient skill, ability, or equipment. Upon a finding of discharge under this subsection, the individual shall be disqualified for a period of nine weeks unless, based on findings by the Commission of aggravating or mitigating circumstances, the period of disqualification is lengthened or shortened within the limits set out above.

To date there have been no decisions in the appellate courts of North Carolina construing the phrase "substantial fault on [her] part connected with [her] work not rising to the level of misconduct."

It is clear from the statute that the conduct can be less egregious than that necessary to constitute misconduct. Miscon-

duct has been defined repeatedly by this Court and the Supreme Court as " 'conduct which shows a wanton or wilful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent.' " *In re Miller v. Guilford County Schools*, 62 N.C. App. 729, 731, 303 S.E. 2d 411, 412 (1983), quoting from *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 375, 289 S.E. 2d 357, 359 (1982). We have since held that *unintentional* rule violations satisfy the requirements of misconduct if the actions "manifested such a degree of carelessness as to show a substantial disregard of [an] employer's interests and of [the] duty to protect those interests." *Douglas v. J. C. Penney Co.*, 67 N.C. App. 344, 346, 313 S.E. 2d 176, 178-79 (1984). And, we have also held that the specific acts in question do not have to occur at the work site or directly in connection with the work assignments, if the resulting consequences violate a standard of behavior which the employer has a right to expect of his employee. *In re Collins v. B & G Pie Co.*, 59 N.C. App. 341, 296 S.E. 2d 809 (1982) (claimant's failure to make restitution payments resulting in revocation of probation, incarceration for two months, and unexcused absences from work held to be misconduct connected with his work).

Reading G.S. 96-14(2A) with guidance from the "misconduct" cases cited above, we hold the personal financial mismanagement of the claimant constituted substantial fault connected with her work not rising to the level of misconduct. The actions of the claimant, though unintentional and occurring primarily away from her work, had the effect of posing a serious threat to the reputation of her employer, the integrity of his practice, and his relationship with clients and associates. It is reasonable for an attorney to require of his employees that their personal affairs should be handled in such a way as to keep from damaging the reputation and integrity of the law firm. It is not necessary that the employer be able to prove an actual loss of clients, etc. The damaging effect of claimant's actions on his law practice, which is founded on trust and confidence in him and his employees, is obvious.

Claimant's last assignment of error is that the decision violates her right to privacy. She argues that the Commission's decision had the effect of imposing its standards of conduct on claimant's handling of her personal affairs. Claimant's argument is frivolous. Any right to privacy the claimant might have been able

to claim concerning her personal financial affairs was certainly waived when her management of those affairs caused those matters to come to the attention of her employer. Furthermore, it was the detrimental effect her mismanagement had on her employer's interests which became the basis for her benefits disqualification, not the mismanagement itself. This assignment of error is overruled.

The decision below is

Affirmed.

Judges WEBB and BECTON concur.

THOMAS L. WALSH v. NATIONAL INDEMNITY COMPANY

No. 8525SC1237

(Filed 20 May 1986)

Insurance § 100— injury not arising from maintenance of insured vehicle—no duty of insurer to defend

An insurance policy issued by defendant requiring it to defend plaintiff in any action involving injury arising out of ownership or maintenance of the insured vehicle did not require defendant to defend plaintiff when tires of the insured vehicle were being hauled to a repair shop in a truck not owned by plaintiff, and the uninsured vehicle struck a person who brought a personal injury action against plaintiff, since there was no causal connection between the repair or maintenance of the tires and injury to the person who was struck.

APPEAL by plaintiff from *Wood, Judge.* Judgment entered 25 June 1985 in Superior Court, CALDWELL County. Heard in the Court of Appeals 14 March 1986.

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

Craighill, Rendleman, Ingle & Blythe by J. B. Craighill for defendant appellee.

COZORT, Judge.

Plaintiff Thomas L. Walsh sued defendant National Indemnity Company for its failure to defend him in a prior action. At the

close of plaintiff's evidence the trial court granted defendant's motion for a directed verdict. Plaintiff appealed. We affirm, holding that defendant had no duty to defend plaintiff in the earlier action because the complaint in that action does not allege facts which arguably fall within the coverage of plaintiff's insurance policy with the defendant.

The essential, and undisputed facts relevant to this appeal are:

The defendant insurance company, National Indemnity, issued to the plaintiff a policy of "Basic Automobile Liability Insurance" covering a "1976 Peterbilt Tractor" and a "1976 Trailmobile S/Trailer" owned by the plaintiff, Thomas L. Walsh. The policy provided, in relevant part, the following coverage:

> I. COVERAGE A—BODILY INJURY LIABILITY—
> COVERAGE B—PROPERTY DAMAGE LIABILITY:
>
> The company will pay on behalf of the *insured* all sums which the *insured* shall become legally obligated to pay as damages because of
>
> *bodily injury* or *property damage*
>
> to which this insurance applies, caused by an *occurrence* and arising out of the ownership, maintenance or use, including loading and unloading, for the purposes stated as applicable thereto in the declarations, of an *owned automobile* or of a *temporary substitute automobile*, and the company shall have the right and duty to defend any suit against the *insured* seeking damages on account of such *bodily injury* or *property damage*, even if any of the allegations of the suit are groundless, false or fraudulent . . . . (Emphasis in original.)

In 1982 Jacob Amaro filed suit in Mecklenburg County Superior Court against George Thomas Walsh and Thomas L. Walsh (plaintiff here). The amended complaint alleged that an accident occurred on 6 September 1979 (during the policy period) when a 1967 Ford truck was negligently backed by George Thomas Walsh into Amaro, injuring him, at Gerrard Tire Company in Charlotte, North Carolina. Paragraph 3(a) of the amended complaint alleges that, at the time complained of, George Thomas Walsh

> was acting as the agent, servant and employee of the Defendant, Thomas L. Walsh, and the negligence of George Thomas Walsh by virtue of such relationship became the negligence of Thomas L. Walsh; that at the time of the said accident the Defendant George Thomas Walsh was driving the said vehicle on a mission for Thomas L. Walsh and transporting tires owned by Thomas L. Walsh from Lenoir to Charlotte, North Carolina, and that he was paid therefor by Thomas L. Walsh and that the mission was solely for the benefit of Thomas L. Walsh.

Although the Amaro complaint does not say so, it appears that the tires in the Ford truck, at the time it was negligently backed into Amaro, had been removed from the Peterbilt tractor covered by National Indemnity's policy and were being hauled to Gerrard Tire Company in Charlotte to have some "work" done on them.

Plaintiff here referred the Amaro complaint to National Indemnity for defense. National Indemnity declined to provide a defense, stating in a letter to Thomas Walsh that the accident in question involved the operation of a 1967 Ford truck which was not owned by plaintiff here and was not an insured vehicle under the policy issued to plaintiff by National Indemnity.

On 26 July 1984 plaintiff filed suit against the defendant seeking to recover damages for defendant's failure to defend him in the Amaro case. Plaintiff demanded a jury trial. On 24 June 1985, at the close of plaintiff's evidence, the trial court granted defendant's motion for a directed verdict.

On appeal plaintiff assigns as error the trial court's entry of directed verdict in favor of defendant. Plaintiff contends that the trial court erred in granting the directed verdict because the facts surrounding the Amaro case show that appellant was a named defendant in the Amaro suit wherein Amaro sought damages for bodily injuries resulting from an accident arising out of the maintenance (taking the tires in for repair) of appellant's insured Peterbilt tractor, and that under the plain language of the policy, National Indemnity had a duty to defend any suit against appellant seeking damages for bodily injuries caused by an accident arising out of the maintenance of plaintiff's vehicle. We disagree with plaintiff's argument.

The scope of an insurer's duty to defend an insured was summarized by the North Carolina Supreme Court in *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691-92, 340 S.E. 2d 374, 377-78 (1986):

> Generally speaking, the insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy. An insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial. 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); 7C J. Appleman, *Insurance Law and Practice* Sec. 4683 (1979 & Supp. 1984). (Footnote omitted.) Conversely, when the pleadings allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.
>
> Where the insurer knows or could reasonably ascertain facts that, if proven, would be covered by its policy, the duty to defend is not dismissed because the facts alleged in a third-party complaint appear to be outside coverage, or within a policy exception to coverage. 7C J. Appleman, *Insurance Law and Practice* Sec. 4683. . . . In addition, many jurisdictions have recognized that the modern acceptance of notice pleading and of the plasticity of pleadings in general imposes upon the insurer a duty to investigate and evaluate facts expressed or implied in the third-party complaint as well as facts learned from the insured and from other sources. Even though the insurer is bound by the policy to defend "groundless, false or fraudulent" lawsuits filed against the insured, if the facts are not even arguably covered by the policy, then the insurer has no duty to defend. *See generally* 14 Couch on Insurance 2d Sec. 51:46 (rev. ed. 1982); 7C J. Appleman, *Insurance Law and Practice* Sec. 4684.01.

Thus our inquiry is whether the Amaro pleadings state facts demonstrating that the alleged injury suffered by Amaro is arguably covered by the policy. Here the parties agree that the

crucial question in this inquiry is whether the accident as alleged is an accident "arising out of the . . . maintenance" of the Peterbilt tractor.

The construction and application of the policy provisions to the undisputed facts is a question of law for the court. *Waste Management of Carolinas, Inc. v. Peerless Ins. Co., supra; Parker v. State Capital Life Ins. Co.*, 259 N.C. 115, 130 S.E. 2d 36 (1963). If the facts as alleged do not arguably fall within the "maintenance" provision of the policy, the defendant had no duty to defend, and the directed verdict was properly granted.

The phrase "arising out of" and the word "maintenance" are not defined in the policy. These terms, in the context in which they are used in the insurance policy, have been judicially construed. In *Fidelity & Casualty Co. of New York v. North Carolina Farm Bureau Mutual Ins. Co.*, 16 N.C. App. 194, 198-99, 192 S.E. 2d 113, 118, *cert. denied*, 282 N.C. 425, 192 S.E. 2d 840 (1972), we stated that

> [t]he words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms effecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such [maintenance]. They are words of much broader significance than "caused by." They are ordinarily understood to mean "originating from," "having its origin in," "growing out of," or "flowing from," or in short, "incident to," or "having connection with" the [maintenance] of the automobile. (Citations omitted.) . . . .
>
> The parties do not, however, contemplate a general liability insurance contract. There must be a causal connection between the [maintenance] and the injury. This causal connection may be shown to be an injury which is the natural and reasonable incident or consequence of the [maintenance], though not foreseen or expected, but the injury cannot be said to arise out of the [maintenance] of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the [maintenance] of the automobile. (Citation omitted.)

Our research has uncovered no cases in North Carolina ruling on whether a given factual situation as alleged in a third-party complaint invoked an insurance company's duty to defend the insured under the policy's coverage for injury "arising out of the . . . maintenance" of the insured vehicle. Furthermore, we found only one North Carolina case which determined whether a specific factual situation came within the policy's coverage for injuries arising out of the maintenance or repair of a motor vehicle, not the company's duty to defend the insured. In *Williams v. Nationwide Mutual Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967), the plaintiff was injured while making repairs underneath an uninsured vehicle raised on blocks when the owner of the vehicle removed a front wheel causing the car to fall or roll onto the plaintiff. The court quoted with approval from the opinion by the Supreme Court of Pennsylvania, in *Morris v. American Liability & Surety Co.*, 322 Pa. 91, 94, 185 A. 201, 202 (1936), defining "maintenance" as follows:

> The word "maintenance" used in this policy covers all acts which come within its ordinary scope and meaning. To maintain means to preserve or keep in an existing state or condition and embraces acts of repair and other acts to prevent a decline, lapse or cessation from that state or condition. . . . In a wide variety of situations the word "maintain" has been taken to be synonymous with "repair" . . . . Here the act which gave rise to the injury for which a judgment was recovered took place while an employee of the assured was in the act of repairing an essential part of the car and, under the circumstances, was expressly within the term of the policy specified as "maintenance."

Our Court held in *Williams* that, giving "maintenance" its common, daily, nontechnical meaning, the facts as alleged by plaintiff came within the coverage of the policy.

Thus our question is whether the facts as alleged by Amaro in his complaint against Thomas L. Walsh arguably come within National Indemnity's policy to provide coverage for injuries arising out of the maintenance of Walsh's vehicle. If so, then defendant had a duty to defend plaintiff in the Amaro suit. Giving the allegations of the Amaro pleadings a liberal interpretation, we hold the facts alleged do not arguably come within the policy's

coverage because there is no causal connection between the repair or maintenance of the tires and the injury to Amaro. The tires were not being repaired at the time the accident occurred. They had been placed in the back of the Ford truck and were being hauled to the tire company for repair when the accident occurred.

Plaintiff appellant argues that the injury to Amaro as alleged in his complaint

> was *connected* to the maintenance of the vehicle at least from Appellant's standpoint as it was his only possible link to the accident.
>
> * * * *
>
> [T]he only possible nexus between Appellant and the accident that occurred in Charlotte was the fact that the [driver of the Ford truck] . . . was employed by Appellant. This employment was related solely to necessary maintenance of Appellant's insured vehicle. (Emphasis plaintiff's.)

Plaintiff appellant's argument is essentially a "but for" argument, *i.e.*, "but for" the tires needing repair they would not have been transported in the Ford truck to Gerrard Tire Company and the accident and injuries to Amaro would not have occurred. This Court has previously rejected the "but for" argument, in construing policy coverage clauses, as being too broad, beyond the contemplation of the parties. *See Nationwide Mutual Ins. Co. v. Knight*, 34 N.C. App. 96, 100, 237 S.E. 2d 341, 345, *disc. review denied*, 293 N.C. 589, 239 S.E. 2d 263 (1977).

In summary, we hold that the complaint in the Amaro case does not allege facts which arguably come within the coverage of the insurance policy; thus, the trial court properly granted a directed verdict for the insurance company.

Affirmed.

Judge BECTON concurs.

Judge PHILLIPS concurs in result.

JAMES K. PERRY, EMPLOYEE, PLAINTIFF v. BURLINGTON INDUSTRIES, INC., EMPLOYER, AND AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8510IC1112

(Filed 20 May 1986)

Master and Servant § 68— workers' compensation—occupational lung disease—exposure to cotton dust

Evidence was sufficient to support an award of workers' compensation for an occupational lung disease caused by exposure to cotton dust in the workplace, and expert medical testimony that plaintiff's cigarette smoking was "probably a more significant contributing factor than his occupation" did not compel the conclusion that plaintiff did not have a compensable occupational disease, since, so long as the employment significantly contributed to or was a significant causal factor in the disease's development, the occupational disease was compensable under N.C.G.S. § 97-53(13).

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 27 June 1985. Heard in the Court of Appeals 13 February 1986.

Plaintiff seeks workers' compensation for occupational lung disease allegedly caused by exposure to cotton dust in the workplace. The hearing commissioner found that plaintiff has experienced long-term exposure to causes and conditions which are characteristic of, and peculiar to, the cotton textile industry and which are known to result in chronic obstructive pulmonary disease, and that workers so exposed are at an increased risk over members of the general public of developing or accelerating chronic obstructive pulmonary diseases. She further found that plaintiff's occupational exposure to cotton dust was a significant causal factor in the development of his chronic obstructive pulmonary disease. She entered conclusions of law that plaintiff's disease is due to causes and conditions characteristic of and peculiar to the textile industry, is not an ordinary disease of life to which the general public is equally exposed, and is therefore an occupational disease. She further concluded that plaintiff is totally incapacitated for work and is entitled to workers' compensation.

The Full Commission adopted the decision of the hearing commissioner. Defendants appeal.

Law Offices of Paul J. Michaels, P.A., by John Alan Jones, for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter, by J. Donald Cowan, Jr., and Caroline Hudson, for defendant appellants.

WHICHARD, Judge.

Defendants contend the commission erred in finding and concluding that plaintiff is totally and permanently disabled as a result of a compensable occupational disease. We find sufficient evidence from which the commission could conclude that plaintiff suffers from an occupational disease.

> 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." . . . 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. . . . (Citations omitted.)

Gay v. J. P. Stevens & Co., Inc., 79 N.C. App. 324, 325, 339 S.E. 2d 490, 491 (1986).

The evidence before the Commission, in pertinent part, tended to establish the following:

Plaintiff initially worked for defendant-employer for approximately four years as a weaver. He was then unemployed for an unspecified period, after which he again worked for defendant-employer as a loom fixer in its weave room from 4 June 1957 through 4 October 1983.

While the dust conditions in the weave room changed four or five years before plaintiff left the mill, during most of his employment the air in the room was "real dusty." Plaintiff testified: "It was like a fog in there sometimes." He further testified that as a loom fixer he worked "above, beside and under a loom," and that there "was lint under the looms a foot and a half or two foot deep—dust or whatever."

Before conditions improved plaintiff's clothes would have dust all over them by the end of a work shift. There were blowers

"going around [which] kept dust in the air all the time." Twice a week a man with an air hose blew off the looms. When that occurred the air in plaintiff's work area "would be real dusty." Plaintiff testified: "It would be like a snow where he was working."

Before he went to work for defendant-employer plaintiff had no breathing problems. By the time defendant-employer made the changes in the weave room plaintiff's breathing "was bad." He first noticed symptoms of a breathing problem twelve to fifteen years prior to the hearing on this claim. He would be in the plant working when he noticed these symptoms. By the end of a work shift he would "be in pretty bad shape." His chest would "tighten up" and he "couldn't halfway breathe." He could always breathe better when he was not in the plant, and his breathing was better during weekends and vacations.

In 1981 plaintiff went to Dr. Ted R. Kunstling about his breathing. He did not go of his own choice but was sent by defendant-employer. At that time plaintiff was less than fully candid in describing his condition to Dr. Kunstling because he was afraid he would lose his job if the doctor "found a lot wrong with [him]." When he subsequently returned after the doctor "had already taken [him] out of the plant," he "felt more free to talk to him." At that time Dr. Kunstling advised him that his breathing problems were work related.

Plaintiff can only walk "maybe a block" without having to stop to catch his breath. It is "about impossible" for him to climb stairs because he "give[s] out" of breath. He formerly had his own band but "got to where [he] couldn't do it." He no longer mows grass or rakes leaves at his home because he does not have the breath to do it.

The planning manager of the plant where plaintiff worked corroborated plaintiff's testimony about the dust conditions in the weave room prior to the changes that were made four or five years before plaintiff left the mill. He testified: "[T]here was dust out there. [Plaintiff's] testimony, based on what I saw, was accurate. . . . I don't quite agree with the amount of lint he said was under the loom. That's the only thing I'd have to disagree on." He further testified:

> I am familiar with what a loom fixer does. In the course of his job, a loom fixer has to spend most of his time working around the loom or under the loom. He would have as dusty a job as anybody in the weave room. The dustiest, if he's working around or under the looms all the time.

Dr. Kunstling, a member and former chairman of the North Carolina Industrial Textile Occupational Disease Panel, testified that plaintiff suffered from "severe chronic obstructive pulmonary disease with elements of asthma, chronic bronchitis, emphysema, and probably byssinosis, caused and/or exacerbated by occupational exposure to cotton dust, cigarette smoking and respiratory infection; number two, chronic rhinosinusitis." He further testified, in response to a hypothetical question which encompassed facts stated above and others, that a person in plaintiff's employment situation was at greater risk of contracting chronic obstructive pulmonary disease than others without similar exposure. In his opinion plaintiff's occupation "did contribute significantly to his . . . chronic obstructive lung disease." He stated: "Under the AMA guidelines, it would appear that [plaintiff] would have Class IV respiratory impairment, that he would be totally disabled. Class IV is the most severe degree of impairment."

On cross-examination, when asked to assume that only fifteen percent of the material run in the weave room where plaintiff worked was cotton blends, and the other eighty-five percent was synthetics, Dr. Kunstling testified:

> [G]iven that history my assumption is that that was a significant occupational exposure to cotton dust that did contribute to [plaintiff's] lung disease. . . . [M]y assumption is that whether you have 100 percent cotton or . . . cotton and synthetic blended together you're still processing the cotton in a similar fashion and therefore you are running the risk of creating a dangerous environment in terms of levels of cotton dust in the environment. . . . [E]ven considering all those things . . . I do feel that his environment, particularly during the earlier years of his employment, did contribute to the development of his current condition. . . . [E]ven though the work environment may now be relatively safe . . . [,] [h]e has

> lung function impairment that . . . appears to me to be sufficiently severe that he is unable to perform the job.

Finally, plaintiff testified that he started smoking cigarettes when he was seventeen or eighteen years old and quit a little over a year prior to the hearing on this claim. He was fifty years old at the time of the hearing. He smoked "[m]aybe three-fourths of a pack [a day], something like that." Dr. Kunstling testified on cross-examination that plaintiff's "smoking [was] probably a more significant contributing factor than his occupation."

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.

> [T]here are three elements necessary to prove the existence of a compensable "occupational disease": (1) the disease must be characteristic of a trade or occupation, (2) the disease [must not be] an ordinary disease of life to which the public is equally exposed outside of the employment, and (3) there must be proof of causation, *i.e.*, proof of a causal connection between the disease and the employment.

Hansel v. Sherman Textiles, 304 N.C. 44, 52, 283 S.E. 2d 101, 105-06 (1981), citing *Booker v. Medical Center*, 297 N.C. 458, 468, 475, 256 S.E. 2d 189, 196, 200 (1979).

The evidence, considered in light of the foregoing legal principles, is sufficient to support the Commission's findings that: plaintiff has experienced long-term exposure to causes and conditions which are characteristic of, and peculiar to, the cotton textile industry and which are known to result in chronic obstructive pulmonary disease; workers exposed long term to cotton dust in the textile industry generally are at an increased risk of developing or augmenting chronic obstructive pulmonary diseases than

are members of the general public; plaintiff's occupational exposure to cotton dust was a significant causal factor in the development of his chronic obstructive pulmonary disease; and plaintiff has been totally disabled as a result of his chronic obstructive pulmonary disease since he left defendant-employer's employment. These findings support the legal conclusion that plaintiff suffers from an occupational disease compensable under N.C. Gen. Stat. 97-53(13). There is ample evidence from which the Commission could conclude that plaintiff's work exposed him to a greater risk of contracting chronic obstructive pulmonary disease than members of the public generally and that occupational exposure substantially contributed to development of the disease. *Rutledge, supra.* The extent of cotton dust in plaintiff's work environment and its potentially harmful effect on the respiratory system were well established. Dr. Kunstling's testimony amply established the causal connection between plaintiff's disease and his work environment and that his occupation contributed significantly to his disease.

We find no merit in defendants' contention that Dr. Kunstling's cross-examination testimony that plaintiff's cigarette smoking was "probably a more significant contributing factor than his occupation" compels the conclusion that plaintiff does not have a compensable occupational disease. So long as the employment "significantly contributed to, or was *a* significant causal factor in, the disease's development," an occupational disease is compensable under N.C. Gen. Stat. 97-53(13). *Rutledge*, 308 N.C. at 101, 301 S.E. 2d at 369-70 (emphasis supplied). The evidence amply establishes that plaintiff's employment was *a* significant causal factor in the development of his disease.

Affirmed.

Judges WELLS and COZORT concur.

WILLIAM P. WARREN v. BUNCOMBE COUNTY BOARD OF EDUCATION

No. 8528SC1086

(Filed 20 May 1986)

1. **Schools § 4— board's approval of superintendent's acceptance of resignation— appeal to superior court proper**

Pursuant to N.C.G.S. § 115C-305, plaintiff could appeal from a decision of defendant board approving the county superintendent's acceptance of his resignation, since that statute allows for appeal to superior court from the decisions of all school personnel.

2. **Schools § 13— resignation by principal**

A tenured public school principal may resign his position whenever he sees fit, and the resignation may be accepted by the school superintendent and be effective before it is approved by the local school board.

Judge ARNOLD dissenting.

APPEAL by plaintiff from *Gaines, Judge.* Judgment entered 7 June 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 13 February 1986.

On 11 October 1984, William P. Warren, the principal of Enka High School, delivered a letter to the office of the Superintendent of the Buncombe County Schools, Dr. N. A. Miller, which stated: "Since I am not doing the professional job which I think is necessary to run Enka High School, I wish to give to you my resignation. The date of this resignation is your choice." Later that day after reading the letter Miller went to Warren's office at Enka High School, told him he wished he hadn't resigned, but accepted the resignation, and the next day formed a committee to select Warren's replacement. A few days later the committee recommended Arthur Taylor, who was offered the position and agreed to accept it on 16 October 1984. On 18 October 1984 Warren told Dr. Miller that he wanted to withdraw his resignation, but Dr. Miller told him it was too late and refused to return the letter. That same evening, during the course of the previously scheduled monthly meeting of the defendant County Board of Education, Dr. Miller reported plaintiff's resignation and the Board approved its acceptance. Warren then requested a hearing, contending that the Board had improperly terminated his employment since his resignation was withdrawn before the Board approved it. The hearing

was granted, but the Board questioned plaintiff's right to it pointing out that he had neither been discharged nor demoted but had resigned. Following the hearing, the Board upheld the action taken earlier, and when plaintiff appealed the decision it was affirmed by the Superior Court.

Long, Howell, Parker & Payne, by Robert B. Long, Jr., for plaintiff appellant.

Roberts, Cogburn, McClure & Williams, by James W. Williams and Isaac N. Northup, Jr., and Tharrington, Smith & Hargrove, by Richard A. Schwartz, for defendant appellee.

PHILLIPS, Judge.

[1] Though not addressed in either party's brief the recorded facts raise a question as to the plaintiff's right to appeal from the decision of the Buncombe County Board of Education to the Superior Court, and if the case was not properly in the Superior Court it is not properly here. In undertaking to appeal plaintiff stated that the Superior Court's review was sought pursuant to G.S. 115C-45 and G.S. 115C-325, both of which provisions were contained in Chapter 115 of the General Statutes before it was recodified with some deletions and additions as Chapter 115C. In substance, these sections provide for appeals to the Superior Court by public schoolteachers that have been dismissed, demoted, or suspended without pay by the local board of education, G.S. 115C-325(n), and where the board's decision affects a teacher's character or right to teach, G.S. 115C-45(c). The board decision challenged here did none of those things, at least directly, as its main thrust was simply to *approve* the action of its superintendent in accepting plaintiff's resignation the day it was tendered; and certainly, as *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971) makes plain, it did not affect plaintiff's character or right to teach as set forth in the predecessor to G.S. 115C-45(c). It can be argued, though, that the decision is reviewable under G.S. 115C-325(n), because if Superintendent Miller had no authority to accept plaintiff's resignation the termination of his employment was not a resignation, but a dismissal, and all dismissals are appealable under that statute. This nice question need not be addressed, however, because the appeal is clearly authorized by G.S. 115C-305, enacted in 1981, as follows:

> Appeals to the local board of education or to the superior court shall lie from the decisions of *all* school personnel, *including decisions affecting character or the right to teach,* as provided in G.S. 115C-45(c). (Emphasis supplied.)

The emphasized language indicates an intention to extend the right of appeal in public school personnel decisions far beyond the confines of the former law; and we hold that plaintiff's appeal was properly before the Superior Court and is properly before us, though G.S. 115C-305 was not cited as authority therefor when the appeal was taken. Nevertheless, plaintiff's appeal is unavailing; for our review of the "whole record" in accordance with the requirements set forth in *Overton v. Goldsboro City Board of Education,* 304 N.C. 312, 283 S.E. 2d 495 (1981) discloses nothing that would require the board's decision to be reversed or modified.

[2] The facts found by the board, including those above stated, are all supported by competent, credible evidence and raise but two questions, both questions of law: Can a tenured public school principal in this state resign his position whenever he sees fit? If so, can the resignation be accepted by the school superintendent and be effective before it is approved by the local school board? The same statutory provision supplies an affirmative answer to both questions. G.S. 115C-325 governs the hiring, firing, tenure and resignations of public schoolteachers; and its definition of "teacher" includes those who directly supervise teaching, as plaintiff did when he was principal of the Enka High School. Subsection (o) of G.S. 115C-325 provides as follows:

> A teacher, career or probationary, should not resign without the consent of the superintendent unless he has given at least 30 days' notice. If the teacher does resign without giving at least 30 days' notice, the board may request that the State Board of Education revoke the teacher's certificate for the remainder of that school year. A copy of the request shall be placed in the teacher's personnel file.

This provision, we think, expressly recognizes the fact that a public schoolteacher can resign whenever he sees fit, though not necessarily with impunity, and that his superintendent has the authority to accept the resignation. For if the superintendent has the power, as the statute provides, to waive the 30 days' notice that generally must be given by resigning teachers, it necessarily

follows that he has the power simply to accept a resignation. Furthermore, the evidence shows that with the defendant Board's acquiescence Miller has routinely accepted all resignations tendered to him since he became superintendent; a practice that neither this statute nor any other forbids. Nor does this statute nor any other require the local board of education to either act directly on a teacher's resignation or to approve the action taken on a resignation by the superintendent; whereas other sections of G.S. 115C-325 require the local board to act in certain specified ways in hiring, promoting, or disciplining career or probationary teachers. The reasons for the General Assembly specifying what local boards must do in the latter situation and saying nothing about its role in the former are obvious. Under the law public school teachers are hired, promoted, dismissed and disciplined by their employer, the local school board, and the law directs how those functions must be accomplished in order to protect the public and teachers alike. On the other hand, to resign or not resign is for the teacher-employee to decide; and when the decision is made neither the superintendent nor the board of education can change it. Thus, when plaintiff resigned his position as principal of Enka High School and the superintendent accepted it, it was final; the subsequent approval of the resignation by the defendant board was a gratuitous but meaningless formality.

The cases relied upon by the plaintiff involved either different circumstances or different statutes, and thus have no application to this case. Though not authoritative, we found the decision of the Oregon Supreme Court in *Pierce v. Douglas School District No. Four*, 297 Or. 363, 686 P. 2d 332 (1984) persuasive. In that case, quite similar to this one, the Court concluded, as we do, that acceptance by the local school board was not required for a teacher's resignation to be effective.

Affirmed.

Judge EAGLES concurs.

Judge ARNOLD dissents.

Judge ARNOLD dissenting.

I vote to dismiss the appeal. Warren filed this suit seeking judicial review pursuant to the provisions of G.S. 115C-325, and G.S. 115C-45, of the Board's decision to accept his resignation. The threshold question which must be determined is whether Warren is entitled to judicial review of the Board's action in accepting his resignation.

G.S. 115C-325(n) provides:

> Any teacher who has been dismissed or demoted pursuant to G.S. 115C-325(e)(2), or pursuant to subsections (h), (k) or (l) of this section, or who has been suspended without pay pursuant to G.S. 115C-325(a)(4), shall have the right to appeal from the decision of the board to the superior court for the judicial district in which the teacher is employed. This appeal shall be filed within a period of 30 days after notification of the decision of the board. The cost of preparing the transcript shall be borne by the board. A teacher who has been demoted or dismissed and who has not requested a hearing before the board of education pursuant to this section shall not be entitled to judicial review of the board's action.

Warren was neither dismissed nor demoted. He freely and voluntarily resigned and his resignation was accepted by the Board. The procedure under which the resignation was accepted does not fall within the purview of G.S. 115C-325(e)(2)(h), (k) or (l), thus, I would find that Warren has no right of review under G.S. 115C-325.

Warren also seeks review pursuant to the provision of G.S. 115C-45 which in pertinent part provides:

> An appeal shall lie from the decision of a local board of education to the superior court of the State in any action of a local board of education affecting one's character or right to teach.

The Board's decision does not affect Warren's character thus the question becomes whether the acceptance of the resignation affects Warren's right to teach. In *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971), our Supreme Court held that a decision not to renew a teacher's contract at the end of the year did not come

within the purview of G.S. 115-34 (repealed 1 July 1981), the forerunner of this statute, because the decision did not deprive the teacher of the right to teach elsewhere. Based upon this decision I believe that in order to bring an action under this statute the Board's action must somehow deprive the appealing party of their right not only of the job they held but also any other teaching job. The action of the board in the case *sub judice* did not deprive Warren of his right to teach within the meaning of the statute. Thus, I would find that he has no right to judicial review pursuant to 115C-45.

Because these statutes afford Warren no right to judicial review of the Board's acceptance of his resignation, I believe that his appeal should be dismissed.

JOAN S. HINSON v. DOYLE BROWN AND COLEEN B. BROWN

No. 8517SC1072

(Filed 20 May 1986)

1. **Trial § 3.2— defendant too nervous to represent self—denial of continuance proper**

The trial court did not abuse its discretion in denying defendant's motion to continue made during plaintiff's case in chief on the ground that defendant was too nervous to represent himself, since the court had previously granted two continuances to allow defendant to retain new counsel but defendant had failed to do so.

2. **Trial § 9.1— questions and comments by court—no error**

Questions and comments by the trial court concerning defendants' self-representation and one defendant's absence from the trial after his emotional outburst were not prejudicial to defendants but instead insured that the jurors' attention would not be diverted from the issues before them.

3. **Automobiles § 23.1— defective brakes—failure to plead**

In an action to recover for injuries sustained in an automobile accident, the trial court did not err in excluding defendants' evidence of defective brakes, since defendants did not plead that defense in their answer; moreover, defendants failed to show prejudice where they did not show the essential content of the excluded evidence.

APPEAL by defendant from *Walker, Russell G., Jr., Judge.* Judgment entered 2 May 1985 in Superior Court, SURRY County. Heard in the Court of Appeals 5 March 1986.

On 14 October 1983, plaintiff, Joan Hinson, and defendant Coleen Brown were involved in a two automobile collision. Defendant, Coleen Brown, was driving a 1979 Cadillac automobile owned by her husband, defendant Doyle Brown. The automobile accident occurred near the intersection of U.S. Primary Route 21 in Iredell County, North Carolina and Rural Paved Secondary Road No. 1833. On 30 November 1983 in Iredell District Court, defendant Coleen Brown entered a plea of no contest to failure to stop at a stop sign.

On 28 March 1984, plaintiff filed her complaint against defendants alleging, *inter alia*, that defendant Coleen Brown failed to stop at a stop sign and collided with plaintiff's vehicle causing plaintiff severe bodily injuries. Plaintiff sought to recover no less than $100,000.00 as damages. On 1 June 1984, defendants answered plaintiff's complaint and denied all pertinent allegations therein. On 10 January 1985, Attorney J. Reed Johnston, Jr. filed a motion to withdraw as counsel of record for defendants. The basis for said motion was, *inter alia*, that defendant Doyle Brown consistently failed and refused to cooperate with Attorney Johnston; that Lumbermen's Mutual Casualty Company paid to plaintiff, as an advance payment, of $25,000.00 (total of insurance policy limits available to pay the claim of plaintiff) and advised Attorney Johnston that it was terminating the defense of defendants. Attorney Johnston also requested that the court grant defendants a motion for a continuance, which Attorney Johnston filed contemporaneously with the motion to withdraw. On 16 January 1985, the court granted the motion to withdraw and the motion for a continuance. The court's order contemplated the transfer of all the file material pertinent to this case in the possession of Attorney Johnston to defendants' new counsel.

At the 22 April 1985 calendar call for this case, defendants appeared, without counsel, and announced they were ready to proceed. A trial date was set for 29 April 1985. During an extensive pre-trial conference on 29 April 1985, Judge Walker ruled that due to defendants' answer denying that the brake system was subject to sudden failure, defendants would not be allowed to defend the case on the basis of a defect in the braking system. The court further stated for the record "that at the conference this morning, Mr. Brown indicated that the purpose of his defense of this lawsuit, was to show to the world that General Motors had

marketed an automobile line that had an inherent dangerous defect in its braking system. . . ."

After the trial commenced, defendant Doyle Brown, represented to the court that he felt ill and would retain counsel if he was granted a postponement. The court denied defendant's request. At one point during the trial, defendant Doyle Brown displayed such emotion that the court examined all twelve (12) jurors to determine if there was any prejudicial effect. The court adjourned early so that defendant could seek medical consultation. The next day, defendant Doyle Brown did not appear in court. Defendant Coleen Brown tendered to the court a note purporting to be from a doctor. The court made further inquiry because the signature on the note appeared different from the handwriting appearing on the prescription pad. Judge Walker telephoned the number shown on the prescription whereupon a Dr. Robertson informed him that he had seen defendant and was familiar with the note, but admitted that no physical examination was conducted on defendant Doyle Brown. Judge Walker was not satisfied with the documentation tendered to the court and decided that the case should proceed in the absence of defendant Doyle Brown. Judge Walker advised defendant Coleen Brown of her rights pertaining to this lawsuit. The case was submitted to the jury. The jury found that plaintiff was injured and was entitled to a judgment of $45,000.00 for her injuries. Defendants appeal.

Joseph W. Freeman, Jr., for plaintiff appellee.

White & Crumpler, by Fred G. Crumpler, Jr., and Robin J. Stinson, for defendant appellants.

JOHNSON, Judge.

[1] Defendants first argue that defendant Doyle Brown made a motion to continue and the court's denial of said motion was a constructive denial of representation. "Granting or denying a motion for continuance rests in the sound discretion of the presiding judge and his decision will not be disturbed on appeal, except for abuse of discretion or a showing the defendant has been deprived of a fair trial." *State v. Ipock*, 242 N.C. 119, 120-21, 86 S.E. 2d 798, 800 (1955). The court denied defendants' request for a "postponement" during trial. However, we note that the court had previously granted two continuances, with consent of plaintiff's counsel, to

allow defendants time to seek new counsel. In the middle of plaintiff's case in chief defendants asserted that defendant Doyle Brown was too nervous to represent himself. We think the following statement by the court to defendant Doyle Brown adequately states the court's basis for denying defendants' request for a "postponement":

> The Court: Mr. Brown, you gave me an assurance in January that you were going to get a lawyer and from what you told me in Chambers today, you spent the last 3 months, for lack of a better word, chasing rabbits about this case and not doing what you were supposed to do, and taking advice from people on the telephone in Washington about whether to get a lawyer or not and have done absolutely the reverse of what you were told to do and what you should have known in the exercise of common sense was absolutely necessary for you to protect your rights in this case.

(T. p. 93). Defendant Doyle Brown's response to the court was "If you postpone it, Your Honor, I will get counsel." We find no abuse of discretion by the court. Defendants' first Assignment of Error is without merit.

[2] Defendants next argue that the trial court abused its discretion and went beyond the scope of judicial impartiality in judicial comments concerning defendants' self-representation and defendant Doyle Brown's absence from trial. We disagree.

It is well settled that a new trial is warranted when the trial judge makes any remark in the presence of the jury that tends to prejudice the jury against the unsuccessful party. *E.g., Beacon Homes Inc. v. Holt*, 266 N.C. 467, 146 S.E. 2d 434 (1966). However, "judges are not merely mute observers of the legal drama before them. They are the most important participants in the search for truth." *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 103, 310 S.E. 2d 338, 344 (1984). In *Colonial, supra*, the Court stated that the primary consideration to determine if there is prejudicial error is as follows:

> Because the trial judge occupies an exalted station, jurors entertain great respect for his opinion and can be easily influenced by a suggestion coming from him. In such cases as this, therefore, where it must be determined whether a par-

> ty's right to a fair trial has been impaired by remarks made by the trial judge, the probable effect upon the jury and not the motive of the judge is determinative.

Colonial, supra, at 103, 310 S.E. 2d at 344. The burden of establishing that a trial judge's remarks were prejudicial is on the appellant. *Kanoy v. Hinshaw,* 273 N.C. 418, 160 S.E. 2d 296 (1968). Under the circumstances of the instant case we consider Judge Walker's questions asked of the jury non-prejudicial. *See State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951). Judge Walker acted in defendants' best interest to assure that an impartial jury would decide the issues of the case. The jury had been exposed to an emotional outburst by defendant Doyle Brown. Judge Walker, without objection by defendants, exercised his discretion in a skillful and patient manner so as to assure that defendant's previous actions and his absence for the remainder of the trial would not divert the individual jury member's attention from the issues before them. Nothing in the record indicates that the trial court's examination of the jury was prejudicial to defendants. Accordingly, we find no error.

[3] Defendants' final argument is that defendants' motion that the evidence offered by defendants of defective brakes, which was not pled in their answer, was improperly ruled on by the trial court as inadmissible. We disagree.

When a trial court excludes evidence it is incumbent upon the proponent to include in the record what the essential content of the excluded evidence was in order for an appellate court to determine if exclusion of that evidence was error. *Currence v. Hardin,* 296 N.C. 95, 249 S.E. 2d 387 (1978). Rule 8(b), N.C. Rules Civ. P. requires that in a defendant's answer "[d]enials shall fairly meet the substance of the averments denied." Rule 8(c), N.C. Rules Civ. P. requires that "[i]n pleading to a preceding pleading a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense."

During the pre-trial conference the trial court ruled in limine that evidence of defective brakes would not be allowed due to defendants' failure to aver such a defense in their answer. Defendants contend that (1) the doctrine of sudden emergency is not one of the twenty-one (21) enumerated defenses in Rule 8(c), N.C. Rules Civ. P., which are to be affirmatively pleaded, and (2) in

the alternative, defendants should have been allowed to amend their answer to include sudden emergency as a defense.

Defendants failed to meet the requirement of Rule 8(c), N.C. Rules Civ. P. in that they failed to set forth affirmatively sudden emergency as an avoidance or affirmative defense. A motion to amend an answer is addressed to the sound discretion of the trial judge and the trial court has broad discretion in permitting or denying amendments. *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). After reviewing the record herein we find that the trial court did not abuse its discretion. Moreover, there was no offer of proof by defendants to show the essential content of the excluded evidence. The only indication we have of the import of the excluded evidence was the trial court's statement for the record that "at the conference this morning, Mr. Brown indicated that the purpose of his defense of this lawsuit, was to show to the world that General Motors had marketed an automobile line that had an inherent dangerous defect in its braking system. . . ." We find no error in the trial court's ruling that evidence of defective brakes was inadmissible. In conclusion, we note that from the time of withdrawal of defendants' counsel, the trial court and plaintiff's counsel afforded defendants ample opportunity to secure legal counsel.

No error.

Judges BECTON and MARTIN concur.

STATE OF NORTH CAROLINA v. ALLEN WAYNE COSTNER

No. 8527SC1186

(Filed 20 May 1986)

1. Criminal Law § 130— propriety of jury verdict—jury polled

The trial court did not err in excluding from evidence the affidavits of three jurors, each of which asserted that the jury's verdict was improper, since the jury was properly polled and each juror publicly agreed that the verdict of guilty was his or her verdict, and the affidavits in question contained no evidence of verdict reached by lot, matters which would violate defendant's

constitutional right to confront witnesses, bribery, intimidation, or extraneous prejudicial information or any outside influence improperly brought to bear upon any juror. N.C.G.S. § 15A-1240; N.C.G.S. 8C-1, Rule 606.

2. Rape § 19— taking indecent liberties with child—questions about defendant's child support arrearage—no mistrial

In a prosecution of defendant for taking indecent liberties with a child, defendant was not entitled to a mistrial where the prosecutor suggested by his questioning that defendant was $17,000 in arrears for child support.

APPEAL by defendant from *Saunders, Chase B., Judge.* Judgment entered 30 April 1985 in Superior Court, GASTON County. Heard in the Court of Appeals 11 March 1986.

Defendant was indicted for second degree rape and taking indecent liberties with a child. At the close of the State's case, the State elected to proceed only on the charge of taking indecent liberties with a child. Upon the jury's verdict of guilty, the trial court rendered judgment imposing a seven-year term of imprisonment. Following timely appeal, defendant filed a motion for appropriate relief based upon affidavits of three jurors, each asserting that the jury's verdict was improper. After hearing arguments of counsel, the trial court denied defendant's motion. From the judgment of the trial court, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

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

ARNOLD, Judge.

[1] Defendant contends the trial court erred in failing to set aside the jury's verdict as contrary to law. Defendant specifically asserts that the court erred in excluding the affidavits of the three jurors from evidence based upon G.S. 8C-1, Rule 606(b) of the North Carolina Rules of Evidence and G.S. 15A-240. We disagree.

Clydia Barker, one of the jurors, stated the following in her affidavit: She did not believe defendant was guilty and she voted not guilty each time a vote was taken. After discussion and several votes, the foreman asked the jurors "how many of you think

that maybe [defendant] could have done it . . . fondle her at some other time." The vote prior to this question by the foreman was "7-5 that [defendant] wasn't guilty." All jurors voted "yes" in response to the foreman's question and the foreman then knocked on the door. She thought the foreman was going to ask the judge another question, as he had done earlier, but instead the foreman reported a guilty verdict. The jury was then polled and she responded "yes" to the questions asked by the clerk because she "didn't know what else to say." She was upset when she realized what she had done, and the next day she notified the defense attorney about what had happened.

Carson Anderson, another juror, stated in his affidavit:

> During the deliberations, approximately ten to twelve votes were taken on whether or not the defendant was guilty or innocent and every vote with the exception of the last vote was in favor of the defendant to be found not guilty. . . . The vote that the jury took just prior to the last and final vote before the jury went to the courtroom was eleven to one for acquittal.
>
> The final vote, the one that was taken to the Courtroom and handed to the Court, was done in the following manner:
>
> The foreman asked the jury panel if anyone thought that the defendant might be guilty or could have committed the act that he was charged with or may have performed such sexual act on the victim sometime in the past. All jurors raised their hands and agreed that this possibly could have happened. The foreman then asked each and every juror to write their vote in this regard on a piece of paper and all did. We handed the paper to the foreman and at this time the foreman knocked on the door and asked for the Bailiff and told the Bailiff that the jury had a verdict. At this time the jury went back into the courtroom and the foreman reported to the Judge that the jury had a verdict and the verdict was guilty. This in fact, was not true but at no time no one objected to the foreman or to anyone else about the verdict not being true and accurate. At no time do I remember any of the jurors trying to get word to the Bailiff or any officer of the Court that this was not the feelings of the jury. No one told anyone or got word to anyone that they might like to

> change their mind about the verdict. I was somewhat misled by the foreman of the jury and was surprised by him knocking on the door and telling the Bailiff that we had a verdict, when in fact I thought we were still deliberating.
>
> After the verdict was given to the Court, the jury was polled by the defense attorney and each and every juror said that the verdict of guilty was his verdict.

Lisa McCallister, the third juror, stated that the foreman called for a vote on whether there was a possibility that the defendant may have committed a crime or may have fondled the little girl and that he then reported this vote as the verdict. Jurors Barker and Anderson indicated that at the time of the jury vote, they were not convinced of defendant's guilt beyond a reasonable doubt.

After defense counsel requested that the jury be polled, the trial judge explained the procedure to the jury as follows:

> Ladies and gentlemen of the jury, counsel wishes to have the jury polled. That simply means a head count. In that procedure each of you will be asked by the Clerk individually whether or not you assent, that is agree, to the verdict in order to determine whether or not the verdict was indeed unanimous. Madam Clerk, you may proceed to inquire of each juror individually whether or not he or she agrees to the verdict.

The jury was then polled by the clerk asking the three questions approved by our Supreme Court in *State v. Asbury*, 291 N.C. 164, 229 S.E. 2d 175 (1976). The trial court's explanation of the jury poll was sufficient, and furthermore our Supreme Court has stated that the questions asked by the clerk are essentially self-explanatory. *Id.* The fact that the jury was properly polled, and that each juror publicly agreed that the verdict of guilty was his or her verdict, constitute evidence that the verdict rendered was the proper verdict of the jury.

Generally, after the jury renders a verdict and has been discharged, the court will not receive the testimony of jurors to impeach their verdict. *State v. Carter*, 55 N.C. App. 192, 197, 284 S.E. 2d 733, 737 (1981), *citing State v. Cherry*, 298 N.C. 86, 100, 257 S.E. 2d 551, 560 (1979), *cert. denied*, 446 U.S. 941, 64 L.Ed. 2d

796, 100 S.Ct. 2165 (1980). General Statute 15A-1240 codified this general rule and provided exceptions as follows:

> *Impeachment of the verdict.*—(a) Upon an inquiry into the validity of a verdict, no evidence may be received to show the effect of any statement, conduct, event, or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.
>
> (b) The limitations in subsection (a) do not bar evidence concerning whether the verdict was reached by lot.
>
> (c) After the jury has dispersed, the testimony of a juror may be received to impeach the verdict of the jury on which he served, subject to the limitations in subsection (a), only when it concerns:
>
> (1) Matters not in evidence which came to the attention of one or more jurors under circumstances which would violate the defendant's constitutional right to confront the witnesses against him; or
>
> (2) Bribery, intimidation, or attempted bribery or intimidation of a juror.

However, as subsection (c) of this statute is in derogation of the common law, it must be strictly construed. *State v. Froneberger*, 55 N.C. App. 148, 285 S.E. 2d 119 (1981), *appeal dismissed*, 305 N.C. 397, 290 S.E. 2d 367 (1982). The affidavits of the three jurors contain no evidence of verdict reached by lot, matters which would violate defendant's constitutional right to confront witnesses, or bribery or intimidation. The affidavits are therefore not admissible in evidence under G.S. 15A-1240.

General Statute 8C-1, Rule 606 also provides an exception to the general rule regarding the impeachment of verdicts and reads in part as follows:

> (b) *Inquiry into validity of verdict or indictment.*—Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection

> therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The jurors' affidavits contain no evidence of extraneous prejudicial information or any outside influence improperly brought to bear upon any juror. The affidavits are therefore not admissible in evidence under G.S. 8C-1, Rule 606. Thus, we find that the trial court properly excluded the affidavits from evidence and properly denied defendant's motion for appropriate relief.

[2] Defendant next contends that "the prosecutor's conduct in inquiring into the details of defendant's prior non-support conviction, and suggesting by his questioning that defendant was $17,000 in arrears for child support, constituted impermissible impeachment and denied defendant a fair trial." The trial transcript discloses the following cross-examination of defendant concerning his non-support conviction:

> Q. I'll also ask you, Mr. Costner, if you haven't pled guilty to non-support in the support of the other children in March of 1981?
>
> A. I don't see where that has anything to do with this case.
>
> Q. Well, if you would answer the question.
>
> A. What was the question?
>
> Q. You pled guilty to non-support of your children on March 2nd, 1981?
>
> A. I appealed it to Superior Court.
>
> Q. Yes or no?
>
> A. Yes, I pleaded guilty.
>
> Q. And as a result of that you were required to pay eighty dollars a week support, is that correct?

EXCEPTION NO. 5

A. Right. And I appealed to Superior Court.

Q. And since that date you have paid no support under that judgment, have you?

EXCEPTION NO. 6

A. Right.

Q. At this time you are approximately seventeen thousand dollars in arrears on that?

EXCEPTION NO. 7

MR. GRAY: OBJECTION.

THE COURT: SUSTAINED.

We note that exceptions 5 and 6 are not supported by objections. A party may not properly make exceptions on appeal to evidence not objected to at trial. Rule 10(b)(1), N.C. Rules App. Proc. The trial court sustained defendant's objection to the question as to whether he was approximately seventeen thousand dollars in arrears on the judgment. Evidently, defendant is asserting that the question alone necessitates a mistrial, and that the trial court erred by not declaring a mistrial on its own motion. However, the mere asking of this question is not so prejudicial as to warrant the granting of a new trial.

Finally, defendant contends that the trial court erred "in basing its finding of prior convictions in aggravation of sentence on a conviction for assault with a deadly weapon, because the state did not offer the assault and it was not supported by any evidence." Defendant's argument is not supported by any assignment of error and is thus in violation of Rule 10 of the North Carolina Rules of Appellate Procedure. As defendant admits, this argument is not properly before this Court, and we decline defendant's invitation to suspend the rules and consider this argument.

For the foregoing reasons, we find

No error.

Judges WHICHARD and JOHNSON concur.

JAMES C. BOOZER v. ROSALIND WELLMAN (FORMERLY ROSALIND BOOZER)

No. 8529SC1138

(Filed 20 May 1986)

Constitutional Law § 26.5— child support—Florida judgment—full faith and credit

Florida judgments awarding defendant arrearages in child support and alimony and awarding her attorney's fees were entitled to full faith and credit where the Florida court had subject matter and personal jurisdiction, and plaintiff had notice of the action against him.

APPEAL by plaintiff from *Friday, John, Judge.* Judgment entered 5 June 1985 in Superior Court, TRANSYLVANIA County. Heard in the Court of Appeals 14 February 1986.

On 3 November 1983, plaintiff filed a petition with the Clerk of Superior Court of Transylvania County seeking a partition by sale of certain tracts of land and an equal division of the proceeds. In that petition plaintiff alleged that he and defendant were formerly married, that defendant had "obtained a divorce in Florida," that ownership of the tract of land at issue was as tenancy by the entirety, but, since the divorce, had been converted by law to a tenancy in common. In an answer and counterclaim filed 30 November 1983, defendant alleged in part that she is a resident of Florida, that plaintiff was formerly a resident of Florida, that on 13 October 1982, she obtained one judgment against plaintiff in the amount of fifty-eight thousand four hundred fifteen dollars and fifty-eight cents ($58,415.58) and a companion judgment ordering attorney's fees. Defendant prayed that the court grant full faith and credit to the Florida decrees. In plaintiff's reply he maintained that "the so called Judgment and all other elements of [that] action . . . are void and ineffective as to the Petitioner [plaintiff]." On 27 March 1985, defendant moved for summary judgment for the sum of $58,415.58 plus twelve percent (12%) interest from 13 October 1982 and for attorney's fees in the amount of six thousand seven hundred ninety-five dollars and seventy-five cents ($6,795.75) plus twelve percent (12%) interest from 29 November 1983. In support of defendant's motion, she submitted to the court certified records of the Florida action in the Circuit Court of the Eleventh Judicial Circuit, Dade County. The record indicates plaintiff filed nothing in opposition to defendant's motion. On 5 June 1985, the court, having "heard

arguments of Counsel and considered the authority submitted to it," held that plaintiff "was duly served, participated in and appealed from the Florida decree" and that the Florida decrees were entitled to full faith and credit. Accordingly, the court allowed defendant's motion for summary judgment and ordered plaintiff to pay the sums prayed for in defendant's motion. The matter was retained for the determination of setoffs due plaintiff and other matters at issue. Plaintiff appeals.

Ramsey, Cilley and Perkins, by Robert S. Cilley, for plaintiff appellant.

White & Dalton, by William R. White, for defendant appellee.

JOHNSON, Judge.

The sole issue before us is whether the Florida judgment and the companion judgment for attorney's fees should be accorded full faith and credit in a North Carolina court. We think they should.

The facts pertinent to this appeal as they appear from the record are as follows: On 20 December 1976, plaintiff in this action was served by a sheriff from the Transylvania Sheriff's Office with a complaint signed by defendant, an amended complaint, and a summons issued from the Circuit Court of the Eleventh Judicial Circuit of Florida, Dade County, Florida. In defendant's complaint she petitioned, *inter alia*, for a dissolution of the marriage, child custody of James Christopher Boozer, the minor born of the marriage, child support, alimony and attorney's fees. In this complaint defendant alleged that plaintiff and defendant jointly owned the marital residence located at 9480 S.W. 25th Drive, Miami, Florida. In defendant's amended complaint she alleged that plaintiff had removed himself and the minor child from Florida "for the primary purpose of avoiding in personam jurisdiction over himself and a determination of child custody under the jurisdiction of this Court." Defendant prayed that the Florida court assume jurisdiction over plaintiff and the minor child. Plaintiff did not respond to defendant's complaint. An order for default judgment against plaintiff was entered 25 January 1977. On 11 November 1977 the Florida court entered a "Final Judgment of Dissolution of Marriage," which stated, *inter alia*:

"this Court having jurisdiction over the child of the parties, JAMES CHRISTOPHER BOOZER, pursuant to Florida Statutes sec. 61.13(2)(a), and a duly noticed Final Hearing having been had and the Court having heard and considered the evidence and testimony of [defendant here], argument of counsel and independent witness as to residency, and the Court being otherwise fully advised in the premises. . . ." The court ratified and confirmed the default judgment previously entered; granted a divorce; granted child custody to defendant; ordered, *inter alia*, alimony and exclusive possession of the Florida home in favor of defendant; and specifically retained jurisdiction of the cause for the entry of further orders. The record indicates that plaintiff was represented by North Carolina counsel at this hearing.

In May 1982, almost four and one-half years later, defendant filed a motion in the Florida action for an order adjudging plaintiff in contempt of court for violation of the 11 November 1977 order. On 21 May 1982, a notice of hearing was mailed to plaintiff at his North Carolina address. The court instructed defendant to move the court for an order of referral to a General Master.

On 22 July 1982, the Dade County Circuit Court ordered that the matter be referred to a General Master for further proceedings as deemed necessary by the General Master, who was requested to report his findings and recommendations to the court. Copies of this order were sent to plaintiff in North Carolina and defendant's attorney. Defendant then applied to the General Master for an order finding plaintiff in contempt of court for noncompliance with the 11 November 1977 order. Plaintiff was served with the motion and notice of hearing by the Transylvania County Sheriff's Office at his Brevard, North Carolina address. The motion and notice were also sent to John M. Thompson of the Florida law firm Tobin and Thompson, who the record identifies as the "attorney for husband." On 30 September 1982, the Dade County Circuit Court approved and ratified the report of the General Master and entered "Order on Report of General Master" in favor of Rosalind Boozer. The General Master retained jurisdiction to file a report regarding attorney's fees and custody of the minor. On 13 October 1982, the Dade County Circuit Court, after hearing the "Order on Report of General Master" and exceptions filed thereto, entered "Final Judgment" in favor of defendant Rosalind Boozer, holding plaintiff in arrears in the amount of

$58,415.58. On 4 October 1982, subsequent to the 30 September 1982 "Order on the Report of General Master" but prior to the 13 October 1982 "Final Judgment," plaintiff filed an affidavit with the Florida court in which he stated, *inter alia*: that in the summer of 1977 defendant lived with plaintiff in Brevard, North Carolina as man and wife, that they "had moved there with the intention of making North Carolina our permanent residence," that the minor child of the marriage and defendant's two children were attending public school in Brevard, North Carolina in the fall of 1977 until defendant "returned to our former home in Miami" with her two children.

On 10 November 1982, plaintiff filed notice of appeal regarding five of the Florida orders, including the 13 October 1982 order at issue here, to the District Court of Appeals of Florida, Third District. In an opinion filed 7 June 1983 the Florida appellate court affirmed the orders from the Dade County Circuit Court *per curiam*. The Dade County Circuit Court thereafter entered several judgments consistent with this affirmance, including the 1 November 1983 order for attorney's fees.

The Constitution of the United States provides, "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." U.S. Const. art. IV, sec. I. Accordingly, a judgment from a rendering state is entitled to the "same credit, validity and effect" in a sister state that it has in the state where it was pronounced. *Montague v. Wilder*, 78 N.C. App. 306, 308, 337 S.E. 2d 627, 628 (1985), so long as certain requirements of a valid judgment have been satisfied, *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E. 2d 790, 793 (1983). The judgment is deemed by the second court to be valid in the rendering state if the minimal requirements of proper subject matter jurisdiction, and the due process concerns of personal jurisdiction, and adequate notice were satisfied. *Montague v. Wilder, supra*, at 309, 337 S.E. 2d at 628-29. "We note that the second court's scope of review concerning the rendering court's jurisdiction is very limited." *Boyles v. Boyles, supra*, at 491, 302 S.E. 2d at 793. If the second court's inquiry reveals that these questions have been "fully and fairly litigated and finally decided in the court which rendered the judgment," the inquiry need go no further. *Id.* However, if the situation presented is one where default judgment was entered in the rendering state and the party against

whom the default was entered subsequently challenges the validity of the proceeding on the grounds that he did not receive notice, the reviewing court must examine the underlying facts to determine whether notice prior to entry of default was adequate. *Id.*

Here, defendant is seeking to enforce in North Carolina the 13 October 1982 order for an arrearage of $58,415.58 and the $6,795.75 attorney fee award as ordered on 1 November 1983. Applying the rules stated above, the proper scope of review on these facts is a limited review. We need not examine the underlying facts because neither judgment at issue is a default judgment and because the issue of notice was fully and fairly litigated in the court which rendered the judgment as indicated by the entire record before us and, specifically, by the language in the 13 October 1982 order, to wit: James Boozer "was properly served notice of all proceedings in the [cause]." We need not address the facts underlying the 25 January 1977 order of default because that judgment is not at issue. Although we note that plaintiff was represented by counsel at that 11 November 1977 hearing where the court adopted and ratified the order of default, we need inquire only as to whether the two judgments which defendant seeks to enforce in North Carolina are valid judgments.

Plaintiff does not challenge subject matter jurisdiction. The language in the 13 October 1982 order "Copies furnished to counsel" and "copies of the above order were mailed to J. T. — H & H," that is, John Thompson, then counsel of record for plaintiff and Hendricks & Hendricks, then counsel of record for defendant, show that plaintiff was represented by an attorney. Plaintiff voluntarily submitted to the personal jurisdiction of the Florida court and actively participated in the litigation. Because the requirements of a valid judgment, to wit: subject matter jurisdiction, personal jurisdiction and notice, have been satisfied, the 13 October 1982 judgment is entitled to full faith and credit. Because the court specifically retained jurisdiction for a later determination on the issue of attorneys' fees, it follows that the 1 November 1983 award of $6,795.75 is also entitled to full faith and credit. Summary judgment for defendant is

Affirmed.

Judges BECTON and MARTIN concur.

STATE OF NORTH CAROLINA v. DARRICK WAYNE BAILEY

No. 851SC1350

(Filed 20 May 1986)

1. **Rape § 4.1— evidence of prior sexual misconduct—admission to rebut defense of consent improper**

In a prosecution of defendant for second degree rape, second degree sexual offense, and crime against nature, the trial court erred in allowing the prosecuting attorney to cross-examine defendant about alleged prior sexual misconduct with a person other than the prosecuting witness, since cross-examination about prior acts of misconduct must be limited to conduct which bears upon or is relevant to the witness's propensity to truthfulness or untruthfulness, and since such cross-examination was clearly designed to rebut defendant's only defense of consent, but evidence of other non-consensual sexual activity would not be relevant on the question of this victim's consent. N.C.G.S. § 8C-1, Rules 608(b) and 404(b).

2. **Rape §§ 1, 7— crime against nature—second degree sexual offense—separate crimes—separate convictions proper**

There was no merit to defendant's contention that his conviction for crime against nature was based upon the same acts for which he was convicted of second degree sexual offense.

APPEAL by defendant from *Watts, Judge*. Judgment entered 27 June 1985 in CURRITUCK County Superior Court. Heard in the Court of Appeals 6 May 1986.

Defendant was convicted of attempted second degree rape, second degree sexual offense and crime against nature. From sentences of imprisonment entered on the jury's verdicts, defendant has appealed.

At trial, Cindy Lancaster, the prosecuting witness, testified that she first met defendant on 13 November 1984 when defendant came to her residence to inquire if he might be employed to assist in re-roofing the Lancaster residence. Defendant told Ms. Lancaster that he and his father were engaged in the roofing business and that, having observed her husband working on their

roof, he would be interested in assisting in that work. After a brief conversation about these matters, defendant gave Ms. Lancaster his name and telephone number. At about noon on 19 November 1984, defendant returned to the Lancaster residence and was admitted into the living room by Ms. Lancaster. Another conversation took place concerning the roof work. During this conversation, Ms. Lancaster attempted to reach her husband by phone, but was unsuccessful. Defendant approached Ms. Lancaster while she was on the phone, rubbing her face with his hand. She asked him to leave. Defendant assaulted Ms. Lancaster by forcefully taking hold of her and throwing her to the floor. Defendant then forced Ms. Lancaster to engage in oral sex with him and then attempted to engage in vaginal intercourse with her before leaving the premises.

After defendant left, Ms. Lancaster went to a neighbor and explained the incident. The neighbor called the Sheriff's Department and reported the incident. Ms. Lancaster subsequently related the incident to Agent Wise of the State Bureau of Investigation, who took Ms. Lancaster to Albemarle Hospital where she was examined by Nurse Braddy.

Agent Wise, Nurse Braddy and Ms. Lancaster's husband gave testimony tending to corroborate Ms. Lancaster's testimony as to the incident with defendant on 19 November.

Defendant testified that he first met Ms. Lancaster at a local store on 5 November 1984; that she invited him to her home; that in response to a telephone call from her, he went to her home on 8 November when they engaged in lengthy consensual sexual intercourse in her bedroom; that at her invitation, he returned to her home on 19 November when they again engaged in consensual sexual intercourse. When defendant prepared to leave, Ms. Lancaster objected; and when defendant persisted in leaving, Ms. Lancaster threatened defendant.

Other aspects of the evidence will be discussed as appropriate in the body of our opinion.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Floyd M. Lewis, for the State.

William T. Davis for defendant-appellant.

WELLS, Judge.

[1] In his first assignment of error defendant contends that the trial court erred in allowing the prosecuting attorney to cross-examine defendant about alleged prior sexual misconduct with a person other than the prosecuting witness. During defendant's cross-examination, the following events took place:

> Q. Have you had other women come up to you in the past and ask you for sexual favors as Mrs. Lancaster did on this occasion?
>
> A. Not to my knowledge, sir.
>
> Q. Have you ever had sexual relations with someone without their consent in the past?
>
> A. Not to my knowledge.
>
> Q. Have you ever attempted to have sexual relations without their consent?
>
> A. Not to my knowledge, sir.
>
> Q. Do you know a Miss Maudie Bradey, sir?
>
> A. Miss who?
>
> Q. Maudie Bradey.
>
> A. No, sir.
>
> Q. Isn't it true, sir, that you attempted to have sexual relations with Maudie Bradey against her will?

Although defendant objected at this point, the trial court allowed the prosecuting attorney to pursue this line of questioning by asking defendant if in July of 1984 he did not go to the residence of Maudie Bradey and attempt to have sexual relations with her against her will. We hold that the trial court erred in allowing this line of inquiry. Prior to the enactment of the North Carolina Evidence Code our Supreme Court had consistently held that a defendant who testifies in his own behalf may be cross-examined for the purpose of impeachment concerning prior criminal acts or specific acts of misconduct so long as the questions are asked in good faith. *See State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980); *see also State v. Sparks*, 307 N.C. 71, 296 S.E. 2d 451

(1982). The Evidence Code, N.C. Gen. Stat. § 8C-1, became effective 1 July 1984 to actions and proceedings commenced after that date and applies to defendant's case. Rule 608(b) provides:

> (b) Specific instances of conduct.—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . .

In *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986), our Supreme Court decided that such inquiries must now be limited to conduct which bears upon or is relevant to the witness' propensity to truthfulness or untruthfulness. Other authorities agree with this position. *See, e.g.*, Weinstein's comments on the identical Federal Rule, 3 Weinstein's *Evidence*, § 608[05] (1985). *See also* Note, *Evidence—Stuck in a Serbonian Bog: State v. Jean and the Future of Character Impeachment in North Carolina*, 63 N.C. L. Rev. 535 (1985).

Under the authority of *Morgan, supra*, we also hold that this cross-examination was not allowable under Rule 404(b) of the Evidence Code (relating to other crimes, wrongs, etc.) because of a lack of relevancy. The cross-examination questions were clearly designed to rebut defendant's defense of consent and we cannot agree that evidence of other non-consensual sexual activity would be relevant on the question of Ms. Lancaster's consent. In the context of this case, where defendant's only defense was consent of the prosecuting witness, this cross-examination inquiry was clearly prejudicial and requires a new trial.

In another assignment of error, defendant contends that the trial court erred in allowing the State to introduce hearsay evidence in the form of a sales receipt for roofing shingles purchased by Cindy Lancaster's husband. Defendant testified that when Cindy Lancaster called him at 8:35 a.m. on 8 November 1984 and invited him to her home, she described her house by saying there would be shingles in her front yard. On rebuttal for the State, Ms. Lancaster's husband testified that he did not pick up his shingles until the late afternoon of 8 November. Mr. Lancaster

identified a receipt for shingles purchased from Moore's building supply store in South Norfolk. The receipt was dated 8 November 1984 and was allowed into evidence over defendant's objection. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. N.C. Gen. Stat. § 8C-1, Rule 801(c) of the Rules of Evidence. Mr. Lancaster's receipt was not offered as the statement of another but was offered to corroborate his own testimony as to the date he purchased his shingles. Thus, it was not hearsay. This assignment is overruled.

[2] In another assignment, defendant contends that the trial court erred in not arresting judgment in defendant's conviction of the crime against nature because that conviction was based upon the same acts for which defendant was convicted of second degree sexual offense. We disagree. N.C. Gen. Stat. § 14-27.5 (1981) provides that a person is guilty of a second degree sexual offense if the person engages in a sexual act with another person by force and against the will of the other person. N.C. Gen. Stat. § 14-27.1(4) (1981) defines fellatio as a "sexual act." Fellatio may be accomplished by mere touching of the male sex organ to the lips or mouth of another. *State v. Goodson*, 313 N.C. 318, 327 S.E. 2d 868 (1985); *see also State v. Ludlum*, 303 N.C. 666, 281 S.E. 2d 159 (1981). On the other hand, the crime against nature proscribed by N.C. Gen. Stat. § 14-177 (1981) requires penetration of or by the sexual organ. *See State v. Adams*, 299 N.C. 699, 264 S.E. 2d 46 (1980) and cases cited therein; *see also State v. Fenner*, 166 N.C. 247, 80 S.E. 970 (1914). Defendant here was convicted of two separate offenses based upon distinct acts of a sexual nature. This assignment is overruled.

Because of our decision to award defendant a new trial, we do not address defendant's assignments as to sufficiency of the evidence to convict him.

For the reasons stated, there must be a

New trial.

Judges ARNOLD and BECTON concur.

Craig v. Buncombe Co. Bd. of Education

KIM CRAIG, BY HOWARD CRAIG, HER GUARDIAN AD LITEM AND KEVIN RUSSELL, BY HIS GUARDIAN AD LITEM, PAM RUSSELL v. BUNCOMBE COUNTY BOARD OF EDUCATION, LARRY C. McCALLUM, IN HIS CAPACITY AS PRINCIPAL OF CHARLES D. OWEN HIGH SCHOOL, VERNON E. DOVER, ROBERT E. GREENE, JAMES LEWIS, JR., WENDALL BEGLEY, MRS. GRACE BRAZIL, MARSHALL ROBERTS AND CHARLES WYKLE, IN THEIR CAPACITY AS MEMBERS OF THE BUNCOMBE COUNTY SCHOOL BOARD

No. 8528SC924

(Filed 20 May 1986)

Schools § 1— propriety of ban on tobacco products

A ban on the use and possession of tobacco products in the Buncombe County schools was valid, since it was reasonably related to the educational process, and the fact that teachers were allowed to smoke while students were not did not violate the constitutional guarantee of equal protection.

APPEAL by plaintiffs from *Gaines, Judge.* Judgment entered 22 May 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 16 January 1986.

Plaintiffs are two students at Charles D. Owen High School in Swannanoa, a part of the Buncombe County school system. Prior to the 1984 school year, it was the policy of the Buncombe County School Board to allow smoking and the use of other tobacco products on high school campuses in designated areas. On 20 September 1984, the School Board amended its policy as follows:

USE OR POSSESSION OF TOBACCO PRODUCTS
BY STUDENTS IN HIGH SCHOOL

The use or possession of tobacco products is not permitted on school property by high school students. This is established on the grounds:

1. That the use of tobacco products by students on school property presents a health and safety hazard.

2. That the possession of tobacco products encourages the carrier to indulge in their use.

3. That *disciplinary* procedures will be left with the individual school principals.

Pursuant to this new policy, defendant Larry McCallum, principal of Owen High School, issued a memo to all teachers at Owen which was read to all students. This memo outlined the disciplinary procedures which would be observed at Owen High School for enforcement of the new policy. The punishments ranged from a three-day "in-school" suspension for a first offense of possessing tobacco products to complete expulsion, after hearing, for a fifth offense of use of tobacco products at school.

Plaintiff Kim Craig is a tenth grade student at Owen. She had acquired the parental permission necessary to smoke at school under the old school policy. She continued to smoke at school after the new policy went into effect, consistent with her stated belief that, "If the parents say you can and the school says you can't, I think the parents should have the word over the school." After being repeatedly suspended for smoking at school, she continued to flagrantly violate the policy. A hearing was held after which she was suspended from school. She appealed that suspension to the Buncombe County Board of Education, and reaffirming its no-smoking policy, the Board upheld the suspension.

Plaintiff Kevin Russell is a junior at Owen High School. He, too, has been repeatedly suspended from school for violation of the school ban on tobacco products. He did not appeal these disciplinary actions to the school board.

C. David Gantt, P.A. for plaintiffs appellants.

Roberts, Cogburn, McClure and Williams by James W. Williams, Isaac N. Northup, Jr. and Glenn S. Gentry for defendants appellees.

PARKER, Judge.

Appellants contend that the smoking ban imposed by the Buncombe County Board of Education deprives students who smoke of the "fundamental right" to an education. However, in our view, the right deprived is only the right to use or possess tobacco products on school grounds during school hours. A smoker is not denied the right to an education so long as he or she confines the smoking to outside school hours and off school grounds.

The smoking ban is not comparable to hair length regulations or dress codes in high schools which have been invalidated by the courts. *See, e.g., Breen v. Kahl,* 419 F. 2d 1034 (7th Cir. 1969); *Copeland v . Hawkins,* 352 F. Supp. 1022 (E.D. Ill. 1973). Both hair length and dress involve First Amendment issues in that both may be used as expressive conduct which enjoys First Amendment protection. *Copeland, supra.* Even with that protection, greater regulation of speech and conduct is permissible in the school environment than would otherwise be allowed. *E.g., Quarterman v. Byrd,* 453 F. 2d 54 (4th Cir. 1971). Thus, a ban on smoking at school is further distinguishable from a hair length regulation in that the latter necessarily involves control of conduct outside the school environment.

The right to smoke in public places is not a protected right, even for adults. In *Gasper v. Louisiana Stadium and Exposition District,* 577 F. 2d 897 (5th Cir. 1978), *cert. denied,* 439 U.S. 1073, 99 S.Ct. 846, 59 L.Ed. 2d 40 (1979), the Fifth Circuit did deny the right of a group of nonsmokers to enjoin smoking in the Louisiana Superdome, but the court stated:

> We assume that Superdome authorities, if they saw fit, could prohibit smoking in the facility, or the City of New Orleans, in the exercise of its police power could prohibit smoking in public stadiums or the State of Louisiana could enact a similar statute of statewide application.

577 F. 2d at 898.

In *Alford v. City of Newport News,* 270 Va. 584, 260 S.E. 2d 241 (1979), a case relied upon by appellants, the Virginia Supreme Court ruled that a municipal ordinance prohibiting smoking in restaurants, health care facilities, schools and elevators was unconstitutional as applied to the owner of a private, one-room restaurant. The court invalidated the ordinance only in its impact upon the regulation of the use of private property.

Our State Legislature has delegated to the various local boards of education in North Carolina the power to "adopt policies governing the conduct of students" and to "[establish] procedures to be followed by school officials in suspending or expelling any pupil from school." G.S. 115C-391(c). Under an earlier version of this statute, a local school board adopted a regulation

requiring students to sign a pledge that they belonged to no fraternal organization. Despite concluding that such a requirement would be unconstitutional if applied to adults, the Supreme Court held that the need to control the school environment and the school board's position *in loco parentis* justified the regulation. *Coggins v. Board of Education*, 223 N.C. 763, 28 S.E. 2d 527 (1944). Thus, the power of school authorities to regulate students' conduct while at school is much greater than the State's authority to regulate the conduct of adults. *See Breen, supra*, at 1037.

The Board of Education has legitimate concerns over students' health, cleanliness of grounds and buildings, fire hazards, the use of "smoking areas" for the smoking of illegal, non-tobacco cigarettes and the effect of smoke inhaled from the air on non-smokers. These concerns are all reasonably related to the educational process and thus provide a rational basis for the regulation. *See generally Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1924) (regulations controlling conduct at schools need only be reasonable to be constitutional).

Appellants contend that the regulation violates the guarantee of equal protection contained in the Fourteenth Amendment to the U.S. Constitution and Article 1, Section 19 of our State Constitution in that the ban applies only to students, while teachers are allowed to smoke in the teachers' lounge. This contention is without merit. Because of their youth and educational goals, there are reasonable differences justifying application of a statute or regulation to high school students but not to adults. *See Breen, supra.* The primary justification for the smoking ban—discouraging smoking in order to prevent impressionable, susceptible adolescents from becoming addicted to tobacco products—does not apply to adults. On that basis alone, for the school board to distinguish between students and teachers is proper. In addition, by being required to confine their smoking to the teachers' lounge, the smoking teachers are not setting a bad example for the students. This is consistent with the policy's justification. The fact that individual teachers violate this requirement does not render the ban on student use of tobacco products void. *See Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971) (school system policy regulating corporal punishment not rendered invalid because of violations by individual teachers).

Because we hold the ban on the use and possession of tobacco products in the Buncombe County schools to be valid, we need not address the question of whether school officials waived their immunity to suit by obtaining liability insurance pursuant to G.S. 115C-47(25). The ban on the use or possession of tobacco products by students at school is a valid exercise of the authority delegated to the various boards of education by the Legislature, and the entry of summary judgment for appellees is

Affirmed.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. WENDELL LITTLE

No. 8520SC1294

(Filed 20 May 1986)

1. **Criminal Law § 101.4— inquiry into numerical division of jury—no error**

The trial court's inquiry into the numerical division of the jury during deliberation was not coercive where the judge did not speak of leaning on the jury or urge the jury into further deliberation.

2. **Criminal Law § 101.4— court's inquiry of jury—no error**

There was no merit to defendant's contention that the trial court erred by engaging in a colloquy with the jury foreman in the absence of other jury members, since the transcript showed that the entire jury was present, and the court inquired whether the jury was making progress in its deliberations and desired to take a break.

Judge COZORT concurring in the result.

Judge EAGLES joins in the concurring opinion.

APPEAL by defendant from *John, Judge*. Judgment entered 22 February 1985 in Superior Court, ANSON County. Heard in the Court of Appeals 12 May 1986.

Defendant was charged in proper bills of indictment with sale and delivery of marijuana and possession with the intent to sell and deliver marijuana. The State presented evidence at trial tending to show that at about 6:50 p.m. on 16 March 1983 an under-

cover agent and a confidential informer went to defendant's house and purchased two $25.00 bags of marijuana. Defendant was found guilty of sale and delivery of marijuana and possession with the intent to sell and deliver marijuana, and the charges were consolidated for sentencing. From a judgment imposing a two-year prison sentence, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Assistant Appellate Defender Daniel R. Pollitt for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant brings forward two arguments on appeal. First, defendant contends that the trial court's inquiry as to the numerical division of the jury during deliberation was coercive and violative of defendant's right to trial by jury.

In *State v. Yarborough*, 64 N.C. App. 500, 307 S.E. 2d 794 (1983), this Court set out the standard of review in cases where the trial judge inquired into the numerical division of the jury. In *Yarborough*, we noted that an inquiry into the numerical division can be useful in certain circumstances and unconstitutionally coercive in others. We held that an appellate court reviewing an inquiry into the numerical division of a jury must determine in the context of the totality of the circumstances whether the trial judge's inquiry was coercive or whether the jury's decision was in any way affected by the inquiry.

In the case at hand, the trial judge merely inquired into the numerical division. Unlike in *State v. McEntire*, 71 N.C. App. 720, 323 S.E. 2d 439 (1984), the trial judge did not speak of leaning on the jury or urge the jury into further deliberation. From the totality of the circumstances, we find no coercion and no error in the trial judge's inquiry.

[2] Citing *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652 (1985) defendant contends that the trial court erred by engaging in a colloquy with the jury foreman in the absence of the other jury members. Unfortunately, the State accepted without question defendant's assertion that the colloquy occurred with the foreman alone in the absence of the entire petit jury. The transcript

discloses that the colloquy occurred in the presence of the jury not just the foreman:

(AT 6:10 P.M., THE COURT DIRECTED THE BAILIFF TO KNOCK ON THE DOOR TO THE JURY ROOM AND INSTRUCT THE JURY TO STOP THEIR DELIBERATIONS AND RETURN TO THE COURTROOM)

(THE JURY RETURNED TO THE COURTROOM)

COURT: I want to make an inquiry, Mr. Foreman, as to whether you feel you are making some progress in your deliberations?

FOREMAN: I think we are now.

COURT: Would it be your pleasure at this point to continue your deliberations for a while or to take a break?

FOREMAN: About 10 more minutes one way or the other.

COURT: All right. If you reach a point where you want a break and feel like you need a break, knock on the door and let us know.

FOREMAN: If the issue comes up again, is there some way we could get a clarification?

COURT: As to the Court's instructions? I can repeat a portion of it, if you request it. You will have to have a specific request.

FOREMAN: Let me talk to them about it.

(THE JURY RETURNED TO THE JURY ROOM)

This assignment of error is frivolous.

We hold that defendant received a fair trial free from prejudicial error.

No error.

Judges EAGLES and COZORT concur in the result.

Judge COZORT concurring in the result.

In my judgment the defendant's assignment of error concerning the colloquy between the trial court and the jury foreman is

not frivolous. While the transcript filed with this Court reflects that the entire jury was present, the record on appeal states that the transcript is in error. The record on appeal states:

> The following proceedings do not appear in the trial transcript or are inaccurately shown therein:
>
> * * * *
>
> At 6:10 p.m., the court directed the bailiff to knock on the door to the jury room. The foreman returned to the courtroom but the other members of the jury remained to [*sic*] the jury room. A colloquy between the court and the foreman—without the entire jury present—then ensued as shown at page 221 of the trial transcript.

The proposed record on appeal containing the language quoted above was prepared by defendant and served on the State on 9 October 1985. The State filed no objections, amendments, or a proposed alternative record on appeal. The record on appeal was then certified to this Court on 3 December 1985. We are bound by that record. In *Vassey v. Burch*, 301 N.C. 68, 74, 269 S.E. 2d 137, 141 (1980), our Supreme Court stated:

> The [appellee] filed no objections, amendments, or a proposed alternative record on appeal. See Rule 11(c), Rules of Appellate Procedure. Accordingly, the proposed record on appeal became the record on appeal. Rule 11(b), Rules of Appellate Procedure. . . .
>
> It is axiomatic that a properly certified record on appeal imports verity. (Citation omitted.) The appellate courts in this State are bound by the record as certified and can judicially know only what appears of record. *Griffin v. Barnes*, 242 N.C. 306, 87 S.E. 2d 560 (1955); *Tomlins v. Cranford*, 227 N.C. 323, 42 S.E. 2d 100 (1947).

With the record on appeal stating that the colloquy occurred between the trial judge and the jury foreman, without the entire jury present, the defendant's argument is not frivolous and should be considered.

In reviewing the colloquy between the trial court and the jury foreman, I find no prejudicial error. The instant case is distinguishable from *State v. Ashe*, 314 N.C. 28, 331 S.E. 2d 652

(1985), cited by the defendant. In *Ashe*, a new trial was ordered where the Supreme Court found the trial court violated G.S. 15A-1233(a) by failing to bring all jurors to the courtroom to hear an inquiry from the jury about reviewing certain evidence. Finding prejudicial error, the court stated:

> Our jury system is designed to insure that a jury's decision is the result of evidence and argument offered by the contesting parties under the control and guidance of an impartial judge and in accord with the judge's instructions on the law. All these elements of the trial should be viewed and heard simultaneously by all twelve jurors. To allow a jury foreman, another individual juror, or anyone else to communicate privately with the trial court regarding matters material to the case and then to relay the court's response to the full jury is inconsistent with this policy. The danger presented is that the person, even the jury foreman, having alone made the request of the court and heard the court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay the jury's request or the court's response, or both, to the defendant's detriment. Then, each juror, rather than determining for himself or herself the import of the request and the court's response, must instead rely solely upon their spokesperson's secondhand rendition, however inaccurate it may be.

Id. at 36, 331 S.E. 2d at 657.

In the case below, no statute was violated, there was no discussion of any matters material to the case, and nothing occurred which could have been inaccurately relayed by the foreman to the other jurors. Thus, while the trial court's colloquy with the jury foreman in this case was inadvisable, it did not rise to the level of prejudicial error.

Judge EAGLES joins in the concurring opinion.

GARY MYERS v. CATOE CONSTRUCTION COMPANY AND ROBERT F. CATOE, SR.

No. 8526SC1158

(Filed 20 May 1986)

1. **Estoppel § 4.1— breach of contract by plaintiff—recovery not barred as matter of law**

There was no merit to defendants' contention that, because there was uncontradicted evidence showing that plaintiff breached the parties' contract, plaintiff was precluded from recovering as a matter of law, since plaintiff's testimony that he met his contractual obligations was sufficient to withstand a motion for directed verdict; furthermore, performance of all contractual obligations is not always required before a party may sue for breach of contract.

2. **Trover and Conversion § 2— conversion of automobile—directed verdict improper**

The trial court erred in granting plaintiff's motion for directed verdict on defendants' counterclaim for conversion of defendant construction company's automobile where the evidence tended to show that plaintiff's initial possession of the vehicle was not wrongful; plaintiff retained possession of the vehicle after he stopped working for defendant company; and plaintiff did not return the vehicle after the individual defendant wrote plaintiff a letter requesting that plaintiff return it.

3. **Contracts § 29— damages verdict unsupported by evidence—denial of new trial improper**

Where the parties agreed to transfer one-half of certain improved property in exchange for approximately $7,000 worth of stock in defendant construction company, and other evidence supported a higher valuation but no evidence supported a lower valuation, the jury's verdict awarding defendants only $1.00 for the one-half interest in the property was unsupported by the evidence, and the trial court therefore erred in denying defendants' motion for a new trial.

APPEAL by defendants from *Snepp, Judge*. Judgment entered 28 May 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 12 May 1986.

This is a civil action wherein plaintiff, Gary Myers, seeks compensation for breach of contract from defendants Robert F. Catoe, Sr. and Catoe Construction Company. Mr. Catoe, sole shareholder in Catoe Construction Company, entered into the following contract with plaintiff on 20 January 1981:

> Robert F. Catoe, President of Catoe Construction Company, Inc. does hereby agree to sell 40% of Catoe's shares to Gary

> Myers, including a 1967 Dodge dump truck, a 1969 Chevrolet Dump truck, a 1972 1/2 ton pickup, a 1978 Chevrolet El Camino, and the contents of the office and storage, desks, chairs, safe, typewriter, filing cabinets, cabinets, one wall clock, c.b. radio and equipment job heater, generator, and ramset gun, miscellaneous tile, odds and ends of doors, windows, a three piece stove unit, hood and vent, etc. Effective March 1st, 1981, price to be $25,000.00. Two trailers and two leased lots in South Carolina on the coast, giving credit of $21,000.00 balance will be paid 10% above any profit that the company makes based on 40% of the profit. Gary Myers shall be promoted to Vice President and secretary. Gary Myers salary will be based on $250.00 per week for 52 weeks. Catoe Construction Company, Inc. agrees to buy a 1977 El Camino to be put into the company as company use by Gary Myers. The price shall be bought at a fair market price.

The parties later modified the contract. Under the modification, Mr. Catoe agreed to accept one-half interest in one of the two trailers and lots instead of full ownership on the condition that plaintiff make certain improvements on the trailer and lot.

At trial, plaintiff presented evidence tending to show the following: Plaintiff delivered title to both trailers, one of the lots and the El Camino to Mr. Catoe. Plaintiff worked for Catoe Construction Company until Mr. Catoe refused to transfer the stock and fired plaintiff. Plaintiff ceased using the company's El Camino after being fired. Plaintiff testified that Mr. Catoe must have "lost" the transfer documents to the second leased lot and mobile home. Plaintiff admitted that after he was fired, he sold his interest in the second lot and mobile home to a third party. Plaintiff stated that he quit driving the company's El Camino after he was fired and informed Mr. Catoe that he could retrieve the vehicle at plaintiff's residence.

Defendants presented evidence tending to show the following: Plaintiff delivered the documents to the El Camino, one lot and one trailer but never delivered documents covering the second lot and trailer. After he stopped working for Catoe Construction Company, plaintiff retained company's El Camino and $600 paid by Mrs. Brown for work done by Catoe Construction Company.

The trial judge dismissed defendants' counterclaim for conversion of the El Camino at the close of all the evidence. The jury answered the special verdict form as follows:

1. Did the defendants breach their agreement with the plaintiff of January 20, 1981, as modified?

ANSWER: YES.

2. Did the plaintiff breach his agreement with defendants of January 20, 1981, as modified?

ANSWER: YES.

3. What amount, if any, is the plaintiff entitled to recover of defendants as damages for breach of said agreement

(a) For value of the stock?

ANSWER: $14,000.00.

(b) For unpaid salary?

ANSWER: $1.00.

4. What amounts, if any, are the defendants entitled to recover of the plaintiff for the breach of said agreement,

(a) For 1/2 the fair market value of the property as improved?

ANSWER: $1.00.

(b) For expenses, if any, of the renovations which were paid by the defendants?

ANSWER: $3,000.00.

5. What amount, if any, are the defendants entitled to recover of the plaintiff on their counterclaim with respect to the Brown job?

ANSWER: $425.00.

From a judgment ordering defendants to pay plaintiff $10,575.00, defendants appealed.

William D. McNaull, Jr., for plaintiff, appellee.

Winfred R. Erwin, Jr., for defendants, appellants.

HEDRICK, Chief Judge.

[1] By their first assignment of error, defendants contend that the trial court erred in failing to grant their motion for directed verdict at the close of all the evidence. Defendants argue that because there is uncontradicted evidence showing plaintiff breached the contract, plaintiff is precluded from recovering as a matter of law.

When considering a defendant's motion for directed verdict, the plaintiff's evidence must be taken as true and be considered in the light most favorable to him. A directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Hawks v. Brindle*, 51 N.C. App. 19, 275 S.E. 2d 277 (1981). Plaintiff testified that he met his contractual obligations. This evidence is sufficient to withstand a motion for directed verdict. Furthermore, performance of all contractual obligations is not always required before a party may sue for breach of contract. *McAden v. Craig*, 222 N.C. 497, 24 S.E. 2d 1 (1943). Defendants' first assignment of error is without merit.

[2] Defendants next contend that the trial court erred in granting plaintiff's motion for directed verdict on defendants' counterclaim for conversion of Catoe Construction Company's El Camino. When considering a motion for directed verdict, the non-moving party's evidence must be taken as true and be considered in the light most favorable to him and a directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the non-moving party. *Dickenson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). If the evidence is of such character that reasonable people may form divergent opinions of its import, the issue is for the jury. *Insurance Co. v. Cleaners*, 285 N.C. 583, 206 S.E. 2d 210 (1974).

In North Carolina, conversion is defined as an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights. *See e.g. Gadson v. Toney*, 69 N.C. App. 244, 316 S.E. 2d 320 (1984). "Where there has been no wrongful taking or disposal of the goods, and the defendant has merely come rightfully into possession and then refused to surrender them, demand and refusal are necessary to the existence of the tort." *Hoch v. Young*, 63 N.C. App. 480, 483, 305

S.E. 2d 201, 203 (1983) (quoting W. Prosser, *The Law of Torts* Sec. 15 (4th ed. 1971)).

In the instant case, there is evidence tending to show that Mr. Myers' initial possession of the El Camino was not wrongful, that Mr. Myers retained possession of Catoe Construction Company's El Camino after he stopped working for Catoe Construction, and that Mr. Myers did not return the El Camino after Mr. Catoe wrote Myers a letter requesting Myers return the vehicle. This evidence presented at trial is sufficient to withstand directed verdict. Directed verdict for plaintiff on defendants' conversion counterclaim must be reversed.

[3] Defendants also contend that the trial court committed reversible error by denying their motion for a new trial. Defendants argue that the portion of the verdict appraising the value of one-half of the improved beach property at one dollar was unsupported by the evidence. We agree. The parties agreed to transfer one-half the improved property in exchange for approximately $7,000 worth of stock in Catoe Construction Company. Other evidence supported a higher valuation but no evidence supported a lower valuation. The jury's verdict was unsupported by the evidence and therefore the trial court erred in denying defendants' motion for a new trial. *See Robertson v. Stanley*, 285 N.C. 561, 206 S.E. 2d 190 (1974).

A court granting a new trial may in its discretion grant a partial new trial on one issue rather than a new trial on all issues. Under the circumstances before us, there is reason to believe that the jury awarded defendants only one dollar for the one-half interest in the beach property because it subtracted $7,000 from plaintiff's award. We therefore reverse and remand for a new trial on all the issues.

We need not address defendants' remaining assignment of error regarding the jury instruction.

Dismissal of defendants' counterclaim regarding conversion of the El Camino is reversed, and the cause is remanded for trial. Judgment on plaintiff's and defendants' contract claims is reversed and remanded for a new trial on all the issues.

Reversed and remanded.

Judges EAGLES and COZORT concur.

ALPHONSO R. VICK v. MARIAN LEE VICK

No. 8518DC1050

(Filed 20 May 1986)

1. **Reference § 3.1— equitable distribution proceeding—refusal to order reference**

The trial court did not abuse its discretion in denying defendant's motion for a compulsory reference in an equitable distribution proceeding. N.C.G.S. 1A-1, Rule 53.

2. **Rules of Civil Procedure § 58— judgment entered in open court—later signing of written judgment**

Where judgment was "entered" in open court on 19 April 1985, the trial judge properly exercised his authority pursuant to N.C.G.S. 1A-1, Rule 58 when he approved the written judgment and signed it on 27 June 1985.

APPEAL by defendant from *Lowe, Judge*. Judgment entered 19 April 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 5 May 1986.

This is a civil action instituted by plaintiff seeking an absolute divorce and equitable distribution of marital property. Defendant filed an answer wherein she also sought equitable distribution of marital property. On 29 July 1982, plaintiff was granted an absolute divorce from defendant.

On 15 April 1985, the court proceeded to the hearing on the claims for equitable distribution. On 19 April 1985, at the conclusion of the hearing, the trial judge entered judgment in open court, ordering that plaintiff receive the parties' lot in Winston-Salem, that defendant receive their residence in Greensboro, its furnishings and their two burial plots, that each of them retain the automobiles and cash in their possession and their insurance policies, that defendant receive credit for $7,800 for marital property liabilities, and that defendant pay plaintiff a distributive award of $49,400.00. Defendant gave notice of appeal in open court. On 27 June 1985, the trial judge signed a written judgment,

making findings of fact and conclusions of law and ordering the equitable distribution of the marital property as ordered in his judgment rendered in open court.

Tuggle Duggins Meschan & Elrod, P.A., by David F. Meschan, for plaintiff, appellee.

Alexander Ralston, Pell & Speckhard, by Elreta M. Alexander Ralston, for defendant, appellant.

HEDRICK, Chief Judge.

Rule 28(a) of the North Carolina Rules of Appellate Procedure provides, in pertinent part, as follows:

> The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs.

Section (b) of Rule 28 further provides that the appellant's brief shall contain a concise statement of the procedural history of the case, a non-argumentative summary of all material facts and an argument, with each question separately stated and immediately followed by a reference to the assignments of error and exceptions pertinent to the question, identified by their numbers and by the pages at which they appear in the record on appeal or the transcript. The brief filed by defendant in this case is in gross violation of these rules. The purpose described in Rule 28(a) is not served by the manner in which this brief has been prepared and filed. We have chosen, however, to rule on the merits of this case as best we can.

Defendant's first assignment of error is set out in the record as follows:

> 1. The denial of Defendant's Motions to Dismiss for lack of jurisdiction over the subject matter and failure to state a claim for that the same is unconstitutional as it applies to this case in which the parties married and separated prior to the enactment of N.C.G.S. Sec. 50-20; and where there was a clear intent on the part of the parties prior to the statute

that all properties which were individually titled and vested should remain separate property; and where the parties intended to be free traders and had no "economic partnership" as envisioned by the statute.

This assignment of error purports to be based on an exception to the denial of defendant's motions to dismiss pursuant to Rule 12(b)(1) and 12(b)(6). Rule 12(b)(1) raises the question of whether the district court has jurisdiction over the subject matter. It is clear that the district court has subject matter jurisdiction over claims for equitable distribution of property. G.S. 7A-244. Defendant's Rule 12(b)(6) motion challenges the sufficiency of the complaint to state a claim upon which relief can be granted. Plaintiff has clearly stated a claim for equitable distribution. This assignment of error borders on the frivolous and is without merit.

[1] Defendant next contends that the trial court erred in denying her motion for a compulsory reference. A reference may be inappropriate in an equitable distribution proceeding, because G.S. 50-20(a) provides that the trial judge "shall determine what is the marital property and shall provide for an equitable distribution of the marital property between the parties. . . ." Assuming *arguendo* that the trial judge could order a compulsory reference in an equitable distribution proceeding, G.S. 1A-1, Rule 53 provides that "the court may . . . order a reference" in certain cases. The ordering or refusal to order a compulsory reference is a matter within the discretion of the trial judge. *See Veazey v. Durham*, 231 N.C. 354, 57 S.E. 2d 375 (1950). It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion. *Clark v. Clark*, 301 N.C. 123, 271 S.E. 2d 58 (1980). Defendant has failed to show that the trial court abused its discretion in denying her motion for a compulsory reference.

Defendant has in her brief a section captioned as "III. The court denied defendant a fair and impartial trial as required by due process of law." Under this section, defendant refers to Assignments of Error Nos. 9, 11, 12, 14, 15, 16, 19, 20 and 22. These assignments of error purport to be based on Exceptions Nos. 7, 9-32, 34, 35, 37 and 39-45. It is needless for us to again list the rules of appellate procedure violated by defendant in this sec-

tion of her brief. Nevertheless, we have carefully examined all of the assignments of error and the exceptions under this portion of defendant's brief and find no error. Defendant's principal argument is that the trial judge denied her a fair trial by making statements and asking questions. We note that this was a trial by a judge without a jury. The judge is permitted to ask questions in such a trial to clarify the testimony of witnesses. In the trial in the present case, the record discloses that the trial judge's questions were necessary because counsel for defendant continued to confuse the issues before the court by making inquiries of the witnesses as to irrelevant and immaterial matters. The trial judge did not err in asking such questions.

Assignment of Error No. 13 is set out in the record as follows: "The admission over objection of plaintiff's opinion as to the fair rental value of the dwelling between 1979 and 1984, for that the same is irrelevant and immaterial." Under the circumstances of this case, we cannot conceive that defendant was prejudiced by the admission of such evidence. This assignment of error is frivolous.

[2] Defendant contends that the trial court entered judgment in open court and therefore had no authority to sign the written judgment on 27 June 1985. This contention is without merit. G.S. 1A-1, Rule 58, in pertinent part, provides:

> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

The record before us discloses that the judgment dividing the marital property between the parties and ordering defendant to pay plaintiff the sum of $49,400 as a distributive award was "entered" in open court on 19 April 1985. Judge Lowe signed the written judgment on 27 June 1985, and the written judgment was filed on 28 June 1985. We hold that Judge Lowe properly exercised his authority pursuant to G.S. 1A-1, Rule 58 when he approved the written judgment and signed it. *See Condie v. Condie*, 51 N.C. App. 522, 277 S.E. 2d 122 (1981).

Defendant argues that the trial court erred in making findings of fact in the judgment that are not supported by the evidence. This argument purports to be based on Exceptions Nos. 47 and 48 in the record. Defendant excepted to the entry of the judgment in open court by Exception No. 47 and to the signing of the written judgment by Exception No. 48. Defendant did not except to each finding of fact or conclusion of law which is assigned as error, as required by Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. When no exceptions are made to the findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 292 S.E. 2d 159 (1982). Thus, the only questions raised by these assignments of error are whether the facts support the judgment and whether error of law appears on the face of the record. *Electric Co. v. Carras*, 29 N.C. App. 105, 223 S.E. 2d 536 (1976). We have reviewed the judgment in the present case and hold that the facts found support the judgment and that error of law does not appear on the face of the record.

For the foregoing reasons, the judgment of the trial court is affirmed. Plaintiff's cross-assignments of error, therefore, present no question for review.

Affirmed.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. CHARLES FREDERICK FORTE

No. 8511SC894

(Filed 20 May 1986)

Forgery § 2.2— uttering check with forged endorsement—sufficiency of evidence

In a prosecution of defendant for uttering a check with a forged endorsement, evidence was sufficient to go to the jury for its consideration of whether defendant possessed the requisite knowledge that the endorsement was forged where the evidence tended to show that the check in question was made out to a mortgagor, mortgagee and defendant's business; only the mortgagee endorsed it; the mortgagor specifically refused to endorse the check; the check was in the possession of the mortgagor's insurance appraisers on 10 November 1983; defendant went to the appraisers' office on that day, and the file contain-

ing the check was left in his presence; late in the afternoon of 10 November 1983 defendant presented the check to the bank; and it bore a forged endorsement in the name of the mortgagor. N.C.G.S. § 14-120.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 3 October 1984 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 14 January 1986.

Attorney General Lacy H. Thornburg, by Jo Anne Sanford, Special Deputy Attorney General, for the State.

Acting Appellate Defender Malcolm Ray Hunter, Jr., by Louis D. Bilionis, Assistant Appellate Defender, for defendant appellant.

PARKER, Judge.

In his sole assignment of error, defendant contends that his conviction for uttering a check with a forged endorsement in violation of G.S. 14-120 must be reversed because the evidence was insufficient, as a matter of law, to allow a reasonable jury to find that he had the requisite knowledge that the endorsement was forged. We disagree.

On a motion to dismiss on the ground of insufficiency of the evidence, the question for the court is whether there is substantial evidence of each element of the crime charged and of the defendant's perpetration of such crime. In evaluating the motion, the trial judge must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn therefrom, *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985) and the test is the same whether the evidence is direct, circumstantial or both. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984).

To convict defendant of uttering a check with a forged endorsement, the State was required to prove beyond a reasonable doubt that (i) defendant passed a check to First Citizens Bank, (ii) such check contained an endorsement which was forged, (iii) defendant knew that such endorsement was forged and (iv) defendant acted for the sake of gain or with the intent to defraud or injure any other person. G.S. 14-120.

There was uncontradicted evidence that defendant passed a check with a forged endorsement to First Citizens Bank. Mary Crawford, a teller, testified that on 10 November 1983, defendant presented a draft to her which was made out to Carol Thomas, First Citizens Bank and defendant's business, Speedy Janitorial Service. Crawford cashed the check and gave defendant $1,742.94. Thomas testified that the endorsement in her name was forged and that she had not signed the back of the check, nor had she authorized anyone to do so for her.

Defendant asserts the State failed to prove that he possessed the requisite knowledge that the endorsement was forged. A basic requirement of circumstantial evidence is reasonable inference from established facts. An inference may not be based upon an inference, but must stand upon some clear and direct evidence. *State v. Goodman*, 71 N.C. App. 343, 322 S.E. 2d 408, *disc. rev. denied*, 313 N.C. 333, 327 S.E. 2d 894 (1984). The evidence presented by the State on this element of the crime charged tended to show the following: Thomas' trailer was damaged by fire, and she retained defendant to do the repair work. After the repair work was "completed," Thomas refused to endorse the check issued by her insurance company over to defendant to cover the costs of her repairs. Thomas made her dissatisfaction known to defendant, and, in defendant's presence, returned the check (which had been endorsed only by a representative of First Citizens Bank, the mortgagee) to a representative of Gay and Taylor, Inc., her insurance appraisers.

Several days later, on 10 November 1983, defendant went to the appraisers' office. Defendant asked Robert Falco, an employee of Gay and Taylor, Inc., for the check and was informed that it could not be released since there was a dispute over the quality of the repairs that had been performed. Falco testified that the check was in a file, "paper-clipped to a report" and had only been endorsed by the mortgagee. Defendant requested a copy of an estimate in this file; Falco put the file on some boxes near the door and went into another room to make a copy. When Falco completed the copy, he saw defendant in the hallway that approached the copying room.

Later, between 3:00 and 4:00 p.m. on 10 November 1983, defendant presented the check to First Citizens Bank. Upon defend-

ant's specific assurance that Thomas had endorsed the check, Crawford cashed it and gave defendant $1,742.94. The next day, when Falco examined the file, the check was missing.

There was direct evidence that (i) Thomas refused to endorse the check to defendant, (ii) Falco refused to release the check to defendant on the morning of 10 November 1983, (iii) the check was in the file at Gay and Taylor, Inc. on 10 November 1983, (iv) the check only contained the endorsement of the mortgagee on 10 November 1983, (v) Thomas did not endorse the check nor did she authorize anyone to do so on her behalf and (vi) defendant presented the check to First Citizens Bank between 3:00 and 4:00 p.m. on 10 November 1983, and (vii) when the check was presented to the bank, it bore a forged endorsement in the name of Carol Thomas. In our view, this direct evidence was sufficient to go to the jury for its consideration of whether defendant possessed the requisite knowledge that the endorsement was forged. A jury could reasonably infer from these established facts that defendant (i) removed the check from the file, (ii) endorsed the check himself or had someone else do it and (iii) presented the check with knowledge of the forged endorsement.

Finally, that defendant acted for the sake of gain or with the intent to defraud or injure another person was proven by competent evidence that Thomas had clearly refused to endorse the check to him, and that Falco refused to release the check to him on the morning of 10 November 1983 because of Thomas' dissatisfaction with the repairs performed by defendant. Also, defendant negotiated the falsely endorsed check and received the proceeds for his own purposes.

Although defendant testified that he received the check which bore Carol Thomas' endorsement in the mail on 10 November 1983, after his visit to Gay and Taylor, Inc., it is well-established that defendant's evidence, unless favorable to the State, is not to be taken into consideration in ruling on a motion to dismiss, *State v. Bell*, 311 N.C. 131, 316 S.E. 2d 611 (1984), and all contradictions and discrepancies do not warrant dismissal, but are for the jury to resolve. *State v. Alston*, 310 N.C. 399, 312 S.E. 2d 470 (1984).

After careful examination of the record and applying well-established rules of law, we conclude that the evidence was suffi-

cient to go to the jury, and that defendant's motion was properly denied.

Affirmed.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. PATRICK SAMUEL SHEA

No. 8610SC116

(Filed 20 May 1986)

1. **Weapons and Firearms § 2— possession of firearm by felon—factual basis for guilty plea**

The prosecutor's statement that an automatic pistol was found in defendant's vehicle which was parked beside his house and an order signed on 16 April 1984 terminating defendant's probation for conviction of a felony was sufficient for the trial judge to determine that there was a factual basis for defendant's plea of guilty of possession of a firearm in violation of N.C.G.S. § 14-415.1.

2. **Criminal Law § 140.3— consecutive sentences proper**

The trial court did not violate the Fair Sentencing Act in imposing consecutive sentences. N.C.G.S. § 15A-1354(a).

3. **Criminal Law § 138.6— severity of sentence—proper basis**

There was no merit to defendant's contention that sentences imposed upon him were improper because they were based on erroneous information supplied to the court by the prosecutor, since the record disclosed that the court did not consider the information in question in imposing defendant's sentences.

APPEAL by defendant from *Barnette, Judge*. Judgments entered 26 August 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 14 May 1986.

Defendant was charged in proper bills of indictment with felonious possession with intent to sell and deliver more than one ounce of marijuana and with felonious possession of a firearm by a felon. On 26 August 1985, defendant entered a plea of guilty as to each charge. From judgments imposing prison sentences of five years for possession with intent to sell and deliver marijuana and two years for possession of a firearm by a felon and ordering that the sentences run consecutively, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Wayne Eads and G. Henry Temple, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant contends that the trial court erred in accepting defendant's plea of guilty as to the charge of felonious possession of a firearm. G.S. 15A-1022(c) provides, in pertinent part, that "[t]he judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea." This statute further provides that this determination may be based upon a statement of the facts by the prosecutor. Defendant argues that the statement of facts given by the prosecutor at the sentencing hearing was insufficient to support the determination of the sentencing judge that there was a factual basis for the guilty plea. We disagree.

G.S. 14-415.1 provides, in pertinent part, as follows:

> (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 . . . within five years from the date of such conviction, or the unconditional discharge from a correctional institution, or termination of a suspended sentence, probation, or parole upon such conviction, whichever is later.
>
> . . . .
>
> Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business.

At the sentencing hearing in the present case, the prosecutor stated that following a search of defendant's residence pursuant to a search warrant, Special Agent Turbeville of the State Bureau of Investigation located a Browning .380 automatic pistol, a firearm which has a barrel length of less than 18 inches and an overall length of less than 26 inches, in a Chevrolet Blazer which was

parked next to defendant's residence and was registered to defendant. The State also produced an order signed on 16 April 1984 terminating defendant's probation for conviction of a felony. This information indicating that defendant had possession of a firearm outside of his home or place of business within five years from the termination of probation for a felony conviction was sufficient for the trial judge to determine that there was a factual basis for defendant's plea of guilty of possession of a firearm in violation of G.S. 14-415.1.

Defendant assigns error to the trial court's failure to find as mitigating factors that defendant reasonably believed that his possession of the firearm was legal and that prior to arrest or at an early stage of the criminal process, defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. Defendant presented no evidence at the sentencing hearing. Defendant contends that statements made by the prosecutor establish these factors in mitigation. These statements by the prosecutor were not competent evidence, and the trial court, therefore, did not err in failing to find these mitigating factors. *See State v. Crouch*, 74 N.C. App. 565, 328 S.E. 2d 833 (1985). This assignment of error is without merit.

[2] Defendant's next assignment of error is set out in the record as follows:

> The trial court erred and abused its discretion by imposing a sentence which violated the provisions of the Fair Sentencing Act by both imposing the maximum penalty rather than the presumptive penalty, and then running a second conviction consecutive to that first sentence, thus enhancing the punishment twice based on the same single aggravating factor.

Defendant concedes in his brief that the trial court did not err in imposing the maximum rather than the presumptive sentence for the charge of possession of marijuana with the intent to sell and deliver. Defendant contends, however, that the trial court improperly "enhanced" the total sentence by ordering that the second sentence for the charge of possession of a firearm by a felon run consecutively to the first sentence. Defendant's argument is without merit. G.S. 15A-1354(a) provides that the trial court has the authority to determine whether sentences shall run con-

secutively or concurrently when multiple sentences are imposed. The court retained this discretion to impose consecutive sentences after the enactment of the Fair Sentencing Act. *State v. Ysaguire*, 309 N.C. 780, 309 S.E. 2d 436 (1983). Thus, the trial court did not err in imposing consecutive sentences in the present case.

[3] Defendant's final assignment of error is set out in the record as follows: "The sentences imposed herein are unconstitutional in that they were based, in whole or in part, on erroneous or improper information submitted to the trial court at the time of sentencing." Defendant contends that the prosecutor's statement at the sentencing hearing that defendant was on probation at the time of the offense was erroneous and his statement that defendant's possession of a handgun that was found in his bedroom was a violation of federal law was improper. Defendant argues that the sentencing judge considered this information in imposing defendant's sentence and, therefore, that the case should be remanded for resentencing. We disagree. Assuming *arguendo* that the statements made by the prosecutor were erroneous or improper, the record discloses that the sentencing judge did not consider this information in imposing defendant's sentences. The sentencing judge stated in open court, "[a]s to the possession . . . of marijuana with intent to sell the Court would find as an aggravating factor of his prior record that he has been convicted on at least two occasions prior to this of offenses in which the maximum sentence exceeds sixty days." This is the only aggravating factor found by the court. Thus, any erroneous statements made by the prosecutor did not prejudice defendant.

No error.

Judges EAGLES and COZORT concur.

IN THE MATTER OF: COMPUTER TECHNOLOGY CORPORATION

No. 8526SC350

(Filed 20 May 1986)

Criminal Law § 80.2; Process § 6— order to make records available to prosecutor— sufficient showing

Evidence of fraud and irregularities in the purchasing of electronic and computer parts, equipment, and services by the City of Charlotte was sufficient to show reasonable grounds to suspect that a violation of the criminal law occurred and that the records sought from a company dealing in computer systems and electronic equipment were likely to bear upon the investigation of the crime, and the trial court could therefore properly order that the requested records be made available to the district attorney.

ON rehearing pursuant to the 18 February 1986 Order of the Supreme Court of North Carolina directing that this cause be reconsidered in light of *In re Superior Court Order*, 315 N.C. 378, 338 S.E. 2d 307 (1986). Originally heard in the Court of Appeals 17 October 1985.

The Charlotte Police Department initiated an investigation into the possibility of fraud and irregularities in the purchasing of electronic and computer parts, equipment, and services by the City of Charlotte. In furtherance of that investigation, the District Attorney sought an *ex parte* order from the superior court directing officials of Computer Technology Corporation (hereinafter Computer Technology) to make available records pertaining to its transactions with two other corporations and the City of Charlotte. The District Attorney gave as grounds that the records were "necessary to the investigation [and] . . . for a proper administration of justice." Based on the verified petition and an attached affidavit, the court found that the best interest of law enforcement and the administration of justice required the production of the information. The court therefore ordered Computer Technology to make available the requested records.

This process was subsequently served on an official of Computer Technology on 1 February 1985. Through a motion filed 4 February 1985, Computer Technology sought a stay of the order. The motion was denied. Computer Technology then timely filed notice of appeal and sought from this Court a temporary stay and a writ of supersedeas which were allowed. On 17 December 1985,

this Court filed an opinion in this cause affirming the superior court and dissolving the writ of supersedeas. 78 N.C. App. 402, 337 S.E. 2d 165 (1985). This decision was based upon *In re Superior Court Order*, 70 N.C. App. 63, 318 S.E. 2d 843 (1984), in which this Court had held that a superior court, as a court of general jurisdiction, possesses the inherent power under the common law to issue a subpoena duces tecum where the interests of justice so required. On 7 January 1986, the Supreme Court reversed this Court's opinion in *In re Superior Court Order* and held that though a superior court does possess the inherent power to issue a subpoena duces tecum, the State had presented insufficient facts to show reasonable grounds to suspect a crime had been committed and that the records sought were likely to bear upon the investigation of that crime. On 18 February 1986, the Supreme Court remanded this cause of action for reconsideration in light of the *In re Superior Court Order* decision.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Daniel C. Higgins, for the State.

Casstevens, Hanner & Gunter, by Nelson M. Casstevens, Jr., Marc R. Gordon and W. David Thurman, for appellant.

ARNOLD, Judge.

The Supreme Court in *In re Superior Court Order* provided that for the court to issue an order such as the one in this case, the State "must present to the trial judge an affidavit or similar evidence setting forth facts or circumstances sufficient to show reasonable grounds to suspect that a crime has been committed, and that the records sought are likely to bear upon the investigation of that crime." 315 N.C. at 381, 338 S.E. 2d at 310. The court reasoned that with this minimum evidence before it, "the trial court can make an independent decision as to whether the interests of justice require the issuance of an order rather than relying solely upon the opinion of the prosecuting attorney." *Id.*

In this case, we have examined the petition by the district attorney and the affidavit of an investigator with the Charlotte Police Department. Both the petition and the affidavit were submitted to the superior court for its consideration. The affidavit sets forth the following: John I. Clark was employed by the City of Charlotte as a supervisor in the Department of Transportation.

His duties included writing specifications for computers and traffic control devices to be purchased by the City of Charlotte. Clark owned 100 percent of Digital Dynamics Corporation (hereinafter Digital Dynamics), a corporation dealing in electronic equipment. Clark was also the dealer for another such company, Alpha Micro Systems. Richard A. Archer was hired as an employee and officer of Digital Dynamics, and he also formed another corporation, Computer Technology, to deal in computer systems and electronic equipment. Archer began to sell parts, equipment, and services to the City of Charlotte through Computer Technology. The parts and equipment purchased from Computer Technology by the City came from Alpha Micro Systems through its local dealer Digital Dynamics.

We believe this affidavit provides sufficient facts and circumstances to show reasonable grounds to suspect a violation of the criminal law, including but not limited to G.S. 14-353, and that the records sought are likely to bear upon the investigation of the crime. The State presented sufficient evidence to enable the trial court to make an independent decision as to whether the interests of justice required the issuance of the order, and we therefore affirm the order of the trial court.

The other aspects of our previous opinion in this cause are not affected by the Supreme Court's ruling in *In re Superior Court Order.*

Affirmed.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. CLEVELAND RANSOM

No. 8612SC33

(Filed 20 May 1986)

Criminal Law § 138.11 — remand — stiffer sentence improper — method of consolidating convictions changed — no error

While N.C.G.S. § 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand.

State v. Ransom

APPEAL by defendant from *Herring, Judge.* Judgments entered 19 July 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 7 May 1986.

Defendant was indicted on twenty counts of breaking or entering and twenty counts of larceny. He pled guilty to thirteen counts of breaking or entering and thirteen counts of larceny. The remaining counts were dismissed. The trial court consolidated all the charges for the purpose of sentencing. The trial court found as an aggravating factor that defendant had a prior conviction for a criminal offense punishable by more than 60 days confinement. The trial court found no mitigating factors and sentenced defendant to twenty years confinement on 21 March 1984.

On 29 March 1984 the State made a motion for appropriate relief on the grounds that the trial court intended to consolidate the bills of indictment rather than the offenses for sentencing. On 16 April 1984 the trial court found patent error in the judgment of 21 March 1984 and struck that judgment. The court then consolidated the breaking or entering charges and sentenced defendant to ten years imprisonment, and consolidated the larceny charges and sentenced defendant to another ten year prison term to begin at the expiration of the first ten-year term.

Defendant appealed and this Court reversed in an opinion reported as *State v. Ransom*, 74 N.C. App. 716, 329 S.E. 2d 673 (1985). This Court held that the trial court was without jurisdiction to grant the State's motion for appropriate relief and that the original sentence was in error because it consolidated crimes punishable by a maximum sentence of ten years yet sentenced defendant to twenty years in violation of G.S. 15A-1340.4(b). Upon remand, the superior court sentenced defendant to three years imprisonment for each of five pairs of breaking or entering and larceny convictions. The court consolidated the remaining eight breaking or entering convictions and the remaining eight larceny convictions and sentenced defendant to one more three year prison term. From denial of defendant's motion to limit the sentence imposed to ten years and denial of defendant's motion for appropriate relief, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sueanna P. Peeler, for the State.

Beaver, Thompson, Holt & Richardson, P.A., by F. Thomas Holt, III, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant contends that G.S. 15A-1335 and G.S. 15A-1340.4 prohibited the trial court from sentencing defendant to more than ten years imprisonment. G.S. 15A-1335, which generally embodies the holding in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), provides as follows:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

G.S. 15A-1340.4(b) describes the three sets of circumstances under which a trial judge may impose a sentence other than the presumptive sentence. Under G.S. 15A-1340.4(b) a trial court may impose a sentence other than the presumptive term when convictions are consolidated for judgment as long as the sentence imposed does not exceed the total of the presumptive terms for each felony consolidated, does not exceed the maximum term for the most serious felony consolidated and is not shorter than the presumptive term for the most serious felony consolidated.

Defendant contends he may not be sentenced to more than ten years imprisonment because all of his convictions were consolidated during the first sentencing hearing and the maximum term for the most serious felony consolidated was ten years. Defendant raises the issue of whether the trial court is bound by its decision to consolidate convictions for sentencing when a case is reversed and remanded for resentencing.

While G.S. 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand. Defendant was originally given a twenty year prison

sentence. After the twenty year sentence was overturned, defendant was sentenced to six three-year prison sentences or a total of eighteen years imprisonment. We hold that the trial court did not err in changing the way defendant's convictions were consolidated and that the sentence imposed does not violate G.S. 15A-1335. Defendant's assignments of error are overruled.

Affirmed.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. JACK RANDALL ELLEDGE

No. 8523SC1120

(Filed 20 May 1986)

Criminal Law § 34.4— communicating threats—evidence of prior offenses—admissibility

In a prosecution of defendant for communicating threats to his estranged wife, the trial court did not err in allowing testimony that defendant had broken into his wife's house and assaulted her on earlier occasions, since the evidence was admissible to show that the threats in question were made in a manner and under circumstances which would cause a reasonable person to believe that the threats were likely to be carried out and the person threatened believed they would be carried out. N.C.G.S. 8C-1, Rule 404(b).

APPEAL by defendant from *Wood, Judge.* Judgment entered 11 June 1985 in Superior Court, WILKES County. Heard in the Court of Appeals 13 February 1986.

Attorney General Thornburg, by Assistant Attorney General Edmond W. Caldwell, Jr. and Special Deputy Attorney General Charles J. Murray, for the State.

Ferree, Cunningham & Gray, by William C. Gray, Jr., for defendant appellant.

PHILLIPS, Judge.

Following appeal from the District Court and a trial *de novo* in the Superior Court defendant was convicted of the misde-

meanor of communicating threats to his estranged wife in violation of G.S. 14-277.1. The State's evidence, in gist, tended to show that: He had broken into her house and assaulted her on previous occasions and about 4 o'clock in the morning on 1 December 1984 he telephoned her stating, among other things, "that I had better get that man out of my bed or he was going to come down and blow my brains out" and "that he would bring the Northwest Housing Authority to throw me out." None of defendant's four assignments of error have merit and two of them have no basis in the record. The assignment asserting that the court erred in refusing to let defendant's mother testify as to the condition of a door that defendant purportedly damaged on an earlier occasion is not supported by an offer of proof showing what her testimony would have been. *State v. Satterfield*, 300 N.C. 621, 268 S.E. 2d 510 (1980). And the assignment contending that the court erred in charging the jury is not supported by an objection to the charge, though the record shows that defendant was given the opportunity to object before the jury retired to consider the case. Rule 10(b)(2), N.C. Rules of Appellate Procedure. Furthermore, the portion of the charge now complained of was an accurate summary of the State's evidence and contentions concerning defendant's telephone call.

The defendant did object though to testimony that he had assaulted his wife on other occasions and contends that this evidence was erroneously received to his prejudice. We disagree. As pointed out in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954), it has long been our law that evidence which reasonably tends to prove a material fact in issue is not to be rejected merely because it also tends to show that the defendant had committed another crime. In enacting the Evidence Code, Chapter 8C of the General Statutes, this long followed principle was brought forward by Rule 404(b), which expressly provides that evidence of other crimes, wrongs or acts may be admissible for purposes other than proving the character of a person. The crime of communicating threats under G.S. 14-277.1 involves more than making a threat to injure one's person or property and communicating it to the other person; it is also necessary, as the statute expressly provides, that the threat was made "in a manner and under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out" and that "[t]he person

threatened believes that the threat will be carried out." Evidence that on earlier occasions defendant had broken into his wife's house and assaulted her certainly tended to prove these two elements of the offense and its receipt did not violate Rule 404(b) of the N.C. Rules of Evidence, as defendant contends. All that Rule 404(b) forbids is receiving evidence of other crimes, wrongs or acts to "prove the character of a person in order to show that he acted in conformity therewith." The evidence in question was not received to prove defendant's character; it was received to prove two facts necessary for his conviction.

Defendant's other assignment concerns an out of court statement purportedly made by a doctor in committing defendant to Broughton Hospital for observation after his wife "took out the papers to put in D-tox," a 24-hour holding facility for alleged drug and alcohol addicts awaiting a hearing. While defendant objected to the statement that he was "too violent" for the detoxification unit, that defendant was sent to Broughton Hospital and his wife's testimony that he "jumped on the doctors" who made the statement were not objected to. Assuming *arguendo* that the statement was improper hearsay, in our opinion it merely supplemented and explained information that the jury already had and could not have affected their verdict. *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980).

No error.

Judges ARNOLD and EAGLES concur.

YADKIN VALLEY BANK AND TRUST COMPANY, JOHN EVERETT HUTCHINSON AND RUTH LAURA DAVIS HUTCHINSON v. NORTHWESTERN BANK, CHORE-BOY, INC., DAIRYMEN, INC. AND LINDA McGEE, TRUSTEE

No. 8523SC1378

(Filed 20 May 1986)

Judgments § 38— U.S. District Court judgment as res judicata

A U.S. District Court judgment was *res judicata* as to plaintiffs' claim that defendants wrongfully removed equipment from plaintiffs' farm after plaintiffs had instituted bankruptcy proceedings.

Yadkin Valley Bank and Trust Co. v. Northwestern Bank

APPEAL by plaintiffs from *Rousseau, Judge*. Order entered 9 August 1985 in Superior Court, WILKES County. Heard in the Court of Appeals 14 May 1986.

This is a civil action wherein plaintiffs seek to recover damages from defendants alleging that defendant Chore-Boy, Inc., as instructed by defendant Northwestern Bank and defendant Dairymen, Inc., negligently removed dairy equipment from a farm owned by plaintiffs Hutchinsons, after the Hutchinsons had instituted bankruptcy proceedings. Plaintiffs alleged that defendants removed the equipment in violation of the automatic stay provision of 11 U.S.C. Sec. 362. Plaintiffs further alleged that defendants' conduct constituted unfair and deceptive trade practices and sought treble damages pursuant to G.S. 75-16 and attorney's fees pursuant to G.S. 75-16.1. On 14 June and 21 June 1985, defendants Dairymen, Inc., Northwestern Bank and Chore-Boy, Inc., filed motions for summary judgment. On 9 August 1985, after a hearing, the trial judge entered an order granting defendants' motions for summary judgment. Plaintiffs appealed.

Daniel J. Park for plaintiffs, appellants.

Barnett & Alagia, by David B. Perkins, Jr., and Brooks, Pierce, McLendon, Humphrey & Leonard, by Mack Sperling, for defendant, appellee, Dairymen, Inc.

Petree Stockton & Robinson, by Dudley Humphrey and Robert E. Price, Jr., for defendants, appellees, Northwestern Bank and Chore-Boy, Inc.

HEDRICK, Chief Judge.

The record before us affirmatively discloses that plaintiffs filed an adversary proceeding in the United States Bankruptcy Court for the Middle District of North Carolina alleging that defendants Dairymen, Inc., Northwestern Bank, and Chore-Boy, Inc., had negligently violated an automatic stay in bankruptcy by removing dairy equipment from a farm operated by plaintiffs Hutchinsons and that defendants' conduct constituted an unfair and deceptive trade practice. On 19 October 1984, United States Bankruptcy Judge James B. Wolfe, Jr., entered an order dismissing plaintiffs' complaint against defendants Dairymen, Inc., Northwestern Bank and Chore-Boy, Inc. On 5 June 1985, the judgment

of the bankruptcy court was affirmed by United States District Judge Frank W. Bullock, Jr. We hold that the judgment of the United States District Court is res judicata as to plaintiffs' claim. The record discloses an insurmountable bar to plaintiffs' claim and therefore the trial court's entry of summary judgment for defendants was proper.

Affirmed.

Judges ARNOLD and EAGLES concur.

CHARLES W. SWISHER, D/B/A ACCREDITED TESTING SERVICES v. AMERICAN HOME ASSURANCE COMPANY

No. 8510DC1345

(Filed 20 May 1986)

Physicians, Surgeons and Allied Professions § 1— employment of unlicensed psychologist—guilty knowledge not required

There is no requirement of guilty knowledge in N.C.G.S. §§ 90-270.16(c) and 90-270.17 making it a misdemeanor for a psychologist to employ a psychologist who does not possess a valid license.

APPEAL by plaintiff from *Redwine, Judge*. Order granting defendant's motion for summary judgment entered 8 October 1985 in District Court, WAKE County. Heard in the Court of Appeals 7 May 1986.

This is a civil action wherein plaintiff seeks to recover from defendant, plaintiff's insurer, $2,250.00 allegedly repaid to the State of North Carolina for services allegedly performed for the State by an unlicensed psychologist employed by and working with plaintiff. This matter came on for hearing before Judge Redwine, District Court Judge, on defendant's motion for summary judgment.

The evidentiary matter considered by the court in support of and in opposition to the motion discloses the following: Plaintiff, the proprietor of a psychological testing service, employed Dr. Richard Coleman to perform psychological evaluations. Plaintiff contracted to provide psychological testing for the North Carolina

Department of Human Resources. On 18 September 1984 the Department of Human Resources demanded that plaintiff refund $2,250.00 paid by the Department for services rendered by Dr. Coleman because Dr. Coleman was unlicensed to engage in the practice of psychology. Plaintiff allegedly refunded the money paid by the State for Dr. Coleman's services and submitted an insurance claim to defendant. When defendant refused to pay the claim plaintiff instituted this action.

On 8 October 1985, the trial court entered summary judgment for defendant. Plaintiff appealed.

Milford K. Kirby for plaintiff, appellant.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and William A. Blancato, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff first contends that the trial court should have granted plaintiff's motions for default judgment and to strike defendant's motion to dismiss.

The determination of whether an adequate basis exists for setting aside the entry of default rests in the sound discretion of the trial judge. *Byrd v. Mortenson*, 308 N.C. 536, 302 S.E. 2d 809 (1983). Default judgments are not favored, and all doubt should be resolved in favor of setting aside entry of default. *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E. 2d 735 (1970). We hold that the trial court did not abuse its discretion in setting aside entry of default.

We need not address the propriety of denying plaintiff's motion to strike defendant's motion to dismiss. Because the trial court did not err in setting aside entry of default and never ruled on defendant's motion to dismiss, the trial court's ruling on plaintiff's motion to strike could not have prejudiced plaintiff. *See Peebles v. Moore*, 302 N.C. 351, 275 S.E. 2d 833 (1981); *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E. 2d 664 (1985).

Plaintiff also argues that the trial court erred in granting summary judgment for defendant. The insurance contract between plaintiff and defendant explicitly states: "This policy does not apply: (a) To any criminal, fraudulent or malicious act or omis-

sion of the Insured . . . ." G.S. 90-270.16(c) and G.S. 90-270.17 make it a misdemeanor for a psychologist to employ a psychologist who does not possess a valid license. Both parties admit that Dr. Swisher employed Dr. Coleman as a psychologist while Dr. Coleman was unlicensed. Plaintiff contends that the policy provision and the two statutes do not create an insurmountable bar to his claim because the two statutes are not violated unless a psychologist *knowingly* employed an unlicensed psychologist. There is no such requirement of knowledge explicit or implicit in G.S. 90-270.16. *See State v. Hales*, 256 N.C. 27, 122 S.E. 2d 768 (1961); *State v. Curie*, 19 N.C. App. 17, 198 S.E. 2d 28 (1973); 1 *Wharton's Criminal Law* Sec. 23 (C. Torcia 14th ed. 1978). Summary judgment for defendant is affirmed.

Affirmed.

Judges EAGLES and COZORT concur.

IN THE MATTER OF: THE ESTATE OF JEWELL F. COLE, DECEASED

No. 8611SC5

(Filed 20 May 1986)

Executors and Administrators § 5— appointment of administrator C.T.A.—no notice to those with higher preference of appointment

The clerk of superior court could properly remove respondent as administrator C.T.A. where petitioner had a higher preference of appointment in that she was an heir and a beneficiary under the will, and no notice of the appointment of respondent was given to those with a higher preference of appointment as required by N.C.G.S. § 28A-4-1.

APPEAL by respondent from *Clark (Giles R.), Judge.* Judgment entered 25 October 1985 in Superior Court, LEE County. Heard in the Court of Appeals 8 May 1986.

The respondent Richard B. Hager appeals from an order of the superior court which affirmed an order by the acting clerk of superior court revoking letters of administration granted him. The respondent was appointed administrator C.T.A. of the estate of Jewell Cole on 16 April 1985. On 14 June 1985 Essie M. Shea-

han petitioned the court for revocation of the respondent's appointment.

The acting clerk of superior court held a hearing on Essie M. Sheahan's petition. The evidence at this hearing showed that by a will dated 27 January 1976 Jewell Cole nominated Orton J. Cameron as executor of her will. Jewell Cole died on 22 July 1984 and her will was probated on 16 April 1985. Orton J. Cameron renounced his right to administer the estate and asked that the respondent be appointed administrator C.T.A., which was done. No notice was given to the heirs or beneficiaries under the will that the respondent had applied for letters of administration. The will contained no provision for a substitute or successor executor or for the authority for anyone to nominate an executor. The respondent is not an heir of Jewell Cole or a beneficiary under her will. Essie M. Sheahan is the sister of Jewell Cole and a beneficiary under her will.

The acting clerk of superior court made findings of fact in accordance with the evidence and entered an order revoking the letters of administration C.T.A. The superior court affirmed this order and the respondent appealed.

Love & Wicker, P.A., by Jimmy L. Love, for petitioner appellee.

Hager & Kinnaman, P.A., by James W. Herring, Jr., for respondent appellant.

WEBB, Judge.

The respondent argues that he was properly appointed administrator C.T.A. and it was error to remove him. G.S. 28A-6-2(1) provides that letters of administration may not be issued to a person who does not have priority of appointment under G.S. 28A-4-1 without notice to all persons who have a higher preference of appointment. The appellee in this case is an heir at law and beneficiary under the will of Jewell Cole. She had a higher preference of appointment than respondent. The respondent should not have been appointed without notice to the petitioner and it was not error for the clerk to correct this error by removing the respondent as administrator C.T.A.

The appellant argues that G.S. 28A-4-1(b) sets forth the priority of those to whom letters of administration may be issued but provides that the clerk may deviate from this priority if in his discretion he "determines that the best interests of the estate otherwise require." He contends that there was no showing that he was not qualified to serve or that the clerk abused her discretion by appointing him. We do not reach this argument. Conceding that the respondent is well qualified to serve as administrator C.T.A. and that the clerk could in her discretion appoint him, the petitioner would nevertheless be entitled to notice before the appointment was made. She did not receive this notice.

The appellant also argues that the petitioner is not qualified to serve as administrator C.T.A. under G.S. 28A-4-2(4) because she is a non-resident of this state who has not appointed a process agent. We are not concerned in this case with the qualification of petitioner. Whether she can be appointed has no effect on our holding that it was not error to remove the respondent.

Affirmed.

Judges WHICHARD and JOHNSON concur.

JAMES EDGAR TYNDALL v. DEBORAH TYSON TYNDALL

No. 854DC1289

(Filed 20 May 1986)

Divorce and Alimony § 24.5— child support—showing of changed circumstances required

When the parties' child support agreement was incorporated into their divorce judgment, it became an order of the court which was modifiable only upon a showing of changed circumstances, and there was no merit to defendant's contention that the child support issue should have been determined without regard to previous circumstances.

APPEAL by defendant from *Williamson, Judge*. Order entered 26 August 1985 in District Court, SAMPSON County. Heard in the Court of Appeals 16 April 1986.

Benjamin R. Warrick for plaintiff appellee.

Bryan, Jones, Johnson & Snow, by Robert C. Bryan, for defendant appellant.

PHILLIPS, Judge.

The parties were formerly husband and wife. After separating they executed a property division and child support agreement, which was expressly incorporated into the divorce judgment rendered in this action on 15 January 1985. In pertinent part the agreement, executed on 7 December 1983, gave defendant custody of their two minor children and required plaintiff to pay $85 a week for their support. On 15 August 1985 defendant moved that the child support payments be increased. After a hearing thereon the court denied the motion, finding that the circumstances had not materially changed since the divorce judgment was entered. In appealing defendant does not contend that the circumstances concerning the needs of the children and plaintiff's ability to pay have changed since the divorce was granted; she contends rather that the finding is irrelevant, and that the child support issue should have been determined without regard to previous circumstances since that issue had not been adjudicated theretofore. This contention has no merit. When the parties' child support agreement was incorporated into the divorce judgment it became an order of court that is modifiable only as other judgments involving child custody and support are modifiable. *Walters v. Walters*, 307 N.C. 381, 298 S.E. 2d 338 (1983). No grounds for modifying the judgment having been presented, the court's refusal to disregard the terms of the judgment and make a new, independent determination was correct.

Affirmed.

Judges BECTON and COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 MAY 1986

CHESTON v. SEABOARD FOODS, INC. No. 8510IC1371	Ind. Comm. (I-9469)	Vacated & Remanded
EDMUNDS v. EDMUNDS No. 861DC14	Chowan (79CVD254)	Affirmed
HANES v. SPENCER No. 8521SC1363	Forsyth (83CVS2700)	Affirmed
HARDEE v. HARDEE No. 8512DC1242	Cumberland (84CVD1982)	Affirmed
HAYES v. HAYES No. 8526DC962	Mecklenburg (83CVD10316)	Affirmed in part, vacated in part and remanded.
IN RE DIGITAL DYNAMICS CORP. AND CARPHONICS, INC. No. 8526SC351	Mecklenburg	Affirmed
IN RE FORECLOSURE OF ESSA No. 8518SC917	Guilford (85SP47)	Affirmed
IN RE JACKSON No. 8526DC1235	Mecklenburg (84J47)	Affirmed
IN RE PACKERD AND FRANKLIN No. 855DC1151	New Hanover (85J0055)	No Error
KIMREY v. KIMREY No. 8619DC68	Randolph (85CVD973)	Affirmed
NAIL v. WILKINS No. 8518SC1110	Guilford (84CVS3794)	Affirmed
ROACH v. LUPOLI CONSTRUCTION CO. No. 8510IC1293	Ind. Comm. (044961)	Vacated & Remanded
STATE v. BLAKENEY No. 8526SC1302	Mecklenburg (85CRS12893)	No Error
STATE v. DYE No. 8520SC1380	Richmond (84CVS4822) (84CVS4823)	No Error
STATE v. EDWARDS No. 8515SC1365	Chatham (85CRS0414)	Affirmed

STATE v. GALLOWAY No. 8521SC1204	Forsyth (84CRS47597) (84CRS48685)	No Error
STATE v. HONEYCUTT No. 8527SC1355	Gaston (85CRS8604) (85CRS8606) (85CRS8608)	No Error
STATE v. IRBY No. 8528SC1376	Buncombe (85CRS14527) (85CRS14528)	No Error
STATE v. LUKER No. 8518SC1375	Guilford (82CRS22664) (82CRS22665) (82CRS22725) (82CRS22726)	No Error
STATE v. MORRISON No. 8527SC1295	Lincoln (81CRS4193) (81CRS4197)	No Error
STATE v. SIMMONS No. 8517SC1278	Rockingham (84CRS12868) (85CRS392)	No Error
STATE v. WOODWARD No. 8510SC955	Wake (84CRS52457)	Reversed
WALTER J. KLEIN COMPANY, LTD. v. THE CONDE NAST PUBLICATIONS, INC. No. 8526SC1291	Mecklenburg (83CVS8150)	Dismissed
WAYNESVILLE MOUNTAINEER, INC. v. MANEY No. 8530DC1180	Haywood (83CVD185)	No Error

APPENDIX

GUIDELINES FOR RESOLVING SCHEDULING CONFLICTS

GUIDELINES FOR RESOLVING SCHEDULING CONFLICTS

IN ORDER TO PROVIDE A UNIFORM STANDARD FOR THE RESOLUTION OF SCHEDULING CONFLICTS BETWEEN AND AMONG THE STATE AND FEDERAL TRIAL AND APPELLATE COURTS OF NORTH CAROLINA THE FOLLOWING GUIDELINES ARE HEREBY ESTABLISHED:

1. It shall be the duty of counsel, other than solo practitioners, to have another member of the firm reasonably well acquainted with the case to the end that, where practicable, substitution of counsel may be made in order to avoid conflict.

2. In resolving scheduling conflicts the following priorities should ordinarily prevail:

a. Appellate cases should prevail over trial cases;

b. The case in which the trial date has been first set (by published calendar, order or notice) should take precedence;

c. Criminal felony trials should prevail over civil trials;

d. Trials should prevail over motion hearings.

e. In resolving conflicts between the several divisions of the North Carolina General Court of Justice, the provisions of Rule 3, General Rules of Practice for the Superior and District Courts, shall control.

3. In addition to the above priorities, consideration should be given to the comparative age of the cases, their complexity, the estimated trial time, the number of attorneys and parties involved, whether the trial involves a jury, and the difficulty or ease of rescheduling.

4. It shall be the duty of an attorney promptly upon learning of a scheduling conflict to give written notice to opposing counsel, the clerk of all courts and the presiding judges, if known, in all cases, stating therein the circumstances relevant to a resolution of the conflict under these guidelines.

5. The judges of the courts involved in a scheduling conflict shall promptly confer, resolve the conflict, and notify counsel of the resolution.

6. If the judges of the courts involved are unable to resolve the conflict they shall so notify the chairman of the State-Federal Judicial Council of North Carolina. The chairman and vice-chair-

man of the State-Federal Judicial Council of North Carolina shall then resolve the conflict.

7. Nothing in these guidelines is intended to prevent courts from voluntarily yielding a favorable scheduling position, and judges of all courts are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts.

ADOPTED by the State-Federal Judicial Council of North Carolina on this the 20th day of June 1985.

J. RICH LEONARD
Secretary

Approved by the respective courts on the dates indicated.

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

July 8, 1985

HARRISON L. WINTER
Chief Judge

THE SUPREME COURT OF NORTH CAROLINA

July 26, 1985

JOSEPH BRANCH
Chief Justice

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

June 27, 1985

W. EARL BRITT
Chief Judge

THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

July 16, 1985

HIRAM H. WARD
Chief Judge

THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA

July 17, 1985

ROBERT D. POTTER
Chief Judge

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

ADVERSE POSSESSION

AGRICULTURE

APPEAL AND ERROR

APPEAL AND ERROR — Continued

§ 42.2. Presumptions with Respect to Record

The trial court was presumed correct in ruling that the three-year statute of limitations did not apply to an action arising from an automobile collision where the insurance policy was not made a part of the record on appeal. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 370.

ARBITRATION AND AWARD

§ 9. Attack of Award

The superior court did not err by denying respondent's motion for an order permitting it to depose the arbitrator because the arbitrator had appeared as an expert witness for clients in the opposing counsel's former law firm. *Turner v. Nicholson Properties, Inc.*, 208.

The superior court did not err by confirming an arbitration award. *Ibid.*

ASSAULT AND BATTERY

§ 5.1. Assault with Intent to Kill

A charge of assault with a deadly weapon with intent to kill was not merged into an armed robbery charge. *S. v. Alston*, 540.

§ 14.4. Sufficiency of Evidence of Assault with Intent to Kill Inflicting Serious Injury

The State's evidence was sufficient to support defendant's conviction of assault with a deadly weapon inflicting serious injury. *S. v. Vaught*, 486.

§ 15.7. Instruction Not Required on Self-Defense

The trial court did not err by denying defendant's request for a self-defense instruction in an assault prosecution. *S. v. Bryant*, 63.

§ 16.1. Submission of Lesser Offenses Not Required

Where the evidence in a prosecution for assault with a deadly weapon tends to show assault on a female at least, the trial court does not err in failing to submit the question of guilt of simple assault. *S. v. Patton*, 302.

ATTORNEYS AT LAW

§ 5.1. Liability for Malpractice

Plaintiff's claim against defendant attorney for negligent representation in negotiating a separation agreement in which plaintiff relinquished her claim to alimony was barred by an election of remedies when plaintiff pursued her claim for alimony by hiring another attorney who filed a counterclaim for alimony and negotiated a new alimony agreement. *Stewart v. Herring*, 529.

AUTOMOBILES AND OTHER VEHICLES

§ 23.1. Defects in Brakes

The trial court did not err in excluding defendants' evidence of defective brakes where they did not plead that defense in their answer. *Hinson v. Brown*, 661.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 45.3. Evidence of Conduct Subsequent to Accident

Evidence that plaintiff contacted his lawyer before he did his doctor following the accident and that defendant has brought two actions against other persons claiming serious injuries was relevant on questions of defendant's credibility and the severity of his injuries. *Thompson v. James*, 535.

§ 55.2. Driving without Lights

The evidence supported a directed verdict against defendant Walters in an automobile collision case where the evidence was sufficent to support a finding that Walters caused the accident by driving in the dark without lights. *Mobley v. Hill and Darden v. Hill*, 79.

§ 88. Sufficiency of Evidence of Contributory Negligence Generally

The trial court did not err in an action arising from an automobile accident by refusing to instruct on contributory negligence and duty to keep a proper lookout. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 370.

§ 90.11. Failure to Instruct on Unavoidable Accident or Sudden Emergency

The trial court erred in an action arising from an automobile accident by refusing to submit to the jury an issue concerning a latent defect in defendant's brakes. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 370.

§ 117.1. Sufficiency of Evidence in Prosecution for Speeding

Defendant's motions to dismiss a speeding charge were properly denied. *S. v. Jenkins*, 491.

§ 117.2. Instructions in Prosecution for Speeding

Defendant was entitled to a new trial on a speeding charge where the court's response to a jury question implied that proof by either radar or observation would be sufficient. *S. v. Jenkins*, 491.

§ 122. "Highway" within Purview of Driving while Impaired Statute

A grassy area of a public park which was legally used for parking during a special event was a "public vehicular area" within the meaning of the driving while impaired law. *S. v. Carawan*, 151.

§ 126.2. Driving while Impaired; Competency of Blood Tests Generally

The results of a blood test done within minutes of defendant's arrival at an emergency room were relevant to the issue of defendant's intoxication, constituted a record made in the usual course of business, were properly identified, and were inherently reliable. *S. v. Miller*, 425.

BASTARDS

§ 10. Civil Action by Illegitimate Child to Compel Father to Furnish Support

Defendant waived the defense of laches in a paternity and child support action by failing to plead such defense, and no statute of limitations barred the action. *Bertie-Hertford Child Support ex rel. Souza v. Barnes*, 552.

BILLS OF DISCOVERY

§ 6. Compelling Discovery

The trial court did not err in admitting a bill of sale and an odometer statement for a car used in a robbery although the court had previously suppressed

CONSPIRACY — Continued

§ 4.1. Sufficiency of Indictment

Indictments were insufficient to charge defendants with conspiracy to commit larceny. *S. v. Fie*, 577.

§ 5.1. Admissibility of Statements of Coconspirators

The trial court did not err in a prosecution for conspiracy and armed robbery by admitting testimony that a codefendant had offered a witness $100 to transport him to Fayetteville on the evening of the robbery. *S. v. Brewington and S. v. Norris*, 42.

CONSTITUTIONAL LAW

§ 18. Right of Free Speech

Petitioner's First Amendment right of free speech was not violated by his dismissal as Director of Student Activities at the N. C. School of the Arts because of his role in assembling a meeting of division directors to discuss complaints about their superior. *Leiphart v. N. C. School of the Arts*, 339.

§ 24.7. Service of Process and Jurisdiction over Foreign Corporations and Nonresident Individuals

The participation of defendants in the drafting of a North Carolina partnership agreement and the supervision of the closing of a transaction by the partnership within North Carolina was conduct involving the protection of the law of this state to such an extent that application of the long arm statute was constitutional. *Park Avenue Partners v. Johnson*, 537.

§ 26.1. Full Faith and Credit; Foreign Judgments Obtained without Jurisdiction

The superior court properly refused to give full faith and credit to a default judgment entered against defendant in California where defendant did not have sufficient contacts with California to allow a court of that state to exercise personal jurisdiction over him. *Erlich Foods International v. 321 Equipment Co.*, 71.

§ 26.5. Full Faith and Credit; Child Support

Florida judgments awarding defendant arrearages in child support and alimony and awarding her attorney's fees were entitled to full faith and credit. *Boozer v. Wellman*, 673.

§ 40. Right to Counsel Generally

Defendant's counsel satisfied the requirements of *Anders v. California. S. v. Taylor*, 500.

§ 45. Right to Appear Pro Se

The trial court did not err in denying defendant's motion to remove his attorney because defendant had not yet fully paid counsel fees. *S. v. David*, 327.

§ 48. Effective Assistance of Counsel

Defendants were not denied effective assistance of counsel where the same counsel represented both defendants. *S. v. Brewington and S. v. Norris*, 42.

§ 63. Exclusion from Jury for Death Penalty Views

Defendant's constitutional rights were not violated by the court's exclusion of potential jurors for cause on the basis of their death penalty views. *S. v. Davis*, 143.

CONSTITUTIONAL LAW — Continued

§ 70. Right of Confrontation; Cross-examination of Witnesses

The admission of blood test results in an involuntary manslaughter prosecution arising from an automobile accident did not violate defendant's right to confront a witness. *S. v. Miller*, 425.

CONTRACTS

§ 21.3. Sufficiency of Performance; Anticipatory Breach

Plaintiff was not required to show that it had complied with conditions precedent in order to recover against defendant for breach of contract where defendant had repudiated the contract. *Pee Dee Oil Co. v. Quality Oil Co.*, 219.

§ 27.1. Sufficiency of Evidence of Existence of Contract

The evidence was sufficient to support a finding that defendant company entered a valid written contract to purchase certain assets of plaintiff. *Pee Dee Oil Co. v. Quality Oil Co.*, 219.

The evidence and findings required a conclusion by the trial court that defendant attorney breached a contract with plaintiff to reimburse plaintiff from the proceeds of a client's personal injury claim if plaintiff would make monthly mobile home payments on behalf of the client. *Forbes Homes, Inc. v. Trimpi*, 418.

§ 27.2. Sufficiency of Evidence of Breach of Contract

Plaintiff breached a contract to supply fuel oil to the State by basing its price on the posted price of its supplier rather than on the price it was actually paying for the oil. *F. Ray Moore Oil Co., Inc. v. State of N. C.*, 139.

Genuine issues of material fact existed as to whether the parties intended that their distribution agreement would be terminable at will, and, if not, whether defendant had the right to terminate because of plaintiff's failure to maintain purchases at an agreed upon level. *Parker Marking Systems, Inc. v. Diagraph-Bradley Industries, Inc.*, 177.

§ 29. Measure of Damages Generally

The jury's verdict awarding defendants only $1.00 for a one-half interest in certain property was unsupported by the evidence, and the trial court therefore erred in denying defendants' motion for a new trial. *Myers v. Catoe Construction Co.*, 692.

§ 29.1. Measure of Damages under Contractual Provisions

The trial court's consideration of "margins of profit" did not violate a provision of the parties' distributorship agreement that defendant shall not be liable for any loss of profits by plaintiff. *Bowles Distributing Co. v. Pabst Brewing Co.*, 588.

§ 29.2. Calculation of Compensatory Damages

The trial court erred in awarding plaintiff $195,000 as compensatory damages for breach of a franchise agreement by refusing to fill plaintiff's order for a particular product where the award was based on the erroneous assumption that plaintiff's right to sell the product in question was exclusive. *Bowles Distributing Co. v. Pabst Brewing Co.*, 588.

CORPORATIONS

§ 16. Sale of Capital Stock

Plaintiff was not entitled to a distribution of retained earnings to shareholders in a surgical clinic where plaintiff never bought a share of stock in the clinic as re-

CRIMINAL LAW — Continued

§ 82.2. Physician-Patient Privilege

The admission of the results of defendant's blood test in a prosecution for involuntary manslaughter arising from an automobile accident did not violate the physician-patient privilege. *S. v. Miller*, 425.

§ 86.1. Impeachment of Defendant

It was incumbent upon defendant to enter a timely objection to evidence of defendant's convictions more than ten years old in order to present the question of its admissibility for a review on appeal. *S. v. Ragland*, 496.

§ 89.4. Impeachment; Prior Inconsistent Statement of Witness

The trial court did not err in a murder and assault prosecution by not allowing defense counsel to question a witness regarding a statement he had allegedly made. *S. v. Shoemaker*, 95.

§ 91.1. Continuance

The trial court did not err in denying defendant's motion for continuance made on the ground that defendant lacked confidence in his counsel and disagreed with counsel's trial strategy. *S. v. David*, 327.

§ 101.4. Conduct or Misconduct Affecting Jury

The trial court's inquiry into the numerical division of the jury during deliberation was not coercive. *S. v. Little*, 687.

There was no merit to defendant's contention that the trial court erred by engaging in a colloquy with the jury foreman in the absence of other jury members since the transcript showed that the entire jury was present. *Ibid.*

§ 102. Who Is Entitled to Conclude Jury Argument

The State was properly permitted to argue last to the jury where one defendant introduced a tape recording of statements by a State's witness during cross-examination of the witness. *S. v. Alston*, 540.

§ 102.5. Conduct in Examining or Cross-Examining Defendant and Other Witnesses

The trial court did not abuse its discretion by sustaining objections to cross-examination of a robbery victim concerning the victim's identification of someone other than defendant as the perpetrator. *S. v. Brewington and S. v. Norris*, 42.

The trial judge did not abuse his discretion in failing to declare a mistrial after sustaining defendant's objections to the prosecutor's questions designed to plant in the minds of the jurors the thought that defense counsel had attempted to procure perjured testimony. *S. v. Davis*, 143.

§ 113.7. Instructions on Aiding and Abetting

The trial court in a prosecution for voluntary manslaughter erred in instructing that the jury could convict defendant on the theory of aiding and abetting. *S. v. Brown*, 307.

§ 114.2. No Expression of Opinion by Court in Statement of Evidence

The trial court did not express an opinion on the evidence in advising the jury that the recollection of others that the victim had received two gunshot wounds differed from his own recollection. *S. v. Sowell*, 465.

CRIMINAL LAW — Continued

§ 122.2. Additional Instructions upon Failure to Reach Verdict

When the court was advised that the jury was unable to reach a verdict and was divided eleven to one, the court erred in mentioning the potential inconvenience and use of the court's time in retrying the case. *S. v. Johnson*, 311.

§ 128.1. Mistrial

The trial court did not abuse its discretion by not declaring a mistrial on its own motion after improper and prejudicial remarks by the prosecutor. *S. v. Shoemaker*, 95.

§ 128.2. Particular Grounds for Mistrial

There was no error in the denial of one defendant's motion for a mistrial after the prosecutor asked the other defendant if he had been fired from a job because he had stolen from his employer. *S. v. Brewington and S. v. Norris*, 42.

§ 130. New Trial for Misconduct of or Affecting Jury

The trial court did not err in excluding from evidence the affidavits of three jurors, each of which asserted that the jury's verdict was improper. *S. v. Costner*, 666.

§ 138. Severity of Sentence

The trial court did not err by finding as an aggravating factor when sentencing defendant for assault that the offense involved great monetary loss based on the victim's medical expenses and lost wages. *S. v. Bryant*, 63.

The trial court erred in finding as a statutory aggravating factor for second degree murder that defendant used a deadly weapon at the time of the crime. *S. v. Coleman*, 271.

The evidence was insufficient to support the court's finding as an aggravating factor for second degree murder that the offense was especially heinous, atrocious or cruel. *Ibid.*

The trial court erred in finding as an aggravating factor for second degree murder that the offense was characterized by more brutality than is inherent in any murder, that the victim suffered physically and mentally by being conscious of the fact that his lifeblood was flowing away, and that the offense had dehumanizing features. *Ibid.*

The court's finding that defendant exhibited no remorse for the crime could not be the basis for a nonstatutory aggravating factor. *Ibid.*

The evidence in a felonious larceny case supported the court's finding in aggravation that the offense involved the taking of property of great monetary value. *Ibid.*

The court did not err in failing to find as a mitigating factor for larceny and armed robbery that defendant was suffering from a physical condition which reduced his culpability when the court did find this factor in mitigation of a second degree murder offense. *Ibid.*

The court was precluded from finding the use of a deadly weapon as an aggravating factor for larceny because evidence of its use was necessary to prove an essential element of the joinable offense of second degree murder. *Ibid.*

A police informant who volunteered to purchase cocaine in a police investigation was not a victim within the meaning of the statutory mitigating circumstance concerning the age and voluntary participation of the victim. *S. v. David*, 327.

The prosecutor's unsworn statements as to defendant's prior criminal record were not competent to support a finding in aggravation. *S. v. Frazier*, 547.

CRIMINAL LAW — Continued

The trial court was not required to find as a mitigating factor for hit and run personal injury that defendant was suffering from a physical condition, alcoholism, which significantly reduced his culpability. *S. v. Ragland*, 496.

The trial court could properly find as an aggravating factor for felonious assault that the offense involved damage causing great monetary loss based on the victim's medical expenses. *S. v. Sowell*, 465.

The evidence was insufficient to support the court's finding as an aggravating factor that an assault was especially heinous, atrocious or cruel. *S. v. Vaught*, 486.

The trial court erred in finding as an aggravating factor for felonious assault that the victim was infirm based on evidence that the victim was wearing a heavy cast from her toes to her knee. *Ibid.*

The trial court erred in finding as a nonstatutory aggravating factor for felonious assault that defendant poses a dangerous threat to others. *Ibid.*

§ 138.6. Severity of Sentence; Matters and Evidence Considered.

Sentences imposed on defendant were not improperly based on erroneous information supplied to the court by the prosecutor. *S. v. Shea*, 705.

§ 138.11. Different Punishment on New or Second Trial

While G.S. § 15A-1335 prohibits trial courts from imposing stiffer sentences upon remand than originally imposed, nothing prohibits the trial court from changing the way in which it consolidated the convictions for sentencing. *S. v. Ransom*, 711.

§ 140.3. Consecutive Sentences

The trial court did not violate the Fair Sentencing Act in imposing consecutive sentences. *S. v. Shea*, 705.

§ 142.3. Particular Conditions of Probation Proper

The trial court's recommendation of restitution to a felonious assault victim in the amount of $18,364 as a condition of work release was supported by the evidence. *S. v. Hunt*, 190.

§ 161.2. Requisites of Assignments of Error

Assignments of error were deemed abandoned where they were placed in defendant's brief with the statement that they were not abandoned but no argument was presented. *S. v. Brewington and S. v. Norris*, 42.

§ 171.1. Error Relating to One Count where Defendant Is Convicted of More than One Count; Where Only One Sentence Is Imposed

Where defendants were convicted of two crimes of the same grade and only one sentence was imposed, any error regarding one charge did not require that the sentence be set aside. *S. v. Fie*, 577.

DEAD BODIES

§ 2. Contract to Inter and Interment

Plaintiffs' evidence in an action for breach of contract to provide funeral and burial services was sufficient to support recovery of compensatory damages for mental anguish but was insufficient to support a recovery of punitive damages. *McDaniel v. Bass-Smith Funeral Home, Inc.*, 629.

DIVORCE AND ALIMONY — Continued

§ 30. Equitable Distribution

There was no merit to defendant's contention that he was entitled to retain as "separate property" the net value at the time of the marriage of a piece of property owned by him. *Nix v. Nix*, 110.

The trial court properly applied the "source of funds" theory in determining the value of separate and marital property. *Ibid.*

A separation agreement fully disposed of the parties' rights in both real and personal property arising out of the marriage and thus barred equitable distribution although it contained no specific references to any real property but only to personal property. *Hartman v. Hartman*, 452.

ELECTION OF REMEDIES

§ 4. Acts Constituting Election

Plaintiff's claim against defendant attorney for negligent representation in negotiating a separation agreement in which plaintiff relinquished her claim to alimony was barred by an election of remedies when plaintiff pursued her claim for alimony by hiring another attorney who filed a counterclaim for alimony and negotiated a new alimony agreement. *Stewart v. Herring*, 529.

EMINENT DOMAIN

§ 5.1. Amount of Compensation where Only Part of Land Is Taken

The trial court did not err in a highway condemnation proceeding by holding that defendant's property consisted of two separate and distinct tracts. *N. C. Department of Transportation v. Kaplan*, 401.

EQUITY

§ 1.1. Nature of Equity

The doctrine of unclean hands prevented the courts from impressing a trust on property conveyed by defendant to a corporation for the purpose of hindering defendant's creditors. *Moffett v. Daniels*, 516.

A genuine issue of fact existed as to whether plaintiff renounced his interest under his mother's will in an attempt to defraud his judgment creditors, and therefore whether his claim for equitable relief was barred by the clean hands doctrine. *Hinson v. Hinson*, 561.

§ 2. Laches

Defendant waived the defense of laches by failing to plead it. *Bertie-Hertford Child Support ex rel. Souza v. Barnes*, 552.

ESTOPPEL

§ 4.1. Equitable Estoppel; Conduct of Party Sought to Be Estopped

Plaintiff was not precluded from recovering as a matter of law for breach of contract because there was uncontradicted evidence showing that plaintiff breached the contract. *Myers v. Catoe Construction Co.*, 692.

EVIDENCE

§ 32.4. Parol Evidence; Matters Relating to Consideration

Where a contract to convey real property provided that the purchase price was $13,400 and that this amount was paid in full, the acknowledgment of payment could not be attacked for the purpose of invalidating the contract or demonstrating that the purchase price was not as stated, but parol evidence was admissible to show that the price was not paid in full. *Weiss v. Woody*, 86.

§ 41. Opinion Testimony as Invasion of Province of Jury

The trial court did not err by striking cross-examination testimony from one plaintiff that an automobile accident was not defendant Walters' fault. *Mobley v. Hill and Darden v. Hill*, 79.

§ 51. Expert Testimony as to Blood Tests

Testimony of the results of blood-grouping tests was not improperly admitted because there was no showing of the chain of custody where the parties stipulated that the chain of evidence of the blood samples would be deemed proper and secure. *Bertie-Hertford Child Support ex rel. Souza v. Barnes*, 552.

§ 52. Expert Testimony as to Sanity

A psychiatrist's testimony was incompetent on the issue of plaintiff's mental capacity to execute a release in 1978 in favor of defendants. *Cox v. Jefferson-Pilot Fire and Casualty Co.*, 122.

EXECUTION

§ 6. Stay

Plaintiff lessees were not precluded from proceeding against defendant subtenants for possession and damages where their appeal from a judgment terminating their lease with the owner was pending and they had been granted a stay of execution and left in possession of the property. *Backer v. Gomez*, 228.

EXECUTORS AND ADMINISTRATORS

§ 5. Attack on Appointment and Revocation of Letters

The clerk of superior court could properly remove respondent as administrator C.T.A. where petitioner had a higher preference of appointment and no notice of the appointment of respondent was given to those with a higher preference. *In re Estate of Cole*, 720.

FALSE PRETENSE

§ 3. Evidence

Evidence with respect to other similar transactions in which defendant had engaged as an employee of an exterminating company was relevant to show motive, intent, plan and knowledge in a prosecution for obtaining money by false pretense by falsely representing to elderly homeowners that their homes needed treatment for active termite infestations. *S. v. Childers and S. v. Thompson*, 236.

§ 3.1. Sufficiency of Evidence

The evidence was sufficient for the jury in a prosecution for obtaining money by false pretense by misrepresenting to homeowners that active infestations of termites were present in their homes and that treatment therefor was necessary. *S. v. Childers and S. v. Thompson*, 236.

FIXTURES

§ 2. Trade Fixtures

Strawberry plants grown on leased property were not trade fixtures which the tenant was entitled to remove after the end of its tenancy. *Lewis v. Lewis Nursery, Inc.*, 246.

FORGERY

§ 2.2. Sufficiency of Evidence

The evidence in a prosecution for uttering a check with a forged endorsement was sufficient to go to the jury for its consideration of whether defendant possessed the requisite knowledge that the endorsement was forged. *S. v. Forte*, 701.

FRAUD

§ 12. Sufficiency of Evidence

A genuine issue of fact existed as to whether defendant obtained through fraud a quitclaim deed to plaintiff's interest in property left to the parties by their mother. *Hinson v. Hinson*, 561.

HIGHWAYS AND CARTWAYS

§ 9. Actions against the Department of Transportation Generally

The court's findings were insufficient to support its conclusion that a construction contract contemplated that the only acceptable method of construction of barrier rails was by the use of a fixed form, and defendant's "Standard Specifications for Roads and Structures" entitled plaintiff to funds withheld by defendant because plaintiff had used slip forming rather than the fixed form method of construction for the barriers. *Hardaway Constructors, Inc. v. N. C. Dept. of Transportation*, 264.

§ 11.1. Actions to Establish Neighborhood Public Roads

The trial court did not err in an action to establish a neighborhood public road by treating an old roadway as a single unit. *Jarvis v. Powers*, 355.

There was sufficient evidence in an action to establish a neighborhood public road to satisfy the first definition of G.S. 136-67. *Ibid.*

The trial court's conclusion that a roadway was a neighborhood public road was not supported by the findings where the court found only that the roadway served a public use before 1931 but did not make any findings on whether the roadway served an essentially private use in 1941. *Ibid.*

HOMICIDE

§ 9.2. Self-Defense; Use of Excessive Force by Defendant

The trial court did not err by denying defendant's motion to dismiss charges of assault and murder based on self-defense. *S. v. Shoemaker*, 95.

§ 19.1. Evidence Competent on Self-Defense; Evidence of Character or Reputation

The trial court did not err in a murder and assault prosecution by not allowing a State trooper to testify about a specific instance of misconduct of the victims indicating their propensity for violence. *S. v. Shoemaker*, 95.

HOMICIDE — Continued

§ 21.9. Sufficiency of Evidence of Manslaughter

The evidence was sufficient to support defendant's conviction for voluntary manslaughter by kicking the victim about his chest and abdomen after the victim had been rendered unconscious by being kicked and beaten by other persons. *S. v. Brown*, 307.

§ 28.3. Instructions on Self-Defense; Use of Excessive Force

The trial court did not err in a prosecution for murder and assault by not instructing the jury that the number of assailants involved should be considered. *S. v. Shoemaker*, 95.

HUSBAND AND WIFE

§ 15.1. Nature and Incidents of Estate; Possession and Control by Husband

The equal right to control and income provisions of G.S. 39-13.6(a) apply to tenancies by the entirety created before the effective date of the statute, 1 January 1983. *Perry v. Perry*, 169.

INSURANCE

§ 75.4. Subrogation; Full Payment by Insurer

Summary judgment was properly entered for defendant in an action to recover damages to a vehicle in an automobile accident where plaintiff had assigned its entire claim for damage to its liability insurer. *Rolling Fashion Mart, Inc. v. Mainor*, 213.

§ 100. Obligations of Parties to Insurance after Accident; Duty of Insurer to Defend

Defendant insurer was not required by a vehicle liability policy to defend the insured in an action which occurred when tires of the insured vehicle were being hauled to a repair shop in an uninsured truck. *Walsh v. National Indemnity Co.*, 643.

§ 106.1. Actions against Insurer by Persons Injured; "No Action" Clause in Policy

The trial court did not err by not permitting an insurance company to offer as a defense that the actions had been brought in violation of a no action provision. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 370.

§ 108. Actions against Insurer; Defenses Available to Insurer

The trial court did not err in an action arising from an automobile collision by not permitting an insurance company to offer the defense of no coverage. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 370.

§ 110. Payment; Extent of Liability of Insurer

The trial court did not err by awarding prejudgment interest to a plaintiff awarded damages under an uninsured motorist provision. *Ensley v. Nationwide Mut. Ins. Co.*, 512.

JUDGMENTS

§ 5.1. Final Judgments

The effective date of an annexation ordinance was the date the judgment of the Court of Appeals holding the ordinance to be valid was certified rather than

LIBEL AND SLANDER

§ 5.4. Particular Statements as Actionable Per Se; Statements Imputing Crime

Allegations that the individual defendant published statements that the individual plaintiff forged his letters of credit and that he is a drug dealer constitute allegations of slander per se. *Talbert v. Mauney*, 477.

MASTER AND SERVANT

§ 1. Nature of the Relationship in General

A corporate employer cannot maintain an action to recover damages from a tort-feasor because of negligent injury to its president and sole employee. *Rolling Fashion Mart, Inc. v. Mainor*, 213.

§ 8. Terms of the Contract Generally

The Industrial Commission erred in denying plaintiff's claim against a State agency on the ground that the evidence failed to show any "negligent act" by any named employee. *Phillips v. N. C. Dept. of Transportation*, 135.

§ 9. Actions to Recover Compensation

The trial court's broad conclusion that the granting of bonuses to employees was discretionary with defendant's board of directors was incomplete and not entirely supported by the findings. *Buchele v. Pinehurst Surgical Clinic*, 256.

§ 10.1. Grounds for Discharge

The State Personnel Commission erred by concluding that the Department of Correction was justified in discharging a halfway house superintendent for insubordination. *Kandler v. Dept. of Correction*, 444.

The statement of petitioner's superior that she could do anything she wanted as long as she did not get caught was not hearsay and was admissible in the appeal of her discharge for insubordination. *Ibid.*

§ 55.3. Workers' Compensation; Particular Injuries as Constituting Accident

There was ample evidence to support findings of the Industrial Commission that the deceased employee was hit with a full volume of water from the cold water line while repairing a leak in a commode valve and that this constituted an "accident" which resulted in the employee's heart attack and subsequent death. *Ballenger v. ITT Grinnell Industrial Piping*, 393.

§ 65.2. Workers' Compensation; Back Injuries

The evidence supported a finding that plaintiff's disability results from his having ruptured a disc in his back while lifting a bag of fertilizer at work although plaintiff thereafter played in a city softball tournament and had had back surgery on two prior occasions. *Kendrick v. City of Greensboro*, 183.

§ 68. Workers' Compensation; Occupational Diseases

Evidence was sufficient to support an award of compensation for an occupational lung disease caused by exposure to cotton dust in the workplace, and expert medical testimony that plaintiff's cigarette smoking was "probably a more significant contributing factor than his occupation" did not compel the conclusion that plaintiff did not have a compensable occupational disease. *Perry v. Burlington Industries, Inc.*, 650.

Evidence that a compensation claimant's environmental restriction caused by an occupational disease significantly limits the scope of potential employment in his usual vocation, when combined with other factors such as a lack of training in

MASTER AND SERVANT — Continued

another vocation, is competent to establish a causal nexus between the occupational disease and the partial or total inability to earn wages in the same or any other employment. *Preslar v. Cannon Mills Co.*, 610.

§ 69. Workers' Compensation; Amount of Recovery Generally

The Industrial Commission properly awarded plaintiff compensation for permanent total incapacity under G.S. 97-29 rather than compensation only for partial loss of use of the back where plaintiff suffers continuous pain in his back, hips and legs. *Kendrick v. City of Greensboro*, 183.

§ 69.2. Workers' Compensation; Successive Injuries

The Industrial Commission did not err by awarding permanent partial disability to a plaintiff who had suffered a myocardial infarction while working and was rendered unable to work after more infarctions during nonworking hours. *Weaver v. Swedish Imports Maintenance, Inc.*, 432.

§ 71.1. Workers' Compensation; Computation of Average Weekly Wage; Particular Cases

Though a compensation claimant actually worked 25 hours per week, the Industrial Commission could properly compute his average weekly wage on the basis of claimant's capability to work a full 40-hour week. *Preslar v. Cannon Mills Co.*, 610.

§ 93.3. Workers' Compensation; Proceedings before Commission; Expert Evidence

Two physicians were qualified to give expert testimony as to whether a water incident was a cause of an employee's heart attack even though the witnesses were not specialists. *Ballenger v. ITT Grinnell Industrial Piping*, 393.

§ 94.3. Workers' Compensation; Rehearing and Review by Commission

The full Industrial Commission erred in awarding plaintiff workers' compensation benefits under the mistaken impression that the law required a finding for plaintiff if there was any competent evidence to support such a finding. *Wagoner v. Douglas Battery Mfg. Co.*, 163.

The full Industrial Commission properly weighed the evidence in a workers' compensation case and did not act under the mistaken impression that the law required a finding in plaintiff's favor when there is any competent evidence to support such a finding. *Ballenger v. ITT Grinnell Industrial Piping*, 393.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

Claimant's personal financial mismanagement constituted substantial faults connected with her work not rising to the level of misconduct for which she could be disqualified from receiving unemployment benefits for a period of four weeks under G.S. 96-14(2A). *Smith v. Spence & Spence*, 636.

MORTGAGES AND DEEDS OF TRUST

§ 2. Purchase Money Mortgages

A deed of trust was a purchase money deed of trust even though it was not made as a part of the same transaction in which the debtor purchased the land and it embraced only a part of the land purchased. *Burnette Industries, Inc. v. Danbar of Winston-Salem, Inc.*, 318.

MORTGAGES AND DEEDS OF TRUST — Continued

§ 25. Foreclosure by Exercise of Power of Sale in Instrument

Documents before the court were sufficient to establish a note holder's right to foreclose the deed of trust. *In re Fortescue*, 297.

§ 26. Notice of Sale

Respondent was given proper notice of foreclosure although, prior to the foreclosure hearing, the holder assigned the note and deed of trust to another person who then proceeded with foreclosure. *In re Fortescue*, 297.

§ 32.1. Restriction of Deficiency Judgments Respecting Purchase Money Mortgages and Deeds of Trust

The anti-deficiency judgment statute prohibited plaintiff from recovering interest on a purchase money note. *Burnette Industries, Inc. v. Danbar of Winston-Salem, Inc.*, 318.

MUNICIPAL CORPORATIONS

§ 30.6. Zoning; Special Permits

A town council properly denied a special use permit for construction of ninety-one dwelling units on a 15.2-acre tract based on the adverse effect of the proposed development upon traffic congestion and safety in the area. *Ghidorzi Construction, Inc. v. Town of Chapel Hill*, 438.

§ 30.9. Zoning; Comprehensive Plan; Spot Zoning

A city council's rezoning of a lot from single family and multi-family residential classifications to a general business district classification was not unreasonable. *Nelson v. City of Burlington*, 285.

A genuine issue of material fact was presented as to whether a city council's rezoning of defendant's lot from residential to general business constituted illegal contract zoning. *Ibid.*

§ 30.19. Zoning; Changes in Continuation of Nonconforming Use

Petitioner did not cease operation of its concrete mixing facility and lose its nonconforming use under a zoning ordinance where petitioner did not operate the plant for more than six months due to a slump in business. *Southern Equipment Co. v. Winstead*, 526.

§ 30.20. Procedure for Enactment or Amendment of Zoning Ordinances

A city council could, upon its own motion, reconsider a previously rejected rezoning petition within 12 months of the original denial. *Nelson v. City of Burlington*, 285.

The superior court did not err in issuing an injunction enforcing a decision of the Board of Adjustment prohibiting petitioners from using their property as an airport. *Mize v. County of Mecklenburg*, 279.

§ 31. Judicial Review

The Zoning Board of Adjustment is a necessary party respondent to a petition for review of a decision by the Board, and the trial court abused its discretion by failing to allow petitioners to amend their petition to join the Board. *Mize v. County of Mecklenburg*, 279.

Petitioners who sought review of a decision of the Zoning Board of Adjustment were not entitled to a jury trial. *Ibid.*

MUNICIPAL CORPORATIONS — Continued

The effective date of an annexation ordinance was the date the judgment of the Court of Appeals holding the ordinance to be valid was certified rather than the date of the Supreme Court's order dismissing plaintiffs' appeal and denying discretionary review. *Hunter v. City of Asheville*, 325.

PARTIES

§ 8.3. Joinder; Discretion of Trial Court

The trial court did not abuse its discretion in denying respondents' motion to join additional parties in an action to condemn land and to quiet title. *Va. Electric and Power Co. v. Tillett*, 383.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 1. What Constitutes Practicing Medicine and Practicing without License

There is no requirement of guilty knowledge in statutes making it a misdemeanor for a psychologist to employ a psychologist who does not possess a valid license. *Swisher v. American Home Assurance Co.*, 718.

PROCESS

§ 6. Subpoena Duces Tecum

The trial court properly ordered that certain records of a computer company be made available to the district attorney in his investigation of a crime. *In re Computer Technology Corp.*, 709.

§ 9.1. Personal Service on Nonresident Individual; Minimum Contacts

A nonresident defendant did not have sufficient minimum contacts with this State to allow the exercise of personal jurisdiction over him in a bank's action to recover on a check which it had accidentally shredded. *First Charter National Bank v. Taylor*, 315.

The trial court erred by denying defendant's motion to dismiss for lack of in personam jurisdiction in an action involving a boiler manufactured in Pennsylvania by a New York corporation which malfunctioned in Ohio and injured a North Carolina resident. *Ash v. Burnham Corp.*, 459.

§ 14.3. Service of Process on Foreign Corporation; Sufficiency of Evidence; Contacts within N.C.

The trial court could properly exercise jurisdiction over defendant foreign corporation where defendant promised to pay for services to be performed in this State by plaintiff, and defendant had sufficient minimum contacts with this State to permit the exercise of jurisdiction over it. *B. F. Goodrich Co. v. Tire King and Smith v. Hill*, 129.

PUBLIC OFFICERS

§ 12. Removal from Office

There was substantial evidence to support the dismissal of petitioner as Director of Student Activities at the N. C. School of the Arts on the ground that petitioner's leadership role in assembling a meeting of division directors to discuss complaints about their superior constituted personal misconduct. *Leiphart v. N. C. School of the Arts*, 339.

ROBBERY — Continued

§ 3. Competency of Evidence

The trial court did not err in a prosecution for conspiracy and robbery by overruling defendants' objection to the prosecutor asking the victim if one defendant knew the victim was carrying money in a folder. *S. v. Brewington and S. v. Norris*, 42.

§ 4.3. Sufficiency of Evidence of Armed Robbery

There was sufficient evidence of armed robbery where the evidence tended to show that defendant took money from the victim without the victim's consent while armed with a shotgun and threatening its use. *S. v. Brewington and S. v. Norris*, 42.

§ 4.5. Sufficiency of Evidence in Cases Involving Aiders and Abettors

There was sufficient evidence to convict a defendant of robbery with a dangerous weapon. *S. v. Taylor*, 500.

§ 5.2. Instructions Relating to Armed Robbery

The trial court adequately and correctly explained to the jury the necessary elements in a prosecution for robbery with a dangerous weapon. *S. v. Taylor*, 500.

RULES OF CIVIL PROCEDURE

§ 4. Process

Service of process by leaving the complaint with defendant's father met the statutory requirement that the paper be left at defendant's usual place of abode with some person of suitable age and discretion then residing therein although the evidence tended to show that defendant and his father occupied separate houses located on the same farm. *Bowers v. Billings*, 330.

§ 12. Defenses

The trial court abused its discretion by failing to allow petitioners to amend their petition to join the Zoning Board of Adjustment as a respondent. *Mize v. County of Mecklenburg*, 279.

§ 13. Counterclaim

Where the wife's prior action concerning child custody and support was pending at the time plaintiff husband filed a motion in the cause in a divorce proceeding pertaining to child custody and support, the compulsory counterclaim provisions of Rule 13(a) required dismissal of the husband's motion. *Basinger v. Basinger*, 554.

§ 15.2. Amendments to Conform to Evidence

The trial court did not err by allowing an amendment to the pleadings to conform them to the evidence. *Mobley v. Hill and Darden v. Hill*, 79.

§ 41. Dismissal of Actions Generally

Summary judgment was properly granted in favor of defendants in an action arising from an automobile accident where the action was commenced on the last day before being barred by the statute of limitations, more than 90 days went by without defendant being served or an endorsement or alias or pluries summons being obtained and a voluntary dismissal without prejudice was taken. *Long v. Fink*, 482.

RULES OF CIVIL PROCEDURE — Continued

§ 56. Summary Judgment

The trial court did not err in an action based on a prior judgment by denying defendant's motion to continue the summary judgment hearing. *NCNB v. Robinson*, 154.

§ 56.3. Summary Judgment; Necessity for Supporting Material

The trial court did not abuse its discretion in admitting an affidavit filed in support of a summary judgment motion on the day of the hearing on the motion. *Rolling Fashion Mart, Inc. v. Mainor*, 213.

§ 56.7. Summary Judgment; Appeal

The trial court's denials of an insurance company's motions for summary judgment and judgment on the pleadings were not reviewable on appeal because a final judgment was rendered in a trial on the merits. *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 370.

§ 58. Entry of Judgment

Where a judgment was entered in open court on 19 April, the trial judge properly exercised his authority under Rule 58 when he approved the written judgment and signed it on 27 June. *Vick v. Vick*, 697.

§ 60. Relief from Judgment or Order

The trial court retains limited jurisdiction pending an appeal to consider a Rule 60(b) motion to indicate what action it would be inclined to take were an appeal not pending. *Talbert v. Mauney*, 477.

SALES

§ 6.1. Implied Warranty of Merchantability

Summary judgment was properly granted for defendant in an action arising from the buckling of a shoe heel where plaintiffs came forward with no evidence that a defect in the shoe existed at the time of sale. *Morrison v. Sears, Roebuck & Co.*, 224.

§ 22.1. Actions for Personal Injuries Based on Defective Goods; Sufficiency of Evidence

Summary judgment was properly granted for defendant in an action to recover for injuries from a fall when the heel of a shoe purchased from defendant allegedly buckled the second time the shoes were worn. *Morrison v. Sears, Roebuck & Co.*, 224.

SCHOOLS

§ 1. Maintenance and Supervision in General

A ban on the use and possession of tobacco products in the Buncombe County schools was valid. *Craig v. Buncombe Co. Bd. of Education*, 683.

§ 4. Boards of Education

Plaintiff principal could appeal from a decision of defendant board approving the county superintendent's acceptance of his resignation. *Warren v. Buncombe Co. Bd. of Education*, 656.

SCHOOLS — Continued

§ 13. Principals

The resignation of a tenured public school principal could effectively be accepted by the school superintendent before it was approved by the local school board. *Warren v. Buncombe Co. Bd. of Education*, 656.

SEARCHES AND SEIZURES

§ 11. Search and Seizure of Vehicles

Failure of officers to obtain a warrant to search defendant's car required the exclusion of evidence obtained by their warrantless search where officers had twenty hours to obtain the warrant. *S. v. Isleib*, 599.

TAXATION

§ 25. Assessment of Ad Valorem Taxes Generally

The Property Tax Commission properly denied petitioners' request to prosecute an appeal of a valuation as a class action. *In re Appeal of Highlands Dev. Corp.*, 544.

§ 25.4. Ad Valorem Taxes; Valuation and Assessment

There was no error in the Property Tax Commission's holding that the failure to give each property owner written notice of the right to an actual visit to his property did not invalidate the revaluation. *In re Appeal of Highlands Dev. Corp.*, 544.

§ 25.6. Ad Valorem Taxes; Valuation at Market Value

The Property Tax Commission did not err by holding that a revaluation complied with G.S. 105-317(a)(1). *In re Appeal of Highlands Dev. Corp.*, 544.

§ 26.1. License Taxes; Particular Enterprises

The statute requiring the operator of a commercial ocean fishing pier to obtain a license is constitutional. *S. v. Rippy*, 232.

TORTS

§ 7.2. Release; Avoidance

The test for mental competence to enter into a release is whether the party challenging the release had the mental competence to manage his own affairs. *Cox v. Jefferson-Pilot Fire and Casualty Co.*, 122.

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence

A cotenant's interest in land was sufficiently disclosed so as to preclude extinguishment of the interest under the Marketable Title Act. *Town of Winton v. Scott*, 409.

A cotenant's claim to title was extinguished under the Marketable Title Act where the conveyance to the challengers' predecessor in title did not refer to a muniment of title which would reveal the latent defect in the title. *Ibid.*

TRIAL

TROVER AND CONVERSION

TRUSTS

UNFAIR COMPETITION

USURY

§ 1. What Constitutes Usury

Corrupt intent was present as a matter of law where the agreed upon interest exceeded that allowed by law. *Swindell v. Overton*, 504.

§ 5. Forfeiture of Interest for Usury

Where a usurious rate of interest had been charged by the lender but interest was not actually paid at the usurious rate, the borrower was entitled to recover only the amount of interest paid rather than double the interest. *Swindell v. Overton*, 504.

VENDOR AND PURCHASER

§ 5.1. Matters Precluding Specific Performance

In an action for specific performance of a contract to convey realty, there was a material issue of fact as to whether the purchase price had been paid in full. *Weiss v. Woody*, 86.

WAIVER

§ 2. Nature and Elements of Waiver

Plaintiff landlord's statements at his deposition that he claimed no ownership interest in strawberry plants grown on the leased land did not amount to a waiver of his right to the proceeds from their sale. *Lewis v. Lewis Nursery, Inc.*, 246.

WATERS AND WATERCOURSES

§ 4. Dams

Water quality is a proper factor to be considered by the EMC in issuing certification for a water project although such factor is not specifically listed in the statute. *In re Appeal from Environmental Management Comm.*, 1.

The fact that the EMC is required to give paramount consideration to the statewide effect of a proposed water project does not preclude consideration of local or regional factors. *Ibid.*

The evidence and findings were sufficient to support issuance by the EMC of a certificate of authority to acquire certain lands by eminent domain for construction of a water reservoir. *Ibid.*

§ 7. Marsh and Tidelands

Petitioner's construction of decking on two sides of a marina to replace decking removed ten years earlier did not come within certain exceptions from the permit requirements of the Coastal Area Management Act, but construction of the decking was an "accessory use" exempted from the permit requirements as long as it met additional requirements set out by administrative regulations. *Pamlico Marine Co., Inc. v. N. C. Dept. of Natural Resources*, 201.

Regulations adopted by the Coastal Resources Commission to govern its permitting procedure must be interpreted as requiring that all criteria must be met before an exemption can be granted although the disjunctive "or" rather than the word "and" appears between the numbers five and six on the list of factors allowing exemption. *Ibid.*

WEAPONS AND FIREARMS

§ 2. Carrying or Possessing Weapons

The evidence was sufficient for the trial judge to determine that there was a factual basis for defendant's plea of guilty of possession of a firearm by a felon. *S. v. Shea*, 705.

WILLS

§ 9.1. Probate; Jurisdiction and Power of Court

Proceedings requiring a sale of defendant's interest under his father's will in order to satisfy plaintiff's judgment against him should have been transferred upon motion by defendant to the county where decedent was domiciled at the time of his death. *NCNB v. C. P. Robinson Co., Inc.*, 160.

§ 21.4. Caveat; Undue Influence; Sufficiency of Evidence

The trial court properly denied propounders' motions for a directed verdict where caveators produced sufficient evidence to establish a prima facie case of undue influence. *In re Will of Dupree*, 519.

§ 22. Caveat; Mental Capacity

The trial court did not abuse its discretion by denying defendant's motion for a new trial in an action to contest the validity of a codicil to a will. *In re Will of King*, 471.

§ 60. Rights of Devisees; Renunciation

Plaintiff could not successfully argue that his renunciation should be set aside as to his testate interest because it was not made within a reasonable time and as to any intestate interest because it was not made within the time limitations of G.S. 29-10. *Hinson v. Hinson*, 561.

A plaintiff who sought and obtained an order allowing him to renounce any interest under the will of his mother could not thereafter engraft a parol trust upon his renounced interest. *Ibid.*

Plaintiff could maintain an action seeking the declaration of a constructive trust on his interest under his mother's will which he had renounced, and his forecast of evidence created a genuine issue as to whether defendant unduly influenced his decision to sign the renunciation. *Ibid.*

A genuine issue of fact existed as to whether plaintiff renounced his interest under his mother's will in an attempt to defraud his judgment creditors, and therefore whether his claim for equitable relief was barred by the clean hands doctrine. *Ibid.*

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina