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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

OLIVETTI CORPORATION v. AMES BUSINESS SYSTEMS, INC.

No. 8526SC1129

(Filed 3 June 1986)

1. **Unfair Competition § 1; Fraud § 12— agreement to sell office products—unfair trade practice and fraud—evidence sufficient**

The trial court did not err in an action for fraud and unfair trade practices arising from an agreement to sell office products by finding that Olivetti had made material misrepresentations and that Ames' reliance on such misrepresentations was reasonable where there was competent evidence supporting the court's findings that the representations were made, that they were both material and false, and that Ames' reliance was reasonable.

2. **Damages § 16.3— lost profits—new business rule—not followed—recovery allowed if lost profit shown with reasonable certainty**

An office products dealer was not precluded from recovering damages from its distributor simply because the dealer did not have a past record of profits; North Carolina has never adopted the "new business rule" and apparently follows the view that recovery is allowed as long as the loss of profits is shown with a reasonable degree of certainty.

3. **Unfair Competition § 1— office products distributor—misrepresentations to dealer—evidence sufficient**

There was sufficient evidence against Olivetti in an action by Ames for unfair trade practices to support the court's findings on damages that Ames could have become an NBI dealer in that NBI was interested in establishing a dealership in the area; NBI's eastern regional manager for dealer operations met with Ames' personnel; NBI's manager was impressed with Ames' personnel and thought that Ames could have been a good NBI dealer; although the manager testified that he did not make a formal offer, the testimony of Ames' personnel showed that Ames was told it could become an NBI dealer if it pur-

chased $25,000-$30,000 worth of NBI equipment; Ames decided not to become an NBI dealer based on the promises and assurances it had received from Olivetti and based on a purchase of additional Olivetti equipment made on Olivetti's misrepresentations; and Ames either had or would have had the financial capability to become an NBI dealer had it not been for Olivetti's misrepresentations.

4. **Unfair Competition § 1; Damages § 16.3— unfair trade practice—lost profits—measure not improper**

The trial court did not use an improper measure to determine lost profits in an unfair trade practice action between an office products distributor and dealer by basing the award for lost profits on the sales and service business which the dealer lost to a competitor because it passed up the opportunity to become an NBI dealer in reliance upon Olivetti's misrepresentations.

5. **Unfair Competition § 1— N.C.G.S. § 75-1.1 applied to distributor-dealer relationship—no error**

The trial court did not err in applying N.C.G.S. § 75-1.1 (1985) to the distributor-dealer relationship between Olivetti and Ames where the activities concerned were undoubtedly in commerce, Olivetti failed to show that it was otherwise exempt from the operation of the statute's provisions, and it was clear that individual consumers were not the only ones protected and provided a remedy by N.C.G.S. § 75-1.1 and § 75-16.

6. **Fraud § 12; Unfair Competition § 1— office products distributor and dealer—fraud and unfair competition—evidence sufficient**

In an action between an office products distributor and dealer, there was competent evidence to support the court's findings of fraud and proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts. N.C.G.S. § 75-1.1.

7. **Unfair Competition § 1; Constitutional Law § 23.4— N.C.G.S. § 75-1.1 not unconstitutionally vague and overbroad**

N.C.G.S. § 75-1.1 was not unconstitutionally vague and overbroad as applied to an action between an office products distributor and dealer because the language of the statute provides adequate notice that conduct constituting fraud is prohibited.

8. **Fraud § 13; Unfair Competition § 1— damages—accounts receivable not offset—no error**

The trial court did not err in an action between an office products distributor and dealer by refusing to award to the distributor the full amount allegedly owed to it by the dealer on accounts receivable for equipment sold to the dealer where the court concluded that the equipment was purchased as a result of the distributor's fraud and unfair and deceptive acts and that the sale of the machines should be rescinded and the machines returned as a matter of equity.

9. **Unfair Competition § 1— damages—accounts receivable not deducted before damages trebled—no error**

The trial court did not err in an action between an office products distributor and dealer in which it had found that the distributor had committed an

unfair trade practice by not deducting the distributor's accounts receivable from the damages awarded the dealer prior to trebling damages. N.C.G.S. § 75-16.

10. Unfair Competition § 1; Damages § 16.3— unfair trade practices—damages awarded for some periods—not shown with sufficient certainty for others

In an action between an office products distributor and dealer in which the dealer was awarded damages for certain periods for the distributor's unfair trade practices, the court did not err by not awarding lost profits or expenses for other periods where the dealer did not meet its burden of presenting sufficient evidence to permit the trier of fact to determine with reasonable certainty the fact and amount of those damages.

11. Unfair Competition § 1; Damages § 17.8— unfair trade practice—damages trebled—punitive damages not awarded

The trial court did not err in an action between an office products distributor and dealer in which the court found that the distributor had committed an unfair trade practice by refusing to assess punitive damages against the distributor in an amount greater than and in lieu of the treble damages awarded the dealer.

12. Unfair Competition § 1— unfair trade practice—attorney fees not awarded—no error

The trial court did not err in an action between an office products dealer and distributor by refusing to award reasonable attorney fees to the dealer pursuant to N.C.G.S. § 75-16.1 (1985). Award or denial of such fees is in the discretion of the trial judge.

APPEAL by plaintiff and cross-appeal by defendant from *Ferrell, Judge*. Judgment entered 3 January 1985 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 12 March 1986.

In April 1982, Olivetti Corporation of America (hereinafter "Olivetti") instituted this action seeking to collect $148,990.68 plus interest allegedly owed to it by Ames Business Systems, Inc. (hereinafter "Ames"). Ames denied that it owed such amount to Olivetti and asserted as a counterclaim that Olivetti had committed willful and intentional fraud and unfair and deceptive acts and practices in violation of N.C. Gen. Stat. § 75-1.1 (1985) and thereby damaged Ames. Ames requested as relief that Olivetti recover nothing of it and that it be awarded actual, treble and punitive damages and attorney's fees.

A non-jury trial was held in May 1984 after which the court took the matter under advisement pursuant to the agreement of

the parties. On 3 January 1985, the trial court entered a judgment in which it found as follows in pertinent part:

> 1. Plaintiff, Olivetti Corporation of America, hereinafter "Olivetti," was, at the time of the transactions involved in this litigation, a wholly owned American subsidiary of a foreign holding company, which was itself part of the "Olivetti Group," controlled by an Italian parent corporation.
>
> 2. The business of Olivetti was, among other things, the sale of office products including typewriters, word processors and related equipment and supplies, through numerous dealers . . . and directly to certain large customers.
>
> 3. Defendant, Ames Business Systems, Inc., hereinafter "Ames," is a closely held North Carolina corporation formed in 1978 in Hickory, North Carolina to be an Olivetti dealer for accounting machines in certain nearby counties.
>
> 4. In March or April of 1978, prior to the formation of Ames, two of Ames' principals, Mr. James Nicholson and Mr. Wade Perry, discussed with Olivetti representatives . . . the formation of Ames as an Olivetti dealer. Olivetti's representatives promised that Ames would be a small local business with the backing of a giant corporation. Olivetti said it had a company-owned sales and service office in Charlotte and Olivetti promised to provide service, programming support and marketing support for Ames out of its Charlotte office. Ames was formed in April, 1978, based on these representations. Ames promptly entered into a dealership agreement with Olivetti. . . . Pursuant to this agreement Olivetti then sold Ames an opening order of approximately $80,000 of equipment, on credit.
>
> 5. In June, 1978, Olivetti announced to its employees that it would close its Charlotte office in August, 1978, except for the service department. The office was closed at the end of July, 1978.
>
> 6. Olivetti failed to provide programming and marketing support to Ames out of its Charlotte office after July, 1978, as promised to Ames in early 1978.
>
> 7. In August, 1978, Olivetti entered into a new dealership agreement with Ames . . . giving Ames the Charlotte

sales territory, as well as Hickory, and also providing that Ames would be its dealer for word processing equipment, as well as accounting equipment. Olivetti also amended its May, 1978 service contract with Ames . . . to include the new territory.

. . .

9. In the service contract, Olivetti promised to provide service to Ames and its customers for a period of two (2) years, in Ames' expanded geographical territory, for the equipment Ames was authorized to sell under its new dealership agreement. In February, 1979, Olivetti sold its service operation in Charlotte to Piedmont Business Systems, Inc., . . . a company formed by Mr. Rex Jones, Olivetti's former service manager. Olivetti assigned at that time Ames' service contract to Piedmont. Piedmont failed on several occasions during the remainder of the contract period to provide adequate service to Ames' customers, and this resulted in some damage to Ames, including a lost sale for a new word processor.

10. The dealership agreement between Ames and Olivetti is dated August 14, 1978. . . . [I]t appears to assign Ames several counties in North Carolina near Charlotte and Hickory, and to give an exclusive dealership to Ames for certain accounting and word processing machines in those counties. It also appears to state that . . . Ames releases Olivetti from all claims it has against Olivetti as of the date of the Agreement.

11. In August, 1979, Olivetti announced and promoted to Ames a new, sophisticated word processor, the TES-701. Olivetti's 701 product manager at that time, Mr. Gallagher, told Ames . . . that the machine was being purchased by Olivetti from NBI in Boulder, Colorado, under a five year supply agreement with NBI; and he guaranteed full software support, technical support and marketing support for the product for that period of time. This statement was false, as the agreement between Olivetti and NBI was not a five year agreement and could be terminated by either party at the end of 1980, upon giving notice prior to July, 1980. This fact was material, as it takes several months of effort for a dealer

to "get ready" to sell a product like the 701. Furthermore, customers and dealers are very reluctant to purchase a product like the 701 if they cannot be fairly assured of continued hardware and software updates and support. Customers realize that if the source of supply is not available, the support becomes unavailable also.

12. Based upon the false statements of Olivetti that it had a five year agreement with NBI for the 701, and the fact that the product was a good product, Ames purchased a demonstration 701 and proceeded to spend at least two-thirds of its time from August, 1979 through October, 1981 preparing to sell and attempting to sell the 701. In so doing, Ames concentrated its efforts on the 701 and slackened its efforts on other products in its line. Ames did so in reliance upon the false representations of Olivetti.

13. The agreement between Olivetti and NBI, hereinafter the "NBI Agreement," . . . was dated April 20, 1979. It provided for Olivetti to purchase 400 of the 701's in 1979 and 700 in 1980. . . . It provided for an initial term ending December 31, 1980, with automatic annual renewals unless either party notified the other party of its intention not to renew at least 180 days prior to the expiration of the term. . . .

14. At or about the time Olivetti announced the 701 product to Ames in August, 1979, Olivetti became concerned that its sales of the 701 were not keeping pace with its purchase commitments under the NBI Agreement and Olivetti attempted to postpone certain shipments of the 701 from NBI. . . . In early 1980 Olivetti was concerned with its inventory level and purchase commitments for the 701, and with whether it could sell the 701's it had in inventory if NBI did not renew the NBI Agreement for 1981. . . .

15. On or about July 17, 1980, Olivetti breached the NBI Agreement and refused to accept any further shipments of 701's from NBI. . . . At that time Olivetti had over 400 of the 701's in inventory, at a purchase price of approximately $5000 each, and was committed to purchase another 400 or more during the remainder of 1980. . . . This breach was committed by Olivetti despite its representations to Ames

that it had a five year supply agreement for the 701, and that it would support the 701 during that period of time.

16. On or about July 24, 1980, NBI notified Olivetti as a result of Olivetti's breach of the Agreement that it would not renew the NBI Agreement for 1980. . . . Between July 24, 1980 and September 15, 1980, Olivetti and NBI argued over the terms of the termination of the NBI Agreement. During that time, Olivetti asked NBI not to make any public announcement of the nonrenewal of the NBI Agreement.

17. On or about September 23, 1980, Olivetti's president confirmed a termination arrangement reached September 15, 1980 with NBI's president. In this arrangement Olivetti would accept from NBI 47 additional 701 systems already completed, but no more; Olivetti would pay a $300 premium per unit on each of the 379 units purchased in 1980 ($113,700); NBI would make no additional software options available to Olivetti except records processing, stat/math, tailorable communications and a diablo wide track printer. The parties specifically agreed, at Olivetti's request, that no public announcement would be made about these matters. . . . Olivetti never made a public announcement of the NBI termination.

18. In October or November, 1980, Ames heard, through a potential customer, a rumor that Olivetti had breached the NBI Agreement and that the Agreement had been terminated. The customer, Mr. J. S. Epley of Charlotte, was considering the purchase of a 701 from Ames, and had heard about these matters. Mr. Epley was disturbed, because he liked Ames and the 701 but did not want to purchase a 701 unless he could be assured of continued service, and support, including hardware and software updates. He conveyed the information and his concern to Ames; and Mr. Jay Ozment, Ames' salesman, telephoned Olivetti . . . to check on the rumors.

19. Mr. Ozment first talked about the matter with Mr. Gallagher, at Olivetti, the former product manager for the 701. Mr. Gallagher told Mr. Ozment there was no truth to the rumor and that everything was fine between NBI and Olivetti. Mr. Gallagher again stated that the Agreement with NBI was for five years, and said Olivetti was merely negotiating with NBI over price and systems updates. He then referred

Mr. Ozment to Mr. Geoffrey Kohart, the then-current Olivetti product manager for the 701. Mr. Kohart confirmed to Mr. Ozment that the rumors were false, and that Olivetti and NBI were merely negotiating over quantities to be shipped. Mr. Kohart agreed to write Mr. Epley a letter confirming these matters.

20. On or about November 26, 1980, Mr. Kohart, on behalf of Olivetti, wrote a letter to Mr. Epley . . . in which he failed to acknowledge that the parties had agreed not to renew the NBI Agreement for 1981, and falsely stated that the Agreement . . . provided for software disks, supplies and technical support for five years. . . .

21. As a result of Olivetti's misrepresentations, Mr. Epley purchased two 701's from Ames in December, 1980, and Ames borrowed some $46,000 from Mr. Wade Perry and purchased five 701's from Olivetti in December for cash. Ames also continued to direct most of its time and effort toward selling the 701, even though the market had been severely damaged by Olivetti's secret actions. Ames would not have taken these actions if it had been told the truth by Olivetti about the NBI relationship and the NBI Agreement. Furthermore, in early 1981 Ames could have become an NBI dealer for the NBI 3000, a product very similar to the 701, but Ames decided not to become an NBI dealer in part in reliance upon the false representations of Olivetti about the NBI relationship and the NBI Agreement.

21. As a result of the rumors in the trade that NBI had terminated the Agreement, it became very difficult for Ames to sell the 701 product in 1981. Ames representatives conferred on several occasions during 1981 with Olivetti representatives, but Ames was never told of the termination of the NBI Agreement. Olivetti kept this information from Ames and its other dealers, and misrepresented the fact that the Agreement had been terminated in order to be able to sell its inventory of 701's to them.

22. Mr. Kohart and Mr. Gallagher were representatives of Olivetti with whom Ames dealt, and they misrepresented the facts; and Olivetti's president had intentionally made this

possible by causing the status of the agreement to be kept secret.

23. Although Ames eventually sold the five 701's it purchased from Olivetti in December, 1980, these sales were very slow and difficult because of Olivetti's secret actions, even with reduced prices and high trade-ins, and Ames lost sales and profits as a result of Olivetti's actions.

24. In early 1981, Olivetti refused to sell Ames supplies, for cash, unless Ames would first sign notes for an amount which Olivetti said was owed to it by Ames. The reason for this action was to eliminate defenses of Ames and to make it easier for Olivetti to sue on the debt. Although Ames disputed the amount, it signed notes to Olivetti in March, 1981, for such amount. The notes were signed by Ames under protest, in order to secure a supply of parts and supplies needed by Ames to service its customers as it had promised to do. Olivetti never told Ames, during the negotiations over the notes, that it had breached its agreement with NBI, or that it could not fulfill its promises to support the 701, or that the NBI Agreement had been terminated; and Ames was not aware of these facts when it signed the notes.

Ames did owe Olivetti at the time $71,000 for equipment purchases, the amount of the series of ten notes dated March 26, 1984; and a present balance of $56,000 is owed on said notes after payments of $15,000 by Ames. Ames is entitled to an additional $15,000 reduction of the $56,000 amount as a result of an agreement with Olivetti to give Ames a dollar for dollar additional credit on payments made. The total amount owed by Ames to Olivetti on said notes is therefore $41,000. The interest note in the amount of $11,537.50 was not owed when signed. The additional $19,000, which Olivetti claims is owed to it by Ames on open account, has not been proved, is denied by Ames, and is not owed.

25. In the summer of 1981 Olivetti offered to sell Ames 10 of the 701's on credit, at a substantially discounted price. . . . Ames asked Olivetti why it was selling the products at such a low price, and Olivetti falsely told Ames it was trying to reduce its inventory so it could purchase more 701's from NBI pursuant to its contract with NBI. Olivetti never told

Ames that the NBI Agreement had been breached by Olivetti or that it had been terminated by NBI. Based upon Olivetti's misrepresentations, Ames purchased, on credit, 10 of the 701's from Olivetti in the early fall of 1981, plus two Olivetti 351's, a new word processing machine. Ames would not have purchased any of these machines if it had been told the truth by Olivetti. . . . Ames signed notes or trade acceptances for the two 351's in the amount of $6348 on August 28, 1981 and for the ten 701's in the amount of $56,000 on November 11, 1981.

26. At or about the time Olivetti sold the ten 701's to Ames, it also sold approximately 100 of these products to a consortium of NBI dealers, including one dealer in North Carolina. Olivetti did not inform Ames about this sale. When Ames' salesman, Jay Ozment, learned about the sale by Olivetti of 701's to NBI dealers, including one dealer in Raleigh, he, his wife Teresa, who was Ames' Marketing Service Representative, and Ames' serviceman, David Harrison, concluded that Olivetti had destroyed the market for the 701 for Ames, and in so doing had destroyed Ames, and they proceeded to make plans to leave Ames. Mrs. Ozment left Ames in October, 1981, Mr. Ozment and Mr. Harrison left Ames in late October or early November, 1981, and went to work for the new North Carolina dealer for NBI products, a company called IPC. Mr. Ozment and Mr. Harrison opened a Charlotte office for IPC and proceeded to take a substantial amount of Ames' service business from Ames and to successfully sell Olivetti 701's and NBI 3000's in the Charlotte area.

Mr. Ozment sold nine Olivetti 701's during his first eleven months with IPC . . . plus related accessories, totalling $130,000 in sales of Olivetti equipment. In addition, he sold NBI products similar to the Olivetti products. In his last complete fiscal year with IPC, October, 1982 through September, 1983, Mr. Ozment, using sales practices similar to those he used with Ames, sold $413,000 of NBI products. From the end of September, 1983 until the date of his testimony (May 15, 1984), he had sold $282,000 of NBI products. The gross profit on these products is approximately 35 percent.

27. If Ames had become an NBI dealer in late 1980 or early 1981, it is reasonable that Jay Ozment would not have left Ames and also David Harrison, and that Ames would have had the sales which Jay Ozment produced for IPC, and also the service business which Ames lost to IPC. Also, it is reasonable that Ames would have gotten the normal amount of service business from the additional sales.

28. Mr. Perry projects that Ames' profits, as an NBI dealer, would have been $77,000 in 1982, $121,000 in 1983, and $203,000 in 1984 and in subsequent years, based upon Mr. Ozment's sales with IPC and Mr. Perry's experience with operating costs and with related service sales and costs. The Court finds that these projections are reasonable, particularly in view of the fact that Olivetti's wrongful conduct caused Ames to take actions which make more definite projections difficult to ascertain.

. . .

30. Olivetti's conduct in falsely telling Ames, when Olivetti announced the 701 product, in 1979, that it had a five-year agreement with NBI for the supply of the 701, when Olivetti knew the terms of the Agreement and knew that a long-term agreement was important to the successful marketing of the 701, constitutes intentional and willful fraud and unfair and deceptive acts and practices by Olivetti against Ames. The Court finds that the false statements were made by Olivetti with the intent to deceive Ames and to induce Ames to take on and promote the 701 product, and they did in fact deceive Ames. Ames reasonably relied upon the false statements and expended considerable time and effort promoting the 701 product as a result of the false statements, to the detriment of Ames.

31. Olivetti's conduct in November, 1980, whereby it intentionally misled Ames by falsely telling Ames that its relationship with NBI was all right, and that it was negotiating with NBI for a continuation of the NBI Agreement, and that the Agreement provided for certain support for five years, when, in fact, Olivetti had breached its agreement with NBI and the two companies had agreed not to renew the NBI Agreement, and the Agreement did not provide for the sup-

port represented by Olivetti, constituted willful and intentional fraud and unfair and deceptive business acts and practices by Olivetti against Ames. Olivetti's representations were made to Ames in order to conceal Olivetti's earlier misrepresentations to Ames and to further deceive Ames and to induce Ames to continue its efforts to market the 701 product; and they did in fact deceive Ames. Ames reasonably relied upon these intentional misrepresentations, to its detriment, in that it continued to expend efforts to market the 701, and borrowed $46,000 to purchase for cash five additional 701's which it continued to market, and thereby passed up other business opportunities, including an opportunity to become an NBI dealer in early 1981.

The Court finds that Ames' damages from this continued fraud and unfair and deceptive business acts or practices, are $401,000.00. This figure includes $77,000 in lost profits in 1982, $121,000 in lost profits in 1983, and $203,000 in lost profits in 1984.

32. Olivetti's conduct in falsely telling Ames, in the fall of 1981, in connection with the sale by Olivetti to Ames of 10 additional 701's and two 351's, that it was selling the 701's at a low price in order to lower its inventory so it could purchase additional 701's from NBI pursuant to the NBI Agreement, when in fact the NBI Agreement had been terminated and Olivetti had no intention to purchase additional 701's from NBI, was further willful and intentional fraud by Olivetti against Ames, especially when viewed in connection with the earlier Olivetti representations to Ames. It also constitutes unfair and deceptive business acts or practices by Olivetti against Ames.

Olivetti's misrepresentations were made to deceive Ames and to cause Ames to purchase additional machines from Olivetti; and they did in fact deceive Ames and cause Ames to purchase ten additional 701's and two 351's from Ames, at a total cost of $62,348, which Ames would not have purchased had it known the truth. This $62,348 is part of the amount Olivetti has sued Ames for in this action. Ames has been unable, as a result of Olivetti's actions, to sell the two 351's and 7 of the 701's, and Ames sold two of the 701's at a

loss of $5200. The Court finds and concludes that Ames should return the two 351's and seven 701's to Olivetti, and that Ames then owes Olivetti $16,800 as a result of the purchase; and that Olivetti owes Ames $5200 in damages resulting from the purchase.

33. The Court finds that the total amount of actual damages suffered by Ames as a result of Olivetti's pattern of willful and intentional fraud and unfair and deceptive business acts and practices is at least as follows:

$401,000.00 resulting from the matters referred to in paragraph 31.

$5,200.00 resulting from the matters referred to in paragraph 32.

34. The Court further finds and concludes that Ames is entitled to a judgment, pursuant to G.S. 75-16, in the amount of treble its actual damages, $1,218,600.00, as a result of the unfair and deceptive acts and practices of Olivetti against Ames.

35. The Court further finds and concludes that Ames owes Olivetti the following:

$41,000 on the March 26, 1981 notes;

$16,800 on the September 1981 purchases;

$57,800 total, plus return of two 351's and seven 701's to Olivetti. In addition, Ames owes Olivetti interest on each amount, at the lawful rate, from September 1, 1981 on the $41,000 amount and from January 1, 1982 on the $16,800 amount.

The trial court made conclusions of law which are basically repetitive of its findings of fact numbers 30 through 35 and ordered as follows: that Ames recover of Olivetti $1,218,600 plus interest from the date of the judgment, that Olivetti recover of Ames $57,800 plus interest as previously described, that Ames return to Olivetti the two 351's and the seven 701's referred to previously or pay the purchase price of such equipment and that Olivetti pay the costs of the action. Both parties filed post-trial motions which were denied by the court by order entered 10 June 1985. Thereafter, both parties gave notice of appeal.

Weinstein, Sturges, Odom, Groves, Bigger, Jonas & Campbell, P.A., by Hugh B. Campbell, Jr., for plaintiff.

Joe C. Young for defendant.

WELLS, Judge.

Olivetti's Appeal

[1] Olivetti first argues that the trial court erred in finding that it made material misrepresentations and that Ames' reliance on such misrepresentations was reasonable. It is well established that in a non-jury trial the trial court's findings of fact are conclusive if supported by competent evidence even though there is evidence to the contrary. *Goldman v. Parkland*, 277 N.C. 223, 176 S.E. 2d 784 (1970). The trial court found that the following conduct constituted fraud: (1) Olivetti's conduct in August 1979 in falsely telling Ames, when Olivetti announced the TES-701, that it had a five-year agreement with NBI for supply of the 701; (2) Olivetti's conduct in November 1980 when it intentionally misled Ames by falsely telling Ames that its relationship with NBI was all right, that it was negotiating with NBI for a continuation of the NBI agreement and that the NBI agreement provided for certain support for five years; and (3) Olivetti's conduct in the fall of 1981 in falsely telling Ames in connection with the sale by Olivetti to Ames of TES-701's and 351's that it was selling the 701's at a discounted price in order to lower its inventory so that it could purchase additional 701's from NBI pursuant to the NBI agreement.

The trial record shows that competent evidence was presented which supports the court's findings that the representations just described were made and that such representations were false. The findings of fact made by the court, which are extensive and supported by competent evidence in the record, clearly demonstrate the materiality of the misrepresentations made by Olivetti. Moreover, the magnitude of the damage suffered by Ames as a result of its reliance on Olivetti's misrepresentations further shows the materiality of those misrepresentations.

The court found that Ames reasonably relied on the false statements made by Olivetti in August 1979, November 1980 and the fall of 1981 regarding the status and terms of the NBI agree-

ment and that Ames passed up an opportunity to become an NBI dealer in early 1981 in reliance upon Olivetti's misrepresentations. Competent evidence was presented which supports these findings. Olivetti argues, however, that Ames passed up the opportunity, if any, to become an NBI dealer in reliance upon the letter written by Kohart to Epley and that such reliance was unreasonable as a matter of law. We disagree. The evidence shows that Ames decided not to become an NBI dealer in early 1981 in reliance upon the prior misrepresentations made by Olivetti and that such reliance was reasonable. Since the findings in question are supported by competent evidence, they are binding upon us. *See Goldman, supra.*

[2] Olivetti next argues that the court erred in its findings as to the amount of damages suffered by Ames. Of the damages awarded to Ames, Olivetti contests only that part awarded for lost profits. In determining that Ames was entitled to damages for lost profits in the amount of $401,000, the court reasoned as follows: Had it not been for Olivetti's misrepresentations, Ames would have become an NBI dealer in late 1980 or early 1981. If Ames had become an NBI dealer at that time, it is reasonable to assume that Ames' salesman, Jay Ozment, and Ames' serviceman, David Harrison, would have remained with Ames. Thus, Ames would have had the sales which Ozment produced for IPC, the NBI dealer for which Ozment went to work after leaving Ames; the service business which Ames lost to IPC; and the normal amount of service business from the additional sales. Ames' profits as an NBI dealer, based on the projections of Ames' president and owner, Wade Perry, would have been $77,000 in 1982, $121,000 in 1983 and $203,000 in 1984, for a total of $401,000 for the three-year period.

Olivetti argues that Ames is not entitled to damages for lost profits because it did not have a history of profits, that the court's finding that Ames could have become an NBI dealer has no support in the record, that the court did not use a proper measure to determine Ames' lost profits and that insufficient evidence was presented to support the award.

Olivetti's argument that Ames is precluded from recovering damages for lost profits because it did not have a history of profits is based on what is sometimes called the "new business rule."

See Comment, *Remedies—Lost Profits as Contract Damages for an Unestablished Business: The New Business Rule Becomes Outdated*, 56 N.C. L. Rev. 693 (1978). Under this rule, recovery for lost profits is not allowed for injury to a new or unestablished business without a history of profits because evidence of expected profits from such a business is necessarily too speculative. *Id. See also* 22 Am. Jur. 2d, *Damages* § 173 (1965); Dobbs, *Handbook on the Law of Remedies* § 3.3 (1973). In contrast, lost profits may be recovered for injury to an "old" or established business because its profit record provides a sufficient minimum basis for calculation of the damages with the degree of certainty required. *See* Dobbs, *supra*; 22 Am. Jur. 2d, *Damages* § 173. It has been said that the name "new business rule" is somewhat misleading because the rule applies to any business without a history of profits in the period immediately preceding the period for which lost profits are sought to be recovered. Comment, *supra*. Thus, this rule could possibly be applied in the present case since Ames did not have a history of profits.

The "new business rule" has been criticized and there is an increasing trend in other jurisdictions either to create exceptions and mitigating sub-doctrines to the rule or simply to recognize that its rationale is not persuasive. *See* Comment, *supra*; Dobbs, *supra*. As noted by one authority:

> Courts are now taking the position that the distinction between established businesses and new ones is a distinction that goes to the weight of the evidence and not a rule that automatically precludes recovery of profits by a new business. What is required is reasonable evidence, and that may at times be found in some fact other than the fact of past profit rates.

Dobbs, *supra*. Those jurisdictions which do not follow the "new business rule" hold that it is enough to merit recovery if the existence and amount of lost profits is shown with reasonable certainty. Comment, *supra*. *See also* 22 Am. Jur. 2d, *Damages* § 173.

It appears from our research that North Carolina has never adopted the "new business rule." On the contrary, North Carolina apparently follows the view that recovery for lost profits is allowed for injury to a business, regardless of whether the business has a history of profits, as long as the loss of profits is shown

with a reasonable degree of certainty. *See Rannbury-Kobee Corp. v. Machine Co.*, 49 N.C. App. 413, 271 S.E. 2d 554 (1980); Hightower, *North Carolina: Law of Damages* § 2-8 (1981). We agree that this view is by far the better and more equitable one. Accordingly, we reject Olivetti's argument that Ames is precluded from recovering damages for lost profits simply because it did not have a past record of profits.

In order to recover damages for lost profits, Ames had the burden of proving with a reasonable degree of certainty that it would have realized profits had it not been for Olivetti's wrongful conduct and the amount of those profits, and that its loss was the direct and necessary result of the wrongful conduct. *See* Hightower, *supra*; 22 Am. Jur. 2d, *Damages* §§ 171, 177. As with any damages, damages for lost profits may only be recovered if sufficient evidence is presented that the trier of fact can find with reasonable certainty the fact and amount of the damages. *See* Hightower, *supra* at § 7-1; 22 Am. Jur. 2d, *Damages* § 172. Recovery for lost profits may not be based on speculation or guesswork but it will be enough if the evidence justifies an inference that the damages awarded are just and reasonable compensation for the injury suffered. *See* Hightower, *supra* at § 7-1. As one authority noted in discussing damages generally, courts seem to have striven for a balance that permits a claimant to recover even if his proof is incomplete as long as he has proven as much as he reasonably can and has proven something relevant to computation of damages. Dobbs, *supra.* It must be borne in mind that lost profits are to some extent uncertain and problematical. 22 Am. Jur. 2d, *Damages* § 172. Absolute certainty is not required but the evidence must be sufficiently specific to permit the fact finder to arrive at a reasoned conclusion. Hightower, *supra. See also Weyerhaeuser Co. v. Supply Co.*, 292 N.C. 557, 234 S.E. 2d 605 (1977). Courts state that less certainty is required to prove the amount of the lost profits than is required to show the fact that the profits were lost. 22 Am. Jur. 2d, *Damages* § 172. *See also Story Parchment Co. v. Paterson P. Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931).

The degree to which the evidence will succeed in establishing the reasonable certainty of lost profits depends in large part on the circumstances of the particular case. Note, *The Requirement Of Certainty In The Proof Of Lost Profits*, 64 Harv. L. Rev. 317

(1950). Consistent with this, it appears that the degree of acceptable uncertainty varies with the strength of the underlying substantive legal policy. Dobbs, *supra*; Comment, *supra*. *See also* Note, *supra*. "The more reprehensible a defendant's behavior, the more the law will feel justified in resolving doubts against him concerning the consequences of the behavior." Comment, *supra*. Thus, courts have applied a more liberal rule in cases involving wrongful conduct such as tort and antitrust cases. *See, e.g., Stefan v. Meiselman*, 223 N.C. 154, 25 S.E. 2d 626 (1943) (Whatever may be the rule in contract actions, a more liberal rule should prevail in tort actions); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946); *Story Parchment Co., supra*. *See generally* Comment, *supra*. As the United States Supreme Court stated in *Story Parchment Co., supra*:

> Where the tort itself [or the wrongful conduct] is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

In such situations, justice and sound public policy require that the wrongdoer bear the risk of the uncertainty which his own wrong has created. *Id. See also Bigelow, supra*.

[3] We now apply these principles to the present case and consider the remaining arguments made by Olivetti regarding the damages awarded to Ames for lost profits. We first conclude that there is sufficient evidence in the record to support the finding that Ames could have become an NBI dealer. Although the evidence does not conclusively show that Ames could have become an NBI dealer in early 1981, sufficient evidence was presented to permit the court to find with reasonable certainty that Ames

could and would have become an NBI dealer in early 1981 had it not been for the false representations made by Olivetti.

The evidence tends to show that in early 1981, NBI was interested in establishing a dealership in the Charlotte area; that in March 1981, Audley Downs, NBI's eastern regional manager for dealer operations, met with Wade Perry and Ames' other personnel to discuss the possibility of Ames becoming an NBI dealer; that one of Mr. Downs' primary duties was to recruit new dealers for NBI; that Mr. Downs was very much impressed with the personnel at Ames and thought that Ames could be successful in selling, supporting and servicing the NBI product line and that Ames could have been a good NBI dealer; and that it would cost Ames between $26,000 and $45,000 to become an NBI dealer. Although Mr. Downs testified that to the best of his knowledge he did not make a formal offer to Ames to become an NBI dealer, the testimony of Wade Perry, Jay Ozment and David Harrison shows that Ames was told that it could become an NBI dealer if it purchased $25,000-$30,000 worth of NBI equipment. The evidence tends to show that Ames decided not to become an NBI dealer based on the promises and assurances it had received from Olivetti and based on the purchase it had recently made of additional Olivetti equipment in reliance on Olivetti's misrepresentations and that if Olivetti had told Ames the truth about its relationship and agreement with NBI, Ames would not have passed up the opportunity to become an NBI dealer. In addition, sufficient evidence was presented to permit the court to find that Ames either had the financial capability in early 1981 to become an NBI dealer or that it would have had such financial capability had it not been for Olivetti's misrepresentations. We conclude that there is adequate support in the record for the finding in question.

[4] We next consider Olivetti's argument that the trial court did not use a proper measure to determine Ames' lost profits. Olivetti contends the court used IPC's sales to measure Ames' lost profits and that such measure was error as a matter of law because a more definite measure—Ames' history of profits or losses—was available and because IPC is too different from Ames to be used as a meaningful yardstick. The court, however, did not determine Ames' lost profits by using the sales record of IPC, as a comparable business, as suggested by Olivetti. The court's determination of the fact and amount of Ames' lost profits is based on the

sales and service business which Ames lost to IPC because it passed up the opportunity to become an NBI dealer in reliance on Olivetti's misrepresentations. The sales and service business which the court considered is that which was produced for IPC, an NBI dealer, by Ames' former salesman, Ozment, and Ames' former serviceman, Harrison, both of whom the court found would have remained with Ames had it not been for Olivetti's wrongful conduct. The court's finding that Ozment and Harrison would have remained with Ames if Ames had become an NBI dealer in late 1980 or early 1981 is clearly supported by the evidence.

In determining Ames' lost profits, the court basically accepted the projections of Ames' president and owner, Wade Perry. Perry's projections were based on Ozment's actual sales during the period between October 1981 and March 1984, the projected gross profit margin on those sales which figure was based on the gross profit margin realized by Ames in prior years, the projected service revenue generated by Ozment's sales which projection was based on Perry's knowledge of and experience in the industry and on Ames' past record, and Ames' projected operating expenses which projection was based on Ames' operating expenses in prior years. We note that the court correctly based its award on Ames' projected net, rather than gross, profits. *See* 22 Am. Jur. 2d, *Damages* § 178. The court found that Perry's projections were reasonable, particularly in view of the fact that Olivetti's wrongful conduct made more definite projections difficult to ascertain, and we agree. Perry's projections are reasonable and conservative and are adequately supported by evidence in the record.

Various means are available to claimants in attempting to prove lost profits with the requisite degree of certainty. Note, *supra. See Rannbury-Kobee Corp. v. Machine Co., supra.* There is no single method of determining lost profits which can be applied in all cases. 22 Am. Jur. 2d, *Damages* § 178. Each case must be determined according to its own facts, keeping in mind the goal of the damage remedy for those facts. *Id.* We are unable to say that the method used by the court here to ascertain Ames' lost profits was improper given the circumstances of this case. Ozment testified that there was no substantial difference between the sales techniques he used while working for IPC and those he used while with Ames. Given this, use of the sales made by Ozment for

IPC, an NBI dealer, during the relevant time period and in the same or similar geographical area in which Ames operated and the service business generated from those sales to determine the profits which Ames would have made during the same time period as an NBI dealer seems particularly reliable.

Olivetti argues, however, that even if the measure used by the court to determine Ames' lost profits was proper, the only basis in the record for the court's findings as to those profits is the unsubstantiated opinion testimony of Wade Perry and that such testimony alone is inadequate to support the award. We disagree. The court's findings as to the profits lost by Ames are supported not only by Perry's testimony but also by Ozment's testimony and certain documentary evidence submitted to the court, such as Ames' tax returns. Perry's projections, in turn, are not mere guesswork, but are based on evidence in the record and therefore provide a sufficient basis for the findings and award made. *See Tillis v. Cotton Mills*, 251 N.C. 359, 111 S.E. 2d 606 (1959).

We conclude that sufficient evidence was presented to permit the court to find with a reasonable degree of certainty that Ames lost profits for the years 1982 through 1984 in the amount of $401,000 and that such loss was the direct and necessary result of Olivetti's wrongful conduct. The evidence supports the findings and award made with respect to such profits and justifies the conclusion that the damages awarded are fair and reasonable compensation for the injury suffered. Accordingly, we find no error in the damages awarded to Ames for its loss of profits for the years 1982 through 1984.

[5] Olivetti next contends the court erred in applying N.C. Gen. Stat. § 75-1.1 (1985) to the distributor-dealer relationship between Olivetti and Ames. Olivetti argues that G.S. § 75-1.1 applies only to transactions involving consumers, that Ames is a dealer rather than a consumer or "user" of Olivetti equipment and that therefore Ames has no standing to sue Olivetti under N.C. Gen. Stat. § 75-16 (1985). G.S. § 75-1.1 provides in relevant part 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, but does not include professional services rendered by a member of a learned profession.

G.S. § 75-16 provides:

If any person shall be injured or *the business* of any person, firm or *corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other* person, firm or *corporation* in violation of the provisions of this Chapter, such person, firm or *corporation* so injured shall have a right of action on account of such injury done, and if damages are assessed in such case judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict. [Emphasis added.]

G.S. § 75-1.1(b) has been broadly applied to cover many activities. *Kim v. Professional Business Brokers*, 74 N.C. App. 48, 328 S.E. 2d 296 (1985). This section is not broad enough, however, to encompass "all forms of business activities," but was adopted to ensure that the original intent of G.S. § 75-1.1 as set forth in G.S. § 75-1.1(b) (1977) was effectuated. *Threatt v. Hiers*, 76 N.C. App. 521, 333 S.E. 2d 772 (1985), *disc. rev. denied*, 315 N.C. 397, 333 S.E. 2d 772 (1986). G.S. § 75-1.1 as originally enacted contained the following declaration of legislative intent in Section (b):

The purpose of this section is to declare, and to provide civil legal means to maintain, ethical standards of dealings *between persons engaged in business*, and between persons engaged in business and the consuming public within this State, to the end that good faith and fair dealings *between buyers and sellers at all levels of commerce* be had in this State. [Emphasis added.]

N.C. Gen. Stat. § 75-1.1 (1975). Any party claiming to be exempt from the provisions of the statute has the burden of proof with respect to such claim. G.S. § 75-1.1(d) (1985); *Edmisten, Attorney General v. Penney Co.*, 292 N.C. 311, 233 S.E. 2d 895 (1977).

We think it is clear that the activities concerned herein fall within the intended scope of G.S. § 75-1.1. The actions in question undoubtedly were in commerce and Olivetti has failed to show that it is otherwise exempt from the operation of the statute's

provisions. It is also clear that individual consumers are not the only ones protected and provided a remedy under G.S. §§ 75-1.1 and 75-16. This is obvious both from the language of the statutes and from the decisions of the appellate courts of this State. *See, e.g., Winston Realty Co. v. G.H.G., Inc.*, 314 N.C. 90, 331 S.E. 2d 677 (1985); *Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980); *F. Ray Moore Oil Co., Inc. v. State of N.C.*, 80 N.C. App. 139, 341 S.E. 2d 371 (1986); *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E. 2d 755 (1986). The case on which Olivetti primarily relies for this argument, *Bunting v. Perdue, Inc.*, 611 F. Supp. 682 (E.D.N.C. 1985), is distinguishable and unpersuasive on this issue and certainly is not controlling on this Court. We conclude that G.S. § 75-1.1 is applicable in the present case and that Ames has standing under G.S. § 75-16 to bring this action.

[6] Olivetti argues that even if G.S. § 75-1.1 is applicable in this case, there is no basis in the record for the court's findings that Olivetti committed unfair and deceptive acts and practices. This argument is premised on Olivetti's previous argument that the court erred in finding that Olivetti made material misrepresentations. We rejected that argument and reject the present argument as well. The court found that Olivetti's conduct as particularly described in findings numbers 30, 31 and 32 constituted fraud. There is competent evidence in the record which supports these findings. "Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts." *Winston Realty Co., supra, citing Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975).

[7] Olivetti further contends that G.S. § 75-1.1, as applied in this case, is unconstitutionally vague and overbroad. The constitutional doctrine that statutes may be held void for vagueness is designed to require that statutes adequately warn people of conduct required or prohibited. *Ellis v. Ellis*, 68 N.C. App. 634, 315 S.E. 2d 526 (1984). *See also United States v. Mazurie*, 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706 (1975). As our Supreme Court stated in *In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 2d 647 (1971):

> "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must

> necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." . . . Even so, impossible standards of statutory clarity are not required by the constitution. When the language of a statute provides an adequate warning as to the conduct it condemns and prescribes boundaries sufficiently distinct for judges or juries to interpret and administer it uniformly, constitutional requirements are fully met. [Citations omitted.]

Courts should scrutinize the constitutionality of a statute only as applied in the case at hand. 16 Am. Jur. 2d, *Constitutional Law* § 173 (1979). *See also In re Biggers*, 50 N.C. App. 332, 274 S.E. 2d 236 (1981); *State v. Covington*, 34 N.C. App. 457, 238 S.E. 2d 794 (1977), *disc. rev. denied*, 294 N.C. 184, 241 S.E. 2d 519 (1978). Clearly, the language of G.S. § 75-1.1 provides adequate notice that conduct constituting fraud is prohibited. *See Hardy v. Toler, supra.* Therefore, we do not agree that the statute is unconstitutional as applied in this case.

[8] Olivetti assigns as error the trial court's refusal to award to it the full amount allegedly owed to it by Ames on accounts receivable for goods sold. Of the $148,990.68 which Olivetti sought to recover, the court awarded Olivetti $57,800.00 plus interest. The court further directed Ames to return to Olivetti the two 351's and the seven 701's which Ames purchased from Olivetti in the fall of 1981 or pay the purchase price for each piece of equipment not returned. Olivetti argues that the court erred in not awarding to it the amount owed by Ames for the two 351's and the seven 701's.

The court concluded that since Ames purchased the 351's and the 701's as a result of Olivetti's fraud and unfair and deceptive acts and practices and had not yet sold the machines or paid Olivetti for them, as a matter of equity the sale of the machines should be rescinded and Ames should return the machines to Olivetti and owe nothing for them or pay the purchase price for each machine not returned. We find no error in this and therefore overrule this assignment of error.

[9] Lastly, Olivetti argues that the court erred in not deducting the amount of its recovery from the damages awarded to Ames prior to trebling Ames' damages. We disagree. Offsetting Ames' damages by the amount of Olivetti's recovery prior to trebling

the damages would amount to a triple recovery for Olivetti and would frustrate the punitive function of the treble damage provision. *See Marshall v. Miller*, 302 N.C. 539, 276 S.E. 2d 397 (1981) (G.S. § 75-16 is partly punitive in nature). Certainly this is not what our legislature intended.

Ames' Appeal

[10] Ames contends the trial court erred in not awarding it damages for the expenses it wasted during the period from August 1979 through December 1981 due to Olivetti's misrepresentations and for its loss of profits after 1984 resulting from Olivetti's wrongful conduct. Ames was awarded damages for its loss of profits in 1982, 1983 and 1984 and for the loss it sustained on the sale of two 701's but was not otherwise awarded any damages for the period from August 1979 through December 1981 or for any time period after 1984. We conclude that Ames failed to prove with the requisite degree of certainty that it was entitled to recover any damages other than those which it was awarded.

At trial, Ames sought to recover in full the amount of its expenses for the period from August 1979 through December 1981. It now in essence concedes that it is not entitled to the full amount it requested at trial and asks that this Court calculate its damages according to a new formula proposed by it which it maintains is a more reasonable and conservative measure of its actual damages for the period. Under this formula, Ames asks that the court determine its damages by calculating the amount of its expenses devoted to the 701 during the period in question and subtract from that amount the profit made and the service revenue obtained by it as a result of its sales of 701's during the period.

Even if we were so inclined to calculate Ames' damages for Ames and accepted the formula just stated as a proper measure of the damages in question, insufficient evidence was presented at trial to permit the calculation of the damages under this formula with the requisite degree of certainty. Ames had the burden of presenting sufficient evidence to permit the trier of fact to find with reasonable certainty the fact and amount of these damages. *See* Hightower, *supra* at § 7-1. This it failed to do. Specifically, Ames failed to present sufficient evidence to permit the court to find with reasonable certainty the portion or amount of its ex-

penses or losses during this period which was attributable to Olivetti's wrongful conduct rather than to other factors. In addition, we note that, had Ames been awarded the damages it now seeks for its expenses incurred from August 1979 until December 1981 as well as damages for lost profits in the years 1982 through 1984, it would have received to a certain extent a double recovery.

The evidence presented in support of Ames' claim for loss of profits after 1984 was simply too speculative to permit recovery. As Ames concedes, the certainty of its profits after 1984 is less than the certainty of its profits prior to that time when Ozment's actual sales are known. The evidence presented was not sufficient to permit the court to determine with any degree of certainty the fact or amount of Ames' lost profits after 1984; thus, Ames' claim for such damages was properly denied.

[11] Ames next argues that the trial court erred in refusing to assess punitive damages against Olivetti in an amount greater than and in lieu of the treble damages awarded Ames. Both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the trier of fact. *Worthy v. Knight*, 210 N.C. 498, 187 S.E. 771 (1936). Given the substantial amount of the treble damages, we find no abuse of the court's discretion in refusing to award punitive damages in an even greater amount. It is clear that the court believed that the amount awarded was sufficient to compensate Ames for the injury suffered by it and to penalize Olivetti for its wrongful conduct. We are inclined to agree.

[12] Lastly, Ames argues that the court abused its discretion in refusing to award reasonable attorney's fees to Ames pursuant to N.C. Gen. Stat. § 75-16.1 (1985). G.S. § 75-16.1 authorizes the presiding judge to allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party upon the finding of certain facts. Award or denial of such fees, even where supporting facts exist, is within the discretion of the trial judge. *Concrete Service Corp. v. Investors Group, Inc., supra.* We perceive no abuse of that discretion here.

The judgment entered by the trial court is hereby affirmed.

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

IN RE: FORECLOSURE OF DEED OF TRUST FROM MARY ANN COOPER TO CLAYTON S. CURRY, JR., TRUSTEE, DATED 9 JANUARY 1984, RECORDED IN BOOK 4779, PAGE 178, IN THE MECKLENBURG COUNTY REGISTRY, BY CLAYTON S. CURRY, JR., TRUSTEE

No. 8526SC272

(Filed 3 June 1986)

Attorneys at Law § 7.1; Contracts § 6— equitable distribution—contingent fee contract not void as against public policy

A contingent fee contract covering services rendered in an equitable distribution action is not void as against public policy and is fully enforceable as long as it does not provide compensation to the attorney for securing the divorce. If an attorney represents a client in both divorce and equitable distribution actions, and the client wishes to have a contingent fee contract in the equitable distribution action, a separate agreement must be executed to provide for a fee in the divorce action that is not contingent upon the securing of the divorce.

APPEAL by respondent from *Burroughs, Judge.* Order entered 19 November 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 16 October 1985.

Wade and Carmichael, by J. J. Wade, Jr., for petitioner appellee.

Robert A. Karney, pro se, as respondent appellant.

BECTON, Judge.

On 1 December 1982, David E. Cooper instituted a divorce proceeding against his wife, Mary Ann Cooper. On 28 December 1982, Mary Ann Cooper and Robert A. Karney, P.A., signed a contract of employment which provided in its entirety:

CONTRACT OF EMPLOYMENT

This is to acknowledge that I have retained the services of Robert A. Karney, P.A., as legal counsel to represent me in

the matter of: David E. Cooper vs. Mary Ann Cooper. The agreed attorney's fee to Robert A. Karney, P.A., for their representation in this matter is as follows:

Thirty-five percent of the gross recovery plus expenses

CSC
M.A.C.

This the 28 day of December, 1982.

s/ROBERT A. KARNEY
Attorney

s/MARY A. COOPER
Client

On 30 December 1982, Ms. Cooper filed an answer and counterclaim in the divorce action admitting all the allegations and seeking equitable distribution of the marital property. On 24 January 1983, a judgment of divorce was entered, ending the Coopers' marriage. For the next year, the Coopers engaged in litigation over their marital property under N.C. Gen. Stat. Sec. 50-20 (1984 & 1985 Supp.). On 12 January 1984, a final judgment by consent was entered.

After the equitable distribution proceeding, Ms. Cooper and Mr. Karney agreed that Ms. Cooper would pay Mr. Karney's fee, $6,790.00, according to an installment plan. The plan was incorporated into a promissory note secured by a deed of trust to Ms. Cooper's interests in the property that was formerly the Cooper's marital home. Ms. Cooper made only one payment on the note. After accelerating the note and receiving no further payment, Mr. Karney instituted foreclosure proceedings. An order of foreclosure was entered by the assistant clerk of the superior court, but a temporary restraining order was served upon the trustee to postpone the foreclosure sale pending a hearing on Ms. Cooper's motion for a permanent injunction.

The trial court found that Ms. Cooper's obligation on the note and deed of trust was to make payment on "a contingent fee contract, the amount of which is contingent upon a divorce of the [Coopers] and upon the value and amount of property awarded Ms. Cooper." The court concluded:

> The said Exhibit "A" CONTRACT is void under the laws of this State as against public policy in accordance with *THOMPSON v. THOMPSON et al*, No. 8239DC578 of the North

Carolina Court of Appeals filed September 4, 1984, not yet published in the official Advance Sheets.

The said fee NOTE and the DEED OF TRUST here sought to be foreclosed were executed by Mrs. Cooper under and pursuant to said Exhibit "A" CONTRACT and thus lacked legal consideration and said two instruments are likewise void and of no legal effect.

The trial court permanently enjoined the foreclosure of the secured property and ordered the note and deed of trust cancelled.

The only issue on appeal is whether the trial court erred in concluding that the contingent-fee contract in this case is void as against the public policy of this State. We conclude that, although a contingent-fee contract in a divorce, alimony, or child support proceeding is void under *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E. 2d 315 (1984), *rev'd on other grounds*, 313 N.C. 313, 328 S.E. 2d 288 (1985), a separate contingent-fee contract in an equitable distribution proceeding may be fully enforceable. The trial court's ruling was based on the conclusion that the contract was contingent upon a divorce and contingent in amount on the value of the equitable distribution recovery. To the extent the decision relies on the conclusion that the contract is void because it was contingent in amount upon her share of the equitable distribution, it is modified to exclude that basis. The trial court's ruling in reliance on *Thompson*, that the contract is void because it was contingent upon securing a divorce, is affirmed.

I

Although the *Thompson* decision did not involve or discuss equitable distribution, we must consider whether the policies discussed in that case apply to contingent-fee contracts in equitable distribution actions.

In *Thompson*, the plaintiff had entered into a contingent-fee contract with a law firm to represent her in "a contemplated domestic relations action against plaintiff's then-husband." Plaintiff discharged the firm and, after securing other counsel, sought "alimony, alimony *pendente lite*, and the setting aside of certain purportedly fraudulent conveyances and stock transfers involving the family business and properties." The original law firm in-

tervened to protect its alleged interest in the wife's recovery. This Court faced the issue squarely:

> The question of the validity of a contingent fee contract in a domestic case is one of first impression in this jurisdiction. However, the longstanding and prevailing view in other jurisdictions is that a fee contract contingent on the securing of a divorce, or contingent in amount on the amount of alimony, support, or property settlement to be obtained, is against public policy and void.

70 N.C. App. at 154, 319 S.E. 2d at 320 (citations omitted). The Court followed the prevailing view, relying on the reasoning in *Barelli v. Levin*, 144 Ind. App. 576, 247 N.E. 2d 847 (1969). The Court noted that in *Barelli*, the Indiana Appellate Court held that a contingent-fee contract in a divorce action was void as against public policy.

The Court in *Thompson* discussed the basic public policy considerations identified in *Barelli* as having led to the majority rule against contingent-fee contracts in divorce cases: "(1) the recognition that these contracts tend to promote divorce and (2) the lack of need for such contracts under modern domestic relations law." *Thompson*, 70 N.C. App. at 155, 319 S.E. 2d at 320. The first policy consideration encompasses the concern that contingent-fee contracts provide an inducement for attorneys to advise the dissolution of marriage ties and to discourage reconciliation. *Id.* The second policy consideration recognizes that many states, including North Carolina, provide statutory authority for the court to award, in its discretion, reasonable attorney's fees to an interested party unable to afford representation in actions for child custody and support, *see* N.C. Gen. Stat. Sec. 50-13.6 (1984), and to a dependent spouse in alimony actions when that spouse would be entitled to alimony *pendente lite*, *see* N.C. Gen. Stat. Sec. 50-16.4 (1984). *Thompson*, 70 N.C. App. at 155 n. 2, 319 S.E. 2d at 321; *see also* N.C. Gen. Stat. Sec. 6-21(4), (10) & (11) (1981). A final policy consideration identified in *Barelli* and adopted in *Thompson* was that because divorce actions are fraught with emotion, there is a danger of overreaching by attorneys. *Thompson*, 70 N.C. App. at 156, 319 S.E. 2d at 321 (quoting *Barelli*, 144 Ind. App. at 589, 247 N.E. 2d at 853); *see* Part II, *infra*.

The first policy reason identified in *Thompson* for excluding contingent-fee contracts in divorce cases has been questioned by critics. Not all are persuaded that a significant number of attorneys would discourage reconciliation when it appears that a marriage is salvageable. One author perceptively argues:

> Indeed, [this] rationale reflects a jaundiced view of human motivation. Under this view of human nature one can just as easily argue that a contingent fee promotes reconciliation, because a client would be tempted to reconcile to avoid paying the contingent fee.

Comment, *Professional Responsibility—Contingent Fees in Domestic Relations Actions: Equal Freedom to Contract for the Domestic Relations Bar*, 62 N.C. L. Rev. 381, 387 (1984) (footnote omitted). We also note that attorneys who do fall within this category would also discourage reconciliation under a fixed-rate hourly-fee contract; after all, a reconciled divorce requires fewer billable hours than a divorce drawn out through the litigation process.[1]

We recognize that, although an equitable distribution action may proceed independently of a divorce action, N.C. Gen. Stat. Sec. 50-21(a) (1984) (decree of absolute divorce must precede equitable distribution), in most cases an attorney will represent the same client in both actions. *Cf.* N.C. Gen. Stat. Sec. 50-11(e) (1984) (right to equitable distribution destroyed if not asserted prior to divorce decree). And although we question whether contingent-fee contracts do, in fact, promote divorce or discourage reconciliation, we are bound by the holding in *Thompson* that such contracts are void in divorce, alimony and child-support cases. But *Thompson* did not involve equitable distribution, and it is possible for an attorney to have two agreements with his or her client—one for a fixed fee to secure a divorce and one for a percentage fee to prosecute the equitable distribution action.[2]

1. For several additional criticisms of the proposition that contingent-fee contracts promote divorce, discourage reconciliation, or provide greater incentive for attorneys to discourage reconciliation than fixed-fee contracts based on billable hours, see Comment, *supra*, at 386-88.

2. We realize that this decision indulges the fiction that equitable distribution actions are not contingent in fact upon the securing of a divorce. Obviously, there can be no equitable distribution without a divorce. Thus, there is an argument that

In many cases when an attorney wishes to represent a client in both a divorce action and an equitable distribution action, it may be too difficult to separate time spent on one action from time spent on the other. As a result, attorneys may decide to offer only fixed-fee contracts in all cases. This, we believe, is the result of *Thompson*. Nonetheless, it does not compel us to condemn all contingent-fee contracts in all equitable distribution cases. Although we do not countermand the conclusion in *Thompson* that contingent-fee contracts in some domestic cases promote divorce, we reject the proposition that such contracts in equitable distribution cases promote divorce.

The second policy consideration in *Thompson*—that contingent-fee contracts are unnecessary because court-awarded fees are available—is not implicated here. The equitable distribution statute does not provide for court-awarded attorney's fees in cases in which one party cannot afford legal representation. The statute was amended in 1985 to allow the court to award reasonable attorney's fees and court costs incurred by one spouse in regaining possession of separate property removed from the marital home or from possession of the owner. But this is a limited policing mechanism designed to protect against the unauthorized and wrongful "disappearance, waste or conversion" of separate property by the non-owner spouse, and the fee award is limited to the fair market value of the removed property. N.C. Gen. Stat. Sec. 50-20(i) (Supp. 1985). The legislature has not provided generally for statutory fees in equitable distribution proceedings. Thus, the reasoning in *Thompson*, that contingent-fee contracts are not needed to help destitute wives (or destitute husbands) in divorce, alimony and child support actions because statutory fees are available, is not applicable to equitable distribution actions.

We believe the third policy consideration in *Thompson*—preventing overreaching and the appearance of overreaching by attorneys—is as relevant in an equitable distribution proceeding as it is in a divorce action. In the next part of this opinion, the prob-

an attorney representing a client in both actions, even with a separate fixed-fee contract for the divorce, will encourage the divorce or discourage reconciliation. As mentioned above, such an attorney would discourage reconciliation to earn more fees even under a flat- or fixed-fee contract. In any event, we decline to expand *Thompson* or apply its reasoning on this issue to equitable distribution cases.

lem of overreaching is considered in more detail. Other concerns are also addressed.

II

In the ongoing debate on the subject of contingent fees, several additional policies and concerns are frequently asserted in addition to those discussed above.

A. *Encouraging Litigation.*

Arguing against contingent fees, many, including the Chief Justice of the United States Supreme Court, contend that contingent fee contracts give rise to increased, often spurious, litigation. We find the following succinct rebuttal persuasive:

> Whatever may be the accuracy of this causal relationship between the contingent fee and frequency of litigation, the juxtaposition of the two subjects by these critics is dangerous. The argument presumes that social policy is well served by less litigation and then inherently admits that the way to discourage litigation is by striking out at the contingent fee! Not surprisingly, most of these critics have not found themselves in the vanguard of the rights of consumers, minorities and the disadvantaged in our society.

Shrager, *The Hammer for the Public Interest*, 71 A.B.A. J. 38, 40 (December 1985). Although we do not condone frivolous lawsuits, if contingent-fee contracts allow disadvantaged citizens to mount innovative challenges against old, unjust legal institutions and, in appropriate cases, replace them with modern and fair alternatives, we cannot say the propensity to "stir up" litigation is against public policy. *See* Perlman, *The Contingent Fee: The Victim's Only Hope for a Fighting Chance*, Trial, Dec. 1985, at 5. Moreover, under the typical contingent-fee arrangement, an attorney is paid based on the result achieved. Thus, there is little incentive for an attorney to file a losing case. Indeed, to the extent attorneys fear risking time and resources on a "loser," the contingent-fee system may screen out some of the baseless lawsuits. Unfortunately, baseless and spurious litigation will exist regardless of the fee arrangement.

B. *Excessive Fees.*

A second criticism of the contingent-fee contract is that it permits attorneys to recover excessive fees, disproportionate to the effort required to secure the favorable outcome. It is asserted that contingent fees are not really contingent at all, except as to the amount of the fee, because so many modern legal doctrines make proof of liability easy and leave only the amount of the damages to be litigated. *See* DuBois, *Modify the Contingent Fee System*, 71 A.B.A. J. 38 (December 1985). Although there is always a risk that a particular case will be lost (especially medical negligence or products liability cases) *see* Shrager, *supra*, at 40, there is, admittedly, very little risk in an equitable distribution action that the client will recover nothing, even when there is an equitable, as opposed to an equal, distribution.

Before discussing the rebuttals to this criticism, we note the distinction between a contingent fee and a percentage fee. *See generally* Grady, *Some Ethical Questions About Percentage Fees*, 2 Litigation 20 (Summer 1976). A contingent fee is payable only upon the occurrence of a specified event, such as obtaining a certain judgment or outcome, in settlement negotiations or at trial. The fee itself may be a flat fee (a specific amount, owing only if the contingency occurs) or a percentage fee (a percentage of an award or recovery, again, owing only if the contingency occurs). Thus, a percentage fee is almost always contingent upon the receipt of an award. In some cases, such as the probate of large estates, clear cases of automobile negligence, and equitable distribution actions, the award is certain to be received and only uncertain in amount. The attorney's risk involves the size of the award relative to the time spent representing the client. The fact that the attorney almost certainly will receive *some* fee seems altogether reasonable and fair.

The concern about excessive fees relates to the possibility of disproportionate recovery presented by the contingent-percentage-fee contract. Although attorneys working for contingent fees often receive disproportionately little compensation relative to time spent, our main concern is the protection of clients from excessive fees. This protection is assured regarding contingent-fee contracts in three ways. First, the client has recourse to general

principles of law adopted in this State to guard against unreasonable contingent-fee contracts:

> The generally accepted view appears to be that a contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee. The burden of proof is upon the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary. . . . *Contracts for contingent fees, especially, are closely scrutinized by the courts where there is any question as to their reasonableness*, irrespective of whether made prior to the commencement of or during the attorney-client relationship.

Randolph v. Schuyler, 284 N.C. 496, 504, 201 S.E. 2d 833, 837-38 (1974) (citations omitted) (emphasis added).

Second, attorneys are prohibited from accepting excessive fees by the Rules of Professional Conduct of the North Carolina State Bar, Rule 2.6 (1985), which provides in relevant part:

> (A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.
>
> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence experienced in the area of the law involved would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered in determining the reasonableness of a fee include the following:
>
> > (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> >
> > * * *
> >
> > (3) The fee customarily charged in the locality for similar legal services.
> >
> > (4) The amount involved and the results obtained.

* * *

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

And the commentary adds: "All fees, including contingent fees, should be reasonable and not excessive as to percentage or amount." We do not suggest that every contingent-fee-arrangement is subject to reformation using the factors in Rule 2.6. But in the unusual case when an attorney's actual fee is clearly excessive in relation to the work performed or other factors, the fee may be attacked. It is sometimes true, as it is in the case at bar, that the attorney will voluntarily reduce the fee if, for example, it is too burdensome or the representation takes substantially less effort than originally contemplated by the parties. In any event, Rule 2.6 provides a mechanism whereby clearly excessive contingent fees may be challenged.

The third protection against excessive fees is inherent in the contingent-percentage-fee arrangement itself. One of the historical reasons for the acceptance of contingent-fee arrangements was that the client is assured that the fee will never exceed a fixed percentage of the recovery. *Cf.* N.C. Code of Professional Responsibility EC 2-20 (1984) (replaced with the Rules of Professional Conduct in 1985). In contrast, an hourly fee or a flat fee may exceed the client's recovery, if there is a recovery, or it may constitute a larger percentage of the recovery than the percentage in a contingent-fee contract. In short, declaring contingent-fee contracts void in equitable distribution cases would not solve the problem of excessive charges for legal services.

C. *Conflict of Interest.*

It has been asserted that contingent-fee contracts in domestic relations cases may create conflicts of interest. *See* Martin, *Contingency Fees and Family Law*, 5 Calif. Law. 23, 73 (July 1985). For example, if a client wants a certain asset to be awarded to him or her, the client may prefer to set its value as low as possible (so the spouse does not receive an asset of comparable value),

while the attorney may prefer to value the client's distributive award at its highest value (for purposes of the percentage fee). *Id.* This, however, is not a significant concern under G.S. Sec. 50-20 because the trial court is required to identify and evaluate the marital property before distributing it. *Capps v. Capps*, 69 N.C. App. 755, 318 S.E. 2d 346 (1984). Thus, the attorney and client are unlikely to bicker over relative values before the distribution, and they always have the predetermined figures necessary to calculate the fee after an equitable distribution. Further, especially given the obligation of attorneys to represent their clients with zeal, if the objective of litigation is to obtain the maximum award possible, then contingent-fee contracts ensure that attorneys and their clients have the same overall interest and objective.

D. *Disruption of Support Schedule.*

A frequent criticism of contingent-fee contracts in alimony and child support cases is that they may deprive a spouse or child of a regulated stream of funds carefully awarded by the court for support or living expenses; to allow the scheduled payments to be bargained away in advance is against public policy. *See* Comment, *supra*, at 391 (1984). We agree that contingent-fee contracts in child support cases are void as against public policy because they would disrupt the support schedule and because statutory attorney's fees may be awarded by the court. *See Davis v. Taylor*, 81 N.C. App. ---, 344 S.E. 2d 19 (1986).

Each spouse in an equitable distribution action presumably will have to pay an attorney's fee, and the money for that fee may well be unavailable unless and until the distribution is complete. In this sense, all fee arrangements are contingent upon the client's ability to pay, which, in turn, may depend upon the attorney's success in representing the client. *See* Comment, *supra*, at 387-88. Furthermore, equitable distribution in this State is accomplished without regard to alimony previously awarded; the amount of alimony previously awarded may be modified or vacated by the court after the marital property is equitably distributed. G.S. Sec. 50-20(f); *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E. 2d 600 (1985). Thus, as long as the court is informed of any depletion of distributed assets in order to pay attorney's fees arising from an equitable distribution action, the alimony award can be modified justly, and there will be no disruption of the

court-determined future support award. *See Capps*; Comment, *supra*, at 392.

E. *Overreaching.*

One final criticism of contingent fees in domestic cases must be addressed: that contingent-fee contracts present the danger of overreaching or at least the appearance of overreaching. This concern is based on the assumption that clients in domestic actions are especially susceptible to overreaching by attorneys. In *Thompson*, this Court quoted the decision of the Indiana Court of Appeals in *Barelli*:

> Wives contemplating divorce are often distraught and without experience in negotiating contracts. Should contingent fee contracts between them and the attorneys they employ under such conditions become the usual fee arrangement, charges of overreaching and undue influence will be all too frequent. The public, the legal profession, and the bench would all suffer. We believe all will benefit by maintaining the present public policy of not enforcing such contracts no matter how freely and fairly entered into and how reasonable may be the fee thereby produced. The wise discretion of capable and experienced trial judges (aided by the evidence placed before them by the parties prior to the time the court fixes the fee to be paid by the husband) can be relied upon to assure every attorney an adequate fee and thus assure every wife adequate representation.

70 N.C. App. at 156, 319 S.E. 2d at 321 (quoting *Barelli*, 144 Ind. App. at 589, 247 N.E. 2d at 853). In *Barelli*, the Indiana Court of Appeals apparently reached this result based in part on a distinction between its case and a California case that had upheld a contingent-fee contract with a husband contemplating divorce. *See Krieger v. Bulpitt*, 40 Cal. 2d 97, 251 P. 2d 673 (1953). This Court rejects any such distinction based on the sex of the spouse. California's approach is to permit contingent-fee contracts on a case-by-case basis when it is reasonably clear that neither dissolution of a marriage is in fact encouraged, nor reconciliation discouraged. *See generally Martin, supra*, at 23-24. Even on a case-by-case basis, we believe there are more valid and relevant distinctions to be drawn than the gender of the litigant.

There is some appeal to the argument that, because emotionally piqued clients may have less than their full faculties about them, contingent-fee contracts should not be permitted. Even when a specific contract is fair, it may be perceived by the public that the attorney took advantage of a vulnerable client. But we permit such contracts in personal injury, wrongful death and other actions. *See High Point Casket Company v. Wheeler*, 182 N.C. 459, 467, 109 S.E. 378, 383 (1921) (setting forth a good faith, fairness and reasonableness standard to assess the validity of contingent-fee contracts); *see also Olive v. Williams*, 42 N.C. App. 380, 257 S.E. 2d 90 (1979). It is just as likely that an automobile-accident victim will be unfamiliar with attorney's fee contracts as will be an equitable-distribution client. *See* Comment, *supra*, at 392 (arguing the case for any type of domestic action client). The client bringing a wrongful death action is just as distraught, perhaps more so, than the client seeking equitable distribution. Why should we disallow contingent-fee contracts in personal injury and wrongful death cases only when there is evidence of fraud or undue influence and, at the same time, prohibit all contingent-fee contracts in equitable distribution actions? We do not believe the latter category embraces a significantly greater danger of overreaching or the appearance of overreaching. Moreover, all contingent-fee contracts are subject to close scrutiny if there is any question regarding their fairness. *Randolph*; *Olive*.

F. *Summary and Balancing.*

In sum, the public policies advanced against contingent-fee contracts in divorce, alimony, and child support actions are either inapplicable to actions for equitable distribution of marital property or collapse of their own weight upon careful examination. To the extent that some of the policies discussed above might have some validity in equitable distribution proceedings, they are outweighed by the public policy of this State that litigants with insufficient means to protect their rights have reasonably experienced counsel available. *See High Point Casket Co.* Whenever one spouse controls the marital assets, the economically disadvantaged spouse may be unable to afford representation based upon an hourly or flat fee.

Critics of contingent-fee contracts in domestic litigation frequently cite the Model Code of Professional Responsibility EC

2-20 (1980) which provides, "because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." The Model Code does not, however, prohibit such contracts in its Disciplinary Rules. More importantly, this sentence was not adopted by the North Carolina Bar in its 1973 Code of Professional Responsibility or its 1985 Rules of Professional Conduct. Although superseded in 1985 by the Rules of Professional Conduct, we find Ethical Consideration 2-20 of the 1973 North Carolina Code of Professional Responsibility instructive on the public policy in this field:

> Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute [the] claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a *res* with which to pay the fee.

Both of these historical considerations support contingent-fee contracts in equitable distribution actions.

III

The contingent-fee contract in the case at bar did not state whether the fee was contingent with respect to both the divorce and the equitable distribution actions or the equitable distribution action alone. Mr. Karney argues that it was intended to cover payment for the equitable distribution action alone, and he points to the fact that the divorce was uncontested. We note that the Coopers were not divorced until 24 January 1983, and the contract between Mr. Karney and Ms. Cooper was signed on 28 December 1982. Had the Coopers reconciled in the interim and decided to salvage their marriage, Mr. Karney would have received no fee under the contract. Of course, it was not known at the time that contingent-fee contracts in divorce actions would be held void as against public policy in *Thompson.*

The trial court specifically found that Mr. Karney's services in securing a divorce for Ms. Cooper were pursuant to the contingent-fee contract. It also found:

> That said . . . CONTRACT is a contingent fee contract, the amount of which is contingent upon a divorce of the parties and upon the value and amount of property awarded Mrs. Cooper.

These findings are supported by the evidence. Although Mr. Karney urges that the uncontested divorce involved relatively minimal time compared with the time he spent on the equitable distribution claim, the fact remains that the fee was directly contingent upon securing the divorce. This is fatal to his claim. Although it is surely little solace to Mr. Karney, because he cannot recover in *quantum meruit* for services rendered pursuant to a contract held void as against public policy, *see Thompson v. Thompson*, 313 N.C. 313, 328 S.E. 2d 288 (1985); *Davis v. Taylor*, the portion of the trial court's decision holding the contract void on the ground that it is contingent upon the value of the property awarded in an equitable distribution action is erroneous.

We hold that a contingent-fee arrangement covering services rendered in an equitable distribution action is fully enforceable as long as it does not provide compensation to the attorney for securing the divorce. If an attorney represents a client in both a divorce proceeding and an equitable distribution proceeding, and the client wishes to have a contingent-fee contract in the equitable distribution proceeding, they must execute a separate agreement to provide for a fee in the divorce action that is not contingent upon the securing of the divorce. We do not intend to encourage or discourage contingent-fee contracts in equitable distribution litigation; we hold only that they are not void as against public policy. The contract in the case at bar was contingent in part on the securing of a divorce and was therefore void under *Thompson*. The permanent injunction ordered by the trial court to prevent the foreclosure on the deed of trust securing payment under the contract was proper.

For the reasons set forth above, the decision of the trial court is

Modified and affirmed.

Chief Judge HEDRICK and Judge PARKER concur in the result.

KATHY LOUISE DAVIS v. LAWRENCE JULIUS TAYLOR

No. 8515DC769

(Filed 3 June 1986)

1. **Divorce and Alimony § 27; Attorneys at Law § 7.1— child support contingent fee contract—not allowed**

A contingent fee contract for the payment of legal fees as a percentage of a child support recovery was void as against public policy because it could disrupt court determined support schedules and because statutory fees were available. N.C.G.S. § 50-13.6.

2. **Divorce and Alimony § 27; Attorneys at Law § 7.1— child support—attorney fee contracts contingent—no court awarded fees—no recovery in quantum meruit**

The portion of an attorney fee contract in a paternity and child support case which was not contingent and not void was not severable and enforceable because the contingent fee provision permeated the entire agreement and was the essence of the contract. Moreover, the attorneys were not allowed to recover their fees in *quantum meruit* because recovery of fees would permit them to benefit directly from services rendered pursuant to an illegal contract and would compromise the main policy of the fee statute.

3. **Divorce and Alimony § 27— attorney fees—failure to make specific findings—reviewable on appeal**

The trial court's failure to make specific findings regarding attorney fees and any miscalculation in the findings in an action for paternity and child support were reviewable on appeal despite defendant's failure to request specific or different findings. Appellee's argument that the court erred in favor of the appellant did not alter the fact that the court's figures were incorrect and must be vacated.

4. **Divorce and Alimony § 27— award of attorney fees—vacated on other grounds—must be supported by detailed accounting**

Where an order requiring defendant to pay attorney fees in an action for paternity and child support was remanded on other grounds, the court noted that any award of fees on remand must be supported by a more detailed accounting of the nature and purpose of the work performed by each attorney, clerk, and paralegal where an excessive amount of time was spent researching and preparing a novel argument and it was clear that plaintiff's attorneys intended ultimately to charge their hours to defendant.

Davis v. Taylor

APPEAL by defendant from *Hunt, Judge*, order entered orally 20 February 1985 and from *Paschal, Judge*, order entered 3 October 1983 in District Court, ORANGE County. Heard in the Court of Appeals 5 December 1985.

Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, by G. Nicholas Herman, Douglas Hargrave, and Steven A. Bernholz, for plaintiff appellee.

Glover & Petersen, P.A., by James R. Glover; Long & Long, by Lunsford Long; and Midgette, Higgins, Frankstone & Graves, by Thomas D. Higgins III, for defendant appellant.

BECTON, Judge.

This appeal arose from two orders awarding attorneys' fees and court costs totaling $45,070.24 against Lawrence Julius Taylor, the defendant in a paternity and child support action.

I

On 28 March 1980, Kathy Louise Davis gave birth to Whitney Taylor Davis. At that time, Kathy Davis and Lawrence Taylor were students at the University of North Carolina. After the birth of Whitney, Davis and Taylor discussed whether Taylor would pay to support Whitney. Davis was receiving public assistance through the Orange County Department of Social Services, and she was represented by attorney Bruce Elmore of Asheville. After the attorneys began negotiations, Taylor began playing football for the New York Giants. Although attorney Elmore and Taylor's attorneys reached a tentative agreement on child support, Davis was referred to attorney Geoffrey Gledhill by an Orange County Child Support Enforcement officer. Gledhill, a partner in the firm Coleman, Bernholz, Dickerson, Bernholz, Gledhill & Hargrave, had a contract with Orange County to act as attorney for the Child Support Enforcement Program in proceedings under N.C. Gen. Stat. Sec. 110-135 (1985 Cum. Supp.).

Davis and attorney Gledhill met on 5 February 1982. On 10 February 1982, Davis signed a contingent-fee contract to have Gledhill's firm privately represent her in establishing paternity and obtaining child support for Whitney. The contract provided that the firm would receive one-third of any award that was to be paid less frequently than monthly and that, in addition, the firm

would retain all attorneys' fees awarded to Davis by agreement or by court order.

On 7 April 1982, Davis filed a paternity action against Taylor seeking child support, payment of public assistance funds received by Davis, and attorneys' fees. Taylor answered on 3 May 1982 denying paternity. On 5 May 1983, after approximately one year of extensive discovery, Taylor admitted paternity in an amended response to Davis' request for admissions. Partial summary judgment on this issue was entered orally on 16 May 1983.

Davis filed a motion on 23 June 1983 for temporary child support and attorneys' fees pending trial, and requested a pre-trial conference in aid of discovery. She also served additional discovery requests on Taylor. A hearing was held on 5 July 1983 before the trial court. Based on evidence presented at that hearing, Judge Paschal signed an order on 3 October 1983 ordering Taylor to pay attorneys' fees in the amount of $18,500 for services rendered to Davis from 10 February 1982 through 4 July 1983. Taylor's interlocutory appeal from this order was dismissed by this Court in Case No. 8415DC101, filed 18 September 1984. Taylor's petition for certiorari to this Court was denied on 24 September 1984.

Some time after September 1984, Davis' contingent-fee contract with her attorneys was changed to a non-contingent-fee contract in response to this Court's decision in *Thompson v. Thompson*, 70 N.C. App. 147, 319 S.E. 2d 315 (4 Sept. 1984), *rev'd on other grounds*, 313 N.C. 313, 328 S.E. 2d 288 (1985).

On 18 and 19 February 1985, the trial court held a trial without a jury to settle the issues of child custody and child support. On 20 February 1985, the court heard evidence on Davis' claim for attorneys' fees for the period 5 July 1983 through 19 February 1985. In an order orally rendered on 20 February 1985 and signed 3 April 1985, Judge Hunt ordered Taylor to pay $24,565 in attorneys' fees and $2,005.24 for court costs advanced to Davis by her counsel.

Taylor appeals from the two orders awarding attorneys' fees and expenses totaling $45,070.24 to Davis' counsel. With regard to the 3 October 1983 order, Taylor argues that the award is not supported by the findings of fact. He contends that the amount

awarded was nearly double the amount the court found to be reasonable; that it includes fees for services related to custody and support without a finding that Davis was acting in good faith; and that the court's conclusions of law were not supported by detailed findings or by the evidence. With regard to the order signed 3 April 1985 covering the period after 4 July 1983, Taylor argues that the award improperly includes fees for services rendered by an associate who had left the firm before 5 July 1983; that it includes time mistakenly attributed to certain attorneys through arithmetic error; and that the court erred in concluding, without a detailed accounting, that 668 hours allegedly spent by Davis' counsel on this case were reasonable and necessary. Lastly, Taylor argues that no fees should have been awarded for services rendered pursuant to the contingent-fee contract.

[1] We hold that the contingent-fee contract was void as against public policy and that, under *Thompson v. Thompson*, 313 N.C. 313, 328 S.E. 2d 288 (1985), plaintiff's attorneys cannot recover fees for the reasonable value of services rendered pursuant to this contract. Therefore, the 3 October 1983 order is vacated, and the 3 April 1985 order is vacated and remanded to exclude fees for the period covered by the void contract. The 3 April 1985 order is also remanded for the trial court to correct errors in accounting for the hours spent by plaintiff's attorneys and to document in accordance with this opinion the hours that were reasonable and necessary to prosecute this case after the period covered by the void contract.

II

In *Thompson v. Thompson*, 70 N.C. App. 147, 157, 319 S.E. 2d 315, 321-22 (1984), *rev'd on other grounds*, 313 N.C. 313, 328 S.E. 2d 288 (1985), this Court held that a contract for legal services contingent upon securing a divorce or "contingent in amount upon the amount of alimony and/or property awarded is void as against public policy." This Court considered and relied primarily upon three broad policies. First, there is a policy in this State against contracts that "encourage or bring about a destruction of the home." *Id.* (quoting *Matthews v. Matthews*, 2 N.C. App. 143, 162 S.E. 2d 697 (1968)). This policy has no bearing in the case at bar.

Second, the *Thompson* Court relied on the lack of need for contingent-fee contracts in divorce actions. The Court cited N.C.

Gen. Stat. Secs. 50-13.6 and 50-16.4 (1984) in a footnote as examples of "a statutory mechanism whereby a wronged [person] seeking representation in a domestic action may be assured the financial means by which to employ an attorney." 70 N.C. App. at 155 n. 2, 319 S.E. 2d at 321.

The third policy consideration identified in *Thompson* was that the public, the legal profession and the bench would suffer if contingent-fee contracts became customary in divorce cases because clients are often distraught and charges of undue influence and overreaching would become frequent. We are not persuaded that this policy is any more relevant in the case at bar than it is, for example, in wrongful death actions, involving distraught plaintiffs; contingent-fee contracts routinely are allowed in those cases. *See Randolph v. Schuyler*, 284 N.C. 496, 504, 201 S.E. 2d 833, 837-38 (1974). *See generally In re Foreclosure of Cooper*, 81 N.C. App. 27, 344 S.E. 2d 27 (1986).

A

The only policy from *Thompson* relevant in the case at bar is that statutory legal fees are available. But there is an additional policy applicable in actions seeking child custody and support under N.C. Gen. Stat. Sec. 50-13.5 (1984).

A contingent-fee contract to pay counsel some percentage of the amount recovered for support of a child alters and disrupts the judicial formulation and structuring of the support award. The trial court is required to carefully consider myriad factors, needs and restrictions in determining the schedule of support payments necessary and reasonable under the circumstances of each case. If the party seeking support for a child has the financial means to obtain legal counsel for this purpose, the payment of the legal fee will not affect the child's stream of income which the court seeks to guarantee. For the party seeking child support who cannot afford counsel, the legislature provided for the court to award reasonable fees. The statute was intended to make it possible for an interested party to bring an action to protect the interests of the child by meeting the opposing party on fair terms. *Stanback v. Stanback*, 270 N.C. 497, 155 S.E. 2d 221 (1967). To allow a contingent-fee contract based on a percentage of a child support award would upset the equilibrium between judicially-monitored support schedules and judicially-monitored awards

of attorneys' fees for plaintiffs who could not otherwise afford adequate legal representation. By allowing the trial court to determine the amount a party must pay in support and the amount reasonable for legal expenses, children's interests are protected without disturbing the incentive for attorneys to represent plaintiffs whose only "assets" are their rights to receive child support payments.

We are mindful that not all contingent-fee contracts are destructive of public policies. In many cases, the contingent fee provides the only possible means by which poor plaintiffs may seek legal redress. The contingent-fee arrangement protects many plaintiffs against incurring debts for legal services without a corpus from which to satisfy them. And the incentive provided by tying the fee to the recovery encourages more vigorous advocacy, often of the rights of the poor and the disadvantaged. The contingent fee is a valuable alternative to the hourly fee, and the broad arguments asserted against all contingent-fee contracts are unpersuasive. *See In re Cooper.*

Even in some domestic law actions, contingent-fee contracts may not violate public policy. For example, contingent-fee arrangements generally are permitted in actions by one spouse to recover separate property from another or to settle property rights among them. 7 Am. Jur. 2d *Attorneys at Law* Sec. 257 and cases cited therein (1980). And a contingent-fee contract for representation in an equitable distribution proceeding, at least when it does not involve representation in a divorce action, is not against public policy. *In re Cooper.* But these examples do not involve legal proceedings for which statutory legal fees may be awarded by the court. Moreover, they do not involve awards that are carefully designed to provide support for a minor over a period of years.

In sum, contingent-fee contracts for the payment of legal fees as a percentage of a child support recovery are void as against public policy because they may disrupt court-determined support schedules and statutory fees are available.

B

[2] The question now arises whether, even though a portion of the contract in the case at bar is void, the remainder of the con-

tract is severable from it and therefore enforceable. Davis argues that the portion contingent upon the recovery of child support is separate and distinct from the portion providing for the additional payment of all court-awarded fees.

We recognize that when a portion of a contract is void as against public policy, the remainder of that contract may still be enforceable to the extent it is severable from, and not dependent in its enforcement upon, the void portion. *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 658, 194 S.E. 2d 521, 531-32 (1973); *see also In re Port Publishing Co.*, 231 N.C. 395, 57 S.E. 2d 366 (1950). "At least this is true where the illegal provision is clearly separable and severable from the other parts which are relied upon and does not constitute the main or essential feature or purpose of the agreement." *Rose*, 282 N.C. at 658, 194 S.E. 2d at 532 (quoting 17 Am. Jur. 2d *Contracts* Sec. 230 (1964)).

The contract between Davis and her attorneys provided in paragraph 1 for the payment of a fee equal to one-third of "the gross amount of money (including the fair market value of any property other than money which may be recovered) which attorneys may recover for the support and maintenance of Whitney Talor [sic] Davis," excluding payments ordered to be made on a monthly (or more frequent) basis. In paragraph 2, the contract provided:

> In addition to the fee described in number 1 herein, attorneys shall also receive any and all amounts which may be awarded to them for their services by agreement or order of the court for their representation of me in this matter.
>
> It is further understood and agreed between client and attorneys that both believe, given the circumstances now existing and likely to exist in the future as determined by the facts known now, that it is in the best interest of Whitney Taylor Davis for any child support obligation obtained to be structured such that the bulk of the support and maintenance obtained be in a lump sum or a series of lump sums. Attorneys, with the consent and approval of client, expect to pursue a course of action to obtain a lump sum child support obligation.[1]

1. It is unlikely that a contingent fee and a court-awarded fee for the reasonable value of an attorney's services may both be accepted by an attorney for

In *In re Port Publishing Co.*, the Supreme Court held that an illegal "closed shop" provision in a labor contract was not the essential purpose of the agreement and that it was severable from the provisions concerning working conditions, wages, hours, training, overtime, vacations and severance pay. 231 N.C. at 398, 57 S.E. 2d at 368. In contrast, the two contract provisions in the case at bar both concern compensation for the same legal services. When the contract was executed, there would have been no certainty that a court would award any fees in addition to the percentage fee the attorneys expected to recover. From the nature of the original contract, it appears unlikely that Davis' attorneys would have taken the case for the potential court-awarded fees alone. And it is the stated purpose of the attorneys and the client to recover a lump sum award, from which a percentage fee would be derived. We conclude that the contingent-fee provision "permeates the entire agreement." *In re Port Publishing Co.*, 231 N.C. at 398, 57 S.E. 2d at 368. It is the essence of the contract. Therefore, the entire contract is void as against public policy.

Our decision is directly supported by the decision of the Fifth Circuit Court of Appeals in *Singleton v. Foreman*, 435 F. 2d 962, 969-70 (1970). In *Singleton*, the Court held that the contingent-fee portion of a contract for legal services in a divorce action was void as against public policy. The Court also held that an additional provision for an initial cash retainer was not severable from the illegal contingent-percentage-fee provision, even though it was neither contingent upon nor tied to a percentage of the recovery.

C

Davis argues that the validity of the contract is irrelevant to recovery of attorneys' fees under G.S. Secs. 6-21 and 50-13.6. We disagree. In *Thompson*, this Court held that although the contingent-fee contract was void as against public policy, the attorneys were entitled to recover the reasonable value of their services in *quantum meruit*, partly because the public policy was

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the same legal services without some set-off. *Cf. Sullivan v. Crown Paper Board Co.*, 719 F. 2d 667 (3d Cir. 1983) (attorney's fees in civil rights cases). Because the issue is not before us, we express no opinion as to whether parties may contractually agree to such an arrangement.

announced after the contract had been executed. 70 N.C. App. at 158, 319 S.E. 2d at 322. In reversing this Court's decision on a separate issue, the Supreme Court also said:

> Although in view of our disposition of the case a decision on the point is not necessary, we note that it is generally held that if there can be no recovery on an express contract because of its repugnance to public policy, there can be no recovery on *quantum meruit*. *Builders Supply v. Midyette*, 274 N.C. 264, 162 S.E. 2d 507 (1968) (unlicensed contractor). *Insulation Co. v. Davidson County*, 243 N.C. 252, 90 S.E. 2d 496 (1955) (county commissioner contracting for repair work for county).

313 N.C. at 314-15, 328 S.E. 2d at 290. Stated differently, the law will not allow one party to benefit directly or indirectly from a contract void as against public policy. *Rockingham Square Shopping Center, Inc. v. Town of Madison*, 45 N.C. App. 249, 254, 262 S.E. 2d 705, 709 (1980).

Davis argues that because the award of statutory attorneys' fees does not depend upon the existence of a contract, the illegality of the contract is irrelevant. According to Davis, *Thompson* is not applicable because the award in the case at bar is not based on the doctrine of *quantum meruit*.

Absent clear statutory language to the contrary, we will not presume that the legislature, in enacting the attorneys' fees statutes, intended to allow the recovery of statutory fees when to do so would violate the public policy of this State. Recovery of statutory fees by Davis' attorneys would permit them to benefit directly from services rendered pursuant to an illegal contract, and, therefore, to benefit indirectly from the illegal contract. Moreover, to allow recovery under the statutes would subvert the policy that there be no recovery in *quantum meruit* for services rendered pursuant to a contract void as against public policy. Both methods of recovery compensate for the reasonable value of services rendered. The law refuses to assign positive value to services rendered pursuant to an illegal contract, particularly when, as here, the party to the contract seeking recovery is an officer of the court, invested with the public trust.

The award of statutory fees for services rendered under the contract in the case at bar would also compromise the main policy

of the fee statute—to protect the interests of children involved in custody and support cases. As mentioned above, the contract itself violates this policy. Should we allow recovery under a statute for services rendered pursuant to a contract which violates the policy behind the same statute? The statute itself limits recovery to "reasonable" fees. Although the amount of a fee is generally in the discretion of the trial court, fees for services rendered pursuant to a contract void as against public policy are unreasonable as a matter of law.

We do not engraft onto the statutory procedure a new requirement that the fee must be for services rendered pursuant to a valid contract. No contract is required. But when the transaction is tainted by the execution of an illegal contract for the legal services, the law simply will not permit recovery for those services. A trial court has no discretion to award statutory legal fees for services rendered in a child custody and support action pursuant to a contract void as against public policy.

The illegal contract in the case at bar was in effect from 10 February 1982 to some time after September 1984. Therefore, the first order, awarding attorneys' fees for the period 10 February 1982 through 4 July 1983, is vacated. The second order, awarding fees for the period 5 July 1983 through 19 February 1985 is vacated and remanded for the trial court to determine the date on which the illegal contract was rescinded or replaced with a valid contract. Statutory legal fees, consistent with Part III, *infra*, may be awarded for the period beginning after the illegal contract was withdrawn.

III

[3] Taylor argues that certain findings of fact in the second order are not supported by the evidence. Specifically, Taylor argues that the award of fees for the period 5 July 1983 through 19 February 1985 (1) includes payment for services attributed to an associate, Sharon Ellis, who had left the firm before 5 July 1983; (2) contains an error in the mathematical calculation of the time attributed to the partners; and (3) was insufficiently detailed to support the finding that the hours spent were reasonable and necessary to prosecute the case.

Davis argues that the court's failure to make specific findings and any miscalculation in the findings are not reviewable on appeal because Taylor failed to request specific or different findings. This argument is without merit. Rule 52 of the North Carolina Rules of Civil Procedure applies:

> (c) *Review on appeal.*— When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings.

The cases cited by Davis were decided before Rule 52 was enacted in 1967. *See, e.g., Logan v. Sprinkle*, 256 N.C. 41, 123 S.E. 2d 209 (1961); *Griffin v. Griffin*, 237 N.C. 404, 75 S.E. 2d 133 (1953). *But see S. J. Groves & Sons v. State*, 50 N.C. App. 1, 68-69, 273 S.E. 2d 465, 501 (1980) (relying on *Logan*, and failing to mention Rule 52), *disc. rev. denied*, 302 N.C. 396, 279 S.E. 2d 353 (1981).

A

It is not disputed that associate attorney Sharon Ellis did not render services on behalf of Davis after 4 July 1983. Yet the trial court found in its second order that she had worked 67.45 hours during the period 10 February 1982 through 19 February 1985, and found in its first order that she had worked 39.5 hours during the period 10 February 1982 through 4 July 1983. The difference, 27.95 hours, is the time attributed to Sharon Ellis for the period after 4 July 1983. This error is significant and must be corrected on remand.

B

Taylor also contends that the court miscalculated the time attributable to the four partners who worked on the case after 4 July 1983. The court found in the second order that partners had spent a total of 311.6 hours on the case from 10 February 1982 through 19 February 1985, and it found in the first order that partners had spent 111.7 hours from 10 February 1982 through 4 July 1983. This leaves 199.9 hours attributable to partners after 4 July 1983, but the court found that partners had spent 209.5

hours for this period. Taylor asserts that the difference is a mathematical error.

Davis argues that there was no miscalculation; rather, there was "an inadvertent understatement of the [total] time expended by the partners." According to this argument, the correct figures are the 111.7 hours spent by the partners on the first part of the case and the 209.5 hours spent on the second part. Thus, the total was inadvertently understated and should have been 321.2 instead of 311.6. Davis argues that the testimony of one of the partners that 311.6 was the total of the partners' hours "may have been an understatement." In the alternative, Davis argues, any additional hours inadvertently attributed to the partners were "absorbed" by the hours spent by partners drafting the trial court's order on the court's instructions.

The appellee misunderstands the purpose of requiring findings of fact. In order to effectively review the trial court's exercise of discretion, this Court must have before it specific findings revealing the basis for the trial court's conclusions. When the findings fail to show the basis for the judgment or reveal an error in calculation, whether it results in an overstatement or an understatement, the case must be remanded for correction. Davis' argument that the court erred in favor of the appellant does not alter the fact that the court's figures are incorrect and must be vacated.

C

[4] Taylor's final contention is that the trial court's order awarding attorneys' fees must be supported by more detailed findings regarding the nature and purpose of the legal work performed by each attorney. The second order, pertaining to the nineteen months beginning in July 1983, awarded fees for over five hundred hours spent by nine attorneys, four student law clerks, and one paralegal. The court found that this was reasonable, considering:

> (a) The novel and difficult legal issues presented in this case, including Plaintiff's claim for a lump sum award of child support and the detailed nature and complexity of Defendant's income sources;

(b) the difficulty in establishing Defendant's standard of living and the reasonable needs of the parties' minor child through age 18, which necessitated expert analysis and testimony from an economist and child psychologist; and

(c) the need for Plaintiff's Counsel to engage in extensive discovery and obtain Court orders enforcing discovery requests.

As Taylor notes, neither paternity nor the admissibility of voluntary blood test results was an issue during the period beginning in July 1983. One of the partners, Mr. Hargrave, testified that in the context of the 668 hours spent on the case, only a small portion of the time was spent on discovery. Taylor argues that an excessive amount of time was spent researching and preparing the novel argument that it would be in the best interest of the child to receive a lump sum for future child support: there was no support for the argument in this or any other State; the court disallowed nearly all expert witness expenses for plaintiff's psychologist and economist as irrelevant on this issue; and the entire theory is contrary to the basic legislative purpose of providing for periodic future support payments for minors.

The attorneys for Davis sought to charge an extremely large number of hours to their adversary. It is clear from their original contract with Davis that they intended ultimately to charge their hours to Taylor. This presented great danger that "billing judgment" would suffer; there is less incentive to exclude unnecessary or unreasonable hours when the adversary, as opposed to the client, will foot the bill. *See Hensley v. Eckerhart*, 461 U.S. 424, 76 L.Ed. 2d 40, 103 S.Ct. 1933 (1983).

We conclude that, particularly because there were errors in the calculation of the hours, any award of fees on remand must be supported by a more detailed accounting of the nature and purpose of the work performed by each attorney, clerk and paralegal. The court should consider whether the number of people working on the case was excessive and should exclude redundant hours, *see Allen v. Allen*, 65 N.C. App. 86, 308 S.E. 2d 656 (1983), *disc. rev. denied*, 310 N.C. 475, 312 S.E. 2d 881 (1984), and it should list the work performed so that an appellate judge may be certain that only hours reasonably necessary to prosecute the case were charged. *See Owensby v. Owensby*, 312 N.C. 473, 476, 322 S.E. 2d

772, 774-75 (1984). The suggestion by Davis' attorneys that they cannot provide a more detailed accounting does not reduce the requirement; rather, it bolsters the fear that there may have been a disregard for the legitimate expectation by Taylor that he is not subsidizing frivolous and speculative research projects. To allow recovery on the facts of this case without a detailed accounting would be an abuse of discretion.

We recognize that this case involved a substantial commitment of time. We also note and agree with the trial court's finding that Davis' attorneys were skillful. And we will defer to the trial court's sound discretion in determining the reasonably necessary hours on remand.

IV

The order awarding legal fees for the period 10 February 1982 through 4 July 1983 is vacated. The order awarding fees for the period 5 July 1983 through 19 February 1985 is vacated and remanded. The trial court may award fees for services that were rendered after the original contingent-fee contract was withdrawn. The award must exclude the hours of Sharon Ellis, and it must contain detailed findings that are supported by an accurate and detailed accounting of the hours spent and the work performed by each attorney, law clerk and paralegal.

For the reasons set forth above, the orders of the trial court are vacated and remanded for proceedings consistent with this opinion.

Order of 3 October 1983—vacated.

Order of 3 April 1985 (orally rendered 20 February 1985)—vacated and remanded.

Judges WEBB and COZORT concur.

DOUGLAS E. OPSAHL AND WIFE, HILDEGARD M. OPSAHL v. PINEHURST INC., PURCELL CO., INC., AND PINEHURST RECEIVABLES ASSOCIATES, INC.

No. 8520SC1121

(Filed 3 June 1986)

1. **Cancellation and Rescission of Instruments § 4— contract for sale of land—mutual mistake of fact doctrine improperly applied**

The trial court erred in rescinding a completed contract for the sale of land on the basis of mutual mistake of fact because the parties contracted on the mistaken belief that roads and utilities would be available for the land by the date shown on the HUD report, since the mutual mistake of fact doctrine does not apply where the mistake pertains to a future contingency or probability regarding the certainty of a future performance rather than a fact which existed at the time the parties entered the agreement.

2. **Cancellation and Rescission of Instruments § 5; Vendor and Purchaser § 11—failure to complete utilities and roads—material breach of contract—rescission**

Rescission of a contract for the sale of a lot may be justified on the basis of material breach of the contract because of defendant's failure to complete roads and utilities for the lot within the time specified in the HUD report where the contract expressly provided that time was of the essence. Therefore, the cause is remanded to the trial court for the entry of findings and conclusions as to the extent of defendant's delay and whether such delay constituted a material breach justifying rescission.

3. **Evidence § 32.6— material breach warranting rescission—admissibility of parol evidence**

Where no provision of the written contract for the sale of land addressed the time when roads and utilities were to be completed, parol evidence regarding the parties' provisions for completion of roads and utilities was admissible to show whether defendant committed a material breach warranting rescission of the contract even though the written contract contained a merger clause.

4. **Deeds § 11.2; Vendor and Purchaser § 11— contract for sale of land—merger into deed—intent of parties**

The trial court on remand must determine whether the parties intended for a contract for the sale of land to merge into the deed so as to prohibit rescission of the contract where no provision of the contract or the deed addressed the survivability of the contract. In making this determination, the trial court should consider a provision of the contract suggesting that, should defendant decide, as it did, to exercise its right to transfer title prior to plaintiffs' completion of payments, the other rights and obligations of the parties shall remain in force until plaintiffs have fully paid the purchase price.

5. **Unfair Competition § 1— completion dates for roads and utilities—misrepresentations not unfair or deceptive**

While defendant's conduct in representing that completion dates for roads and utilities for subdivision lots were firm when in fact they were not came

within the scope of N.C.G.S. § 75-1.1, the court was not required to find that such conduct was unfair or deceptive.

6. Cancellation and Rescission of Instruments § 12— rescission of contract—moving and rental expenses not recoverable

Should the trial court find a material breach of contract for the sale of a lot by defendant justifying rescission, plaintiffs will not be entitled to damages for moving and rental expenses voluntarily made by plaintiffs after they were aware of defendant's breach.

APPEALS by plaintiffs and defendant Pinehurst Inc. from *Albright, Judge.* Judgment entered 13 May 1985 in Superior Court, MOORE County. Heard in the Court of Appeals 8 April 1986.

Plaintiffs brought this action seeking to rescind a contract for the sale of real estate in which defendant Pinehurst Inc. (defendant) agreed to sell and plaintiffs agreed to buy a subdivided lot in Pinehurst, North Carolina. Plaintiffs' complaint alleged breach of contract or, in the alternative, breach of warranty and misrepresentation by defendant. Prior to trial plaintiffs amended their complaint to include a claim for unfair and deceptive trade practices under N.C. Gen. Stat. 75-1.1 *et seq.*

Plaintiffs' evidence tended to show, in pertinent part, that:

In February 1980 plaintiffs met with Rick Phillips, then employed as a real estate agent by defendant, regarding the purchase of a lot in defendant's development in Pinehurst. Plaintiffs explained to Phillips that they intended to retire on 31 December 1981 and that they wanted to build a home in Pinehurst. One of the lots plaintiffs viewed was Lot 615 in Unit 16, Phase 2 of Pinehurst (the lot). At this time the roads and other amenities for the lot—including water, sewer and electricity—were not completed. Plaintiffs indicated to Phillips that they wanted the lot available "to build and retire on" by 31 December 1981. Phillips assured plaintiffs that the lot would be finished on 31 December 1981 and that plaintiffs would be able to build at that time. He showed plaintiffs the property report prepared in 1979 by Pinehurst Inc. for the U.S. Department of Housing and Urban Development (HUD report) and indicated his belief that the dates shown in that report reflected when the roads and utilities would be completed. The HUD report indicated estimated completion dates of 31 December 1980 for water and sewer, and 31 December 1981 for the roads.

Based on Phillips' assurances that the completion dates in the HUD report were firm, plaintiffs decided to buy the lot. Plaintiff-wife testified that she and plaintiff-husband would not have purchased the lot without these assurances.

Plaintiffs and defendant executed a contract to purchase and sell the lot on 26 February 1980. The agreement provided for a sales price of $36,900 with a cash down payment of $14,900 and the remaining $22,000 to be financed over ten years at an annual interest rate of 9% with 120 regular monthly payments of $278.69 plus an annual assessment for police and fire protection. The contract further provided that defendant would convey the lot by general warranty deed to plaintiffs as grantees "when the purchase price has been fully paid and you have fully performed all covenants herein required and have surrendered this contract . . . ." However, the agreement also provided that defendant had the right to transfer title "at any time during this contract" and to require of plaintiffs a promissory note and deed of trust for the then outstanding balance of principal and interest on the financed portion of the sale. Pursuant to this provision, the parties transferred title to the lot from defendant to plaintiffs by a general warranty deed dated 2 March 1981 and recorded on 7 October 1981.

On 1 January 1982 plaintiffs returned to the lot and found that water, sewer, and paved roads were not yet serving it. These conditions frustrated plaintiffs' building plans. On 4 January 1982 plaintiff-husband met with defendant's assistant secretary, who assured him that plaintiffs would receive a full refund for monies paid toward the lot. In March 1982, however, defendant informed plaintiffs that they would not receive a refund but could trade for another lot. In anticipation of trading for another lot on which to build their retirement home, plaintiffs sold their existing home in Tennessee and moved to a rental home in the Pinehurst area in July 1982. Plaintiff-husband testified that at this time "[o]n Lot 615 we had no permits; we had no roads; we had nothing; couldn't hardly build on it."

Defendant subsequently failed to provide a refund or a trade for another lot. Consequently, with their savings depleted, plaintiffs moved to Illinois where plaintiff-husband returned to work. Plaintiffs then commenced this action.

The court, sitting without a jury, entered findings of fact and conclusions of law calling for rescission of the parties' agreement on the basis of a mutual mistake of fact. Specifically, the court found:

> 4. The parties contracted on the mistaken belief that all roadway and utility services would be available on the lot in question on or before December 31, 1981. Plaintiffs would never have entered into said contract had they known the true facts that indeed said amenities would not be available by December 31, 1981.

The court awarded plaintiffs "the sum of $31,257.30 paid in principal and interest toward the purchase price of [the lot]; the sum of $405.90 paid in property assessments; and the sum of $625.95 paid in ad valorem property taxes." It did not find an unfair and deceptive trade practice under N.C. Gen. Stat. 75-1.1 *et seq.*, and it did not order plaintiffs to reconvey the lot to defendant pursuant to the rescission of the contract.

From the judgment entered, both plaintiffs and defendant appeal.

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

Van Camp, Gill, Bryan, Webb & Thompson, P.A., by Douglas R. Gill, for defendant Pinehurst Inc.

WHICHARD, Judge.

Defendant appeals from that portion of the judgment rescinding the contract on the basis of mutual mistake of fact. Plaintiffs appeal from the court's failure to find an unfair and deceptive trade practice under N.C. Gen. Stat. 75-1.1 and its failure to award plaintiffs' moving and rental expenses as contract damages.

In defendant's appeal we hold that the court should not have applied the doctrine of mutual mistake to the facts here. We further hold, however, that rescission nevertheless may be justified on the basis of a material breach of the contract by defendant.

In plaintiffs' appeal we hold that the court did not err in failing to find an unfair and deceptive trade practice under N.C. Gen.

Stat. 75-1.1. We also hold that plaintiffs are not entitled to an award for moving and rental expenses should the court, on remand, grant a rescission for material breach.

Accordingly, the judgment is affirmed in part and vacated in part, and the cause is remanded for further proceedings consistent with this opinion.

Defendant's Appeal

[1] Defendant contends the court erred in rescinding and cancelling the contract on the basis of mutual mistake of fact. We agree.

Under certain circumstances a contract for the sale of real estate may be rescinded on the basis of mutual mistake of fact. *See, e.g., MacKay v. McIntosh*, 270 N.C. 69, 153 S.E. 2d 800 (1967). In *MacKay* the Court rescinded an executory real estate contract when the parties, at the time of execution, shared the mistaken belief that "the subject property was within the boundaries of an area zoned for business." *MacKay*, 270 N.C. at 73-74, 153 S.E. 2d at 804. The Court reasoned:

> "The formation of a binding contract may be affected by a mistake. Thus, a contract may be avoided on the ground of mutual mistake of fact where the mistake is common to both parties and by reason of it each has done what neither intended. Furthermore, a defense may be asserted when there is a mutual mistake of the parties as to the subject matter, the price, or the terms, going to show the want of a consensus *ad idem*. Generally speaking, however, in order to affect the binding force of a contract, the mistake must be of an existing or past fact which is material; it must be as to a fact which enters into and forms the basis of the contract, or in other words it must be of the essence of the agreement, the *sine qua non*, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties." 17 Am. Jur. 2d, Contracts Sec. 143.

Id. at 73, 153 S.E. 2d at 804.

However, in *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975), our Supreme Court expressly refused to apply the mutual mistake of fact theory to an executed, as opposed to ex-

ecutory, real estate sale contract. *Hinson*, 287 N.C. at 432-33, 215 S.E. 2d at 109-10. The parties there mistakenly assumed the subject property could support an on-site sewage disposal system and thus be suitable for a residence. *Id.* The Court explained:

> [B]ecause of the uncertainty surrounding the law of mistake we are extremely hesitant to apply this theory to a case involving the completed sale and transfer of real property. Its application to this type of factual situation might well create an unwarranted instability with respect to North Carolina real estate transactions and lead to the filing of many nonmeritorious actions. Hence, we expressly reject this theory as a basis for plaintiff's rescission.

Id. The Court found, instead, that defendants had breached an implied warranty arising out of the restrictive covenants that the subject property was suitable for residential purposes. *Id.* at 435-36, 215 S.E. 2d at 110-11. Accordingly, the Court held that plaintiff was entitled to full restitution of the purchase price provided she reconveyed title to the subject lot to defendants. *Id.* at 436, 215 S.E. 2d at 111.

Our Supreme Court later qualified *Hinson* in *Financial Services v. Capitol Funds*, 288 N.C. 122, 217 S.E. 2d 551 (1975). The Court there held that a real estate contract was not subject to rescission for mutual mistake of fact where the purchaser mistakenly assumed that an effective driveway permit for the subject property had been obtained by the assignor of an option to purchase the property. *Financial Services*, 288 N.C. at 137-39, 217 S.E. 2d at 561-63. The Court stated:

> Although this Court will readily grant equitable relief in the nature of reformation or rescission on grounds of mutual mistake when the circumstances justify such relief, we jealously guard the stability of real estate transactions and require clear and convincing proof to support the granting of this equitable relief in cases involving executed conveyances of land. [Citation omitted.]

Id. at 139, 217 S.E. 2d at 562.

In *Homes, Inc. v. Gaither*, 31 N.C. App. 118, 228 S.E. 2d 525, *disc. rev. denied*, 291 N.C. 323, 230 S.E. 2d 675 (1976), this Court, following *MacKay, supra*, upheld the trial court's application of

the mutual mistake of fact theory. The parties in *Homes, Inc.* mistakenly assumed that the applicable zoning ordinance permitted conversion and use of the subject property from a hotel to an apartment complex. *Homes, Inc.*, 31 N.C. App. at 119, 228 S.E. 2d at 526. The Court found that this mistake was as to a material fact and held that plaintiff was entitled to rescind the contract for sale. *Id.* at 120-21, 228 S.E. 2d at 527.

Viewing the facts here in light of the foregoing decisions, we hold that the court incorrectly relied on the theory of mutual mistake of fact as the basis for granting rescission. The court concluded that "[t]he parties contracted on the mistaken belief that all roadway and utility services would be available on the lot in question on or before December 31, 1981." While timely completion may have been material to the parties' agreement (*see infra*), it does not justify rescission based on a mutual mistake of fact. Specifically, the firmness of the completion dates pertains to future performance rather than to " 'an existing or past fact . . . .' " *MacKay, supra*, 270 N.C. at 73, 153 S.E. 2d at 804. In general, to justify a rescission of a contract for a mutual mistake of fact, the mistake must concern facts as they existed at the time of the making of the contract; reliance on a prediction as to future events will not support a claim for rescission based on mutual mistake of fact. *Boles v. Blackstock*, --- Ala. ---, ---, 484 So. 2d 1077, 1081-82 (1986). *See also Duane Realty Corp. v. Great Atlantic & Pacific Tea Co.*, 8 Mass. App. Ct. 899, 394 N.E. 2d 964 (1979) (there is no mistake where a party is disappointed that its expectation as to future events proved to be erroneous). *See, generally, Restatement (Second) of Contracts* Sec. 151 (1979) at Comment a ("A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here."). The Court in *Hinson, supra*, acknowledged this distinction as a relevant factor in mutual mistake cases for determining whether the aggrieved party is entitled to some kind of relief. 287 N.C. at 430, 215 S.E. 2d at 108. In light of our Supreme Court's reluctance to apply the mutual mistake of fact doctrine to completed sales of real estate, *Hinson, supra*, and *Financial Services, supra*, we hold that the doctrine should not apply here, where the mistake pertains to a future contingency or probability regarding the certainty of future performance rather than to a

fact which existed at the time the parties entered the agreement, such as existing zoning restrictions, *MacKay, supra.*

As in *Hinson, supra,* the question now arises: "[Are] plaintiff[s] therefore without a remedy?" *Hinson,* 287 N.C. at 433, 215 S.E. 2d at 109; and the answer here is: not necessarily. It follows from *Hinson* that, although rescission for mutual mistake is not proper, the evidence may support another theory of recovery which provides plaintiffs with comparable relief. In *Hinson,* this theory was an implied warranty arising out of the restrictive covenants. *Hinson,* 287 N.C. at 435-36, 215 S.E. 2d at 110-11. The Court's substitution of theories in *Hinson* was consistent with the general principle that a trial court's "ruling must be upheld if it is correct upon any theory of law[,]" and thus it should "not be set aside merely because the court gives a wrong or insufficient reason for [it]." *Manpower, Inc. v. Hedgecock,* 42 N.C. App. 515, 519, 257 S.E. 2d 109, 113 (1979). *See also Sanitary District v. Lenoir,* 249 N.C. 96, 99, 105 S.E. 2d 411, 413 (1958) (if correct result reached, judgment should not be disturbed even though court may not have assigned the correct reasons for the judgment entered); *Payne v. Buffalo Reinsurance Co.,* 69 N.C. App. 551, 555, 317 S.E. 2d 408, 411 (1984) (it is common learning that a correct judgment must be upheld even if entered for the wrong reason).

[2] While the court here improperly based rescission on the theory of mutual mistake, rescission may nevertheless be proper on the theory of material breach of contract. We are unable to conclude from the record as a matter of law, however, whether the particular facts and circumstances warrant application of this theory. We thus vacate those portions of the judgment relating to mutual mistake and remand the cause for consideration under the theory of material breach.

> The Supreme Court has indicated that upon the breach of a contract for the purchase and sale of real estate by the seller, the buyer has the following remedies available to him, among others: (1) the buyer may sue at law for damages for the breach; (2) he may sue in equity and seek specific performance; or (3) he may abandon and thereby rescind the contract and recover what he has paid.

Johnson v. Smith, Scott & Assoc., Inc., 77 N.C. App. 386, 389, 335 S.E. 2d 205, 207 (1985), *citing Brannock v. Fletcher,* 271 N.C. 65,

73, 155 S.E. 2d 532, 541 (1967). However, "[n]ot every breach of a contract justifies a cancellation and rescission." *Childress v. Trading Post*, 247 N.C. 150, 156, 100 S.E. 2d 391, 395 (1957). "The breach must be so material as in effect to defeat the very terms of the contract." *Id.* In *Childress* the Court held that a two month delay in completion of a dwelling did not justify cancellation and rescission of the parties' real estate contract where time was not of the essence. *Id.* The Court reasoned that:

> Time for completion is not normally regarded as a part of the plans or specifications for the construction of a dwelling nor is time normally a substantial or vital element in a contract of purchase and sale. [Citations omitted.]
>
> "As a general rule, time is not of the essence of a building or construction contract, in the absence of a provision in the contract making it such. Failure to complete the work within the specified times does not *ipso facto* terminate the contract, but only subjects the contractor to damages for the delay." [Citation omitted.]

Id. at 155, 100 S.E. 2d at 395. *See also Sanders v. Meyerstein*, 124 F. Supp. 77, 83 (E.D.N.C. 1954). In *Johnson, supra*, this Court, following *Childress*, held that a delay of at most two weeks in completion of a dwelling did not provide grounds for rescission where the contract did not expressly provide that time was of the essence and the Court found nothing in the contract or the parties' actions which demonstrated their intent to make time of the essence. *Johnson*, 77 N.C. App. at 390, 335 S.E. 2d at 207.

Unlike the agreements in *Childress* and *Johnson*, the contract here expressly provides that, "[t]ime is of the essence of this contract . . . ." Accordingly, timely completion of the roads and utilities may have been a substantial or material element of the contract. Thus, defendant's failure to complete the work within the times specified in the HUD report may justify plaintiffs' cancellation and rescission of the contract.

However, we cannot determine from the record as a matter of law whether defendant's delay here constitutes a material breach justifying rescission by plaintiffs. As Judge (now Justice) Mitchell stated in *Insurance Co. v. McDonald*, 36 N.C. App. 179, 184, 243 S.E. 2d 817, 820 (1978), whether failure to perform a con-

tractual obligation is so material as to discharge the other parties' performance is a question of fact for the jury or for the trial court without a jury. *See also Snider v. Hopkins*, 314 N.C. 529, 334 S.E. 2d 776 (1985) (whether plaintiff breached babysitting contract held to be a jury question).

Thus, while we cannot simply affirm or reverse the judgment as in *Hinson*, consistent with *Hinson* we hold that plaintiffs are not necessarily without a remedy simply by virtue of the court's erroneous application of the mutual mistake doctrine. Accordingly, we vacate those portions of the judgment granting rescission for mutual mistake and remand the cause to the trial court to enter findings and conclusions as to the extent of defendant's delay and whether such delay constituted a material breach justifying rescission.

Should the court on remand find a material breach justifying rescission, each party would be entitled "to be placed in *statu quo ante fuit*." *Brannock, supra*, 271 N.C. at 75, 155 S.E. 2d at 542. *See also Town of Nags Head v. Tillet*, 314 N.C. 627, 632, 336 S.E. 2d 394, 398 (1985). As the court ordered, plaintiffs would be entitled to full restitution of the purchase price, including principal and interest, assessments, and ad valorem taxes, "provided that [plaintiffs] execute and deliver a deed reconveying the subject lot to defendant . . . ." *Hinson, supra*, 287 N.C. at 436, 215 S.E. 2d at 111. "[A]s a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed." *Bolich v. Insurance Company*, 206 N.C. 144, 156, 173 S.E. 320, 327 (1934).

[3] We note that no provision in the written agreement addresses the time when the roads and utilities were to be completed. It thus is necessary to refer to parol or extrinsic evidence to determine defendant's performance obligations under the contract in this regard. In general, "[t]he parol evidence rule excludes prior or contemporaneous oral agreements which are inconsistent with a written contract if the written contract contains the complete agreement of the parties." *Cable TV, Inc. v. Theatre Supply Co.*, 62 N.C. App. 61, 64-65, 302 S.E. 2d 458, 460 (1983). In *Cable TV* the Court held that the parol evidence rule applied to exclude parol testimony where the written contract included a

merger or integration clause which stated that "[t]his instrument constitutes the entire agreement between the parties . . . ." *Id.*

The written contract here contains a comparable merger or integration clause:

> 10. It is further mutually agreed that the terms, covenants and conditions appearing on both sides of this contract contain the entire agreement of the parties, it being understood that the authority of Seller's representatives is limited and confined to securing purchasers for the property upon the terms and conditions set out in this written agreement, and not otherwise; that sales representatives have no power or authority to make any change, alteration, modification, stipulation, inducement, promise or any representation whatsoever other than those herein stated; that said sales representatives are acting as special representatives and all representations of Seller not herein set forth are deemed waived by Buyer.

However,

> "[t]he parol evidence rule presupposes the existence of a legally effective written instrument. It does not in any way preclude a showing of facts which would render the writing inoperative or unenforceable. Thus it may be proved that . . . there was such mistake as to prevent the formation of a contract or make it subject to reformation or rescission." Stansbury, N.C. Evidence (Second Edition), Sec. 257.

MacKay, supra, 270 N.C. at 73, 153 S.E. 2d at 803-04. Parol evidence generally is admissible to show grounds for granting or denying rescission even if the written agreement includes a merger clause. Calamari, *et al. Contracts*, Secs. 3-4 at 113 (2d ed., 1977). Accordingly, on remand the court may consider the parol evidence in the record regarding the parties' provisions for completion of the roads and utilities in order to determine whether defendant committed a material breach warranting rescission.

[4] We further note that the doctrine of merger may operate to render the contract here unenforceable since the parties subsequently transferred title to the lot by deed. "Generally, a contract for the sale of land is not enforceable when the deed fulfills all the provisions of the contract, since the executed contract then

merges into the deed." *Biggers v. Evangelist*, 71 N.C. App. 35, 38, 321 S.E. 2d 524, 526 (1984), *disc. rev. denied*, 313 N.C. 327, 329 S.E. 2d 384 (1985). "However, it is well-recognized that the intent of the parties controls whether the doctrine of merger should apply." *Id.* In *Biggers* the Court, "look[ing] to the instruments to discern the parties' intent," held that the "contract did not merge in the deed [since] the parties' clearly-defined intent rebut[ted] the presumption of merger [, and plaintiffs thus] were entitled to bring an action on the contract." *Id.* at 38-39, 321 S.E. 2d at 526-27. Inclusion of a survival clause in the contract coupled with the absence of any language in the deed suggesting waiver of survivability demonstrated that the parties in *Biggers* clearly intended to avoid the doctrine of merger. *Id. See also Town of Nags Head, supra*, 314 N.C. at 632, 336 S.E. 2d at 398.

The written contract here, unlike the ones in *Biggers* and *Town of Nags Head*, does not contain a survival clause. By the same token, there is no provision which expressly addresses the survivability of the contract, and the language of the deed is silent on this issue as well. Accordingly, the court on remand must also determine whether the parties intended to avoid the doctrine of merger. Should the court find that the parties did not intend to avoid it, plaintiffs may not maintain an action to rescind the contract. *Biggers, supra.* In this regard the court should consider the following provision of the contract:

> 6. It is further mutually agreed that Seller shall have the right at any time during this contract, and without waiting for full performance by the Buyer, to deliver a good and sufficient deed to the Buyer with title in the same state and condition as hereinbefore required upon fulfillment by Buyer of all the terms and conditions of this contract, and to require of the Buyer an executed promissory note and deed of trust for the balance of principal and interest, payable in the manner as herein provided. Such note and balance of purchase money deed of trust shall be upon forms satisfactory to Seller. Buyer shall do all things necessary to make such purchase money deed of trust a first lien on said property in the same condition of the title as herein called for to be delivered to Buyer.

It was pursuant to this provision that the parties transferred title even though plaintiffs had not fully paid the purchase price. This provision suggests that, should defendant decide, as it did, to exercise its right to transfer title prior to plaintiffs' completion of payments, the other rights and obligations of the parties under the contract still remain in force and thus, in essence, "survive" until plaintiffs have fully paid the purchase price. The court should consider this provision with other evidence of the parties' intent as to survivability of the contract.

Plaintiffs' Appeal

[5] Plaintiffs contend the court erred in failing to conclude that defendant violated N.C. Gen. Stat. 75-1.1 and that plaintiffs thus were entitled to treble damages under N.C. Gen. Stat. 75-16. We disagree. For the reasons stated below, we hold that while defendant's conduct was within the scope of N.C. Gen. Stat. 75-1.1, the court was not required to find it unfair or deceptive.

N.C. Gen. Stat. 75-1.1 provides that "unfair or deceptive acts or practices in or affecting commerce . . . are declared unlawful." "The Act does not, however, define an unfair or deceptive act, 'nor is any precise definition of the term possible.'" *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 229-30, 314 S.E. 2d 582, 584, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984). The facts surrounding the transaction and the impact on the marketplace determine whether a particular act is unfair or deceptive, and this determination is a question of law for the court. *Id.* at 230, 314 S.E. 2d at 584. Whether defendant acted in bad faith is not pertinent. *Id.*

Before a court can declare a practice unfair or deceptive, it must first determine whether the practice or conduct is within the scope of N.C. Gen. Stat. 75-1.1, *i.e.*, whether it "takes place within the context of the statute's language pertaining to trade or commerce." *Johnson v. Insurance Co.*, 300 N.C. 247, 261, 266 S.E. 2d 610, 620 (1980). Defendant does not contend that its conduct was outside the scope of the statute. In *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 452-53, 279 S.E. 2d 1, 7 (1981), this Court considered the application of N.C. Gen. Stat. 75-1.1 to the conduct of a residential subdivision developer vis-a-vis plaintiff-purchasers of a lot within the subdivision. While the court there found the evidence insufficient to establish unfair or deceptive acts or prac-

tices, it is clear from *Overstreet* that defendant's conduct here is within the scope of N.C. Gen. Stat. 75-1.1.

The pertinent question is whether the evidence and findings of fact compel a conclusion of law that defendant engaged in unfair or deceptive acts or practices. "The concept of 'unfairness' is broader than and includes the concept of 'deception.'" *Johnson, supra*, 300 N.C. at 263, 266 S.E. 2d at 621. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Id.* Specifically, "[a] party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position." *Id.* at 264, 266 S.E. 2d at 622. "An act or practice is deceptive . . . if it has the capacity or tendency to deceive." *Id.* at 265, 266 S.E. 2d at 622. "In determining whether a representation is deceptive, its effect on the average consumer is considered." *Id.* at 265-66, 266 S.E. 2d at 622.

The court here found, in pertinent part, that:

> 7. It was the practice of Phillips as a land sales agent of Pinehurst, Incorporated to assure all prospective purchasers of real estate from Pinehurst, Incorporated that the dates set forth in the Property Reports filed with the U.S. Department of Housing & Urban Development were firm dates and all promised actions would be completed by the stated dates. Mr. Phillips believed at that time that the dates were firm and would in fact be met. It was his practice as a real estate agent to so assure prospective purchasers of real estate, but it was also the practice generally within the Land Sales Office of Pinehurst, Incorporated to assure prospective purchasers generally that the dates were firmly established for completion of amenities. In truth and fact said dates were not firm and were not met.

As in *Overstreet, supra*, "[w]e do not find that plaintiffs have shown that defendant's acts . . . meet any of [the *Johnson*] criteria . . . ." 52 N.C. App. at 453, 279 S.E. 2d at 7. Courts take judicial notice of subjects and facts of common knowledge. *Smith v. Kinston*, 249 N.C. 160, 166, 105 S.E. 2d 648, 653 (1958); *McClure v. McClure*, 64 N.C. App. 318, 322, 307 S.E. 2d 212, 215 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E. 2d 651 (1984). It is common

knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill. In light of this common knowledge and the capacity of consumers to contract with reference thereto, we do not believe the legislature intended that the representation of such dates as firm when in fact they are not, standing alone, should rise to the level of immoral, unethical, oppressive, or unscrupulous conduct, or amount to an inequitable assertion of power or position. We thus hold that the court did not err in failing to find a violation of N.C. Gen. Stat. 75-1.1 and to award plaintiffs treble damages. Plaintiffs' remedy lies in contract for material breach only.

[6] Plaintiffs next contend that the "court erred in failing to award as part of the reasonable contract damages moving expenses and rental incurred by the plaintiffs." While technically we need not address this contention, given our disposition of defendant's appeal, we will consider it to assist the court on remand.

In general damages for breach of contract are not available when there has been a lawful rescission of the agreement. 17 Am. Jur. 2d Contracts Sec. 516 at 1002. Our Supreme Court has recognized a limited exception to this rule where fraud is involved. *Kee v. Dillingham*, 229 N.C. 262, 265-66, 49 S.E. 2d 510, 512 (1948). In such cases a plaintiff may recover special damages sustained as the result of the fraud which rescission of the contract does not repair. *Id.* Further, plaintiffs contend that a court "will, where necessary to effect complete justice, award to the party not in default his expenses necessarily incident to the contract." 17 Am. Jur. 2d Contracts Sec. 519 at 1007.

However, the record here reveals that plaintiffs sold their Tennessee home, moved to Moore County and rented a home, and then moved away, all with full knowledge that defendant had not completed the roads and utilities by the promised dates. Thus, these were not "expenses necessarily incident to the contract" but voluntary expenditures by plaintiffs made after they were aware of defendant's breach. Accordingly, should the court on remand find a material breach justifying rescission, plaintiffs will not be entitled to damages for moving and rental expenses.

Affirmed in part, vacated in part, and remanded.

Judges ARNOLD and JOHNSON concur.

GLORIA C. BOYD v. JAMES E. BOYD

No. 8526DC1033

(Filed 3 June 1986)

1. **Divorce and Alimony § 24.2— child support—separation agreement—motion to modify—burden of proof**

When a motion is made to modify the child support provisions of a separation agreement which has not previously been incorporated into an order or judgment of the court, the moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing. Should the evidence establish that such amounts substantially exceed the amount agreed upon in the separation agreement, such evidence would necessarily rebut the presumption of reasonableness created in *Fuchs v. Fuchs*, 216 N.C. 635, and establish the need for an increase; absent such a showing, the agreement of the parties will be deemed reasonable. N.C.G.S. § 50-13.4(b) and (c).

2. **Divorce and Alimony § 24.2— child support—separation agreement—medical and dental expenses—specific performance**

The trial court did not erroneously order defendant to specifically perform those portions of a separation agreement relating to payment of medical and dental expenses and maintenance of medical insurance for each child where plaintiff had not sought specific performance and the court did not order specific performance; the court found the provisions of the agreement relating to medical and dental care to be reasonable and incorporated those provisions into its order for child support; and the provisions of the order relating to payment for medical and dental care and insurance coverage were directly related to the health and maintenance of the children and were well within the court's discretion.

3. **Divorce and Alimony § 24.9— child support—findings inadequate**

The trial court's findings of fact were inadequate to support its conclusions as to the amount reasonably required of defendant for the support of his children or as to his ability to pay that amount where the record contained extensive evidence with respect to the incomes and estates of each of the parties and ample findings relating to those factors, but no findings as to reasonable expenses. N.C.G.S. § 50-13.4(b) and (c).

4. Divorce and Alimony § 24.9— child support—no findings as to actual past or present expenses

The trial court's findings concerning child support were deficient in that plaintiff's itemized expenses of $1,654.16 were based on expenses several months before the hearing when plaintiff was providing and maintaining a residence for herself and her children; plaintiff had remarried and moved her children into her new husband's home; plaintiff testified that expenses for the children had remained the same or increased but offered no other evidence as to the expenses of the children on the date of the hearing; the court found that the reasonable needs of the children amounted to at least $1,050.00; but there were no specific findings with respect to actual past or present expenses incurred for the support of the children.

5. Divorce and Alimony § 24.9— retroactive child support—not supported by findings

The trial court erred in an action for increased child support by finding that defendant's $800.00 monthly obligation should be retroactive without making findings supporting the amount of the retroactive award or the date to which the obligation was made retroactive.

6. Divorce and Alimony § 27— attorney fees—husband's obligation to pay wife's fees—not excused by prior voluntary payment

In an action for increased child support, defendant was not excused from any obligation to pay plaintiff's counsel fees by reason of his prior voluntary payment of an amount higher than that called for in the separation agreement. The action was precipitated by defendant's unilateral reduction in the amount which he had been voluntarily paying and was grounded upon plaintiff's allegation that the reduced amount was inadequate; on remand, an order requiring defendant to assist in the payment of counsel fees would be appropriate if otherwise authorized under N.C.G.S. § 50-13.6 and if the court should determine that defendant deprived his children of such support as they were entitled to under the circumstances.

7. Divorce and Alimony § 27— attorney fees—findings not sufficient

An award of attorney fees to plaintiff in an action for increased child support was vacated where the court's findings were insufficient with respect to the amount of child support defendant should be required to pay; moreover, the Court of Appeals could not say that plaintiff was unable to employ counsel to meet defendant on substantially even terms where plaintiff received a salary of nearly $1,400.00 per month; had savings and cash management accounts aggregating in excess of $7,000.00; owned a house and lot with equity of more than $24,000.00 and yielding a gross rental of $500.00 per month; owned other real property valued at $2,000.00; owned a $15,000.00 Porsche automobile; there was scant evidence of plaintiff's liabilities or expenses except for her mortgage on the rented property and her car payment; there was evidence that defendant earned in excess of $54,000.00 per year and had accumulated savings immediately available to him of $40,000.00; he and his new wife had purchased a home valued at approximately $60,000.00; and there was evidence, but no findings, that defendant's taxes, insurance and expenses total nearly $31,000.00.

APPEAL by defendant from *Cantrell, Judge.* Judgment entered 28 February 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 12 February 1986.

Plaintiff and defendant were married to each other in 1969 and separated in February 1982. They have two minor daughters. According to the terms of a separation agreement executed by the parties at the time of their separation, plaintiff was given custody of the children and defendant agreed to pay $380.00 per month as child support. Defendant also agreed to provide hospitalization insurance for the children and to pay for all of their medical and dental expenses, except for orthodontic expenses which the parties agreed to divide equally. The parties were divorced on 29 April 1983.

Defendant paid $380.00 for child support in February and March 1982. Commencing in April 1982, and continuing through December of that year, he paid $400.00 per month. In January and February 1983, defendant paid $800.00 per month, and then paid $700.00 per month until May 1984. Beginning in June 1984, defendant reduced the monthly child support payments to $500.00.

In response to defendant's reduction of his child support payments, plaintiff filed a motion on 29 June 1984, alleging that $500.00 per month was inadequate to meet the needs of the children. She requested that she be awarded custody of the children, reasonable child support, and attorney's fees. Defendant answered, alleging that he had paid child support in excess of that required by the separation agreement. He also sought custody of the children. As a result of court-ordered mediation, the custody dispute was resolved by agreement of the parties and an order was entered on 8 January 1985 which provided that the children would continue to live with plaintiff and that defendant would continue to have the same visitation rights as had been provided by the separation agreement.

Plaintiff's motion for child support was heard on 18-20 February 1985 and on 28 February 1985 an order was entered requiring defendant (1) to pay $800.00 per month for child support; (2) to provide hospitalization insurance for the children and to pay all medical and dental expenses incurred by the children which are not covered by insurance; (3) to pay one-half of all orthodontic

expenses incurred by the children which are not covered by insurance; (4) to make one lump-sum payment of child support in the amount of $1,500.00; and (5) to pay $1,500.00 as attorney's fees to plaintiff's attorney. Defendant appeals.

Casstevens, Hanner & Gunter, by Nelson M. Casstevens, Jr., for plaintiff appellee.

James, McElroy & Diehl, by William K. Diehl, Jr., for defendant appellant.

MARTIN, Judge.

I

[1] By his first argument defendant brings forward four assignments of error grounded upon eleven exceptions to the findings of fact and conclusions of law contained in the court's order. The basis of his argument is that since the parties had agreed in their separation agreement as to the amount which defendant would pay for support of the children, the court was not warranted in increasing that amount in the absence of proof by plaintiff and a finding by the court that circumstances relating to the reasonable needs of the children had substantially changed between the date of the separation agreement and the date of the hearing upon the motion for increase. He further contends that because plaintiff offered no evidence of a change in circumstances, there was no basis for any increase in the amount of child support provided by the terms of the separation agreement.

In those cases where the amount of support for minor children has been fixed by *court order*, a party seeking to modify the award of support must show a change in circumstances affecting the welfare of the child between the time of the prior order and the time of the hearing of the motion to modify it. G.S. 50-13.7; *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). However, in those instances where child support is originally fixed by a *separation agreement* between the parties, which is not thereafter approved by the court and incorporated into an order or judgment, there is apparently some confusion as to the proof required of a party seeking to modify the child support provisions of the agreement. Some cases have held that the court may not modify the amount of child support agreed upon in the separation

agreement unless there is evidence of a change in conditions. *See Hershey v. Hershey*, 57 N.C. App. 692, 292 S.E. 2d 141 (1982); *Rabon v. Ledbetter*, 9 N.C. App. 376, 176 S.E. 2d 372 (1970). *See also dicta* in *Holthusen v. Holthusen*, 79 N.C. App. 618, 339 S.E. 2d 823 (1986). However, in *Perry v. Perry*, 33 N.C. App. 139, 234 S.E. 2d 449, *disc. rev. denied*, 292 N.C. 730, 235 S.E. 2d 784 (1977), the Court, while finding ample evidence of a change in circumstances, declared that the moving party was not required to show the needs of the child at the time the separation agreement was signed, but only the amount reasonably required for the support of the child at the time of the hearing. Implicit in this statement is the notion that no proof of a change in circumstances relating to the needs of the child is required. And, in *Walker v. Walker*, 63 N.C. App. 644, 306 S.E. 2d 485 (1983), the Court held that the party moving for modification "was not required to show a substantial change in circumstances from the time of the separation agreement as justification for an increase in child support payments." *Id.* at 647, 306 S.E. 2d at 486. *See Rice v. Rice*, 81 N.C. App. ---, 344 S.E. 2d 41 (1986).

It is well established that the provisions of a separation agreement relating to custody and support of minor children are not binding on the court, which has the inherent and statutory authority to protect the interests of children. *Crutchley v. Crutchley*, 306 N.C. 518, 293 S.E. 2d 793 (1982); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E. 2d 487 (1963). However, in *Fuchs*, the Supreme Court recognized a presumption, in the absence of evidence to the contrary, that the amount of child support agreed upon in the separation agreement is reasonable. Consequently, the *Fuchs* court held that the trial court is "not warranted in ordering an increase in the absence of any evidence of a change in conditions *or of the need for such increase*. . . ." *Id.* at 639, 133 S.E. 2d at 491 (emphasis added). Scarcely one month later, the Supreme Court decided *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964). In *Williams* the Court clearly distinguished the showing which is required upon a motion for increase in *court ordered* child support from that required when the amount of child support has been fixed by *separation agreement*.

> When a wife petitions the judge to increase the amount which the Court itself has previously fixed for the support of minor children, she assumes the burden of showing that cir-

> cumstances have changed between the time of the order and the time of the hearing upon the petition for increase . . . . However, . . . in this case, the defendant's support payments for the children had been made pursuant to the terms of a deed of separation which was in no way binding on the court insofar as it applied to the children. Therefore, plaintiff's only burden was to show the *amount reasonably required for the support of the children at the time of the hearing.* The amount which the parties fixed . . . was merely evidence for the judge to consider, along with all the other evidence in the case, in determining a reasonable amount for support of the children.

Id. at 58-59, 134 S.E. 2d at 234-35 (emphasis added). Referring to the presumption created by *Fuchs*, the Court explained that an increase in the amount of child support mutually agreed upon is not warranted "in the absence of *any* evidence of the need for such increase." *Id.* at 59, 134 S.E. 2d at 235.

When a motion is made to modify the child support provisions of a separation agreement which has not previously been incorporated into an order or judgment of the court, the court is called upon, for the first time, to exercise its authority to see that the reasonable needs of the child are provided for commensurate with the abilities of those responsible for the child's support. We hold, under the authority of *Williams*, that the moving party's only burden is to show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing. Should the evidence establish, giving due regard to the factors contained in G.S. 50-13.4(b) and (c), that such amount substantially exceeds the amount agreed upon in the separation agreement, such evidence would necessarily rebut the presumption of reasonableness created in *Fuchs* and establish the need for an increase. Absent such a showing, the agreement of the parties will be deemed to be reasonable. While evidence of a change in circumstances, involving a comparison of actual expenditures and other circumstances between the time of the separation agreement and that date of the hearing, may be relevant to the issue of reasonableness, such evidence is not an absolute requirement to justify an increase.

II

Having concluded that plaintiff is not required to show a change in circumstances, but only the present reasonable needs of the children, in order to justify modification of the child support provisions of the separation agreement, we turn now to a consideration of defendant's assignments of error relating to the amount of support which he was ordered to pay.

[2] Initially, defendant contends that the trial court entered a judgment which required him to specifically perform those provisions of the separation agreement relating to payment of medical and dental expenses and maintenance of medical insurance for each child. Citing *Christie v. Christie*, 59 N.C. App. 230, 296 S.E. 2d 26 (1982), defendant contends that the trial court erred in awarding specific performance of those provisions of the agreement without first finding that plaintiff had no adequate remedy at law. We find his reliance on *Christie* to be misplaced and his argument without merit. Plaintiff did not seek specific performance of any provisions of the separation agreement nor did the trial court decree specific performance. A fair reading of the order indicates that the court found the provisions of the agreement relating to medical and dental care to be reasonable and incorporated those provisions into its order for child support. The provisions of the order relating to payment for medical and dental care and insurance coverage for the children are directly related to the health and maintenance of the children and are well within the discretion of the trial court.

[3] Defendant next contends that the court's findings of fact are inadequate to support its conclusions as to the amount reasonably required of him for the support of the children or as to his ability to pay that amount. In these respects, his contentions have merit.

Support for minor children is an obligation shared by both parents according to their relative abilities to provide support and the reasonable needs and estate of the child. G.S. 50-13.4(b); *Plott v. Plott*, 313 N.C. 63, 326 S.E. 2d 863 (1985). The amount of each parent's contribution to the support of the child is based upon the trial court's evaluation of each parent's circumstances, including a determination of certain factors mandated by G.S. 50-13.4(c):

> (c) Payments ordered for the support of a minor child shall be in such amounts as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

Plott v. Plott, supra. In order to comply with the statute, the trial court is required to make findings of fact with respect to the factors listed in the statute which findings must be sufficiently specific to support its conclusions of law with respect to the amount reasonably necessary for support of the child and the relative abilities of the parties to provide that support. *Id.* Such findings are required in order that the appellate court may determine whether the trial court gave due consideration to these factors and whether the order for support is sufficiently supported by competent evidence. *Id.* The trial court's consideration of the factors contained in G.S. 50-13.4(c) is an exercise in sound judicial discretion however, and if its findings are supported by competent evidence in the record, its determination as to the proper amount of support will not be disturbed on appeal. *Id.* A recitation of all evidentiary facts presented at the hearing is not required; those facts required to be found are those facts which are determinative of the rights and obligations of the parties and essential to support the court's conclusions of law. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). With respect to an order for child support, the factual findings must be sufficiently specific to enable the appellate court to determine that the trial court "took 'due regard' of the particular 'estates, earnings, conditions, [and] accustomed standard of living' of both the child and the parents" in determining "(1) the amount of support necessary to 'meet the reasonable needs of the child' and (2) the relative ability of the parties to provide that amount." *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E. 2d 185, 189 (1980).

The record in the present case contains extensive evidence with respect to the income and estates of each of the parties and the order contains ample findings of fact relating to those factors. However, notwithstanding evidence contained in financial affidavits submitted by both parties and in their testimony at the hearing, the court made no findings as to their reasonable ex-

penses. "It is not enough that there may be evidence in the record sufficient to support findings which *could have been made.* The trial court must itself determine what pertinent facts are actually established by the evidence before it. . . ." *Id.* Without findings relating to the parties' reasonable expenses, there is no basis for a determination as to the relative abilities of the parents to provide the support necessary to meet the reasonable needs of the children. *Little v. Little,* 74 N.C. App. 12, 327 S.E. 2d 283 (1985) (citing *Newman v. Newman,* 64 N.C. App. 125, 306 S.E. 2d 540, *disc. rev. denied,* 309 N.C. 822, 310 S.E. 2d 351 (1983)).

[4] The order is similarly deficient in another respect. Plaintiff's affidavit itemized expenses for the children totalling $1,654.16. The calculations were based, according to plaintiff's testimony, on estimates of expenses incurred several months before the hearing when plaintiff was providing and maintaining a residence for herself and the children. Approximately four months before the hearing, plaintiff remarried and moved, with the children, into her new husband's home. Although she testified that expenses for the children had remained the same or had increased since her remarriage, she offered no other evidence as to the reasonable expenses of the children as of the date of the hearing. The trial court found that the reasonable needs of the children amounted to "at least $1,050.00," implying that the court considered some portion of the expenses claimed by plaintiff to be unreasonable. "In order to determine the reasonable needs of the child, the trial court must hear evidence and *make findings of specific fact* on the child's actual past expenditures and present reasonable expenses." *Atwell v. Atwell,* 74 N.C. App. 231, 236, 328 S.E. 2d 47, 50 (1985) (citing *Newman v. Newman, supra*) (emphasis added). The determination of what portion of the claimed expenses is reasonable, and what portion is unreasonable, in arriving at an amount necessary to meet the reasonable needs of the child, "requires an exercise of judgment and is therefore not a question of fact but a conclusion of law." *Plott v. Plott, supra* at 74, 326 S.E. 2d at 870. The order in the present case contains no specific findings with respect to the actual past or present expenses incurred for the support of these children and is, therefore, insufficient to support the court's conclusion that the reasonable needs of the children amounted to $1,050.00.

[5] The trial court also specified that defendant's $800.00 monthly child support obligation should be made "retroactive to October 1 or October 5, 1984" and ordered him to pay $1,500.00 in lump-sum child support. However, we can discern no finding of fact which supports either the amount of the retroactive award or the date to which the defendant's obligation was made retroactive.

In summary, that portion of the court's order setting the amount of defendant's child support obligation is not supported by appropriate and adequate findings of fact to permit an appellate court to determine whether the award was supported by competent evidence or whether it amounted to an abuse of discretion. *Quick v. Quick, supra.* Therefore, the cause must be remanded.

III

[6] Finally, defendant contends that the trial court erred in requiring him to pay a portion of plaintiff's attorney's fees. In order to award attorney's fees in an action involving only child support

> the trial court must find as fact that (1) the interested party (a) acted in good faith and (b) has insufficient means to defray the expenses of the action and further, that (2) the supporting party refused to provide adequate support "under the circumstances existing at the time of the institution of the action or proceeding."

Brower v. Brower, 75 N.C. App. 425, 429, 331 S.E. 2d 170, 174 (1985).

Defendant argues that he should be excused from any obligation to pay counsel fees by reason of his voluntary payment of an amount for the support of the children which exceeded that called for in the separation agreement. We reject this argument. Plaintiff's application for an order requiring defendant to pay reasonable child support was precipitated by defendant's unilateral reduction in the amount which he had been voluntarily paying and was grounded upon plaintiff's allegation that the reduced amount was inadequate. Should the court, upon remand, determine upon proper findings of fact that defendant, by reducing his payments, deprived his children of such adequate support as they were entitled to have provided for them under the circumstances,

an order requiring defendant to assist in the payment of plaintiff's counsel fees would, if otherwise authorized under G.S. 50-13.6, be appropriate. *See Teague v. Teague*, 272 N.C. 134, 157 S.E. 2d 649 (1967).

[7] For other reasons, however, the trial court's order with respect to attorney's fees must be vacated and that issue remanded for consideration anew. We have concluded that the court's findings are insufficient to support its determination with respect to the amount which defendant should be reasonably required to pay for the support of his children. The court's determination of that issue, upon remand, will necessarily have a direct bearing upon the issue of whether defendant, by paying $500.00 per month, has "refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding. . . ." G.S. 50-13.6.

Moreover, the statute requires that the party seeking attorney's fees have "insufficient means to defray the expenses of the action." *Id.* That requirement has been interpreted as meaning that the party seeking counsel fees "must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Hudson v. Hudson*, 299 N.C. 465, 474, 263 S.E. 2d 719, 725 (1980). The findings required by the statute must be supported by competent evidence and are fully reviewable on appeal. *Id.* Our review of the evidence in this case discloses that plaintiff receives a salary of nearly $1,400.00 per month, has savings and cash management accounts aggregating in excess of $7,000.00, owns a house and lot with equity of more than $24,000.00 and yielding a gross rental of $500.00 per month, owns other real property valued at $2,000.00 and owns a $15,000.00 Porsche automobile. There was, however, scant evidence of her liabilities or expenses, except for her mortgage payment on the rental property and her car payment. There was evidence that defendant earns in excess of $54,000.00 per year, has accumulated savings which are immediately available to him in the approximate amount of $40,000.00, and that he and his new wife have purchased a home valued at approximately $60,000.00. There was evidence, though no findings were made, that his taxes, insurance and expenses total nearly $3,100.00 per month, and that he has debts totalling nearly $31,000.00. In the absence of additional evidence with respect to plaintiff's expenses and liabilities, we

cannot say that plaintiff is unable to employ counsel to meet defendant on substantially even terms. *See Hudson, supra.*

IV

For the foregoing reasons, the order for child support and attorney's fees is vacated and this cause is remanded to the District Court of Mecklenburg County for further findings of fact, conclusions of law, and a determination of the amount which defendant should be reasonably required to pay for the support of his children and for such other proceedings as are consistent with this opinion.

Vacated and remanded.

Judges BECTON and JOHNSON concur.

IN THE MATTER OF: ANTHONY DONTA WHITE AND VERNON BERNARD WHITE, MINOR CHILDREN

No. 8526DC1231

(Filed 3 June 1986)

1. **Parent and Child § 1.5— termination of parental rights—bifurcated hearing not required**

The trial court was not required to conduct two separate hearings for the adjudication and disposition stages of a proceeding to terminate parental rights.

2. **Parent and Child § 1.6— termination of parental rights for neglect—effect of payments by respondent**

The trial court's findings of neglect under N.C.G.S. § 7A-289.32(2) were not invalidated by the fact that respondent made some payments to DSS for support of his children after the children were placed in foster care. Furthermore, the court was not required to make findings as to respondent's ability to pay where the order of termination was based upon neglect and not failure to pay a reasonable portion of the cost of child care pursuant to N.C.G.S. § 7A-289.32(4).

3. **Parent and Child § 1.6— failure to establish parental relationship—sufficient evidence**

The evidence in a proceeding to terminate parental rights was sufficient to support the trial court's finding that respondent had failed to establish a parental relationship with the children.

4. Parent and Child § 1.6— termination of parental rights—inability to provide proper care—sufficient evidence in findings

The trial court's finding that respondent does not have the ability to provide proper care, supervision and discipline for his children was supported by a psychologist's testimony. Furthermore, the trial court did not merely recite the psychologist's testimony in its findings relating thereto but weighed and evaluated the testimony and found specific facts therefrom.

5. Parent and Child § 1.6— termination of parental rights—neglect up to time of hearing

The trial court did not base its decision terminating respondent's parental rights only on evidence of neglect which occurred before the children were placed in foster care but properly considered evidence of conditions existing up to the time of the hearing. The overwhelming evidence supported the court's findings that respondent had neglected his children up to the time of the initial order granting custody to DSS and that such neglect continued until the time of the termination hearing, including respondent's lack of visitation, his present inability to parent the children, and his failure to provide a living environment suitable for the children.

APPEAL by respondent Vincent Grier from *Harris, Resa L., Judge.* Orders entered 23 April 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 5 March 1986.

On 21 March 1984, the Mecklenburg County Department of Social Services filed juvenile petitions alleging that Anthony Donta White and Vernon Bernard White were neglected. By order of the District Court, dated 23 March 1984, the children were placed in the custody of DSS. The petitions were served upon respondents Ola Mae White, the mother of the children, and Vincent Grier, their father. After a hearing on 10 April 1984, the children were adjudged to be neglected as defined by G.S. 7A-517(21). Additional review hearings were conducted on 4 June 1984 and 5 November 1984. On 29 November 1984, DSS filed petitions to terminate the parental rights of Ms. White and Mr. Grier. Hearings were conducted on 26 March, 22 April and 23 April 1985 and, at the conclusion of those hearings, Judge Harris entered separate, but virtually identical, orders terminating respondents' parental rights with respect to each child. Respondent Vincent Grier appeals from those orders; respondent Ola Mae White did not appeal.

Badger, Johnson, Chapman & Michael, by Ronald L. Chapman for respondent appellant.

Ruff, Bond, Cobb, Wade & McNair by Moses Luski and William H. McNair for petitioner appellee.

MARTIN, Judge.

On appeal respondent Grier assigns error to procedures followed by the District Court, to several of its findings of fact, and to its failure to find other facts. Respondent also contends that the findings are insufficient to support the court's conclusions of law and its orders terminating his parental rights. After reviewing each of his assignments of error, we conclude that the orders should be affirmed.

The evidence established that Vincent Bernard White was born on 24 April 1978 and Anthony Donta White was born on 22 December 1979. Their mother, Ola Mae White, has never been married to respondent Grier, their father, nor have Ms. White and Grier ever lived together. From birth until March 1984, the children have been primarily in the care of their mother, with the exception of a brief period in 1983 when they resided with respondent Grier's sister. Contact between respondent Grier and the children was sporadic and he provided little, if any, support for them. He has never provided a home for them.

In May 1983, Ola Mae White and the children moved into an apartment with Ms. White's boyfriend, Roscoe Simpson. Simpson abused alcohol and drugs and engaged in violent behavior toward Ms. White and the children. Ms. White drank excessively and basically neglected the children. Although respondent Grier was living in Charlotte and was aware of the environment in which the children were living, he took no action to remove them therefrom.

After custody of the children was placed in DSS in March 1984, respondent Grier informed the court that he wished to establish a relationship with the children. He provided some child support, though not in the amount ordered by the court. From June 1984 until October 1984, respondent Grier made only limited contacts with DSS. In October 1984, he requested visitation privileges, however he appeared at only seven of the ten scheduled visits, and only four of the visits lasted for the full allotted time.

[1] By his first assignment of error, respondent Grier contends that the trial court erred by refusing to conduct a bifurcated hearing. He argues that a termination proceeding should be conducted in two separate hearings; the first to determine whether grounds for termination exist and, if so, a second hearing to determine whether termination is in the best interests of the children.

Our Supreme Court has recognized that a termination proceeding involves a two-stage process; the adjudication stage which is governed by G.S. 7A-289.30, and a disposition stage which is governed by G.S. 7A-289.31. *In re Montgomery*, 311 N.C. 101, 316 S.E. 2d 246 (1984). At the adjudication stage, petitioner is required to prove the existence of grounds for termination, listed in G.S. 7A-289.32, by "clear, cogent and convincing evidence," G.S. 7A-289.30(e), while at the disposition stage, the court's decision as to whether to terminate parental rights is discretionary. *Id.* However, although the court is required to apply different evidentiary standards at each of the two stages, we discern no requirement from the statutes or from *Montgomery* that the stages be conducted at two separate hearings. Moreover, since a proceeding to terminate parental rights is heard by the judge, sitting without a jury, it is presumed, in the absence of some affirmative indication to the contrary, that the judge, having knowledge of the law, is able to consider the evidence in light of the applicable legal standard and to determine whether grounds for termination exist before proceeding to consider evidence relevant only to the dispositional stage. *See* 1 H. Brandis, North Carolina Evidence § 4a (2d rev. ed. 1982). The trial court did not err in denying respondent Grier's motion for a bifurcated hearing.

By his second assignment of error, respondent Grier contends that the evidence presented to the trial court was insufficient to support certain of its findings of fact. In reviewing the contested findings, the question presented to us is whether they are supported by clear, cogent and convincing evidence. *In re Montgomery, supra.* If so, they are binding upon us, even though there may be evidence to the contrary. *Id.*

Each order of termination of parental rights contains forty-one identical and correspondingly numbered findings of fact. Of these, respondent Grier has excepted to eight. He concedes, how-

ever, that there was sufficient competent evidence to establish that he had neglected his children prior to March 1984, when the original petitions alleging neglect were filed by DSS, and abandons his exceptions to the findings which deal with events or conduct occurring before the petitions were filed. He argues that the evidence is insufficient to support the trial court's findings with respect to events occurring after the initial court involvement.

[2] The trial court found that respondent Grier did not request any visitation with the children from 23 March 1984, when they were placed in foster care, until 3 October 1984. According to the record, at a review hearing on 4 June 1984 respondent Grier expressed a desire to establish a relationship with his children. The court ordered that both parents visit with the children at least every other week. Notwithstanding those facts, Bob Cochran, the social worker assigned to the case, testified that respondent Grier did not contact him about visiting the children until 3 October 1984. Mr. Cochran's testimony is sufficient to support the court's finding with respect to visitation.

The trial court also found

> 32. That the respondent Vincent Bernard Grier has never provided a home for this child and his brother, but has relied upon the respondent Ola Mae White, Beverly Grier, and the Department of Social Services to provide the child and his brother a home, food, clothing, medical care and other essentials.

Respondent Grier contends that although the evidence supports this finding with respect to his conduct before March 1984, it is fatally flawed in that it does not take into account the fact that he made support payments to DSS after June 1984, and contains no findings as to his ability to pay. We have recognized that where parental rights are terminated on the grounds that the parent has failed to pay a reasonable portion of the cost of child care, pursuant to G.S. 7A-289.32(4), the parent's ability to pay is controlling. *In re Bradley*, 57 N.C. App. 475, 291 S.E. 2d 800 (1982). In the present case, the orders for termination are grounded upon neglect, G.S. 7A-289.32(2), involving more than a mere lack of financial support after the children had been placed in foster care. The evidence discloses that respondent has never provided a home or other essentials for these children throughout their en-

tire lifetime and that he has basically depended upon others to do so. The fact that after the children were placed in foster care, respondent made some payments to DSS for their support does not invalidate the court's findings of neglect, under G.S. 7A-289.32(2). Since the petitions did not allege, and the court did not find, that respondent had not paid a reasonable portion of the cost of child care while the children were in foster care, G.S. 7A-289.32(4), the court was not required to make findings as to his ability to pay.

[3] Respondent Grier advances a similar argument in support of his exception to the trial court's finding of fact:

> 37. That the respondent Vincent Grier has, during the life of this child, deliberately and willfully failed to actively participate in parenting this child and has deliberately and willfully refused to perform the natural and legal obligation of parental care and support; and that the respondent Vincent Grier has failed to establish a parental relationship with the child, and withheld from the child his presence, his love, his care, and the opportunity to display filial affection.

Although conceding that the evidence is sufficient to support this finding with respect to his conduct prior to March 1984, respondent Grier contends that the finding ignores both his financial contribution and his other efforts after the children were placed in foster care. We disagree. The issue of financial support has previously been addressed. With respect to the issue of respondent Grier's efforts to establish a parental relationship, the evidence disclosed that in the year following the placement of the children in DSS custody, respondent Grier visited them only seven times. During these visits, according to the testimony of Mr. Cochran, "there was no physical interaction and very little verbal interaction other than an occasional command to stop running around or quiet down, that sort of thing, but very little interaction as far as affection or emotional exchange." Respondent's exception to this finding of fact is overruled.

[4] Respondent Grier also excepts to the following finding of fact:

> 29. That the respondent Ola Mae White and the respondent Vincent Bernard Grier do not have the ability to parent this

child and his brother, nor to provide proper care, supervision and discipline for these children at this time; and that the prognosis for either respondent to develop the ability or desire to adequately parent these children is very poor.

Respondent contends that because the finding cites no instances of misconduct or an absence of appropriate behavior on his part, it is conclusory. The court is not required to find all the evidentiary facts presented at the hearing; it is only required that the court specifically find the ultimate facts proven by the evidentiary facts. *Farmers Bank v. Michael T. Brown Distribs., Inc.*, 307 N.C. 342, 298 S.E. 2d 357 (1983). The evidentiary facts which support the ultimate facts found in Finding of Fact 29 are contained in the testimony of Dr. Combs, the psychologist who examined respondent Grier. Dr. Combs testified that respondent Grier possessed very minimal parenting skills, had borderline intelligence and provided no structure for the children during visitation. Other evidence indicated that the children have exceptional problems caused primarily by their previous environment, and require a structured, positive and supportive environment. Considering the problems, Dr. Combs did not feel that either parent could develop the skills necessary to care for the children adequately.

In a related exception and assignment of error, respondent Grier contends that the court merely recited the testimony of Dr. Combs in its findings related thereto. He contends, citing *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 323 S.E. 2d 368 (1984), that such recitation is insufficient because it does "not reflect a conscious choice between the conflicting versions of the incident in question which emerged from all the evidence presented." *Id.* at 806, 323 S.E. 2d at 369 (quoting *Kraemer v. Moore*, 67 N.C. App. 505 n. 1, 313 S.E. 2d 610 n. 1 (1984)). While respondent's statement of the law is accurate, his application of it to this case is misplaced. In *Chloride*, the trial court's findings amounted to no more than a recapitulation of the testimony of each witness, which created conflicts rather than resolving them, and did not reflect that the court had determined the weight or credibility to be accorded any of the testimony. In the present case, rather than simply reciting Dr. Combs' testimony, the court found specific facts therefrom, indicating that the court weighed and evaluated the testimony and accepted Dr. Combs' opinions. This assignment of error is without merit.

Respondent Grier excepts to two findings of fact made by the trial court on the grounds that they are, in reality, conclusions of law. The findings complained of are:

> 31. That the respondent Ola Mae White and the respondent Vincent Bernard Grier have failed to provide proper care, supervision, and discipline for this child.
>
> . . . .
>
> 39. That the respondent Vincent Grier has failed to provide proper care, supervision, and discipline for the child at any time since the child's birth and has made no significant attempt to establish a genuine parental relationship with the child.

Assuming, without deciding, that the foregoing findings involve a mixed application of the statutory definition of "neglect," as contained in G.S. 7A-517(21), to the facts of the case, we review the other facts found by the court to determine if they are sufficient to support the conclusion that respondent Grier neglected his children. *See Jones v. Andy Griffith Products, Inc.*, 35 N.C. App. 170, 241 S.E. 2d 140, *disc. rev. denied*, 295 N.C. 90, 244 S.E. 2d 258 (1978). We hold that they are. Other specific findings of fact, some of which have been previously set out verbatim and others which were summarized at the beginning of this opinion, amply support the trial court's conclusion that respondent Grier has provided inadequate care, supervision and discipline for these children, within the statutory definition of neglect.

[5] Respondent Grier's final assignments of error relate to the trial court's failure to find certain facts which he contends were shown by competent evidence. We find no need to discuss several of the findings which he contends were omitted because they do not relate to the ground upon which the trial court terminated his parental rights, i.e., neglect, pursuant to G.S. 7A-289.32(2). However, one area raised by respondent Grier deserves discussion. Respondent Grier contends that the trial court did not consider, and failed to make findings upon, competent evidence that a change in circumstances had occurred between the time the children were initially placed in foster care and the time of the termination hearings.

Where termination of parental rights is sought upon allegations of neglect, the court may consider evidence of neglect occurring before custody has been taken from the parents, but termination may not be based solely on conditions of neglect which may have previously existed, but no longer exist. *In re Ballard*, 311 N.C. 708, 319 S.E. 2d 227 (1984). The court must also consider evidence of any change in condition up to the time of the hearing, but this evidence is to be considered in light of the evidence of prior neglect and the probability of repetition of neglect. *Id.*

In the present case, the court found, upon overwhelming evidence, that respondent had neglected his children up to the time of the initial order granting custody to DSS. The court also made findings as to continuing neglect up until the time of the termination hearing, including respondent's lack of visitation, his present inability to parent the children, and his failure to provide a living environment suitable for the children. Though respondent Grier offered evidence to the contrary, the court's findings indicate that the court considered the evidence of conditions existing up to the time of the hearing, considered that evidence in the light of respondent's previous performance, and resolved the conflicts between the evidence offered by petitioner and that offered by respondent. The findings are supported by clear, cogent and convincing evidence and are binding on us. *In re Montgomery, supra.*

The court's findings of fact amply support its conclusions that grounds for termination of parental rights by reason of neglect existed as of the dates of the hearings and orders, and its conclusions that the best interests of the children required that respondent Grier's parental rights be terminated. The orders appealed from are

Affirmed.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. MARY ELIZABETH JAMES, LIONEL JAMES AND MICHAEL M. RODDEY

No. 8526SC1197

(Filed 3 June 1986)

1. **Narcotics § 4— cocaine—intent to sell or deliver—evidence sufficient**

There was sufficient evidence of possession of cocaine with intent to sell or deliver as to defendant Lionel James where a small quantity of cocaine was packaged in multiple envelopes of the type commonly used in the sale of drugs; there was evidence of a large number of syringes in the house where the cocaine was found, as well as a large number of bags of heroin under the porch; there was evidence that defendant Lionel James had brought cocaine with him to the house, taken it away, and returned with it several hours later; Lionel was frequently at the house; and Lionel did not object to evidence that the area was frequented by drug dealers.

2. **Narcotics § 4.3— heroin—found under porch—evidence of possession sufficient**

In a prosecution for possession of heroin with intent to sell or deliver where the heroin was found under a porch board, there was ample evidence of defendant Lionel's activity in and frequent presence at the house where his clothes and pay stub were found to establish his access to the heroin; the evidence of cocaine possession on the same premises was part of the incriminating evidence necessary to show guilty knowledge and belie defendant's asserted ignorance of drug dealing; and the manner in which the heroin was packaged made it clear that intent to sell would be established once possession was established.

3. **Narcotics § 4.4— cocaine—constructive possession—evidence insufficient**

The evidence was insufficient to convict defendant Roddey of possession with intent to sell and deliver cocaine or of acting in concert where the evidence linking Roddey to the cocaine was that he was found in the kitchen where a refrigerator containing the drugs was located; he had a gun in his hand and was "sneaking around"; he had been at the house the day before; and there was no evidence that he lived there, only that he had visited on the two days in question.

APPEAL by defendants Lionel James and Michael M. Roddey from *Sitton, Judge*. Judgments entered 7 June 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 March 1986.

Defendants Mary Elizabeth James, Lionel James and Michael Roddey were charged with two counts each of possession with intent to sell the same controlled substances, *i.e.*, cocaine and heroin. They were tried together.

The State's evidence tended to show the following: Police prepared to raid defendant Mary Elizabeth James' ("Mary's") house which was located in an area frequented by drug dealers. Police had seen Mary's brother, defendant Lionel James ("Lionel"), and defendant Michael Roddey ("Roddey") at Mary's house the preceding day. As the officers approached the house, Lionel was on the front porch. They took him into custody and entered the house. Roddey was in the kitchen; police observed him "sneaking around" with a gun in his hand. Roddey laid the pistol down when police entered. A search of the house disclosed cocaine in the refrigerator in the kitchen, and a bottle containing packets of heroin hidden beneath a board under the front porch. Lionel's clothing and an envelope containing a pay stub belonging to him were found in a bedroom on a mattress on the floor, but Lionel denied living at the house. The three defendants were arrested and each charged separately with possession of the two quantities of drugs.

Mary testified that she had nothing to do with drugs; that she rented the house and lived there, and that Lionel had brought the cocaine over. She testified that earlier she had asked him to remove it. She denied any knowledge of the heroin, and testified that drug dealers who frequented the neighborhood often threw things into her yard.

Lionel testified, and admitted that the cocaine was his but that he intended to use it himself. He confirmed that Mary asked him to take the cocaine away but testified that he brought it back later when she was working. Lionel denied knowledge of the heroin. He denied that the clothes at the house were his, but admitted that he occasionally stayed at his sister's house to babysit.

Roddey testified, denying any connection to the house or the drugs. He was only a casual visitor. He had found the gun, which was inoperable, lying in the yard and was simply looking for a place to put it when the police arrived.

The trial court allowed Roddey's motion to dismiss the charge of possession of the heroin found under the porch. As to all other charges, the defendants were found guilty. Roddey received a sentence in excess of the presumptive. Mary and Lionel each received two consecutive presumptive sentences, the second

being suspended on conditions of probation. All three appealed; Mary has since withdrawn her appeal.

Attorney General Thornburg, by Assistant Attorney General Douglas A. Johnston, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Marc D. Towler, for defendant-appellant Michael M. Roddey.

Keith M. Stroud for defendant-appellant Lionel James.

EAGLES, Judge.

The appeals involve common questions of the sufficiency of the evidence of constructive possession of controlled substances. The doctrine of constructive possession applies when a person without *actual* physical possession of a controlled substance has the *intent and capability* to maintain control and dominion over it. *State v. Williams*, 307 N.C. 452, 298 S.E. 2d 372 (1983). As the terms "intent" and "capability" suggest, constructive possession depends on the totality of circumstances in each case. No single factor controls, but ordinarily the question will be for the jury. *See State v. Baize*, 71 N.C. App. 521, 323 S.E. 2d 36 (1984) (collecting cases), *disc. rev. denied*, 313 N.C. 174, 326 S.E. 2d 34 (1985). *See also State v. Beaver*, 77 N.C. App. 734, 336 S.E. 2d 112 (1985). In *Baize*, we identified three typical situations regarding the premises where drugs were found: (1) some exclusive possessory interest in the defendant and evidence of defendant's presence there; (2) sole or joint physical custody of the premises of which defendant is not an owner; and (3) in an area frequented by defendant, usually near defendant's property. *Id.* at 529, 323 S.E. 2d at 41. The fact that a person is present in a room where drugs are located, nothing else appearing, does not mean that person has constructive possession of the drugs. *Id.* If possession of the premises is non-exclusive, there must be evidence of other incriminating circumstances to support constructive possession. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984).

As in other cases, where the sufficiency of the evidence of possession is challenged, we consider the evidence in the light most favorable to the State, with all favorable inferences. We disregard defendant's evidence except to the extent it favors or clar-

ifies the State's case. *See generally State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

DEFENDANT LIONEL JAMES' APPEAL

[1] Lionel assigns error only to denial of his motions to dismiss for insufficiency of the evidence of possession of the controlled substances with intent to sell or deliver. As to the cocaine, Lionel admitted that it was his. The only question is whether there was sufficient evidence of his intent to distribute it. That intent may be established by circumstantial evidence. *State v. Casey*, 59 N.C. App. 99, 296 S.E. 2d 473 (1982). Even where the amount of drugs involved is small, the surrounding circumstances may allow the jury to find an intent to distribute. *State v. Williams*, 71 N.C. App. 136, 321 S.E. 2d 561 (1984) (less than one ounce of marijuana packaged in numerous small bags). *But see State v. Wiggins*, 33 N.C. App. 291, 235 S.E. 2d 265 (7 ounces of marijuana, no other evidence of intent to distribute; insufficient), *cert. denied*, 293 N.C. 592, 241 S.E. 2d 513 (1977).

Here there was evidence that the cocaine, although of small quantity, was packaged in multiple envelopes of a type commonly used in the sale of drugs. There was evidence of a large number of syringes in the house, as well as a large number of bags of heroin under the porch. There was evidence that Lionel had brought the cocaine with him to the house, taken it away, and returned with it several hours later, despite the small amount and his admission that he used cocaine. Lionel frequently was at the house. There was evidence that the area where the house is located was frequented by drug dealers. While this last evidence was perhaps not technically competent, *State v. Weldon*, 314 N.C. 401, 333 S.E. 2d 701 (1985), it was admitted without objection and was properly before the jury. *State v. Coffey*, 289 N.C. 431, 222 S.E. 2d 217 (1976) (evidence admitted without objection may be considered for whatever value it may have). These factors, considered together, sufficiently raise a jury question as to Lionel's intent to distribute the cocaine as part of drug-related activities at the house.

[2] As to the heroin, the question turns on whether the State presented sufficient evidence of Lionel's joint custody or routine access to the house to support an inference that he had control over the drugs located under the porch. The manner in which the

heroin was packaged, in a large number of small envelopes, together with the other circumstances described above, make it clear that once possession was established, intent to sell would be established as well. Lionel admitted to police officers that his clothes were on a mattress in one room of the house, where the officers also found a pay stub bearing his name. The house was rented by Lionel's sister, Mary. He admitted staying over at the house occasionally to babysit for Mary's child. Lionel had been seen there the day before, and was standing on the porch nearest the heroin when police arrived. He admitted keeping the cocaine at the house though without his sister's permission. We think these circumstances sufficed to show sufficient joint custody and access to the premises and other incriminating circumstances to allow the jury to consider Lionel's constructive possession of the heroin.

We rely on *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). There the Supreme Court affirmed a conviction based on constructive possession where marijuana was found in a shed close to defendant's house, defendant was frequently seen around the shed, *and* there were marijuana seeds inside the house. The seeds in the house were important, as they served to establish guilty knowledge, without which mere access cannot ordinarily constitute possession. *State v. Brown, supra.* Here there was ample evidence of Lionel's activity in and frequent presence at the house where his clothes and pay stub were found, sufficient to establish his access to the heroin. The evidence of cocaine possession on the same premises was part of the incriminating evidence necessary to show guilty knowledge and belie his asserted ignorance of drug dealing. *See also State v. Summers*, 15 N.C. App. 282, 189 S.E. 2d 807 (drugs found in fenced yard outside house shared by defendant; sufficient evidence of possession), *cert. denied*, 281 N.C. 762, 191 S.E. 2d 359 (1972).

We conclude that the State presented sufficient evidence to go to the jury on all charges against Lionel. The court correctly denied his motions. The defense theory, that some unknown drug dealer(s) used the porch as a hiding place unknown to the occupants of the house, was for the jury, not the court, to consider. *See State v. Hamilton*, 77 N.C. App. 506, 335 S.E. 2d 506 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E. 2d 33 (1986).

Lionel also attempts to argue that certain jury instructions were improperly given. No objection was made at trial, and the question is not before us. App. R. 10(b)(2). We find no "plain error" in the instructions, or other reversible error on the face of the record.

DEFENDANT MICHAEL RODDEY'S APPEAL

[3] Roddey was convicted only of possession with intent to sell and deliver the cocaine. He also made a motion to dismiss for insufficiency of the evidence. The evidence linking Roddey to the cocaine was that he was found in the kitchen where the refrigerator containing the drugs was located. He had a gun in his hand and was "sneaking around." Roddey had been at the house the day before. There was no evidence that he lived there, only that he had visited on the two days in question. The gun was not introduced into evidence, nor was there any evidence that it was loaded or usable or that Roddey committed any crime simply by possessing it. Roddey took no action to defend the house but when accosted by law enforcement officers, surrendered after putting the gun down. All the evidence suggests that Roddey was looking for a place to hide the gun. There was no evidence, other than Roddey's presence, linking him to Lionel (the admitted owner of the cocaine) or Mary or any current drug dealings, except his admission he had known Mary for several years.

As we have noted earlier, mere presence in a room where drugs are located does not itself support an inference of constructive possession. *State v. Baize, supra. See also State v. Weems*, 31 N.C. App. 569, 230 S.E. 2d 193 (1976) (defendant passenger in car where drugs found, no evidence connecting him to drugs, insufficient); *State v. Balsom*, 17 N.C. App. 655, 195 S.E. 2d 125 (1973) (no evidence visitors knew of drugs, insufficient; upholding conviction of tenant). The only incriminating circumstance going beyond Roddey's presence was the fact that he had a gun in hand and was "sneaking around" when police raided the house. We think this single circumstance was insufficient to establish constructive possession of the cocaine. *See State v. Baize, supra* (no constructive possession even though in same room with drugs and conspiracy with actual possessor established).

The court also instructed on acting in concert, and the jury may have found Roddey guilty on this theory. We think the evi-

dence was insufficient for the charge to be considered by the jury on an acting in concert theory as well. We note that the acting in concert theory has not been frequently applied to possession offenses, as it tends to become confused with other theories of guilt. *See State v. Baize, supra.* The only connection between Roddey and the possessor(s) of the cocaine was Roddey's presence and the gun. There was no evidence of joint action other than presence at the scene. *Compare State v. Lovelace*, 272 N.C. 496, 158 S.E. 2d 624 (1968) (possession of burglary tools on acting in concert theory) (both defendants observed together working at door found disturbed by tool marks). Mere presence at the scene of a crime is not itself a crime, absent at least some sharing of criminal intent. *See State v. Ham*, 238 N.C. 94, 76 S.E. 2d 346 (1953). This record raises no more than a suspicion that Roddey was intentionally involved in possession of the cocaine.

We therefore hold that defendant Roddey's motion to dismiss should have been allowed. Since we reach this result, we need not reach his remaining assignments of error.

CONCLUSION

The State presented sufficient evidence to go to the jury on all charges against defendant Lionel James. The State did not present sufficient evidence of defendant Michael Roddey's guilt, however, and his conviction must be reversed.

As to defendant Lionel James—no error.

As to defendant Michael Roddey—reversed.

Judges WEBB and PARKER concur.

Stines v. Willyng, Inc.

RONALD E. STINES AND WIFE, JUDY C. STINES; RICHARD E. ALLEN AND WIFE, LYNETTE ALLEN; MIKE P. WALKER, JR. AND WIFE, EDITH P. WALKER; ROBERT R. VOLLRATH, JR. AND WIFE, SUSAN VOLLRATH; AND PATRICIA ANN STILLWELL v. WILLYNG, INC., A CORPORATION

No. 8528SC1305

(Filed 3 June 1986)

1. **Easements § 4.1— "Park Property" on recorded plat—insufficient description**

A description on a recorded plat designating areas north and west of platted lots 353-370 as "Park Property" was patently ambiguous and thus insufficient to create a valid dedication or easement.

2. **Dedication § 4— easement on recorded plat—no withdrawal**

Any dedication or easement of an area of "Park Property" adjacent to lots 298-306 on a recorded plat could not be withdrawn under N.C.G.S. § 136-96 where there was evidence to support the court's findings that such area had been used for recreational purposes within fifteen years from its dedication and thus had not been abandoned for purposes of the statute.

APPEAL by plaintiffs and defendant from *Snepp, Judge.* Judgment entered 30 July 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 6 May 1986.

Plaintiffs are owners of lots in Lee's Ridge Subdivision, Section I (hereinafter Lee's Ridge) in Asheville. This subdivision was originally owned and developed by Pilot Construction Co. (Pilot) in 1969. Pilot recorded a plat of Lee's Ridge in the Buncombe County Register of Deeds office on 25 August 1969. Relevant portions of this plat are appended.

In three places along the periphery of the subdivision the plat designates areas as "Park Property." The plat also provides that Pilot "hereby acknowledge[s] this plat and allotment to be their free act and deed and hereby dedicate[s] to public use as streets, playgrounds, open spaces and easements, forever all areas so shown or dedicated on this plat."

Defendant acquired title to the area north of Lee's Ridge, as well as the area adjacent to lots 298-306 which is designated as "Park Property" on the plat, by mesne conveyances from Pilot. Defendant seeks to develop these areas for commercial and residential purposes. Plaintiffs brought this action seeking to enjoin such development temporarily and permanently.

The trial court concluded that the areas adjacent to lots 298-306 and "north of the entire Section I . . . as far as the extent of said property can be determined from said plat" are burdened with an easement in favor of plaintiffs and other lot owners in the section, which easement prohibits the use of said areas other than as a park. It permanently enjoined the residential and commercial uses planned by the defendant "within the areas burdened by the easement described in this Judgment."

Plaintiffs and defendant appeal.

Redmond, Stevens, Loftin & Currie, P.A., by Gwynn G. Radeker and Thomas West, for plaintiffs.

McGuire, Wood, Worley & Bissette, P.A., by Joseph P. McGuire and Steven A. Jackson, for defendant.

WHICHARD, Judge.

[1] Defendant contends the court erred in concluding that the subject plat identified the areas shown as "Park Property" north and west of platted lots 353-370 with sufficient certainty to create a valid dedication or easement burdening defendant's adjacent land in favor of plaintiffs and other owners of lots within the subdivision. The area designated as "Park Property" adjacent to lots 298-306 is not at issue here.

Plaintiffs, as appellees, contend that the court properly concluded that the area north of Lee's Ridge "as far as the extent of such property can be determined from said plat," is burdened with an easement that "prohibits the use of said land for uses other than as a park." Plaintiffs, as appellants, contend that the court erred in concluding that the easement for "Park Property" burdens only the land shown on the plat. They maintain that the court should have concluded that this easement burdened all of the land north of the subdivision owned by Pilot at the time it filed the plat. Such an easement would include land north of what is shown on the plat. We hold that the description for areas designated as "Park Property" lying north and west of platted lots 353-370 is patently ambiguous, and thus no easement for use as a park burdens the property adjacent to those lots, either that property shown on the plat or beyond.

Defendant's position is that the description of the "Park Property" area lying to the north and west of platted lots 353-370 is patently defective. In general,

> [a] description which leaves the subject of the contract, the land, in a state of absolute uncertainty, and which refers to nothing extrinsic by which it might possibly be identified with certainty, is patently ambiguous. Parol evidence is not admissible to aid such a description . . . and the instrument which contains it is void. [Citation omitted.]
>
> A description is "latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made." . . . "In such case plaintiff may offer evidence, parol and other, with reference to such extrinsic matter tending to identify the property, and defendant may offer such evidence with reference thereto tending to show impossibility of identification, i.e., ambiguity." [Citation omitted.]

Bradshaw v. McElroy, 62 N.C. App. 515, 516, 302 S.E. 2d 908, 910 (1983). "The law endeavors to give effect to the intention of the parties, whenever that can be done consistently with rational construction." *Allen v. Duvall*, 311 N.C. 245, 251, 316 S.E. 2d 267, 271 (1984). However,

> [w]hen an easement is created by deed, either by express grant or by reservation, the description thereof "must either be certain in itself or capable of being reduced to a certainty by a recurrence to something extrinsic to which it refers. . . . *There must be language in the deed sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.*" [Citations omitted.]
>
> It is to be stressed that an alleged grant or reservation of an easement will be void and ineffectual only when there is such an uncertainty appearing on the face of the instrument itself that the court—reading the language in the light of all the facts and circumstances *referred to in the instrument*—is yet unable to derive therefrom the intention of the parties as to what land was to be conveyed. [Citation omitted.]

Id. at 249, 316 S.E. 2d at 270. This Court has emphasized that "[t]he reference must be to another document . . . [and] [t]he connection between documents must be clear and cannot be shown by extrinsic evidence." *House v. Stokes*, 66 N.C. App. 636, 638-39, 311 S.E. 2d 671, 674, *cert. denied*, 311 N.C. 755, 321 S.E. 2d 133 (1984).

"[A] map or plat, referred to in a deed, becomes a part of the deed, as if it were written therein . . . ." *Collins v. Land Co.*, 128 N.C. 563, 565, 39 S.E. 21, 22 (1901). A recorded plat becomes part of the description and is subject to the same kind of construction as to errors. 6 Thompson, *Real Property* Sec. 3052 at 608 (1962).

Applying the above principles to the description of "Park Property" lying to the north and west of platted lots 353-370 on the plat here, we hold the description patently ambiguous. It provides no northern boundary line. Plaintiffs' assertion as appellees that "[t]he top line of the plat is the terminus of the plat and a logical cap of the easement" is without merit. The northern border of the plat has no metes and bounds description, does not join a clearly demarcated eastern or western terminus for the area, and clearly cannot operate as a property line.

In general, "[a] description which omits one or more of the boundaries, and leaves the quantity of land undetermined, is insufficient." *Thompson, supra*, Sec. 3020 at 440. *See also Deaver v. Jones*, 114 N.C. 649, 19 S.E. 637 (1893). There is absolutely no reference here to anything on the plat itself which is " '*sufficient to serve as a pointer or a guide to the ascertainment of the location of the land.*' " *Allen, supra*, 311 N.C. at 249, 316 S.E. 2d at 270. Nothing on the plat or referred to therein would enable a title attorney to determine the precise boundaries of the area burdened with the park easement. The description for the areas designated as "Park Property" north and west of lots 353-370 is thus patently ambiguous and void. *Bradshaw, supra*, 62 N.C. App. at 516, 302 S.E. 2d at 910.

Assuming, *arguendo*, that this description is latently ambiguous, when the extrinsic evidence in the record is considered along with the description, it is still incapable of " 'being reduced to a certainty . . . [,]' " *Allen, supra*, 311 N.C. at 249, 316 S.E. 2d at 270, or identified, *Bradshaw, supra*, 62 N.C. App. at 516, 302 S.E. 2d at 910. Accordingly, the court erred in concluding that the

plat identified the areas designated as "Park Property" north and west of lots 353-370 with sufficient certainty to create a valid dedication or easement. This portion of the judgment thus is reversed, and the cause is remanded for entry of judgment in favor of the defendant.

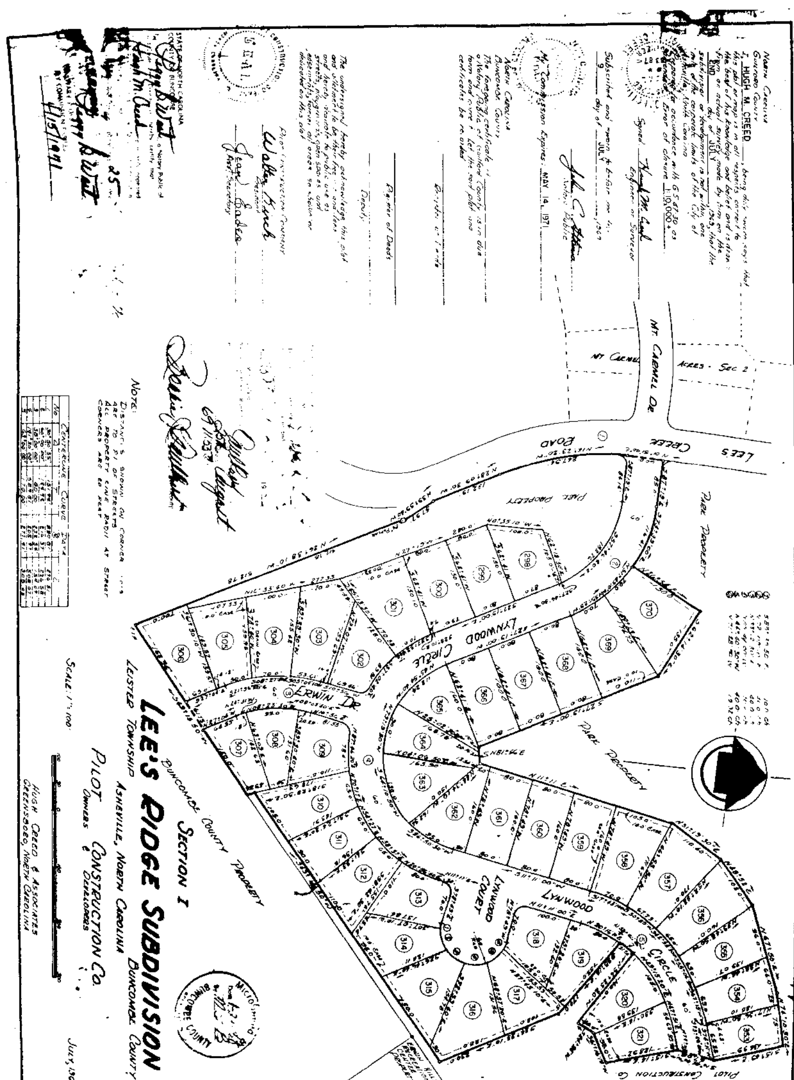
[2] Defendant next contends the court erred in concluding that any dedication or easement of the "Park Property" area was not abandoned and withdrawn under N.C. Gen. Stat. 136-96. Since the area of "Park Property" adjacent to lots 298-306 is at issue here, we consider defendant's contention in reference to this area only, given our disposition of the first issue. For the reasons stated below, we hold that this area has not been abandoned and effectively withdrawn under N.C. Gen. Stat. 136-96.

Our Supreme Court has stated:

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. . . . It is said that such streets, parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. . . . It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. . . . This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. . . . Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated. . . . [Citations omitted.]

Realty Co. v. Hobbs, 261 N.C. 414, 421, 135 S.E. 2d 30, 35-36 (1964). *See also Whichard v. Oliver*, 56 N.C. App. 219, 287 S.E. 2d 461 (1982).

Following *Realty Co.*, plaintiffs, as purchasers of lots within Lee's Ridge, have acquired the right to have the "Park Property"


SECTION I
LEE'S RIDGE SUBDIVISION
PILOT CONSTRUCTION CO.
LEE'S CREEK ROAD
MT. CARMEL DR.
LYNWOOD CIRCLE
ERWIN DR.
LYNWOOD COURT
PARK PROPERTY
BUNCOMBE COUNTY PROPERTY

adjacent to lots 298-306 kept open for their reasonable use absent an agreement for revocation of such right. There is no evidence of any such agreement in the record. Assuming, *arguendo*, that N.C. Gen. Stat. 136-96 is applicable, we hold that defendant could not withdraw the "Park Property" under this statute since there was evidence to support the court's findings that the subject area had been used for recreational purposes within fifteen years from its dedication and thus had not been abandoned for purposes of the statute.

Affirmed in part, reversed in part, and remanded.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. LAWRENCE GRAY HILLARD

No. 8519SC1175

(Filed 3 June 1986)

1. **Automobiles and Other Vehicles § 126— manslaughter case—cautioning patients about Valium and alcohol**

Testimony by two medical experts concerning their practices of cautioning patients about the dangers of combining Valium, alcohol and driving was relevant in this manslaughter prosecution arising out of an automobile accident where there was evidence tending to show that defendant consumed beer and Valium on the morning of the accident.

2. **Criminal Law § 39— rebuttal testimony**

Testimony by defendant's roommate in a manslaughter prosecution that defendant consumed Valium and alcohol in combination almost daily while they were roommates was admissible to rebut defendant's testimony that he rarely drank during that time.

3. **Criminal Law § 75.14— confession after automobile accident—admissibility**

The evidence supported the trial court's determination that defendant's inculpatory statement made to police officers at the hospital after an automobile accident was made freely, voluntarily and understandingly and did not require the trial court to find that defendant could not have voluntarily waived his right to remain silent because he was suffering from a concussion.

4. **Criminal Law § 51.1— forensic toxicology—qualification of expert**

When a witness was tendered by the State as an expert in forensic chemistry, the State presented sufficient evidence to support the trial court's

conclusion that the witness was also qualified to express an opinion in the field of forensic toxicology.

5. **Automobiles and Other Vehicles § 113.1— sufficient evidence of manslaughter**

The evidence was sufficient to support defendant's conviction of involuntary manslaughter arising out of an automobile accident where it tended to show that defendant drove his car across the center line and forced at least four oncoming cars off the highway; defendant's car then struck the victim's car in a head-on collision; defendant admitted drinking beer and taking Valium on the morning of the accident; one half-empty and two empty beer cans were found in defendant's car; defendant had a blood Valium content of .07% after the accident; and in the opinion of several witnesses defendant smelled of alcohol, had red, glassy eyes, and appeared to be impaired.

APPEAL by defendant from *Freeman, Judge.* Judgment entered 24 April 1985 in Superior Court, ROWAN County. Heard in the Court of Appeals 8 April 1986.

The defendant was tried for involuntary manslaughter after he was involved in an automobile accident in which Jacquelyn Broadway Correll was killed. The evidence at trial tended to show that while the defendant was driving in Rowan County on 31 October 1984 his car crossed the center line forcing at least four oncoming cars off the highway. His car then struck Mrs. Correll's car in a head-on collision. Mrs. Correll died immediately after the accident. Two blood alcohol analyses, one performed by the hospital and one performed by the State Bureau of Investigation, indicated that the defendant had a blood alcohol concentration of 0.00%. A third blood analysis showed that the defendant had a blood Valium concentration of 0.07%.

The defendant presented evidence tending to show that he had not consumed alcohol on the day of the accident, including the testimony of the emergency room physician that he examined the defendant and found no evidence that the defendant had been drinking. The defendant also presented evidence tending to show that at the time of the accident he suffered a blackout caused by a heart condition of which he had not previously been aware. He presented uncontradicted testimony that 0.07% blood concentration is a very small amount of Valium, that he had been taking the drug for two and a half months before the accident, that he had continued working as an ambulance driver during that time with the knowledge and consent of his supervisor, and that his physician never warned him not to drive while taking Valium.

The defendant was convicted of involuntary manslaughter and sentenced to three years imprisonment. He appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General George W. Lennon, for the State.

J. Stephen Gray for defendant appellant.

WEBB, Judge.

By his first assignment of error the defendant argues that the trial court committed prejudicial error in making "various evidentiary rulings in violation of Rules 402, 403, 802, 401, and 404 of the North Carolina Rules of Evidence." We disagree.

He first argues that the court erred in permitting a witness who was forced by the defendant's driving to leave the highway shortly before this accident to testify as follows:

> A: [W]hen someone is assaulting you with an automobile, that you do the best you can to save your own life.
>
> . . . .
>
> Q: I take it that you were very frightened?
>
> A: Not too frightened, but I was more frightened than I would have been, if you had been assaulting me, trying to shoot at me with a gun.

Assuming for the sake of argument that the admission of this testimony was improper, we believe the defendant has failed to show any resulting prejudice.

[1] The defendant next argues that the court erred in admitting irrelevant testimony of two medical experts concerning their practices with regard to cautioning patients about the use of Valium alone, in combination with alcohol, or while driving a car. The State presented evidence tending to show that the defendant admitted consuming two beers and two 10 milligram Valium tablets on the morning of the accident. Blood samples taken after the accident indicated that the defendant had a blood Valium concentration of 0.07%. Several witnesses testified that the defendant appeared to be impaired, that his breath smelled of alcohol, and that two empty and one half-empty beer cans were found in his

car after the accident. In light of this evidence testimony about the dangers of combining Valium, alcohol and driving is relevant.

[2] The defendant also argues that the court committed prejudicial error by admitting testimony of the defendant's former roommate. First the witness testified that while he and the defendant were roommates the defendant consumed Valium and alcohol in combination almost daily. The defendant contends that this evidence was irrelevant to his behavior on the day of the accident and served simply to incite prejudice in the jury. However, on direct examination the defendant testified that he rarely drank during that time. His roommate's testimony was therefore admissible in rebuttal. The defendant's roommate also testified that when he visited the defendant after the accident the defendant stated, "I'll get that damned bitch that hit me." He argues that this testimony was inadmissible hearsay and was irrelevant. Assuming that the defendant is correct, in light of the substantial evidence of his guilt we are unable to agree that admission of this testimony was prejudicial error.

[3] By his second assignment of error the defendant argues that the court improperly admitted his inculpatory statement made to police officers at the hospital after the accident because he was suffering from a concussion and could not have voluntarily waived his right to remain silent. We disagree.

The trial court determines whether a confession is voluntary, and therefore admissible, by looking at the totality of the circumstances. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). "In making this determination the trial judge must find facts; and when the facts are supported by competent evidence, they are conclusive on the appellate courts." *State v. Booker*, 306 N.C. 302, 308, 293 S.E. 2d 78, 81 (1982).

In the present case the trial court conducted an extensive voir dire before admitting the defendant's confession. The court made the following findings of fact. The defendant was advised both orally and in writing of his constitutional rights to remain silent and to the assistance of counsel. The defendant responded that he understood those rights. He signed a waiver of rights form and indicated that he did not desire to consult an attorney or have an attorney present when he answered questions. At the time of the interview though the defendant's eyes were red and

glassy, he was coherent, and he answered questions appropriately, although he answered some questions incorrectly. At the time of the interview he complained of pain in his knee, had a head injury, multiple contusions, some chest injuries and a fractured patella. The defendant understood the questions asked of him. No threats, promises, offers of reward or inducements were offered to the defendant. At no time did the defendant indicate that he wished to stop questioning. Based upon these findings the court concluded as a matter of law that the defendant made his statement freely, voluntarily and understandingly with full knowledge of his constitutional rights. There was sufficient evidence on voir dire to support the court's findings which are in turn sufficient to support its conclusions of law. The court properly denied the defendant's motion to suppress.

[4] The defendant next argues that the court erred in permitting an expert qualified in the field of forensic chemistry to testify concerning his opinion in the field of forensic toxicology. We disagree.

Our Supreme Court stated in *State v. Bullard*, 312 N.C. 129, 140, 322 S.E. 2d 370, 376 (1984):

> Whether the witness has the requisite skill to qualify him as an expert is chiefly a question of fact, the determination of which is ordinarily within the exclusive province of the trial judge . . . . A finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it. (Citations omitted.)

In the present case when the witness was tendered to the court as an expert in forensic chemistry the State presented sufficient evidence to support the court's conclusion that the witness was also qualified to express an opinion in the field of forensic toxicology.

[5] By his fourth assignment of error the defendant argues that the court improperly denied his motions to dismiss, for mistrial and for appropriate relief. He contends that there was insufficient evidence to support his conviction for involuntary manslaughter and that therefore the court should have allowed his motions to dismiss and for appropriate relief. We disagree.

In a manslaughter case arising from an automobile accident, evidence is sufficient to submit the case to the jury if it tends to show:

> (1) that [the defendant] was guilty of an intentional, wilful or wanton violation of a statute designed for the protection of human life and limb, or guilty of an inadvertent violation of such statute accompanied by recklessness [of] probable consequences of a dangerous nature amounting altogether to a thoughtless disregard of consequences or heedless indifference to the safety and rights of others, and (2) that such violation and conduct was the proximate cause of the injury and resulting death of deceased.

State v. Hewitt, 263 N.C. 759, 762, 140 S.E. 2d 241, 243 (1965).

We believe the evidence in the present case was sufficient to submit the case to the jury. Evidence tending to show that the defendant admitted drinking beer and taking Valium on the morning of the accident, that there were two empty and one half-empty beer cans in his car, that blood analyses indicated the presence of 0.07% Valium in his blood after the accident, and that in the opinion of several witnesses he smelled of alcohol, had red, glassy eyes, and appeared to be impaired raises an inference from which the jury could find that the defendant operated his vehicle after consuming alcohol and Valium. When combined with evidence that immediately before the fatal accident defendant forced four cars other than the victim's off the road by driving on the wrong side of the road this evidence is sufficient to permit the jury to find that the defendant operated his vehicle recklessly and in heedless disregard of the safety and rights of others and that this conduct proximately caused the death of Jacquelyn Broadway Correll. The trial court properly denied the defendant's motions to dismiss and for appropriate relief.

The defendant also argues that because of its allegedly incorrect evidentiary rulings the court erred in denying the defendant's motion for a mistrial. As stated earlier, the court committed no prejudicial error in those rulings and therefore properly denied the defendant's motion for a mistrial.

Finally, the defendant argues that the court erred in permitting the State's attorney, during closing argument, to include in

his argument facts outside the record which were highly inflammatory. We disagree. Counsel must be allowed wide latitude during closing argument in hotly contested cases and may argue facts in evidence and all reasonable inferences to be drawn therefrom together with the relevant law. In *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976), our Supreme Court held that whether counsel had abused that privilege is generally a matter left to the trial court's discretion and is not reversible on appeal absent a showing of such gross impropriety as would likely influence the jury's verdict. We have reviewed the State's closing argument and are unable to detect such impropriety.

No error.

Judges EAGLES and PARKER concur.

LENORA W. GILBERT, MOTHER; JAMES GILBERT, DECEASED, EMPLOYEE, PLAINTIFF v. B & S CONTRACTORS, INC., EMPLOYER, AND NATIONWIDE INSURANCE CO., CARRIER, DEFENDANTS

No. 8510IC700

(Filed 3 June 1986)

1. Master and Servant § 55.5— workers' compensation—unexplained death—no presumption that death arose from employment

A workers' compensation claimant was not entitled to a presumption that an unexplained death arose out of the employment and was compensable where the employee's death was not a violent death and was not unexplained in that an expert witness testified that the most likely cause was severe coronary artery disease.

2. Master and Servant § 47.1— presumption that close cases decided in employees' favor—not valid

A workers' compensation claimant was not entitled to a presumption that close cases should be decided in the employee's favor where the supporting case law concerned the issue of whether an employee was acting for the benefit of his employer, the issue here was whether the employee's death was caused by coronary artery disease or electrical shock, and there was no evidence that the employee ever came into contact with any charged electrical conduits.

3. Master and Servant § 55.5— workers' compensation—failure to find compensable death—no error

The Industrial Commission did not err by failing to conclude as a matter of law that an employee's death was caused by an injury or accident arising out of and in the course of his employment where the employee died of either an electrical shock or coronary artery disease and the evidence from which the Commission could have found that death was caused by an electrical shock was virtually nonexistent.

APPEAL by plaintiff from Order of North Carolina Industrial Commission entered 9 January 1985. Heard in the Court of Appeals 3 December 1985.

Joseph B. Roberts III and Stephen T. Gheen for plaintiff appellant.

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

COZORT, Judge.

James Gilbert, a 34-year-old cablevision lineman, was found dead at the base of a utility pole by two co-workers. The examining pathologist attributed the probable cause of death as marked atherosclerotic coronary artery disease, noting, however, that "the possibility of a low voltage injury cannot be completely excluded." The North Carolina Industrial Commission denied Gilbert's mother's claim for workers' compensation benefits, ruling that Gilbert's death was not compensable under the Workers' Compensation Act. We affirm. The facts follow.

James Gilbert, Dennis Lawing and Donald Herman were working as a three-man crew putting up cable for television on utility poles on Davis Park Road in Gaston County on the morning of 11 June 1982. They were "pulling" the cable, running it along the side of the road prior to climbing the pole to attach the cable to the pole. Lawing and Herman had gone on down the road around a curve. Gilbert had stayed behind at the utility pole, out of the vision of Lawing and Herman, watching for cars which would need to slow down before going around the curve where Lawing and Herman were pulling the cable. When Lawing and Herman came back around the curve, Gilbert was lying near the utility pole, apparently dead. Lawing did not recall hearing anything or seeing any sparks. Herman did not observe any blood

on Gilbert's shirt. Lawing ran to a house down the road to have an ambulance called. When the ambulance arrived, emergency medical technicians attempted to revive Gilbert with cardiopulmonary resuscitation, to no avail. Gilbert was pronounced dead in the emergency room at Gaston Memorial Hospital, without ever having regained consciousness.

The pathological examination was conducted by Dr. Jon F. Gentry. He testified he found two things: "very severe significant coronary artery disease," and "blood in his stomach." He testified he could find no anatomic basis for the blood in the stomach: "I just mentioned it as a finding because it is a finding. What it means, I don't know." Dr. Gentry also found abrasions on the front of each leg below the knee. He testified that the most probable and the most likely cause of death was the coronary artery disease, which he described as severe enough to narrow the vessels such that the flow of blood in the heart was restricted to only 25 to 30 percent of normal. He was asked whether "a low voltage shock could or might have caused [Gilbert's] death and the blood in his stomach." Dr. Gentry testified:

> [T]here is a possibility. I can't exclude it. . . .
>
> * * * *
>
> [T]here were no wounds about the body.
>
> * * * *
>
> [A] person may die of a low-voltage injury and there's nothing there you can see inside that body. . . .
>
> * * * *
>
> . . . I was looking for evidence of electrical injury which I did not find in terms of the examination . . . .
>
> * * * *
>
> I don't have physical evidence to indicate such, but a low-voltage injury you may not see physical damage to the body like burns. . . . I can't exclude that.

The Deputy Commissioner for the Industrial Commission denied the claim, finding that Gilbert "died as a result of very severe and significant coronary artery disease that was neither

caused by, aggravated by or otherwise related to his employment. [Gilbert's] death was not proximately caused by an injury by accident arising out of and in the course of his employment with defendant/employer." The Full Commission adopted as its own and affirmed the Deputy Commissioner's Opinion and Award.

On appeal, claimant contends the Commission erred by failing to accord to claimant two "presumptions of law" to which she was entitled: (1) "upon an unexplained death of an employee . . . an evidentiary presumption or inference exists that the death arose out of the employment and is compensable"; and (2) "in close cases benefit of the doubt as to the issue of whether the injury arose out of and in the course of employment should be decided in the employee's benefit in accordance with [the] established policy of liberal construction and application of the Workers' Compensation Act." We disagree.

[1] Claimant contends she was entitled to the first presumption that, upon an unexplained death, there is an inference the death arose out of the employment and is compensable, relying on her interpretation of *Harris v. Henry's Auto Parts, Inc.*, 57 N.C. App. 90, 290 S.E. 2d 716, *disc. rev. denied*, 306 N.C. 384, 294 S.E. 2d 208 (1982). Claimant's reliance on *Harris* is misplaced. In *Harris*, we held that there was a presumption in claimant's favor where a night attendant at a self-service gas station was shot to death during his work hours on the station premises. The death was unexplained; there was no evidence of robbery or any other motive for the killing. In reviewing three North Carolina Supreme Court cases where an inference of compensable death was allowed, we stated that "[o]ur Supreme Court has held that *death by violence* raises the presumption that the death arose out of the employment when the employee is found at his place of employment during the time which he was to be working." *Id.* at 94, 290 S.E. 2d at 719 [emphasis added]. The presumption is a rebuttable one and arises only if there is no evidence of what caused the death. *Id.*, 290 S.E. 2d at 718. There are two reasons the case below is not covered by the rules set forth in *Harris*. First, Gilbert's death was not a "violent" death, as was the case in *Harris*. Second, Gilbert's death was not unexplained because the expert witness, Dr. Gentry, gave an explanation for Gilbert's death: the most likely cause was severe coronary artery disease. We hold the claim-

ant was not entitled to a presumption that Gilbert's death arose out of his employment.

[2] In her argument that she was entitled to a presumption that "close cases . . . should be decided in the employee's benefit," claimant cites *Hoffman v. Ryder Truck Lines, Inc.*, 306 N.C. 502, 293 S.E. 2d 807 (1982). Again, we find claimant's reliance on case law to be misplaced. In *Hoffman*, the court found an injury to be compensable where the primary issue to be resolved was "whether or not the employee was acting for the benefit of his employer 'to any appreciable extent' when the accident occurred." *Id.* at 506, 293 S.E. 2d at 810, *quoting Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955). The court held that "[s]uch a determination depends largely upon the unique facts of each particular case, and, in close cases, the benefit of the doubt *concerning this issue* should be given to the employee in accordance with the established policy of liberal construction and application of the Workers' Compensation Act." *Id.* [Emphasis added.] We face a substantially different issue in this case. The issue is whether Gilbert's death was caused by coronary artery disease (not compensable) or electrical shock (compensable). The testimony from the examining pathologist was that the most probable and most likely cause of death was coronary artery disease, though he could not "exclude" the possibility that Gilbert could have died from a low-voltage electrical shock. In our review of the record, we find no evidence that Gilbert ever came in contact with any charged electrical conduits. In fact, there is no evidence that he had even climbed the utility pole prior to his death. Given the record before us, we decline to hold that the claimant is entitled to a presumption that the case should be decided in the employee's benefit because the examining pathologist could not rule out the possibility of low-voltage electrical shock.

[3] We lastly consider claimant's contention that this case is analogous to *Snow v. Dick & Kirkman, Inc.*, 74 N.C. App. 263, 328 S.E. 2d 29, *disc. rev. denied*, 314 N.C. 118, 332 S.E. 2d 484 (1985), where we affirmed the Industrial Commission's finding of a compensable death. There, a 29-year-old electrician fell over dead while working on a large electrical control panel containing about a hundred terminals, some of which were energized with 277 volts of electricity. No one heard any popping noises or saw any sparks. No burn marks were found on the body. The evidence showed

that the electrician was seen by a fellow employee sitting in front of the panel on a wire reel spool holding a screwdriver. The next time he was seen, he was lying on the floor with his right leg drawn up as if in a cramp, and his jaws were clinched so tightly they had to be forcibly pried apart before mouth-to-mouth resuscitation could be administered. The electrician had mildly hardened coronary arteries. Two doctors testified as to the cause of death. They agreed that the cause of death was a disorganized, erratic heartbeat caused by either sudden heart failure or an electrical shock. One doctor was of the firm opinion that the chances of death from an electrical shock were far greater than the chances of sudden death due to the fairly minimal coronary arteriosclerosis. The other doctor was of the opinion that sudden, spontaneous heart failure was the more likely cause. We upheld the Commission's finding of a compensable death caused by an accidental electrical shock.

It is readily apparent that the case below is distinguishable from *Snow*. The evidence from which the Commission could have found Gilbert's death was caused by an electrical shock is, in the instant case, virtually nonexistent.

> In order for a claimant to recover Workers' Compensation benefits, he must prove that his injury was (1) by accident; (2) arising out of his employment; and (3) in the course of the employment. G.S. 97-2(6). The claimant has the burden of proving each of these elements. *Henry v. Leather Co.*, 231 N.C. 477, 479, 57 S.E. 2d 760, 761 (1950).

Harris v. Henry's Auto Parts, Inc., supra, at 91, 290 S.E. 2d at 717. We cannot say, on the record before us, that the Commission erred as a matter of law in failing to conclude that Gilbert's death was caused by an injury by accident arising out of and in the course of his employment.

The employer and the insurance carrier cross-appealed, alleging error in the Commission's findings and conclusions that an employer-employee relationship existed between B & S Contractors and Gilbert, and alleging error in the admission of certain evidence. With our having affirmed the Commission's decision denying the claim, we deem it unnecessary to address the cross-appeal.

The Opinion and Award of the Industrial Commission is Affirmed.

Judges WEBB and BECTON concur.

CHERRY, BEKAERT & HOLLAND, A GENERAL PARTNERSHIP v. JAMES DAVIS WORSHAM

No. 8526SC1067

(Filed 3 June 1986)

1. **Appeal and Error § 24— cross-assignment of error—properly a cross-appeal—assignments of error not considered**

An appellee's assignments of error were not properly before the Court of Appeals where appellee attempted to raise as cross-assignments of error questions he was required to file as a cross-appeal. N.C. Rules of App. Procedure, Rule 10(d).

2. **Pensions § 1; Partnership § 3— retirement agreement—retirement benefits reduced by disability payments—summary judgment for retiree proper**

Summary judgment was properly granted for an accountant who retired early, began receiving retirement benefits, began receiving disability benefits, and had his retirement benefits reduced by the amount of the disability benefits. A clause in the partnership agreement providing that the benefits provided "herein" would be reduced by the amount of insurance benefits referred only to the benefits provided in that article, which concerned disability benefits, and not to the entire agreement.

3. **Rules of Civil Procedure § 56— partnership agreement—meaning of herein—interpreted by plain language of agreement—summary judgment proper**

Summary judgment was not improper in an action which involved the meaning of the word "herein" in a partnership agreement because the plain language of the contract supported the interpretation argued by appellee.

APPEAL by plaintiff from *Snepp, Judge*. Partial judgment entered 1 July 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 11 March 1986.

Plaintiff-appellant Cherry, Bekaert & Holland is a general partnership based in Charlotte engaged in the practice of accounting. Defendant-appellee James Davis Worsham was a partner in the firm and, until his retirement, was the managing partner for

the firm's office in Gadsden, Alabama. The firm's partnership agreement provided the partners with the option of early retirement beginning at age 55. In September 1983, appellee elected to retire early and gave notice of his intention to the firm.

Over the next several months, the parties negotiated over the exact terms of appellee's retirement plan. Appellee would receive annual payments of $18,828.22 on April 30 of every year for fifteen years. In addition, he was to receive monthly payments of $3258.87, or $39,106.44 annually for the first five years after retirement, then monthly payments of $1543.11, or $18,517.32 annually for the following ten years. Appellee retired, effective 1 May 1984.

During his tenure as a partner in the firm, appellee participated in the group health insurance plan provided to members of the firm by Mutual Benefit Life Insurance Company. Appellee paid the premiums on this policy, and he continued to be covered by the policy after his retirement. Prior to his retirement, appellee had applied for disability benefits under that policy. He suffers from coronary artery disease and spinal problems. A determination was made by the insurance company that appellee was indeed disabled and qualified for payments under his insurance policy. These payments, in the amount of $2680.00 per month, began in July 1984, two months after appellee's retirement.

These disability insurance payments went directly to the partnership, and were then forwarded to Worsham. Appellant contended that the firm's partnership agreement permitted it to reduce appellee's retirement benefits by the amount of disability insurance benefits he was receiving. Appellant unilaterally began deducting the $2680.00 from appellee's monthly retirement benefit of $3258.87 in May 1985, paying only $578.87. Appellant also withheld appellee's annual payment for 1985 of $18,828.22, asserting that appellee had been overpaid by $31,858.66 before appellant began reducing his monthly retirement benefits.

Appellee protested these actions by appellant. In order to determine their respective rights, appellant brought this declaratory judgment action, seeking a judicial determination of its right to reduce the retirement benefits. Appellee counterclaimed seeking a determination that the appellant had wrongfully withheld

the funds, recovery of the withheld funds, $10,000.00 in damages under the Unfair and Deceptive Trade Practices Act, G.S. 75-1.1, *et seq.*, injunctive relief, and an order compelling appellant to specifically perform the retirement plan.

The case came on for hearing before Judge Snepp on 24 June 1985 on appellee's motion for summary judgment at which time appellant made an oral motion for summary judgment. Finding that no genuine issue of material fact existed as to appellant's request for declaratory judgment, Judge Snepp concluded that the partnership agreement did not give appellant a right to reduce appellee's retirement benefits by the amount of disability benefits appellee was receiving and granted appellee's motion for summary judgment on that issue. Judge Snepp then dismissed appellee's claim under G.S. 75-1.1 and appellee's claims for injunctive relief and specific performance, concluding that his available remedies at law were adequate. Although only a partial judgment, Judge Snepp certified, pursuant to N.C. Rule of Civil Procedure 54(b), that there was no just reason for delay entitling the parties to bring an immediate appeal.

Parker, Poe, Thompson, Bernstein, Gage and Preston by Irvin W. Hankins, III, Gaston H. Gage, and Stephen R. Hunting for plaintiff-appellant.

Wyatt, Early, Harris, Wheeler and Hauser by William E. Wheeler for defendant-appellee.

PARKER, Judge.

[1] We note at the outset that appellee's purported assignments of error are not properly before this Court. Appellee attempts to raise the questions as cross-assignments of error. However, as stated in Rule 10(d), N.C. Rules App. Proc., cross-assignments of error are reserved for asserting errors "which deprived the appellee of an alternative basis in law for *supporting* the judgment . . ." (emphasis added). In order to bring the questions presented before this Court, appellee was required to file a cross-appeal as an appellant, complying with all of the Rules of Appellate Procedure, including deadlines, applicable to appellants. Therefore, the only questions before us are those raised by appellant.

[2] Appellant argues that the court erred in denying its motion for summary judgment and, alternatively, that summary judg-

ment should not have been granted for appellee because there was a genuine issue of material fact concerning the intent of the parties as to the meaning of the word "herein" in the clause in the partnership agreement covering disability of a partner.

The partnership agreement is divided into articles. Article XI deals with disability and Article XII with retirement. Article XI, entitled "DISABILITY," begins by outlining the benefits that a disabled partner would receive from the partnership. After describing the benefits, the last sentence of the first paragraph reads:

> If a disability policy is available to the Partners on a group basis through the Partnership, and, whether or not the disabled Partner is covered under said policy, and whether or not the Partnership pays the premiums for said policy, the benefits provided *herein* shall be reduced by the amount of the insurance benefits provided by said policy. (Emphasis added.)

Appellee is receiving disability insurance benefits from a policy "available to the Partners on a group basis through the partnership." He is also receiving his retirement benefits, as provided for in Article XII of the partnership agreement. He is not receiving any disability benefits from the partnership.

The controversy centers around the meaning of the word "herein." Appellant contends the word refers to the entire agreement, meaning that any benefits provided by any article of the partnership agreement would be reduced by disability insurance benefits received. Appellee argues that "herein" refers only to the benefits provided in that particular article providing disability benefits.

We agree with appellee. When read in the context of the article on disability, the word "herein" is clearly limited in its application to disability benefits. The disability benefits provided for in Article XI are intended to provide income for a partner who is temporarily disabled and planning to return to work for the partnership. The partner receives his full pay for the period of disability, up to six months. The partnership is then given the option of electing to retire a partner who remains disabled for more than six months, and a partner who remains disabled for

two years is automatically retired. Because the disability benefits provide temporary, emergency income, which can be very expensive to the firm, it is logical for the partnership to desire to offset the burden of providing such benefits by insurance received by the partner.

Retirement benefits, on the other hand, are not emergency provisions. The assumption is that a partner in the firm will remain there until retirement. Benefits can be carefully planned so that financial security can be provided to a retired partner while not presenting the partnership with an undue financial burden. Such careful planning is not possible with disability benefits. The need for the partnership to offset the expense of retirement benefits is not present as it is with disability benefits. Each party entered into the partnership agreement expecting that the new partner would be there until retirement and, upon retirement, would draw a predetermined amount from the partnership. In order to protect the expectations of the parties, the word "herein" must be interpreted to apply only to the benefits provided by Article XI on disability.

[3] Appellant also contends that summary judgment for appellee was improper because a genuine issue of material fact existed concerning the intent of the parties as to the meaning of the word "herein." However, where a contract is unambiguous, its construction is a matter of law for the court to determine. *Bicycle Transit Authority, Inc. v. Bell*, 314 N.C. 219, 333 S.E. 2d 299 (1985). The intent of the parties is to be determined from the plain language of the contract, its purposes and subject matter. *Adder v. Holman and Moody, Inc.*, 288 N.C. 484, 219 S.E. 2d 190 (1975). We have already determined that the plain language of the contract supports the interpretation of the contract argued by appellee. The court cannot under the guise of interpretation rewrite the contract for the parties.

From an analysis of the language of the contract, its purposes and subject matter, the trial court properly determined that there was no genuine issue of material fact and that appellee was entitled to judgment as a matter of law. The judgment below is

Affirmed.

Judges WEBB and EAGLES concur.

NELDA D. COSTNER, WIDOW OF THE DECEASED, AND NELDA D. COSTNER, ADMINISTRATRIX OF THE ESTATE OF AUSTIN F. COSTNER, DECEASED EMPLOYEE v. A. A. RAMSEY & SONS, INCORPORATED, EMPLOYER; AND BITUMINOUS INSURANCE COMPANIES, CARRIER

No. 8610IC65

(Filed 3 June 1986)

Master and Servant § 79.1— workers' compensation—permanent disability—death of employee—no continued compensation to dependent

The dependent of a deceased employee who was receiving benefits for total and permanent disability because of the loss of use of both legs is not entitled to receive compensation as a survivor where the employee's injury occurred before the 1 July 1975 amendment to N.C.G.S. § 97-31(17), since the dependent's claim is based on the employee's claim and is governed by the law in effect at the time of the employee's injury, and under that law the deceased employee had no vested benefit which would pass to his survivor.

Judge JOHNSON dissenting.

APPEAL by defendants from an opinion and award of the Industrial Commission filed 15 October 1985. Heard in the Court of Appeals 15 May 1986.

The defendants appeal from an award to the widow and administratrix of the estate of Austin F. Costner. The deputy commissioner found facts which are not disputed that Austin F. Costner, who was employed by A. A. Ramsey & Sons, Incorporated, was injured by an accident arising out of and in the course of his employment on 16 March 1979. As a result of this accident he lost the use of both legs. He entered into an agreement with the defendants by which he was paid compensation for total and permanent disability. Austin F. Costner died on 21 July 1984 from a cause unrelated to his compensable injury. At the time of his death he had received 281 weeks of compensation.

The deputy commissioner concluded that Nelda Costner was entitled to 119 weeks of compensation. The Full Commission

adopted the findings and conclusions of Deputy Commissioner Sellers and the defendants appealed.

Bridges, Bridges & Morgan, P.A., by Forrest Donald Bridges, for plaintiff appellees.

Caudle & Spears, P.A., by Lloyd C. Caudle and Richard S. Guy, for defendant appellants.

WEBB, Judge.

The question posed by this appeal is whether the dependent of a deceased employee who was receiving benefits for permanent disability is entitled to receive payments under the Workers' Compensation Act as a survivor. We hold that she is not entitled to such benefits.

The decision in this case depends on the interpretation of several sections of the Workers' Compensation Act. G.S. 97-31(17) was amended effective 1 July 1979 to add the part in brackets.

> The loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two thereof, shall constitute total and permanent disability, to be compensated according to the provisions of G.S. 97-29. [The employee shall have a vested right in a minimum amount of compensation for the total number of weeks of benefits provided under this section for each member involved. When an employee dies from any cause other than the injury for which he is entitled to compensation, payment of the minimum amount of compensation shall be payable as provided in G.S. 97-37.]

The Industrial Commission, relying on *Booker v. Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979), held that because the right of the plaintiff did not arise until after the amendment to the statute the amendment applied to her claim. We do not believe this was correct. The claim of the plaintiff in *Booker* was pursuant to G.S. 97-38. G.S. 97-38 creates a claim for dependents of persons who die as the result of a compensable accident. Our Supreme Court held that since the claim for the dependent in that case did not arise until the death of the employee the claim was governed by the statute in effect at the time of the employee's death. In this case G.S. 97-31(17) does not create a claim for a dependent. The plaintiff's claim is based on Austin Costner's

claim. She is entitled to that part of his claim which had vested at his death. Austin Costner's injury occurred before the amendment to the statute and his claim was governed by the law in effect at that time. *See Wood v. Stevens & Co.*, 297 N.C. 636, 256 S.E. 2d 692 (1979). Because the plaintiff's claim is based on Austin Costner's claim, it is governed by the law in effect at the time of Austin Costner's injury.

The appellees argue that the amendment to G.S. 97-31(17) is merely a compilation of the existing case law and that prior to the adoption of the amendment she had a right to the payment of the compensation which would have been due her deceased husband. She bases this argument on *McCulloh v. Catawba College*, 266 N.C. 513, 146 S.E. 2d 467 (1966); *Butts v. Montague Bros.*, 204 N.C. 389, 168 S.E. 2d 215 (1933); and *Wilhite v. Veneer Co.*, 303 N.C. 281, 278 S.E. 2d 234 (1981). Each of these cases involved a claim by a survivor to benefits of the decedent that had vested prior to death. It was held in each case that a survivor of a deceased employee is entitled to the benefits to which the employee was entitled at the time of his death. In this case Austin F. Costner was entitled under G.S. 97-31(17) to compensation for total and permanent disability according to G.S. 97-29. G.S. 97-29 provided that the benefits would last during Mr. Costner's total disability. It did not provide that the benefits would survive his death. He had no vested benefit which would pass to his survivor.

We reverse and remand to the Industrial Commission for an order consistent with this opinion.

Reversed and remanded.

Judge WHICHARD concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I believe *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979) controlling, as did the Full Commission, despite the distinction between G.S. 97-37 and G.S. 97-38 pointed out in the majority opinion. In *Booker*, the Court stated:

> Among those [majority of] jurisdictions which, like North Carolina, treat the dependents' right to compensation as separate and distinct from the rights of the injured employee, it is generally held that the right to compensation is governed by the law in force at the time of death. (Citations omitted.) This rule has been applied *even when the effect was to confer upon the dependents substantive rights which were unavailable to the employee during his lifetime.* (Citation omitted.)

Id. at 467, 256 S.E. 2d at 195. (Emphasis added.)

The Court in so stating in no way limited the application of this rule to G.S. 97-38, that is, to only dependents of employees who died as a result of the compensable accident.

Moreover, to construe G.S. 97-37 and G.S. 97-31(17) as the majority does leads to absurd results. As one example, according to the majority's construction, dependents of an employee who suffers the loss of one leg prior to the effective date of the amendment to G.S. 97-31(17) and then dies from causes unrelated to the compensable injury within 200 weeks from the time of the injury are better off than the dependents of an employee who suffers the loss of *two* legs, such that he is deemed totally and permanently disabled, and likewise dies from causes unrelated to the compensable injury within 200 weeks. The former dependents receive compensation; the latter receive none. I believe the majority's construction, which permits such a result, violative of the Supreme Court's clear mandate to construe G.S. ch. 97 liberally "to the end that the benefits thereof should not be denied upon technical, narrow and strict interpretation." *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 599 (1955).

MARGARET SKAMARAK v. DAVID WILLIAM SKAMARAK

No. 8510DC1027

(Filed 3 June 1986)

1. **Divorce and Alimony § 2.2— divorce from bed and board—failure to reply to counterclaim**

The trial court properly refused to grant defendant a directed verdict on his counterclaim for divorce from bed and board because plaintiff failed to reply to the counterclaim since all allegations in a divorce action are deemed to be denied by the opposing party. N.C.G.S. § 50-10.

2. **Divorce and Alimony § 4.2— alimony action—spendthrift issue**

The trial court in an alimony action erred in refusing to submit an issue as to whether plaintiff was a spendthrift where defendant properly raised the issue and offered evidence to support his allegation. N.C.G.S. § 50-16.2.

3. **Divorce and Alimony § 17.3— award of alimony—insufficient findings**

The trial court failed to make sufficient findings to support its award to plaintiff of $700 per month in alimony in an action for divorce from bed and board where no findings were made as to the earning capacity or the condition of the parties, and findings as to the accustomed standard of living and estates of the parties were inadequate.

4. **Divorce and Alimony § 18.16— attorney fees—failure to make findings**

The trial court erred in awarding the plaintiff in an alimony action $300 in attorney's fees without making any findings of fact concerning attorney's fees.

APPEAL by defendant from *Bullock, Judge*. Order entered 2 May 1985 in District Court, WAKE County. Heard in the Court of Appeals 6 February 1986.

M. Jean Calhoun and David Parker for plaintiff appellee.

Sullivan & Pearson by Mark E. Sullivan for defendant appellant.

COZORT, Judge.

On 28 December 1984, the plaintiff filed an action asking, *inter alia*, for a divorce from bed and board from the defendant on the grounds of abandonment and the offering of indignities to the plaintiff, and for permanent alimony. The defendant answered denying all material allegations of the plaintiff's complaint, raising the affirmative defenses of recrimination, abandonment, and spendthrift. The defendant also filed a counterclaim, designated

as such, alleging that plaintiff constructively abandoned the defendant and that the plaintiff offered indignities to the defendant. The counterclaim prayed that he be granted a divorce from bed and board from the plaintiff. The plaintiff never answered the defendant's counterclaim.

On 16 April 1985, this case came on for jury trial in Wake County District Court. At the close of all the evidence the defendant made a motion for directed verdict on the counterclaim alleging that the allegations of the counterclaim had been admitted because of the plaintiff's failure to reply to the counterclaim. The trial court denied the defendant's motion. Four issues were submitted to the jury:

> Did the Defendant, without provocation, offer such indignities to the person of the Plaintiff as to render her life burdensome and condition intolerable?
>
> Did the Defendant willfully abandon the Plaintiff without just cause or provocation?
>
> Did the Plaintiff, without provocation, offer such indignities to the person of the Defendant as to render his life burdensome and condition intolerable?
>
> Did the Plaintiff willfully abandon the Defendant without just cause or provocation?

The jury answered the first issue "yes" and answered the remaining three issues "no." The trial court entered an Order granting the plaintiff a divorce from bed and board from the defendant, ordering the defendant to pay $700 per month in alimony, and awarding plaintiff $300 in attorney's fees. From the verdict and Order the defendant appeals.

[1] The defendant contends that the trial court erred by refusing to rule on the effect of plaintiff's failure to file a reply to defendant's counterclaim or to grant defendant a directed verdict on the issues raised in the counterclaim, because by failing to answer the counterclaim the plaintiff was deemed to have admitted the allegations in the counterclaim. We disagree.

G.S. 50-10 provides:

> The material facts in every complaint asking for a divorce or for an annulment shall be deemed to be denied by

> the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury.

In *Ellis v. Ellis*, 190 N.C. 418, 130 S.E. 7 (1925), the Supreme Court of North Carolina, presented with the exact issue before us, held:

> True, no answer was interposed by the plaintiff to the complaint filed by his wife in her cross-action, but the material facts in every complaint asking for a divorce, are deemed to be denied under the statute, and no judgment is allowed to be given in favor of the plaintiff in any such complaint until all the material facts have been found by a jury.

Id. at 421, 130 S.E. at 8-9. This is still the law in North Carolina with regard to a divorce from bed and board. *Cf.* G.S. 50-10 (1985 Cum. Supp.) (with regard to absolute divorce). Thus, all the allegations of defendant's counterclaim, wherein he sought a divorce from bed and board, were deemed to be denied by the plaintiff. This assignment is overruled.

[2] The defendant contends that the trial court erred by failing to instruct the jury on the issue of plaintiff's being a spendthrift. In defense to a claim for alimony, the supporting spouse may claim that the dependent spouse has committed any of the acts set forth in G.S. 50-16.2. *See* G.S. 50-16.5(b); *Self v. Self*, 37 N.C. App. 199, 200-01, 245 S.E. 2d 541, 542-43 (1978). Under G.S. 50-16.2, grounds for alimony exist where the supporting spouse is a spendthrift. In this case the defendant, in defense to plaintiff's claim for alimony, pled that the plaintiff was a spendthrift. A spendthrift is a person who spends money profusely and improvidently. *Black's Law Dictionary* 1255 (rev. 5th ed. 1979). The defendant presented evidence showing how the plaintiff spent money during the marriage. The majority of the testimony in this case concerned the couple's financial condition and the wife's spending habits. The defendant requested that the trial court submit the issue of spendthrift to the jury. "[I]t is the duty of the trial judge to submit to the jury those issues 'which are raised by the evidence, and which, when answered, will resolve all material controversies between the parties.' " *Wilkinson v. Weyerhaeuser Corp.*, 67 N.C. App. 154, 158, 312 S.E. 2d 531, 533 (1984), *quoting*

Wooten v. Nationwide Mutual Insurance Co., 60 N.C. App. 268, 298 S.E. 2d 727 (1983). Defendant properly raised the issue of spendthrift and offered evidence to support his allegation. We hold that the trial court erred in refusing to submit the issue of spendthrift to the jury.

[3] The defendant assigns error to the trial court's Order awarding $700 a month in alimony to the plaintiff and $300 in attorney's fees. The defendant contends that the trial court failed to make the required findings of fact to support both awards. We agree.

G.S. 50-16.5(a) states: "Alimony shall be in such amount as the circumstances render necessary, having due regard to the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case." The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors established by G.S. 50-16.5(a) for a determination of an alimony award. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982); *Spencer v. Spencer*, 70 N.C. App. 159, 170, 319 S.E. 2d 636, 645 (1984). To have a valid order the trial court must make detailed findings concerning the following:

(1) the estates of the parties;

(2) the earnings of the parties;

(3) the earning capacity of the parties;

(4) the condition of the parties; and

(5) the accustomed standard of living of the parties.

Spencer, supra. The requirement for detailed findings is thus not a mere formality or an empty ritual; it must be done. *Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). The trial judge failed to make the necessary findings in this case. There are no findings as to the earning capacity of the parties, or the condition of the parties. There are inadequate findings as to the accustomed standards of living of the parties and the estates of the parties. "The existence of evidence in the record from which such findings *could* be made cannot remedy this failing. What the evidence does in fact show is for the trial court to determine, not this Court." *Spencer, supra*, at 170, 319 S.E. 2d at 645. The Order of the trial court on alimony must be vacated.

[4] G.S. 50-16.4 provides for attorney's fees for the dependent spouse in actions for alimony. The order awarding attorney's fees must set out findings of fact upon which the award of attorney's fees is made. *Self v. Self, supra.*

The trial court's Order in this case is devoid of *any* findings concerning attorney's fees; therefore, the award of attorney's fees is vacated.

The defendant contends the trial court made additional errors on various evidentiary matters. We have reviewed those assignments of error and find no prejudicial error.

The Order of the trial court is vacated and this case is remanded for a new trial.

New trial.

Judges WELLS and WHICHARD concur.

ROBERT C. SMITH v. GEORGE E. JONES

No. 8526SC1088

(Filed 3 June 1986)

1. Bills and Notes § 4— note—consideration sufficient

The assignment of potential commissions was sufficient consideration to support a note where plaintiff was a general insurance agent and defendant a soliciting agent; defendant was paid a commission based on a full year's premiums when the policies were sold even though the premiums were paid monthly; agents were required to sign an agreement providing for repayment of any commissions on premiums which were not paid; defendant was liable to repay $60,000.00 in commissions on policies in which the premiums were not paid; plaintiff requested and defendant signed a note for $65,836.95; and the note was subject to assignment of defendant's commissions on policies plaintiff was attempting to place with another company in place of the rejected policies.

2. Bills and Notes § 20— note covering insurance agent charge backs—intention of parties—directed verdict properly denied

It was not reversible error to submit to the jury an issue as to the intention of the parties on a note where the note was given by a soliciting agent to a general agent to cover charge backs for commissions on policies with unpaid premiums and a clause stated that the first installment would be due subject to assignment of commissions from replacement policies.

ON writ of certiorari to review proceedings before *Lewis (Robert D.), Judge.* Judgment entered 9 May 1984 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 March 1986.

This is an action on a note. The evidence showed that the plaintiff was the general agent in North Carolina for Mutual Benefit Insurance Company and the defendant was employed as soliciting agent for the company. Agents for the company were paid commissions based on a full year's premiums for insurance policies when sold although the premiums were paid monthly. The agents were required to repay commissions on any premiums which were not paid. The payment of commissions to agents by this method was known as the automatic monthly payment (AMP) plan and to take advantage of this plan agents were required to sign an agreement under which they would repay any commissions within ten days of notice of such a charge back.

In 1981 the defendant as agent sold insurance policies for which he received advanced commissions in the amount of approximately $60,000.00. No premiums were paid on the policies upon which these commissions were based. The defendant was not able to repay the commissions. The plaintiff requested the defendant to give him a note for $65,836.95 payable in equal monthly installments of $5,486.41. The defendant would not sign the note until a paragraph in the note was amended, by the part shown in brackets, to read as follows:

> The first such installment shall be due, [subject to assignment of commissions from policies issued by Manufacturer's Life on the lives of Douglas D. Brendle, Sidney F. Brendle, and William F. Cosby;] on July 31, 1981, and each subsequent installment shall be due on the last working date of each subsequent month until the entire unpaid balance is paid. Should any of such installments be unpaid, [following a thirty (30) day grace period] the entire unpaid balance becomes due upon demand.

The evidence showed that the plaintiff was attempting to place policies with another insurance company in place of the rejected policies. He was unable to do so.

The court submitted the following issue to the jury to which the jury answered "yes."

Did Robert C. Smith and George E. Jones agree that liability on the note dated July 1, 1981, in the face amount of $65,836.95 was to be dependent upon the acceptance of policies on the lives of Brendle and Cosby issued by Manufacturer's Life as a condition precedent to payment of the note?

The court entered a judgment for the defendant and this Court granted certiorari.

Moore, Van Allen, Allen & Thigpen, by John T. Allred, Joseph W. Eason, Randel E. Phillips and Denise S. Cline, for plaintiff appellant.

Marshall, Williams, Gorham & Brawley, by Lonnie B. Williams, for defendant appellee.

WEBB, Judge.

[1] The appellant first contends that he was entitled to have a directed verdict entered in his favor because all the evidence showed, without dependence on the credibility of a witness, the truth of the basic facts upon which the plaintiff's claim is based. He says this is so because there is no dispute that under the AMP agreement commissions were paid to the plaintiff which he was bound by the agreement to return. He argues that the note signed by the parties did not alter the underlying obligation because (1) the note was not supported by consideration and (2) the interlineated "subject to" phrase in the note constituted a promise by the defendant relating to the time of payment and is not a condition precedent to liability.

One difficulty with the plaintiff's argument is that the action was brought on the note and not on the AMP agreement. Nevertheless he says that a waiver of a right to recover a stated sum needs consideration to support it and there is no consideration for the waiver by the plaintiff. The plaintiff, relying on *Sinclair v. Travis*, 231 N.C. 345, 57 S.E. 2d 394 (1950) and *Clement v. Clement*, 230 N.C. 636, 55 S.E. 2d 459 (1949) argues that the defendant promised to do only what he was legally bound to do and this is not sufficient consideration to support a waiver of the plaintiff's absolute claim for payment. We believe the evidence in this case shows that the defendant did something he was not legally bound to do. "[T]here is a consideration if the promisee, in return for the

promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not." *Albemarle Educational Foundation, Inc. v. Basnight*, 4 N.C. App. 652, 654, 167 S.E. 2d 486, 488 (1969). (Citations omitted.) In this case the defendant signed a note and assigned to the plaintiff potential commissions from another insurance company. This assignment proved to be of little value but it was what the plaintiff bargained for and we believe it is sufficient consideration to support the note.

[2] The appellant next contends that clause which says "[t]he first such installment shall be due, subject to assignment of commissions from policies issued by Manufacturer's Life" is not a condition but relates solely to the time of payment and that payment became due within a reasonable time. He says that an absolute debt existed prior to the time the note was signed and that when payment of a pre-existing debt is to be postponed until the happening of an event within the control of the debtor, payment is due within a reasonable time, without regard to whether the debtor causes the event to occur. He cites 148 A.L.R. 1075 (1944) for this proposition. The first difficulty with this argument is that the occurrence of the event was not within the control of the debtor. He could not require the persons with whom he dealt to purchase the insurance policies from Manufacturer's Life. The second difficulty is that plaintiff did not sue on the pre-existing debt. He sued on the note and he must be bound by its terms.

The appellant argues further that the disputed clause is not a condition precedent but a promise to pay. We do not believe the clause can under any interpretation be considered a promise to pay. The plaintiff argues finally that it is inconceivable that he would give up the absolute right to payment dependent upon events within the control of the defendant and that to interpret the note so renders it a nullity. We can only be governed by the words in the note as to the intention of the parties. We do not believe this makes the note a nullity but it does make it enforceable according to its terms. We hold that it was not reversible error to submit to the jury the issue as to the intention of the parties to the note.

The plaintiff also argues it was error not to give a peremptory instruction in his favor and to set the verdict aside. For the reasons stated in this opinion we hold neither ruling was in error.

It does appear that the defendant has received from the plaintiff money which he should not keep under the AMP agreement. We believe we are limited to reviewing the trial for errors committed. The plaintiff sued on the note and we believe there were no prejudicial errors at the trial of the claim which the plaintiff pursued.

The defendant has cross assigned error to the failure of the court to submit to the jury an issue as to an unfair trade practice on the part of the plaintiff. We overrule this assignment of error.

No error.

Chief Judge HEDRICK and Judge PARKER concur.

STATE OF NORTH CAROLINA v. JOHN C. BOLT, JR.

No. 8510SC1206

(Filed 3 June 1986)

Elections § 15— exceeding contribution limit—venue for prosecution

The proper venue under N.C.G.S. § 163-278.27 of a prosecution for exceeding the statutory limitation on individual contributions to a candidate is the county in which the individual contributor resides.

APPEAL by the State from *Read, Judge.* Judgment entered 26 June 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 11 March 1986.

The State appeals from a judgment of the Superior Court of Wake County, dismissing the criminal summons against the defendant for lack of jurisdiction.

Attorney General Lacy H. Thornburg by Assistant Attorney General James Wallace, Jr. for the State.

Boyce, Mitchell, Burns and Smith, P.A., by G. Eugene Boyce and Susan K. Burkhart for defendant-appellee.

PARKER, Judge.

Defendant is a resident of Wilson County. The District Attorney for the Tenth Judicial District, which includes only Wake County, brought this complaint against defendant, alleging a violation of North Carolina Election Laws, specifically the limitation on individual contributions to any candidate contained in G.S. 163-278.13. General Statute 163-278.27 provides, in relevant part:

> (b) Whenever the Board has knowledge of or has reason to believe there has been a violation of any section of this Article, it *shall* report that fact, together with accompanying details, to the following prosecuting authorities:
>
> (1) In the case of a candidate for nomination or election to the State Senate or State House of Representatives: report to the district attorney of the prosecutorial district in which the candidate for nomination or election resides;
>
> (2) In the case of a candidate for nomination or election to the office of Governor, Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, State Superintendent of Public Instruction, State Attorney General, State Commissioner of Agriculture, State Commissioner of Labor, State Commissioner of Insurance, and all other State elective offices, Justice of the Supreme Court, Judge of the Court of Appeals, judge of a superior court, judge of a district court, and district attorney of the superior court: report to the district attorney of the prosecutorial district in which Wake County is located;
>
> (3) In the case of an individual other than a candidate, including, without limitation, violations by members of political committees, referendum committees or treasurers: *report to the district attorney of the prosecutorial district in which the individual resides*; and
>
> (4) In the case of a person or any group of individuals: report to the district attorney or district attorneys [of] the prosecutorial district or districts in which any of the officers, directors, agents, employees or members of the person or group reside.

(c) Upon receipt of such a report from the Board, *the appropriate district attorney shall prosecute* the individual or persons alleged to have violated a section or sections of this Article. (Emphasis added.)

Defendant resides in the Seventh Judicial District. The Superior Court judge dismissed the criminal action brought in the Tenth Judicial District, ruling that the courts of the Tenth District lacked jurisdiction to hear the case. The State's sole assignment of error raises the issue whether G.S. 163-278.27 is a jurisdictional statute, as the trial court concluded, or merely a concurrent venue statute, as the State contends.

Defendant was accused of contributing in excess of the statutory limit to the Rufus Edmisten for Governor Committee. The contributions were sent to the Committee's address in Raleigh. Our venue statutes, G.S. 15A-131, *et seq.*, provide that "[a]n offense occurs in a county if any act . . . constituting part of the offense occurs within the territorial limits of the county." G.S. 15A-131(e). It is further provided that venue "lies in the county where the charged offense occurred." *Id.*, (c). The State argues that G.S. 163-278.27 must be read in conjunction with the venue statutes, giving the State the power to proceed against a defendant wherever "any . . . act constituting part of the offense occurs . . . ." Under this theory, concurrent venue would lie in Wake and Wilson counties. G.S. 15A-132(a).

In order to properly address this question, we need first to distinguish between jurisdiction and venue. Statewide jurisdiction to hear criminal matters is vested in our trial court of general jurisdiction, the Superior Court. N.C. Const. Art. IV, § 12(3). By statute, the General Assembly has given the District Court division statewide jurisdiction to hear misdemeanors. N.C. Const. Art. IV, § 12(4); G.S. 7A-272. Because this jurisdiction is statewide, jurisdictional issues should arise only to determine: (i) whether North Carolina courts can hear the case, *see State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977); and (ii) which division of the General Court of Justice must first try the matter. *See State v. Karbas*, 28 N.C. App. 372, 221 S.E. 2d 98, *disc. rev. denied*, 289 N.C. 618, 223 S.E. 2d 394 (1976).

On the other hand, when deciding the proper county in which to bring the criminal action, principles of venue, not jurisdiction,

are involved. Improper venue will not deprive the court of jurisdiction. *State v. Cox*, 48 N.C. App. 470, 269 S.E. 2d 297 (1980). A jurisdictional challenge questions the "very power of this State to try [the defendant]." *Batdorf* at 493, 238 S.E. 2d at 502. In this case the question is not whether the State has the power to prosecute one who violates our election laws, but rather where the State must prosecute that person. That question is one of venue. This case is distinguished from *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984), where the Supreme Court ruled that a grand jury in Wake County did not have jurisdiction to issue an indictment for an offense committed in Cumberland County. The grand jury is limited in its jurisdiction to the county in which it sits. *Id.*; *State v. Mitchell*, 202 N.C. 439, 163 S.E. 581 (1932). However, the decision as to the county in which defendant should be tried presents a question of venue because our trial courts have statewide jurisdiction.

Were we to agree with the court below and hold that exclusive jurisdiction in this case lies in Wilson County, a defendant's right to move for a change of venue under G.S. 15A-957 would be effectively destroyed. For example, under that interpretation, because no other court would have jurisdiction to hear the case, a defendant could conceivably be forced to go to trial in his home county despite prejudicial publicity.

In our view, the better reasoned position is that G.S. 163-278.27 is a legislative determination that the crime of violating any section of Article 22A of Chapter 163, when committed by "an individual other than a candidate," is committed where the individual resides. Thus, venue lies solely in that county, subject only to defendant's right to move for a change of venue. The State, in its brief, appears to wish us to substitute the word "may" where the word "shall" appears in the statute. We cannot do this. The statute is clearly mandatory in its language. The State Board of Elections *shall* report a violation of election laws, when committed by an individual other than a candidate, to the district attorney of the judicial district in which the individual resides. That district attorney—the "appropriate" district attorney—*shall* prosecute the individual. The statute does not merely permit, but rather requires this procedure.

Although the court below based its ruling on jurisdiction rather than venue, the correct result was reached and we hold that the action should have been dismissed for improper venue. For the reasons stated herein, the judgment is

Affirmed.

Judges WHICHARD and EAGLES concur.

ROBERT C. DUNN v. SHIRLEY T. HARRIS

No. 8518SC1317

(Filed 3 June 1986)

1. **Malicious Prosecution § 13.2— insufficient evidence of malice and absence of probable cause**

Plaintiff's evidence was insufficient to show that defendant maliciously and without probable cause initiated an earlier action in which she claimed an interest in land purchased by plaintiff on the ground that her signature on the 1973 deed to plaintiff's grantor was forged where it tended to show only that defendant discovered the alleged forgery in 1976; she and her attorney knew that plaintiff was going to buy the land but failed to inform plaintiff of her claim to a one-eighth interest in the land; defendant thought plaintiff might have been a middleman purchasing the land for her ex-husband; and even though defendant knew of other forged deeds, she had not brought actions against the owners of those properties. Defendant had no duty to inform plaintiff of her claim prior to his purchase of the land, and the fact that she instituted an action to obtain her interest in this property and not in the other properties does not show the requisite malice.

2. **Malicious Prosecution § 13— voluntary dismissal without prejudice—no basis for malicious prosecution**

Defendant's taking of a voluntary dismissal without prejudice after she learned her claim was barred by the statute of limitations may not be the basis of a malicious prosecution claim.

APPEAL by defendant from *Friday, Judge.* Judgment entered 10 July 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 April 1986.

In June 1979 Robert Dunn purchased two tracts of land containing 16.548 acres and 6.513 acres respectively from Brown Investment Properties, Inc. Dunn purchased the land, which was

located between Interstate 85 and Interstate 40, in order to move his automobile dealership from a leased facility in downtown Greensboro to the new location. If Dunn had been able to move to the new location he would have collected approximately $232,000 in relocation and rental subsidy bonuses.

On 11 August 1980, Shirley T. Harris brought a declaratory judgment action claiming a 1/8 interest in the 6.513 acre tract of land. She based her claim upon the alleged forgery of her signature to a 26 October 1973 deed which conveyed the property to Brown Investment Properties, Inc. During a deposition of Ms. Harris it was determined that she became aware of the alleged forgery in 1976. Based in part upon this revelation a motion for summary judgment was filed against Ms. Harris. On 13 November 1981, the date the motion was scheduled to be heard, Ms. Harris took a voluntary dismissal without prejudice of her declaratory judgment action. During the year in which there was a possibility that the suit would be refiled, Dunn was unable to get financing to build a building for his new dealership. During the year following the dismissal, Dunn's lease expired and he was forced to buy a smaller facility. When he moved to the smaller facility he lost the rental subsidy and relocation bonuses he had been promised by Ford Motor Company.

On 22 January 1982, Dunn filed this action, a malicious prosecution suit, against Ms. Harris. Following a trial a jury found that Ms. Harris was guilty of malicious prosecution in the institution of the prior declaratory judgment action. The jury further found that Dunn was entitled to $175,000 in compensatory and $75,000 in punitive damages. From a judgment entered on the verdict, defendant appealed.

Rivenbark & Kirkman, by James B. Rivenbark, John W. Kirkman, Jr. and Rodney D. Tigges, for plaintiff appellee.

Allman, Spry, Humphreys & Armentrout, by James W. Armentrout, for defendant appellant.

ARNOLD, Judge.

The issue dispositive of this appeal is whether the trial court erred in denying defendant's motion for a directed verdict at the close of all the evidence. We believe that defendant's motion

should have been allowed. Thus, we reverse the judgment of the trial court.

The question presented by the defendant's motion for a directed verdict is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient to submit the case to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971); *Horne v. Trivette*, 58 N.C. App. 77, 293 S.E. 2d 290, *disc. rev. denied*, 306 N.C. 741, 295 S.E. 2d 759 (1982). "To recover for malicious prosecution the plaintiff must show that defendant initiated the earlier proceeding, that he did so maliciously and without probable cause and that the earlier proceeding terminated in plaintiff's favor." *Stanback v. Stanback*, 297 N.C. 181, 202, 254 S.E. 2d 611, 625 (1979). To recover for malicious prosecution in civil cases plaintiff also must show special damages such as substantial interference with either his person or property. *Id.* at 203, 254 S.E. 2d at 625.

Defendant argues that she was entitled to a directed verdict because *inter alia* plaintiff failed to offer any evidence that she initiated the earlier proceeding maliciously and without probable cause. The malice necessary to support a claim for malicious prosecution is not express or particular malice such as ill will, grudge or a desire for revenge, but is rather general malice which consists of a wrongful act done intentionally, and without excuse or just cause. Byrd, *Malicious Prosecution in North Carolina*, 47 N.C. L. Rev. 285, 302 (1969). *See also, Gaither v. Carpenter*, 143 N.C. 240, 55 S.E. 625 (1906). Malice has also been found when the earlier proceeding was begun primarily for a purpose other than the adjudication of the claim in suit and where the defendant's conduct is a clear abuse of defendant's position of power or an exploitation of the plaintiff's position of weakness. W. Keeton, *Prosser and Keeton on Torts* § 120 (5th Edition 1984).

[1] The only evidence to which plaintiff can point to show that the earlier proceeding was *initiated* maliciously and without probable cause is that the defendant discovered the alleged forgeries in 1976; that she and her attorney knew before plaintiff bought the property that he was going to buy the property but failed to inform him of her claim to a one-eighth (1/8) interest in the property; that she thought he might have been a middleman purchasing the property for her ex-husband, and that even though she

knew of other forged deeds, she had not brought actions against the owners of those properties. We hold that this evidence is insufficient to support a finding that the defendant initiated the earlier proceeding maliciously and without probable cause. The defendant had no duty to inform the plaintiff of her claim prior to his purchase of the property. Furthermore, the fact that she instituted an action to obtain her interest in this property and not the other properties does not show the requisite malice. We find no evidence in the record that would support a finding that the action was instituted without probable cause.

[2] Finally, the defendant's actions in taking the voluntary dismissal without prejudice after she learned her claim was barred by the statute of limitations may have subjected her to liability for damages under a theory of abuse of process. *See, Stanback*, 297 N.C. at 200, 254 S.E. 2d at 624. *See also* Byrd, *supra*. However, these actions may not be used to support the malicious prosecution claim, and an abuse of process claim was not submitted to the jury. Thus, we hold the trial court erred in failing to grant a directed verdict in favor of defendant at the close of all the evidence.

Reversed.

Judges WHICHARD and JOHNSON concur.

ELYSE C. SCHMOYER, GENERAL GUARDIAN AND NATURAL MOTHER OF ROBERT WESLEY HARMON, JR., MINOR CHILD OF ROBERT WESLEY HARMON, SR., DECEASED, PLAINTIFF-EMPLOYEE v. CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, DEFENDANT-EMPLOYER, AND UNITED STATES FIDELITY & GUARANTY INSURANCE COMPANY, DEFENDANT-INSURANCE CARRIER

No. 8510IC1390

(Filed 3 June 1986)

Master and Servant § 62— workers' compensation—employee not on special errand

A church custodian was not on a special errand for his employer, and his injury and death did not arise out of and in the course of his employment, where deceased was killed in a car accident while traveling to his fiancee's home and then to the church to spend the night because snow was predicted and he had to be at the church the next morning to let someone in.

Schmoyer v. Church of Jesus Christ of Latter Day Saints

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award entered 10 September 1985. Heard in the Court of Appeals 8 May 1986.

Robert Wesley Harmon was killed in an automobile accident in Greensboro in the late evening of 5 February 1984. This claim for benefits under the Workers' Compensation Act was brought by plaintiff as the natural guardian of Robert Wesley Harmon, Jr., the only child of Robert W. Harmon.

On 5 February 1984, Robert Harmon was employed as a custodian at the Church of Jesus Christ of Latter Day Saints located on Pinetop Road in Greensboro. Harmon worked for hourly wages, his usual hours of employment being from 8:00 a.m. until 4:00 p.m. One of Harmon's duties was to open the church in the morning. On the day he was killed, Harmon worked at the church until about 5:00 p.m., then went to visit his fiancee, Ms. Cynthia Howle, at her residence about three miles from the church. Harmon left Ms. Howle's residence at about 11:00 p.m., intending to spend the night with his parents who lived in Pleasant Garden, a town located between Climax and Greensboro. After Harmon arrived at his parents' home, he received a telephone call from Ms. Howle who told him that she was distraught and upset. Harmon offered to return to her home and console her, saying that afterwards he would probably go to the church and spend the night. While en route to Ms. Howle's residence, Harmon was involved in the accident which caused his death. Other facts will be discussed as necessary in the body of our opinion.

Following a hearing, Deputy Commissioner Rush denied plaintiff's claim for benefits. Upon appeal, the Full Commission adopted and affirmed Commissioner Rush's opinion, Commissioner Clay dissenting. Plaintiff appealed to this Court.

Nichols, Caffrey, Hill, Evans & Murrelle, by Thomas C. Duncan, for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Clinton Eudy, Jr., Richard D. Ehrhart and George W. Jarecke, for defendant-appellees.

WELLS, Judge.

The essence of plaintiff's first argument is that the Commission erred in concluding and holding that Robert Harmon's injury by accident which caused his death did not arise out of and in the course of his employment. Plaintiff contends (1) that at the time of the accident which resulted in his death, Robert Harmon was on a "special errand" for the benefit of his employer and therefore the accident arose out of and was in the course of his employment or (2) that, at least, Harmon was on a "dual purpose" trip for the benefit of his employer and therefore the accident arose out of and was in the course of his employment. We disagree and affirm.

In order for a covered worker's injury to be compensable, it must be shown that the injury was caused by an accident arising out of the worker's employment and occurring in the course of the employment. N.C. Gen. Stat. § 97-2(6) (1985); *Powers v. Lady's Funeral Home*, 306 N.C. 728, 295 S.E. 2d 473 (1982). Whether the injury arose out of and in the course of the worker's employment is a mixed question of law and fact. *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 293 S.E. 2d 807 (1982); *White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 303 S.E. 2d 547, *disc. rev. denied*, 309 N.C. 325, 307 S.E. 2d 170 (1983). The two requirements are separate and distinct and both must be satisfied in order to render an injury compensable. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980). The term "arising out of" refers to the origin of the injury or the causal connection of the injury to the employment, while the term "in the course of" refers to the time, place and circumstances under which the injury occurred. *Barham, supra; Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977).

As a general rule, injuries occurring while a covered worker is traveling to and from his place of employment do not arise out of and are not in the course of employment and thus are not compensable. *Powers, supra; Barham, supra.* Equally well recognized as the general to and from rule is the "special errand" exception. *Powers, supra.* This exception provides that the injury is in the course of the employment if it occurs while the employee is engaged in a special duty or special errand for his employer. *Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 328 S.E. 2d 282 (1985). Plaintiff contends that this claim falls within the "special errand" rule

because of the following evidence. On the afternoon of Sunday, 5 February 1984, before he left the church, plaintiff engaged in a conversation with Ms. Clara Campbell, a non-supervisory volunteer of the church, who usually went to the church on Tuesday mornings. Ms. Campbell told Harmon that she wanted to come in on Monday morning and that she would be there around 8:00 a.m. It was a part of Harmon's duty to open the church on Monday morning. A snowstorm was predicted for Sunday night. Harmon told Ms. Campbell that he would be at the church to let her in on Monday morning and that he would spend the night at the church if it snowed and the weather was bad. Also, when Harmon was at his parents' home on Sunday night, he told them that he was going to spend the night at the church because snow was predicted and he had to be at the church Monday morning to let someone in. The accident in which Harmon was killed was at a place on the usual route from his parents' home to the church. We cannot agree that this evidence, viewed in the light most favorable to plaintiff, was sufficient to establish that Harmon was on a special errand for his employer when he met his death, but at most shows that he may have exercised his discretion to go to the church in advance of the time he was required to be there. In that way, he accomplished no other purpose but to help ensure his timely arrival at his job. We fail to see how such circumstances differ in any meaningful way from the exercise of the judgment of any employee to depart for his work at an earlier time than usual in order to avoid possible late arrival associated with predicted inclement weather. *Compare Powers, supra; Pollock, supra.* In this case, Harmon's employer would have no more benefited by Harmon's late night endeavor to reach the church in time for work than it would have from Harmon's usual enterprise in getting himself to work on time.

As we have decided that Harmon was not on an errand for his employer when his injury occurred, we need not address plaintiff's contention that Harmon's trip to his fiancee's residence may have had a dual purpose, *i.e.*, as both a personal trip and a special errand.

Our disposition of plaintiff's first argument makes it unnecessary for us to reach plaintiff's only remaining argument relating to the nature of the supervision of plaintiff's work at the church.

For the reasons stated, the opinion of the Full Commission is

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. LUCKIE D. CARTWRIGHT

No. 852SC930

(Filed 3 June 1986)

1. **Criminal Law §§ 10 and 15; Conspiracy § 5— conspiracy and larceny of oil truck—defendant not in Washington County—properly tried in Washington County**

In a prosecution in Washington County for conspiracy to commit larceny, felonious larceny, and felonious possession of stolen goods, the fact that defendant was not in Washington County when the conspiracy was formed and the larceny committed did not deprive Washington County of jurisdiction because judgment on the possession charge was arrested and the issue became moot; conspirators may be indicted and tried either where the conspiracy was formed or where an overt act in furtherance of the conspiracy was committed; the evidence was sufficient to show that defendant procured the commission of the larceny and the distinction that formerly existed between principals and accessories before the fact has been abolished. Moreover, there is no jurisdictional limitation on the admissibility of evidence. N.C.G.S. § 14-5.2.

2. **Criminal Law § 138.37— mitigating factor not found—testified truthfully in another prosecution—error**

The trial court erred in sentencing defendant to more than the presumptive term for conspiracy to commit larceny, felonious larceny, and felonious possession of stolen goods by not finding in mitigation that defendant testified truthfully for the State in another felony prosecution where there was uncontradicted, manifestly credible testimony to that effect by the district attorney of a neighboring prosecutorial district. N.C.G.S. § 15A-1340.4(a)(2)h.

APPEAL by defendant from *Brown, Frank R., Judge.* Judgments entered 7 March 1985 in Superior Court, WASHINGTON County. Heard in the Court of Appeals 4 February 1986.

Defendant was convicted of conspiracy to commit larceny, felonious larceny, and felonious possession of stolen goods. Judgment was entered on the first two convictions but was arrested on the third. The State's evidence pertinent to defendant's appeal

tended to show the following: In December 1981, while at his home in Perquimans County, defendant, Freddie Lee, Darnell Jones and William Thatch discussed stealing a tanker truck loaded with diesel fuel oil from the Alligator Oil Company's facility at Creswell in Washington County. Defendant told them that diesel fuel was selling for a good price and he could sell all he could get. Shortly after dark on the evening of 12 January 1982, pursuant to a telephone call from defendant, Freddie Lee and Darnell Jones went to defendant's house; and while there defendant told them to go along with William Thatch to Alligator Oil Company's place in Creswell and steal a tanker truck that was loaded with about 9,000 gallons of diesel fuel. He said the keys were in the truck. Lee and Jones immediately drove to Creswell and verified that the loaded tanker was on the oil company's lot and that the keys were in the truck. They then drove to Elizabeth City and got Thatch, an experienced truck driver. All three men then went to Creswell, stole the loaded tanker, and took it to defendant's house. When they got there defendant was away but his wife said she knew what to do and telephoned for two other men to come and help unload the tanker. The men got several large, empty drums from one of defendant's outbuildings and began draining oil into them from the tanker. Before all the drums were filled defendant returned home, and when the last drum was filled he told Thatch to drive the tanker truck to Virginia and abandon it. Thatch then drove the vehicle away. Later the defendant paid Lee, Jones and Thatch $1,800 for their part in the theft. Defendant presented no evidence.

Attorney General Thornburg, by Assistant Attorney General Norma S. Harrell, for the State.

Lennie L. Hughes for defendant appellant.

PHILLIPS, Judge.

[1] That the defendant was not in Washington County when the conspiracy was formed and the larceny was committed is the basis for three of the four assignments of error brought forward in the brief. Because of that circumstance defendant argues that Washington County did not have jurisdiction to indict and try him for conspiring to commit larceny and possessing stolen goods; that the evidence does not show that he committed any of the of-

fenses; and that the court erred in receiving testimony as to the various events that occurred in Perquimans County recited above. None of these contentions have merit for several good and fundamental reasons. First, whether Washington County had jurisdiction to try defendant on the possession charge is, of course, moot since judgment for that conviction was arrested. Second, that Washington County, where the planned and conspired crime became a reality, had jurisdiction to try defendant for the conspiracy is plain, even though he was not in that county when any of the crimes charged were committed; for in this state conspirators may be indicted and tried either where the conspiracy was formed or where an overt act in furtherance of the conspiracy was committed. *State v. Goldberg*, 261 N.C. 181, 134 S.E. 2d 334, *cert. denied*, 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964); *State v. Noland*, 204 N.C. 329, 168 S.E. 412 (1933); *State v. Lea*, 203 N.C. 13, 164 S.E. 737, *cert. denied*, 287 U.S. 649, 77 L.Ed. 561, 53 S.Ct. 95 (1932). Third, the larceny conviction was valid because the distinction that formerly existed between principals and accessories before the fact has been abolished, G.S. 14-5.2, and the evidence shows that defendant procured the commission of the larceny. Before G.S. 14-5.2 was enacted his role in the larceny would only have supported an indictment for being an accessory before the fact to larceny; but because of that statute the evidence supports defendant's conviction of the principal charge. *See State v. Gallagher*, 313 N.C. 132, 326 S.E. 2d 873 (1985); *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). Fourth, in trials for crime there is no extra jurisdictional limitation on the admissibility of evidence. The admissibility of words spoken and deeds done by one charged with crime is determined not by the place where the deeds were done and things said, but by the relevancy of the words and deeds to the issues being tried. 1 Brandis N.C. Evidence Sec. 77 (1982). And the evidence in this case plainly shows that the words that defendant said and the things that he did in Perquimans County were as relevant and material to his guilt on both charges as was the stealing of the loaded tanker in Washington County; for they tended to show that defendant conceived, planned, instigated and directed both the conspiracy and the larceny, received and disposed of the plunder, and distributed the proceeds.

[2] The other assignment of error argued—that his sentencing by the court was in violation of the Fair Sentencing Act—is well taken. In sentencing defendant to more than the presumptive term on each conviction the court found in aggravation that he had a prior conviction or convictions punishable by more than 60 days' confinement, found in mitigation that he had a good reputation in the community in which he lives, and found that the aggravating factor outweighed the mitigating factor. The finding and weighing of the factors stated was not error and defendant does not contend that it was. The error was in failing to find an additional factor in mitigation authorized by G.S. 15A-1340.4(a)(2)h—that he aided in the apprehension of another felon or testified truthfully for the State in another felony prosecution. There was uncontradicted, manifestly credible testimony to that effect by the District Attorney of a neighboring prosecutorial district, and under *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983) defendant was entitled to have that fact found and considered by the court before sentence was imposed. Thus, defendant must be resentenced.

No error in the trial; remanded for resentencing.

Judges ARNOLD and EAGLES concur.

SANDRA BROYHILL, NOW KNOWN AS SANDRA B. HARMON v. OTIS L. BROYHILL, JR.

No. 8528DC1101

(Filed 3 June 1986)

Divorce and Alimony § 23— child support—motion in the cause—transfer of venue

The court of original venue may, in its discretion, transfer the venue of an ongoing action for child custody or support to a more appropriate county. N.C.G.S. § 50-13.5(f).

APPEAL by defendant from *Styles, Judge*. Order entered 16 August 1985 in District Court, BUNCOMBE County. Heard in the Court of Appeals 14 March 1986.

This appeal arises from a motion in the cause in an action for child support. The case was first heard in Buncombe County Dis-

trict Court in 1976. Thereafter, in June 1985, plaintiff filed a motion for change of venue from Buncombe County to Mecklenburg County, where plaintiff and her children had moved. In the motion, plaintiff stated that defendant had a four month arrearage in his child support payments and further that the needs of the parties' minor children had substantially increased. Since, however, plaintiff and the minor children had moved to Mecklenburg County, plaintiff moved for a change of venue prior to the hearing on the merits of the motion in the cause. An Order granting the change of venue was entered 16 August 1985, and from that Order, defendant appealed.

Carnegie and Miller, by Leslie H. Miller, for plaintiff-appellee.

Stephen R. Little for defendant-appellant.

BECTON, Judge.

By his sole assignment of error, defendant-appellant contends that the venue of this motion in the cause should not have been transferred to Mecklenburg County. G.S. § 50-13.5(f) in pertinent part provides:

> *Venue.* An action or proceeding in the courts of this State for . . . support of a minor child may be maintained in the county where the child resides . . . or in the county where a parent resides, except as hereinafter provided. If an action . . . for divorce . . . has been previously instituted in this State, *until there has been a final judgment in such case,* any action or proceeding for . . . support of the minor children of the marriage shall be . . . by motion in the cause in such action. (Emphasis added.)

In this case, a final judgment in the divorce action between the parties was entered in 1976 in Buncombe County. A final judgment in the child support action between the parties was also entered in 1976 in Buncombe County. We have previously held that the *only* proper court to entertain an action seeking to modify an earlier award of custody and support is the court of original jurisdiction and venue. *Tate v. Tate,* 9 N.C. App. 681, 177 S.E. 2d 455 (1970).

Plaintiff seeks to distinguish *Tate* by contending that the custodial parent in that case attempted to file an action for support in a different county without first asking the court of original venue for a change of venue. In the present case, plaintiff went before the court of original venue and requested a change of venue *before* making a motion for arrearages and an increase. Plaintiff thus contends that the trial court properly exercised its discretion by transferring the venue of the action to the locale in which the minor children currently reside, and that such a transfer was in the best interests of the minor children.

In cases dealing with custody and support of minor children there is no truly "final" judgment until the children are emancipated. *Kennedy v. Surratt*, 29 N.C. App. 404, 224 S.E. 2d 215 (1976). Accordingly, the court of original venue was thought to retain that venue during the entire period of custody and support. The holding in *Tate* is that a party cannot seek modification of a child support order in a court other than that in which it was entered *where there has been no change of venue by the court. Tate* does not hold, however, and we find no authority which does hold, that the court which entered the order cannot transfer venue to another court for the convenience of witnesses and parties and the best interest of the child. In this age of increased mobility and frequent changes of residence, it is unrealistic to assume that divorced parents will always remain in the county in which their judgment of divorce was entered, or in which an order of custody and support was entered. For the convenience of witnesses and parties and because it may be in the best interests of justice and the parties, we hold that the court of original venue may, in its discretion, transfer the venue of an ongoing action for custody or support to a more appropriate county. Accordingly, the order of the trial court transferring venue in this motion in the cause from Buncombe County to Mecklenburg County is

Affirmed.

Judges WHICHARD and EAGLES concur.

EARL C. JACKSON, JR. AND BEVERLY LYNN JACKSON v. HOLLOWELL CHEVROLET CO., INC., AND BOBBY HOLLOWELL

No. 851SC1324

(Filed 3 June 1986)

1. **Unfair Competition § 1— admission of testimony on damages—no error**

In an action for unfair and deceptive trade practices arising from the sale of a truck, there was no prejudice from the admission of evidence of the cost of replacing four tires and a battery where plaintiffs had not revoked their acceptance of the truck, the measure of damages was the difference in the value of the truck as represented and as equipped, the only evidence of that difference was that the value was decreased by $3,000 to $4,000, and the jury returned a verdict awarding plaintiffs $3,000 in damages.

2. **Unfair Competition § 1— unfair trade practice—sale of truck—expert witness—no personal knowledge—admissible**

The trial court did not err in an action for unfair trade practices arising from the sale of a truck by admitting the testimony of the vice-president of an auto dealership concerning the difference in value of a truck with a 1980 engine and a 1977 engine despite the witness's lack of personal knowledge of the condition of the vehicle where he testified only after listening to testimony about the difference in the engine promised and the engine installed.

3. **Unfair Competition § 1— unfair trade practice—sale of truck—evidence of damages sufficient**

The trial court properly denied defendants' motion for a directed verdict and judgment n.o.v. in an action for unfair trade practices arising from the sale of a truck where testimony that the truck as actually equipped was worth less than the truck as represented was properly admitted.

APPEAL by defendants from *Watts, Judge*. Judgment entered 12 June 1985 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 17 April 1986.

This is a civil action wherein plaintiffs seek damages pursuant to G.S. 75-1.1 and G.S. 75-16 for unfair and deceptive trade practices arising out of the purchase and sale of a truck. Plaintiffs' evidence tends to show the following. On 28 November 1983 plaintiffs purchased from defendant Hollowell Chevrolet a 1981 Chevrolet Blazer four-wheel drive truck. At the time of the purchase defendants warranted the overall good condition of the truck. Before the purchase plaintiffs realized that there might be a problem with the Blazer's engine. Defendant Bobby Hollowell, a representative of Hollowell Chevrolet, agreed that if they found a

problem with the engine he would rebuild it. Several days after the purchase plaintiffs discovered that the engine used an excessive amount of oil and Mr. Hollowell agreed to rebuild the engine.

Plaintiffs asked Mr. Hollowell to install a used 350 cubic inch engine rather than rebuilding the original 305 cubic inch engine and agreed to pay the extra $300 necessary to purchase that engine. After the installation plaintiffs discovered that the engine installed was a 1977 engine driven 130,000 miles rather than the 1980 engine driven 28,000 miles defendants had said was installed. Alvin Arnold, vice president of an automobile dealership, testified that the truck with the 1977 engine was worth no more than $4,500 and that if the truck had been equipped with the 1980 engine it would be worth between $3,000 and $4,000 more.

Defendants' evidence tends to show that the plaintiffs said only that they were interested in getting the best engine available for their truck, that they were not told what year model engine was ultimately installed and that Mr. Hollowell never told the plaintiffs the engine installed in their truck was a 1980 engine with 28,000 miles. Mr. Hollowell testified that before the sale he told the plaintiffs that he was not satisfied with the weak engine in the Blazer. The plaintiffs wanted to buy the truck anyway and the defendant agreed that the plaintiffs should take the truck for seven days on a trial basis and that if they found the engine weak he would rebuild it. The only warranty provided was a 7-day warranty on the engine.

At the close of all the evidence the trial court granted defendants' motion to dismiss plaintiffs' claim for breach of warranty. The jury returned a verdict awarding plaintiffs $3,000 on their claim for unfair and deceptive trade practices. Pursuant to G.S. 75-16 the court trebled plaintiffs' damages and entered judgment in favor of plaintiffs for $9,000. Defendants appealed.

Trimpi, Thompson & Nash, by C. Everett Thompson, for plaintiff appellees.

Russell E. Twiford for defendant appellants.

WEBB, Judge.

[1] Defendants first argue that the trial court erred in allowing plaintiffs to present evidence of the cost of replacing four tires

and the battery on the Blazer. They contend that because plaintiffs did not revoke their acceptance of the truck, the measure of damages was only the difference in value of the truck with a 1980 engine with 28,000 miles and with a 1977 engine with 130,000 miles and that evidence of other expenditures was irrelevant. Assuming for the sake of argument that defendants are correct, we believe they have failed to show any resulting prejudice. The only evidence presented concerning the difference in value of the truck as represented and as actually equipped shows that the value was decreased by between $3,000 and $4,000 by installation of the 1977 engine. The jury returned a verdict awarding plaintiffs $3,000 in damages. It appears from that verdict that the jury did not consider other expenditures.

[2] Defendants next argue that the trial court erred in admitting the testimony of Alvin Arnold, vice president of an automobile dealership, concerning the difference in value of the truck with the 1980 engine and with the 1977 engine because the witness did not have personal knowledge of the condition of the vehicle before and after the engine was installed. We disagree. It is well-established that an expert witness' testimony need not be based upon personal knowledge so long as the basis of his or her opinion is available in the record or available upon demand. *Thompson v. Lenoir Transfer Company*, 72 N.C. App. 348, 324 S.E. 2d 619 (1985). The witness in the present case testified about the value of the truck only after listening to testimony about the difference in the engine promised and the engine actually installed. Therefore, the basis of his opinion is present in the record and his testimony was properly admitted.

[3] Finally, defendants argue that the court erred in denying their motions for directed verdict and for judgment notwithstanding the verdict because plaintiffs presented no competent evidence of their damages. Again we disagree. We have already found that Alvin Arnold's testimony about the value of the truck was properly admitted. He testified that the truck as actually equipped was worth $3,000 to $4,000 less than the truck as represented. This evidence was sufficient to allow the jury to find plaintiffs' damages. The trial court properly denied defendants' motions.

Our decision regarding defendants' assignments of error makes it unnecessary to discuss plaintiffs' cross-assignment of error regarding the dismissal of plaintiffs' claim against defendants for breach of warranty.

Affirmed.

Judges EAGLES and PARKER concur.

R. CURTIS RATCLIFF, INDIVIDUALLY AND ON BEHALF OF OTHER CITIZENS AND RESIDENTS OF BUNCOMBE COUNTY, NORTH CAROLINA v. THE COUNTY OF BUNCOMBE

No. 8628SC37

(Filed 3 June 1986)

1. **Constitutional Law § 4.2— statute prohibiting county commissioner from being county manager—standing to challenge constitutionality**

The trial court properly dismissed plaintiff's complaint challenging the constitutionality of a statute prohibiting the chairman of the Buncombe County Commissioners from simultaneously holding the office of county manager where plaintiff accepted the benefits of the act by being elected to the Buncombe County Board of Commissioners and by being elected chairman of the board under the act.

2. **Appeal and Error § 3— constitutionality of statute—not raised in lower court**

The Court of Appeals would not rule upon the issue of whether the trial court erred by failing to declare a disputed statute unconstitutional where defendant did not seek such relief in its motion for judgment on the pleadings and the trial court did not reach or rule upon the question of the constitutional validity of the statute.

APPEAL by plaintiff from *Lamm, Judge.* Judgment entered 12 December 1985 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 15 May 1986.

In 1983 the North Carolina General Assembly enacted a bill, codified at Chapter 129 of the 1983 Session Laws, entitled "An Act to Provide that Buncombe County Shall Be Governed by a Board of Commissioners Elected Together, and Shall Be Under the County-Manager Plan" (hereinafter the Act). The Act provided for the election of a board of five county commissioners for

four-year terms and for the election of the chairman and vice-chairman of the board by the board members. Section 2 of the Act provided for the establishment of a county manager form of government. Section 2 further provided that "neither the chairman nor any other member of the board of commissioners may simultaneously hold the office of county manager."

Plaintiff, then the chairman of the Buncombe County Board of Commissioners and chief administrative officer for the county, filed an action in federal court challenging the constitutionality of the Act. The federal court abstained from deciding the merits of the case on the ground that there were state law questions to be answered. *See Ratcliff v. County of Buncombe*, 759 F. 2d 1183 (4th Cir. 1985). On 15 October 1985 plaintiff filed the present declaratory judgment action seeking to have the portion of the Act prohibiting dual office-holding declared unconstitutional.

In the meantime, plaintiff was elected to the Buncombe County Board of Commissioners in the 1984 elections provided for in the Act and was elected board chairman by a majority of the board members. He then submitted his application for the position of county manager. The Board, however, refused to consider his application because of the disqualification provision of Section 2 of the Act. Plaintiff, nonetheless, has been serving as interim county manager while the position of county manager remains vacant during this litigation.

Both sides moved for judgment on the pleadings and for summary judgment. Finding that plaintiff lacked standing to challenge the constitutionality of the Act, the court granted defendant's motion for judgment on the pleadings and entered judgment dismissing plaintiff's complaint. Plaintiff appealed.

Robert B. Long, Jr. and Steve Warren, for plaintiff-appellant.

Shuford, Best, Rowe, Brondyke & Orr, by James Gary Rowe, for defendant-appellee.

WELLS, Judge.

[1] The law is well settled that "one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens." *In re Appeal of Martin*, 286 N.C. 66, 209 S.E. 2d 766 (1974),

quoting 16 Am. Jur. 2d, *Constitutional Law* § 135 (1964). Thus, in *Martin*, Mecklenburg County was held to be precluded from challenging the constitutionality of exemptions from taxation after having exercised its taxing powers under the statute. Similarly, in *Ramsey v. Veterans Commission*, 261 N.C. 645, 135 S.E. 2d 659 (1964), an applicant for a scholarship provided by statute was precluded from challenging the constitutionality of eligibility requirements stated by the statute. *See also City of Durham v. Bates*, 273 N.C. 336, 160 S.E. 2d 60 (1968) (landowners could not challenge constitutionality of eminent domain statute when they had accepted part of deposit under statute); *Convent v. Winston-Salem*, 243 N.C. 316, 90 S.E. 2d 879 (1956) (plaintiff, who had obtained special use permit under zoning ordinance, was barred from challenging ordinance and restrictions in permit); *Goforth Properties, Inc. v. Town of Chapel Hill*, 71 N.C. App. 771, 323 S.E. 2d 427 (1984) (plaintiffs, having built under a building permit issued pursuant to an ordinance, were precluded from challenging ordinance).

It is undisputed in the present case that plaintiff has accepted the benefits of the Act by being elected to the Buncombe County Board of Commissioners and by being elected chairman of the Board under the Act. He thus will not be heard to challenge the constitutionality of a statute under which he has benefited. We therefore hold that the court properly dismissed plaintiff's complaint.

[2] Defendant County has attempted to assert a cross-assignment of error, contending that the trial court erred in failing to declare the disputed statute to be constitutional. In its motion for judgment on the pleadings, defendant did not seek such relief, nor did the trial court reach or rule upon the question of the constitutional validity of the statute. Under these circumstances, we will not reach or rule upon this question. *See Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547 (1980) and cases cited and relied upon therein. This assignment is overruled.

The judgment appealed from is

Affirmed.

Judges ARNOLD and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 JUNE 1986

ATTINELLI v. EMPLOYMENT SECURITY COMMISSION OF N.C. No. 8526SC1321	Mecklenburg (85CVS6651)	Affirmed
BLAND v. GARLAND SHIRT COMPANY No. 864SC26	Sampson (85CVS511)	Affirmed
CONRAD INDUSTRIES, INC. v. SONDEREGGER No. 8528SC1357	Buncombe (79CVS1056)	Affirmed
DAUGHETY v. DAUGHETY No. 854DC1361	Onslow (84CVD588)	Affirmed
GATTIS v. GATTIS No. 8515DC1382	Alamance (83CVD1607)	Affirmed
HOGUE v. GAINES No. 8515SC1269	Chatham (84CVS350)	Affirmed
HOPPER v. HOPPER No. 8517DC1314	Rockingham (83CVD1118)	Reversed and Remanded
IN RE AVERY No. 8514DC1216	Durham (83-J-114)	Affirmed
MADDEN v. WESTON No. 8510DC1116	Wake (84CVD2242)	Affirmed in part; reversed in part and remanded to the trial court for entry of judgment not inconsistent with this opinion.
PARKER v. CITY OF HICKORY No. 8525SC1391	Catawba (83CVS1201)	Affirmed
SLIWOSKI v. ARRINGTON No. 8526DC1313	Mecklenburg (84CVD7021) (84CVD7019)	Appeal Dismissed
STATE v. ALBERT No. 8518SC1166	Guilford (83CRS015629)	Affirmed
STATE v. ARMSTRONG No. 8518SC1287	Guilford (85CRS31579)	No Error
STATE v. BAKER No. 8511SC1360	Harnett (84CRS7447)	No Error

STATE v. BALDWIN No. 8616SC12	Robeson (85CRS7505) (85CRS7506)	Vacated and remanded for entry of judgment and resentencing.
STATE v. BALL No. 8624SC25	Madison (85CRS1328)	No Error
STATE v. BROOKS No. 8521SC1379	Forsyth (85CRS2281)	No Error
STATE v. BROWN No. 852SC1383	Beaufort (85CRS1738) (85CRS1741)	No Error
STATE v. CANTRELL No. 8628SC82	Buncombe (82CRS9554)	No Error
STATE v. DANIELS No. 8512SC1381	Cumberland (84CRS26995) (84CRS26996) (84CRS26997)	No Error
STATE v. EDDIE No. 867SC9	Wilson (84CRS8994)	No Error
STATE v. GEORGE No. 8518SC767	Guilford (84CRS89177) (85CRS21339)	Affirmed
STATE v. GOODSON No. 8630SC104	Haywood (85CRS2247)	No Error
STATE v. HEIDMOUS No. 864SC32	Onslow (83CRS7656)	Affirmed
STATE v. McGILL No. 8526SC1393	Mecklenburg (84CRS59927- 84CRS59980)	No Error
STATE v. McLEAN No. 8618SC76	Guilford (85CRS41093)	No Error
STATE v. OLIVER No. 869SC47	Person (84CRS4433)	No Error
STATE v. PHILLIPS No. 8627SC63	Gaston (85CRS5849)	No Error
STATE v. THOMAS No. 8617SC3	Caswell (84CRS1643)	No Error
STATE v. THOMPSON No. 8513SC1311	Bladen (85CRS248) (85CRS249)	No Error

STATE v. WALKER No. 8527SC1348	Gaston (85CRS10892)	No Error
STATE v. WILLIAMS No. 852SC1281	Beaufort (85CRS568)	No Error
STATE v. WILLIAMS No. 858SC1196	Duplin (85CRS813) (85CRS814) (85CRS827)	No Error
STATE v. WILSON No. 8526SC1282	Mecklenburg (85CRS11052)	No Error
WEE ONE'S PARADISE DAY CARE CENTER, INC. v. MARYLAND CASUALTY COMPANY No. 8526SC1184	Mecklenburg (83CVS9829)	Affirmed

JANE GAFFNEY LAWING v. WILLIAM CRAIG LAWING

No. 8526DC993

(Filed 3 June 1986)

1. **Divorce and Alimony § 30— equitable distribution—objectionable evidence—presumptions**

Where evidence of similar import to that objected to came in elsewhere without objection, defendant lost the benefit of his objection; furthermore, defendant failed to show how, if at all, plaintiff's vague testimony affected the court's judgment, especially in light of the presumptions that the court relied only on competent evidence and that all property acquired during the marriage is marital property unless the contrary is shown by clear, cogent and convincing evidence.

2. **Divorce and Alimony § 30— equitable distribution—value of ring**

Where plaintiff valued a ring at $5,000, defendant valued it at $750, and no other evidence of value was introduced, plaintiff's affidavit clearly sufficed to support the trial court's finding that the ring was worth $5,000, and though the court selected the higher of two widely diverging values, it was not required to state its reasons.

3. **Divorce and Alimony § 30— equitable distribution—real estate as marital property—finding supported by evidence**

The trial court's finding that a particular piece of property was marital property was supported by the evidence that the parties stipulated to their ownership as 100% marital property of the parcel in question; defendant testified that he got the money to buy the property from a family business, but he did not specifically identify any particular withdrawals or transactions; defendant treated family businesses interchangeably with his personal finances; and defendant admitted signing a note on the property in question in his own name but did not testify that he signed in a representative capacity.

4. **Divorce and Alimony § 30— equitable distribution—stock as marital property—finding supported by evidence**

The trial court did not err in determining that certain shares of stock were marital property as opposed to being property of a family business, since the stock certificates bore only defendant's name and did not appear to have been issued to him in any representative capacity; other than the oral assertions of ownership of the parties, the only other evidence was from the family business's accountant, who testified orally that the stock was carried on the books of the business; neither records nor books of the corporation, nor tax returns showing dividend income received or intangibles tax paid were ever introduced; and corporate funds, if any, used to purchase the stock constituted compensation to defendant.

5. **Divorce and Alimony § 30— equitable distribution—valuation of stock—improper date**

The trial court in an equitable distribution action erred in valuing stock as of the date of trial instead of valuing it as of the date of separation.

6. **Appeal and Error § 16.1— additional assignment of error after settlement conference—authority of trial court to allow**

The trial court did not err in allowing defendant's addition of an assignment of error after the settlement conference, since the case had not been docketed in the appellate court; the trial court retained jurisdiction; and the assignment added no new evidentiary matter to the record.

7. **Divorce and Alimony § 30— equitable distribution—consideration of tax consequences not required**

The trial court was not required to consider the tax consequences of its order of equitable distribution, since consideration of tax consequences is always proper and may be advisable but is not automatically required.

8. **Divorce and Alimony § 30— equitable distribution—increases to separate property—distinction between active and passive increases**

Increases in value to separate property remain separate property only to the extent that the increases have been passive, as opposed to active appreciation resulting from the contributions of the parties during the marriage.

9. **Divorce and Alimony § 30— equitable distribution—shares in family business—appreciation as separate property—ruling improper**

The trial court erred in ruling that the entire appreciation in value of inherited shares in a family business was separate property, and the court should have made findings as to the value of the shares at the time of the inheritance and as of the date of the separation; it should have determined what proportion of that increase was due to funds, talent or labor which were contributed by the marital community as opposed to passive increases due to interest and rising value of land owned at inheritance; and it should have made a determination as to the efforts of a third person who took half of the inherited shares.

10. **Divorce and Alimony § 30— equitable distribution—certificate of deposit as separate property—clear, cogent and convincing evidence**

There was no merit to plaintiff's contention that defendant failed to produce sufficient clear, cogent and convincing evidence that a certificate of deposit was separate property to overcome the presumption that it was marital where the evidence tended to show that the certificate was titled to defendant alone; defendant testified at trial that the account represented by the certificate was funded solely out of his mother's estate; and plaintiff contended in her affidavit that the certificate was marital but admitted at trial that she did not know where the funds came from.

11. **Divorce and Alimony § 30— equitable distribution—limitation on court's authority to make distributive award**

A court's authority to make distributive awards is limited and a court may not enter a distributive award which will be treated as ordinary income under the Internal Revenue Code.

12. **Divorce and Alimony § 30— cash payments under distributive award—award unaffected by death of parties—payments not alimony**

Periodic payments of cash over 18.3 years pursuant to the court's distributive award were not alimony under the Internal Revenue Code and

were not includable in plaintiff's gross income and taxable to her, since one of the tests to determine whether payments are alimony is whether the payments must be terminable at the death of the recipient, but the judgment in this case was unaffected by the death of either spouse.

13. Divorce and Alimony § 30— distributive award—period limited to six years

N.C.G.S. § 50-20(b)(3) authorizes the court to make distributive awards for periods of not more than six years after the date on which the marriage ceases, except upon a showing by the payor spouse that legal or business impediments or some overriding social policy prevent completion of the distribution within the six-year period, and awards for periods longer than six years, if necessary, should be crafted to assure completion of payment as promptly as possible in order to serve both statutory goals: affording the recipient's share non-recognition treatment under the Internal Revenue Code, and fairly wrapping up the marital affairs as quickly and certainly as possible. Therefore, the trial court erred in entering a distributive award requiring periodic payments of cash over 18.3 years in the absence of a showing of legal or business impediments.

APPEAL by plaintiff and defendant from *Brown (L. Stanley), Judge.* Judgment entered 31 January 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 11 February 1986.

Plaintiff wife and defendant husband were married in 1943 and divorced in July 1984. They had two children, both of whom are now adults. The principal support for the family during the marriage came from various family businesses. These included Lawing Auction Co. ("LAC"), a partnership with defendant and his brother Plato as 50% general partners, and Lawings, Inc. ("LINC"), in which defendant held 48% of the shares, plaintiff 6%, and Plato the remainder. Both parties worked in these businesses; during the 21 years defendant served in the General Assembly, plaintiff assumed most of the responsibility for daily management of the businesses during legislative sessions.

In 1983 plaintiff sued for divorce from bed and board, temporary and permanent alimony, attorney fees, and equitable distribution. The parties stipulated that grounds existed entitling plaintiff to alimony. By consent order in March 1984, the court determined that plaintiff was a dependent spouse and ordered payment of alimony pendente lite and attorney fees, and directed that plaintiff would continue to have possession of the family residence. In July 1984, the parties were granted an absolute divorce based on one year's separation.

The equitable distribution claim came on for hearing in August 1984. The court entered a judgment finding a net value of marital property of $1,142,223. The court determined that an equal distribution of this property would be equitable, and ordered division and distribution accordingly. Both parties appealed. Settlement conference procedures failed and the case was duly filed and docketed here.

Helms, Mullis & Johnston, by W. Donald Carroll, Jr. and Catherine E. Thompson, for plaintiff.

Walker, Palmer & Miller, by James E. Walker and H. Irwin Coffield, III, for defendant.

EAGLES, Judge.

These appeals raise a number of questions. The judgment represents for the most part a fair and sound resolution of the issues, but there are errors which require that the case be remanded.

STANDARD OF REVIEW

We presume that the proceedings in the trial court are correct until shown otherwise. *Phelps v. McCotter*, 252 N.C. 66, 112 S.E. 2d 736 (1960). Where the record is silent on a particular point, we presume that the trial court acted correctly. *Dobbins v. Paul*, 71 N.C. App. 113, 321 S.E. 2d 537 (1984). The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result. G.S. 1A-1, R. Civ. P. 61; *Medford v. Davis*, 62 N.C. App. 308, 302 S.E. 2d 838, *disc. rev. denied*, 309 N.C. 461, 307 S.E. 2d 365 (1983).

The General Assembly has committed the distribution of marital property to the discretion of the trial courts, and the exercise of that discretion will not be disturbed in the absence of clear abuse. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). Accordingly, the trial court's rulings in equitable distribution cases receive great deference and may be upset only if they are so arbitrary that they could not have been the result of a reasoned decision. *Id.* The trial court's findings of fact, on which its exercise of discretion rests, are conclusive if supported by any competent evidence. *Humphries v. City of Jacksonville*, 300 N.C.

186, 265 S.E. 2d 189 (1980). The mere existence of conflicting evidence or discrepancies in evidence will not justify reversal. *Coble v. Richardson Corp.*, 71 N.C. App. 511, 322 S.E. 2d 817 (1984). Finally, formal errors in an equitable distribution judgment do not require reversal, particularly where the record reflects a conscientious effort by the trial judge to deal with complicated and extensive evidence. *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E. 2d 809 (1986). With these general considerations in mind, we turn to the individual assignments of error.

DEFENDANT'S ASSIGNMENTS OF ERROR

I

[1] In his first assignment of error, defendant argues that the court erroneously admitted plaintiff's testimony that "he [defendant] probably intended [business purchases of property] to be investments for he and I because he and I had done more to keep the [family] businesses going." Defendant himself testified later, in response to a question about investments for the family, that any enhancement in value of the family businesses would be for the benefit of the family. Where, as here, evidence of similar import to that objected to comes in elsewhere without objection, the objecting party loses the benefit of its objection. *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983); 1 H. Brandis, N.C. Evidence Section 30 (1982). Further, defendant has not shown how, if at all, plaintiff's vague testimony affected the court's judgment. *Wood-Hopkins Contracting Co. v. N.C. State Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473 (1974). This is especially important in light of the presumptions (1) that the court relied only on competent evidence, *id.*, and (2) that all property acquired during the marriage is marital property, unless the contrary is shown by clear, cogent and convincing evidence. *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E. 2d 33, *cert. denied*, 313 N.C. 508, 329 S.E. 2d 393 (1985). This assignment is overruled.

II

[2] Defendant next assigns error to the court's valuation of a ring. Following the local practice, both sides introduced affidavits listing what they contended was the marital personalty with each item's value. Plaintiff valued the ring, which the court awarded to defendant, at $5,000; defendant valued it at $750. No other evi-

dence regarding the ring was introduced. The court gave it a value of $5,000, which defendant now contends was error.

Under the "any competent evidence" standard, plaintiff's affidavit sufficed to support the trial court's finding as to the ring's value. *Humphries v. City of Jacksonville, supra.*

Defendant argues that since the trial court selected the higher of two widely diverging values, it should have stated its reasons. He cites only *In re Wolfe*, 202 Mont. 454, 659 P. 2d 259 (1983) which is clearly distinguishable. There, where independent professional appraisers, one for each side, valued land at $1.6 and $1.2 million, the trial court erred in adopting without explanation the landowning husband's conclusory valuation of $450,000. This court has held that in certain situations the trial court must indicate its valuation method(s). *Poore v. Poore*, 75 N.C. App. 414, 331 S.E. 2d 266 (professional practice), *disc. rev. denied*, 314 N.C. 543, 335 S.E. 2d 316 (1985); *but see Patton v. Patton*, 78 N.C. App. 247, 337 S.E. 2d 607 (1985) (Hedrick, C.J., dissenting) (valuation of corporation). However, this rule has not been applied to personal effects and household property previously and we decline to do so here.

We note that the finding excepted to is one of some 120 individual findings as to household items including such things as "1 lamp (green): Net FMV as of 6/19/1983 $15.00," "5 cats: . . . $25.00," "1 telescope: . . . $8.95," etc. Values for each item were asserted in long lists as part of each party's affidavits. It appears that in large measure the trial court adopted plaintiff's valuations, resolving any questions of witness credibility aided by extensive oral testimony by both parties. In the absence of evidence that plaintiff's valuation of the ring and her valuations of personalty generally were inherently incredible, defendant cannot now complain to this Court about the trial court's decision to accept plaintiff's valuation as to this one item. We therefore overrule this assignment.

III

Defendant's next question concerns various findings that certain property was marital. Defendant contends that the property in question was acquired through the family businesses, and the court either (1) incorrectly found that it belonged to the marital

economy or (2) awarded specific property to plaintiff that the court elsewhere found was an asset of the businesses, erroneously giving plaintiff a double benefit. We note again the "any competent evidence" standard of review and the dual presumptions that the judgment is correct and that property is marital.

A

In his arguments on this question defendant relies in part on the following finding of fact:

> The Court notes that a number of items of property, particularly real property, which were listed by the parties in their various exhibits, including their original equitable distribution affidavits, as marital property, are not found herein by the Court as either items of marital property or as items of either the plaintiff's or the defendant's separate property. The Court finds that the items so omitted are neither marital nor the separate property of either party. The reason that most of these items are not so included is because, as appears of record, both parties agreed, the plaintiff's agreement coming in the form of a concession during final argument of counsel, that the parcels of real property so omitted are owned by one of the two business entities distributed herein to the defendant.

This finding, argues defendant, leaves ambiguous what property the court treated as marital property and what it valued as part of the assets of the businesses, allowing plaintiff a double recovery.

One of our roles in reviewing findings of fact is to reconcile apparently inconsistent findings and uphold the judgment when practicable. *Davis v. Ludlum*, 255 N.C. 663, 122 S.E. 2d 500 (1961); *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E. 2d 636 (1984). We presume the correctness of the judgment. We can readily reconcile the quoted finding with the court's specific findings regarding marital property: the court in making findings with respect to specific property obviously found that it was not an asset of the businesses; the quoted finding relates only to *other* property, the residue not treated specifically elsewhere in the judgment.

B

The record contains a "Summary of the Parties' Stipulated Positions" signed by plaintiff's attorneys. Defendant did not dispute the assertion made at trial that he had stipulated as outlined in the summary (claiming instead that he stipulated erroneously under pressure of time), and the court relied on the summary in the judgment. The record on appeal contains no objection by defendant to the inclusion of the summary in the record. Accordingly we conclude that the summary of stipulations is what it purports to be. *See Asheville Woodworking Co. v. Southwick*, 119 N.C. 611, 26 S.E. 253 (1896) (appellate court will not disturb trial court's ruling on what records of trial court contain). *Compare Hall v. Lassiter*, 44 N.C. App. 23, 260 S.E. 2d 155 (1979) ("stipulation" not signed by both parties treated as "notice"), *disc. rev. denied*, 299 N.C. 330, 265 S.E. 2d 395 (1980).

A stipulation, once made and of record, is binding on the parties in the absence of fraud or mutual mistake. Therefore, in our review of these assignments of error, we treat the facts stipulated to in the summary as established.

C

[3] Turning to the specific items of property in question, defendant first contends that the court erroneously identified investment property in McCain, North Carolina ("McCain property") as marital property and erred in including it separately in the list of marital property, when it was actually property of LAC. The summary of stipulations indicates that the parties "stipulated to their ownership as 100% marital property of two parcels," including the McCain property. In a separate stipulation, *not* including the McCain property, the parties agreed on the value of other real property but noted that plaintiff contended that this other property was owned by the parties while defendant contended it was owned by LAC. These stipulations together support a finding that the McCain property was owned by the parties and was marital property.

Defendant testified that he got the money for the property from LAC, but he did not specifically identify any particular withdrawals or transaction(s). It appears that defendant treated the family businesses interchangeably with his personal finances

and did not maintain the kind of careful separation he now claims existed. (In fact Plato Lawing testified that he had brought suit to have title to some property transferred from defendant to the businesses.) Defendant admitted signing a note on the McCain property in his own name, but did not testify that he signed in a representative capacity. We conclude that the court's findings that the McCain property was marital property were supported by the record.

Defendant also attempts to argue under this assignment that the court erroneously included the McCain property in the marital estate twice, once standing alone and once as an asset of LAC. Defendant excepted to the finding that the McCain property was marital property, and we have found that finding properly supported. He did not except to the court's valuation of LAC. Review here is confined to consideration of exceptions properly set out in the record. App. R. 10(a); *Midgett v. Midgett*, 5 N.C. App. 74, 168 S.E. 2d 53, *cert. denied*, 275 N.C. 595 (1969). Whether the trial court erred in valuing LAC, and whether included in that value is the McCain property, is not properly before us.

D

[4] Defendant next assigns error to the court's finding that 2,000 shares of North Carolina Federal Savings & Loan and 9,332 shares of Preferred Savings & Loan were marital property, as opposed to being property of LINC. The stock certificates in the record bear only defendant's name, however, and do not appear to have been issued to him in any representative capacity. This was some evidence that they were not property of LINC. *See* G.S. 25-8-308 ("appropriate person"); G.S. 55-17(b)(5) (corporation may hold stock in its own name); *Corporation Comm. v. Harris*, 197 N.C. 202, 148 S.E. 174 (1929) (presumption of ownership from registration). Other than the oral assertions of ownership of the parties, the only other evidence was from LINC's accountant, who testified orally that the stock was carried on the books of LINC. Neither records nor books of the corporation, nor tax returns showing dividend income received or intangibles tax paid, were ever introduced. The record contains no current balance sheet of LINC. There is evidence from which the court could properly find that this stock belonged to defendant, not to LINC, and was presumed to be marital property.

Defendant argues that the stock was paid for out of corporate funds and was therefore corporate property, regardless of title. We are aware that we have adopted a "source of funds" rule in other equitable distribution cases. *McLeod v. McLeod*, 74 N.C. App. 144, 327 S.E. 2d 910, *cert. denied*, 314 N.C. 331, 333 S.E. 2d 488 (1985); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E. 2d 260, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). Here there is no dispute that, to the extent that monies were diverted from LINC to the ownership of the parties, they were marital property. The "source of funds" theory does not really apply, since defendant simply disputes legal ownership. Defendant dominated LINC, and shifted funds at will among family businesses and his marriage with frequency and with little accountability. He admitted that the family businesses provided for the family's personal needs. In the absence of compelling evidence to the contrary, the court implicitly found, and we agree that the corporate funds, if any, used to purchase the stock constituted compensation to defendant. In *McLeod v. McLeod, supra*, we rejected a contention that only the salary of the head of a closely held corporation was subject to equitable distribution, because of the corporate head's substantial ability to control how and in what form payments were made. The same logic applies here.

Defendant again argues that the court's findings allow the value of the stock to be considered twice, once individually and once as an asset of LINC. Since he failed to except to the court's valuation of LINC, the question is not before us. According to the summary of stipulations, the agreed value of LINC was as found by the court, and the stock was treated separately elsewhere in the stipulations and the judgment. We find no error in the findings. These assignments are overruled.

E

Defendant next attacks the court's finding that a 1978 Lincoln automobile was marital property. The automobile was titled in defendant's name, without indication of any representative capacity. Defendant nevertheless contends that it was property of LINC, since it was paid for by that entity. For the reasons discussed concerning the stock, we overrule this assignment. Additionally, we note that under our motor vehicle laws the registra-

tion established prima facie defendant's ownership. G.S. 20-71.1; G.S. 20-4.01(26).

F

Defendant next assigns error to the determination that a promissory note was 100% marital property. The note was identified in the parties' affidavits. Plaintiff contended it was 100% marital property; defendant, consistent with his present contention that it was property of LINC, contended it was only 54% marital. The note itself was not introduced nor were its terms mentioned in the testimony, though defendant does not deny its existence. There was evidence of the note's existence and sufficient evidence to support the court's finding. *Humphries v. City of Jacksonville, supra.*

IV

The next assignment of error brought forward by defendant concerns the valuation of several properties. The stipulated date of valuation, in accordance with the statute, was the date of separation. G.S. 50-21(b). The proper value for equitable distribution purposes is the "net value," the market value less the amount of any encumbrances serving to offset or reduce market value. G.S. 50-20(c); *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984).

A

Defendant argues that the court erred in valuing the McCain property at the offering price less the amount of a note secured by the property. He points to his own testimony regarding the diminished prospects for sale of the property, contending that the court erred in not taking this into account in valuation, since the offering price merely represented an initial negotiating position. It is true that mere offers to purchase or sell are not generally competent as evidence of value. *See N.C. State Highway Comm. v. Helderman*, 285 N.C. 645, 207 S.E. 2d 720 (1974). However, where the offer constitutes an admission against interest, operating against the landowner's or offeror's contended value, the rule has been relaxed. *Id.* (allowing in evidence of low offers to impeach landowner's contended high value in condemnation action); *see generally* Annot. 25 A.L.R. 4th 983 Section 6 (1983) (col-

lecting cases). In these circumstances, absent objection by defendant and given the self-serving and unsupported nature of his testimony, we conclude that the court did not err in using the offering price as evidence of the value of the McCain property. In addition, we note that the summary of stipulations contains an agreed "equity" (sale price minus debt) in the property in excess of what the court found as its value. We therefore overrule this assignment.

B

Defendant next contends that the court erred in valuing the promissory note discussed earlier. He argues that the court erred in finding that the note had a value of $36,000 when that amount was receivable over a ten-year period. Defendant contends that his notation "total value to be received over 10-year period" meant that the $36,000 value must be discounted for future payment, yielding a lower net current fair market value. Plaintiff responds that her affidavit, stating "current fair market value: present value at 8% over 9 years $36,900" indicates that the discount had already been figured in. This was the sum of the evidence on this issue. There was some substantial evidence in plaintiff's affidavit to support the finding. Her statement as to the current market value was express and definite; defendant's must be implied. The assignment is therefore overruled.

C

[5] Defendant next argues that the court erroneously valued stock of Preferred Savings & Loan as of the date of trial, as opposed to the correct valuation date as the date of separation. G.S. 50-21(b). It appears that the court did select the wrong valuation date for these shares of stock: the summary of stipulations clearly indicates that the value as of the date of separation was as contended by defendant, a difference of about $20,000. This was error and must be corrected on remand.

D

Finally, defendant contends that the court improperly valued the 1978 Lincoln automobile discussed earlier. It is not clear whether the parties stipulated to its value. Plaintiff's affidavit assigned the automobile a value of $5,000. Defendant testified that it was worth about twenty-five hundred dollars. He testified

that plaintiff had left the car for him to drive because she thought it was "falling apart," but also that he still drove it. No other evidence of the Lincoln's value came before the court. While evidence for either side was not strong, the question was simply one of credibility. The trial court did not err in adopting plaintiff's contended value.

E

Other than the error in valuation of the Preferred Savings & Loan stock, we conclude that no error has been shown by defendant with respect to the valuation of the marital property.

V

Defendant next argues that the court erred in finding that neither party presented evidence of tax consequences of equitable distribution and that the court could therefore make no findings with respect thereto. This argument is based on an assignment of error added after the settlement conference.

A

[6] We first address plaintiff's argument that it was error to allow defendant to add the assignment in the first place. Since the record on appeal had already been settled, she argues, she was denied due process by the addition of the new assignment without a chance to include in the record evidence relevant to the new legal issue.

The general rule is that an appeal takes the case out of the jurisdiction of the trial court; the trial court does retain jurisdiction for the purpose of settling the case on appeal. *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 234 S.E. 2d 748 (1977). Until the case has been docketed in the appellate court, the appellate court does not formally acquire jurisdiction over the record. *See Avery v. Pritchard*, 93 N.C. 266 (1885). As plaintiff conceded at argument, the trial court had jurisdiction over the record when the amendment was made. The assignment added no new evidentiary matter to the record, and was properly allowed to be included.

B

[7] Defendant argues that G.S. 50-20(c)(11) required that the court consider the tax consequences of its order of equitable dis-

tribution, and that the court's admitted failure to make findings relative to tax consequences constituted reversible error. An equal division is presumptively equitable. *White v. White, supra.* Therefore, the factors listed in G.S. 50-20(c) need not be expressly considered in ordering an equal division, *Loeb v. Loeb, supra,* but are particular matters to be proved and considered where it is contended that an unequal division is more equitable. *White v. White, supra; see Andrews v. Andrews, supra* (comparing factors with universal factors in G.S. 50-16.5). The court's finding was not erroneous for failure to comply with G.S. 50-20(c).

C

Defendant relies on *Clark v. Clark,* 301 N.C. 123, 271 S.E. 2d 58 (1980) for his contention that for failure to consider tax consequences the judgment is unrealistic and unjust. In *Clark,* the Supreme Court considered a dependent spouse's contention that an alimony award was erroneous because the trial court failed to consider the fact that alimony would be taxable income. The court held that tax consequences of awards would be a proper consideration and should not be ignored. 301 N.C. at 132-33, 271 S.E. 2d at 66. It nevertheless stopped short of holding that in every case tax consequences must be considered, and in fact affirmed the disputed portion of the order, which contained no findings regarding tax consequences. *Clark* was decided under G.S. 50-16.5, which requires consideration of universal factors which might be construed to include taxes, *e.g.* earnings or estates.

We have reviewed the authority of other jurisdictions cited by defendant. They appear generally to adopt the position taken in *Clark,* namely that consideration of tax consequences is always proper and may be advisable, but is not automatically required. Annot., 51 A.L.R. 3d 461 Section 3 (1973); *see also Bennett v. Bennett,* 15 Mass. App. 999, 448 N.E. 2d 77 (1983) (no request for tax findings, no consideration in judgment; affirmed). *Clark* does not require that we find error.

D

We now consider whether the evidence before the court presented the tax questions sufficiently to trigger the court's fact finding role. The trial court must consider all the competent evidence relevant to the issues before it. *Hodges v. Hodges,* 257

N.C. 774, 127 S.E. 2d 567 (1962). When competent evidence pointing to the existence of a fact is before the court, it is error to find that no evidence on that issue was introduced. *Long v. Long*, 71 N.C. App. 405, 322 S.E. 2d 427 (1984).

In this voluminous record the only evidence regarding possible tax consequences (and the only evidence relied on by defendant), came following examination of his accountant about the net value of business property. The accountant testified:

> Q [By plaintiff's attorney Carroll]: The book values that you've given, they include the real estate at its cost basis, do they not?
>
> A: Yes, sir.
>
> Q: And some of that property was purchased going back into the 50's and 60's; is that correct?
>
> A: In the 60's. Now, if I may respond to that. One of the problems that you have with a corporation, it's easy to say that the appraised value of this is such and such an amount, and the difference between the two is a gain, but it's really not because in order to get that gain, you have to—the corporation has to pay the tax in order to accomplish that gain. So sometimes if you look here and you see a tax appraisal, that's what you may have if everything was liquidated out in cash and there were no taxes to pay. But once you put a tax effect on here, that's why we don't do things at appraised values. But in order to get that, somebody's going to have to pay the tax, and it's going to be substantially less than this assuming that these are the net realizable value.
>
> MR. CARROLL: I have no further questions. [Witness excused.]

This evidence at most simply stated a general principle of tax law, that tax must be paid on gain realized at sale. It did not suggest any specific consequences of any possible award, unless it is assumed that the corporation would have to be sold to satisfy the equitable distribution award. To the extent that the evidence addressed the value of the family businesses, it had little if any probative value. Since defendant failed to except to the findings regarding the value of the businesses, any error was harmless.

From a strictly technical viewpoint, the court's finding that no evidence as to tax consequences was introduced may have been erroneous. As a practical matter, the court undoubtedly found that no helpful evidence was before it. We agree, and hold that the error, if any, was not prejudicial.

VI

With the exception of the one incorrect valuation date for the Preferred Savings & Loan stock, we have found no prejudicial error as to each of defendant's assignments of error and overrule them. In addition we find no error as to plaintiff's assignment regarding the amendment to the record.

PLAINTIFF'S APPEAL

I

When LINC was originally formed, defendant, Plato and their father each owned 32 shares (32%) of its stock, and plaintiff owned 4 shares (4%). Defendant and Plato each inherited 16 shares from their father at his death in 1963. At that time LINC had a value of about $13,300, or $133 per share. At the valuation date here, LINC was worth $1,000,000, or $10,000 per share. Plaintiff claimed that the appreciation or increase in value of the 16 shares inherited by defendant from his father was marital property. The court found that she had no interest in the appreciation in value, and plaintiff assigns error. Neither side questions the finding that the shares themselves were separate property, nor is there any real dispute that plaintiff made substantial contributions to the corporation, both directly and indirectly. The only question is the "separate property" designation of the appreciation of the inherited shares.

A

[8] This Court has recently addressed questions of this type in applying G.S. 50-20(b)(2), under which inherited property is separate property and increases in value of separate property are also separate property. In each case we have held that increases in value remained separate property only to the extent that the increases were passive, as opposed to active appreciation resulting from the contributions of the parties during the marriage. *McLeod v. McLeod, supra; Phillips v. Phillips, supra; Wade v.*

Wade, supra. This rationale should apply here. We are aware that our opinion in the first of these cases, *Wade*, was certified 25 February 1985, and that the hearing in the instant case took place in August 1984, judgment being filed 31 January 1985 and notice of appeal being given 8 February 1985. Decisions are generally presumed to apply retroactively to other pending appeals, absent compelling justification to the contrary. *State v. Rivens*, 299 N.C. 385, 261 S.E. 2d 867 (1980); *State v. Funderburk*, 56 N.C. App. 119, 286 S.E. 2d 884 (1982). Accordingly, we hold that the *Wade-Phillips-McLeod* rule applies here.

B

Plaintiff urges that we apply *McLeod* and *Phillips* to the *entire* appreciation in value. She relies on her evidence that she and defendant ran the corporation, defendant's statements that Plato did not have a real share in business decisions, and defendant's dominance in handling business finances. She contends that this total control by the parties means the entire appreciation should have been designated marital property. Plato testified however that he had an equal share in running the business, and defendant's later statements agree with Plato. On this record the court could properly find that some part of the appreciation in value was due to the efforts of Plato Lawing. For the purposes of evaluating the contributions to the marital economy for equitable distribution, *see Hinton v. Hinton*, 70 N.C. App. 665, 321 S.E. 2d 161 (1984), we see no difference between "passive" increases in separate property (interest, inflation) and "active" increases brought about by the labor of third parties for whom neither spouse has responsibility. The court therefore correctly rejected plaintiff's contention that she was entitled to marital treatment of the entire increase in value of the inherited stock.

C

Nevertheless it would be contrary to the spirit of the Equitable Distribution Act and our decisions in *McLeod* and *Phillips* to hold that simply because a third party worked with plaintiff and defendant in a closely-held corporation, all increase in value automatically is exempted from treatment as marital property. Although the owner of separate shares was treated as the sole owner in *Phillips*, the presence of some minimal (2%) third party involvement did not preclude treatment of corporate appreciation

during the marriage as marital property. Other states have generally recognized "active" appreciation of fractional interests in corporations as marital property, even though the underlying shareholder interest was separate property. *See Hoffmann v. Hoffmann*, 676 S.W. 2d 817 (Mo. 1984) (29.5% interest was separate, but increase of value during marriage would be marital to extent claimant could prove value of separate owner's services to corporation; proof failed, however); *Nolan v. Nolan*, 107 A.D. 2d 190, 486 N.Y.S. 2d 415 (1985) (spouse quit job to manage separate securities full time; some portion of increase in value marital property; remanded for findings).

D

Here the entire appreciation in value of the inherited shares was clearly identified for the trial court. The portion of the appreciation attributable to the active efforts of the parties was property "acquired" during the marriage. *McLeod; Phillips; Wade*. It therefore was presumably marital in nature. *Loeb*. The only evidence regarding the appreciation was that sketchy evidence discussed above: that evidence did not rebut the presumption of marital property, but only plaintiff's claim to the entire appreciation.

E

[9] We therefore hold that the court erred in ruling that the *entire* appreciation in value of these separate shares was separate property. We remand for a determination of the proportion of the appreciation that may properly be classified as marital property. *McLeod v. McLeod, supra*. The court should make findings as to the value of the shares at the time of the inheritance and as of the date of valuation. It then should determine what proportion of that increase was due to funds, talent or labor that were contributed by the marital community, *id.*, as opposed to passive increases due to interest and rising land value of land owned at inheritance, and the efforts of Plato. We recognize that we cannot require mathematical precision in making this determination. *See Poore v. Poore, supra* (valuing goodwill of business). Nevertheless, the trial court must make a reasoned valuation, identifying to the extent possible the factors it considered. *Id.*

II

[10] Plaintiff's second assignment concerns a certificate of deposit valued at $78,000 which the court found was separate property of defendant. Plaintiff contends that defendant failed to produce sufficient "clear, cogent, and convincing" evidence that the certificate was separate to overcome the presumption that it was marital. *Loeb v. Loeb, supra.* Plaintiff conceded in oral argument that this question turns solely on the sufficiency of the evidence. There is no dispute in the record that this property was acquired during the marriage, so the *Loeb* presumption does apply.

A

What constitutes "clear, cogent and convincing" evidence is a difficult question. *In re Webb*, 70 N.C. App. 345, 320 S.E. 2d 306 (1984) (Becton, J., dissenting), *aff'd*, 313 N.C. 322, 327 S.E. 2d 879 (1985). Once substantial evidence is before the finder to support a finding of fact, whether that evidence reaches the level necessary to support a finding under the appropriate standard is a weighing function resting essentially with the finder of fact. *In re Caldwell*, 75 N.C. App. 299, 330 S.E. 2d 513 (1985). We traditionally have hesitated to disturb the fact finder's decision that the evidence is clear, cogent, and convincing.

Moreover, it is well established that the finder of fact is free to believe or disbelieve the testimony of witnesses in whole or in part, and even to believe that a witness testified truthfully as to one particular and untruthfully as to another. *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977).

B

The court found that the certificate was separate property. The record does not reflect what standard of evidence the court applied. Plaintiff does not argue that the finding was erroneous because it was made under the wrong evidentiary standard, but only that the evidence itself did not meet the *Loeb* clear, cogent and convincing standard. Under the "silent record" rule, we presume that the court applied the proper evidentiary standard. *Dobbins v. Paul, supra*; App. R. 10(a). *Loeb* was decided 2 January 1985, and the judgment in this case was signed and filed on 31

January 1985, four weeks later. We presume that the trial court was aware of, and applied, the law as set forth in *Loeb*.

C

Defendant bore the burden of proving that the certificate was his separate property. *Loeb*. The certificate appears to have been titled to defendant alone. In his affidavit filed before trial defendant proposed that this certificate be divided equally, but the summary of stipulations reflects that he contended that it was separate property. Defendant testified at trial that the account represented by the certificate was funded solely out of his mother's estate. Plaintiff contended in her affidavit that the certificate was marital, but admitted at trial that she did not know where the funds came from. She admitted that defendant's mother's heirs maintained a separate account for income from her estate. There was equivocal evidence from defendant regarding his intention and knowledge at the time he first proposed that the certificate be divided equally. From this evidence, we conclude that the trial court could and did correctly find that this certificate was separate property of defendant. The trial court apparently accepted defendant's specific trial testimony on this issue, disregarding the equivocal evidence presented elsewhere and giving the specific evidence the necessary weight. This was within its power, and we will not disturb its finding. *McManus v. McManus*, 76 N.C. App. 588, 334 S.E. 2d 270 (1985).

III

Plaintiff's final assignment of error involves the distributive award ordered by the court. The court valued the marital property and determined that 50% of that value was $571,000. The court awarded property worth approximately $816,000 to defendant and $326,000 to plaintiff. The court ordered defendant to pay half the difference, $245,000, as a "distributive award," by paying $25,000 immediately and the remainder in installments of $1,000 per month, plus interest at 8% per annum on the balance, over the next 220 months, or 18.3 years. Plaintiff's principal argument is that this distributive award is contrary to the statutory definition and authorization, and that it inequitably makes her dependent on defendant over an inordinately lengthy period.

A

The trial court had authority to make a distributive award under G.S. 50-20(e):

> In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

The statute clearly recognizes that the court may make the distributive award payable over an extended period. Since G.S. 50-20(e) does not limit the duration of the time period for payment, nothing else appearing, the structure and timing of payment of the award would rest with the discretion of the trial judge. *See Andrews v. Andrews, supra.*

[11] There are, however, other relevant statutory provisions. According to G.S. 50-20(b)(3), " 'Distributive award' means payments that are payable either in a lump sum or over a period of time in fixed amounts, *but shall not include payments that are treated as ordinary income to the recipient under the Internal Revenue Code.*" (Emphasis added.) The emphasized language suggests, and plaintiff contends, that a North Carolina court may only make distributive awards payable over periods that will not subject the distributive payments to treatment as ordinary income under the United States Internal Revenue Code ("the Code" or "I.R.C."). We note that in enacting the equitable distribution statute, the General Assembly intended to avoid taxable events which would chill the use of equitable distribution. *See* Comment, Equitable Distribution—The Tax Effects of North Carolina's Equitable Distribution Statute, 18 Wake Forest L. Rev. 555, 565 (1982). We therefore hold that a court's authority to make distributive awards is limited and that a court may not enter a distributive award that will be treated as ordinary income under the Internal Revenue Code.

B

[12] We look to the Code to determine whether the 18.3 year period for payment of the award makes its installments taxable as ordinary income to plaintiff, the recipient. Under the tax law as it existed in 1984, periodic payments of cash over 18.3 years under a decree of divorce would constitute alimony, and would be includable in plaintiff's gross income under former I.R.C. Section 71.

The applicable law was substantially revised effective for judgments and other instruments executed after 31 December 1984. 98 Stat. 798, Pub. Law 98-369, Section 422(e)(1) (1984). The new tax provisions for alimony and property transfers reflect a legislative intent to reduce the number of taxable events incident to divorce. House Ways & Means Comm., Deficit Reduction Act of 1984, H. Rep. No. 98-432, Pt. II, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News: Legislative History 697, 1134-37. To qualify as alimony under the new I.R.C. Section 71, payments must meet certain tests. One test designed to *prevent* the deduction of payments as alimony when the payments are "in effect transfers of property unrelated to the support needs of the recipient," H. Rep. No. 98-432, *supra* at 1138, is that to be treated as alimony the payments must be terminable at death of the recipient. I.R.C. Section 71(b)(1)(D). The present judgment is not so limited: its direction is absolute and unaffected by the death of either spouse. Accordingly, the periodic payments are not alimony under the Code and are not includable in plaintiff's gross income and taxable to her under I.R.C. Section 71. (There is no conflict with North Carolina law on this issue, as our statute expressly follows the Code. G.S. 105-141.2.)

C

The periodic payments are not alimony; it appears instead that they constitute a transfer incident to divorce governed by new I.R.C. Section 1041, enacted by 98 Stat. 793-94, Pub. Law 98-369, Section 421 (1984). I.R.C. Section 1041 was intended to have broad application to interspousal transfers of all types of property, including cash, in order to provide uniform federal tax treatment despite conflicting state property laws. H. Rep. No. 98-432, *supra* at 1135. Section 1041 provides that no gain or loss shall be recognized for transfers to "a former spouse, but only if

the transfer is incident to the divorce." I.R.C. Section 1041(a)(2). If no gain or loss is recognized on a transfer, the payments to the recipient are not treated as ordinary income. *See Badgett v. United States*, 175 F. Supp. 120 (W.D. Ky. 1959) (theory of non-recognition discussed); G.S. 105-145(d1) (transfers incident to divorce treated as under Code).

Since equitable distribution only occurs following divorce, G.S. 50-21(a); *Lofton v. Lofton*, 71 N.C. App. 635, 322 S.E. 2d 654 (1984), the transferee spouse will always be a "former spouse," and I.R.C. Section 1041(a)(2) applies. "For purposes of subsection (a)(2), a transfer of property is incident to the divorce if such transfer—(1) occurs within 1 year after the date on which the marriage ceases, or (2) is related to the cessation of the marriage." I.R.C. Section 1041(c). Since performance of the long-term payment provisions of this judgment will occur more than one year after the date on which the marriage ceases, we must consider whether the transfer "is related to the cessation of the marriage." Our research discloses no statutory definition and no previous judicial interpretation of the language "related to the cessation of the marriage." The Internal Revenue Service regulations provide:

> Q-7 When is a transfer of property "related to the cessation of the marriage"?
>
> A-7 A transfer of property is treated as related to the cessation of the marriage if the transfer is pursuant to a divorce or separation instrument, as defined in section 71(b)(2), and the transfer occurs *not more than 6 years after the date on which the marriage ceases.* A divorce or separation instrument includes a modification or amendment to such decree or instrument. Any transfer not pursuant to a divorce or separation instrument and any transfer occurring more than 6 years after the cessation of the marriage is presumed to be not related to the cessation of the marriage. This presumption may be rebutted only by showing that the transfer was made to effect the division of property owned by the former spouses at the time of the cessation of the marriage. For example, the presumption may be rebutted by showing that (a) the transfer was not made within the one- and six-year periods described above because of factors which hampered an

> earlier transfer of the property, such as legal or business impediments to transfer or disputes concerning the value of the property owned at the time of the cessation of the marriage, and (b) the transfer is effected promptly after the impediment to transfer is removed.

26 C.F.R. Section 1.1041-1T (1985) (emphasis added). The parties dispute the effect of this regulation, plaintiff contending that we should adopt the six-year limit and defendant contending that it merely constitutes a presumptive guideline which may be extended in the sole discretion of the court.

D

We consider these federal statutes and regulations for guidance in interpreting G.S. 50-20. For purposes of interpreting North Carolina statutes, federal practice, even decisions interpreting identical language, does not control this Court. *Bulova Watch Co., Inc. v. Brand Distributors, Inc.*, 285 N.C. 467, 206 S.E. 2d 141 (1974). While federal practice is not controlling, the preferable policy in matters of taxation is for state and federal statutes to be interpreted and applied consistently, particularly where no common law issues are involved. *See Stone v. Lynch*, 68 N.C. App. 441, 315 S.E. 2d 350 (1984), *aff'd*, 312 N.C. 739, 325 S.E. 2d 230 (1985). Our legislature has recognized this policy by providing at numerous places in our tax statutes that the State shall follow federal practice. *Id.* The legislature has recognized not only federal tax statutes but also federal tax regulations as providing guidance in interpreting our law. *See* G.S. 105-144.1(g); G.S. 105-145(e). The very language of G.S. 50-20(b)(3) constitutes a legislative admission of the importance of federal tax treatment in administering the statute. Accordingly we find the I.R.S. regulation persuasive in defining the interpretation of "related to the cessation of the marriage."

We note in addition that G.S. 50-20(b)(3) speaks of payments "treated" as income under the Code. It does not, as the General Assembly has enacted elsewhere, speak of amounts "includible . . . under the internal revenue *laws* of the United States." G.S. 105-141(a)(20)c (emphasis added). Nor does it specifically mention the "provisions of the Code," *compare* G.S. 105-141(b)(9), (10), or specific authorizations of acts of Congress. *Compare* G.S. 105-141(b)(15). We note that the IRS regulation used the same

word, "treated." To "treat" means "to handle, manage, or otherwise deal with," Webster's Third New International Dictionary 2434 (1966), suggesting a more broad concept of federal tax considerations than simple adherence to the letter of federal tax statutes. *See Gomillion v. Lightfoot*, 364 U.S. 339, 5 L.Ed. 2d 110, 81 S.Ct. 125 (1960) ("discriminatory treatment").

E

One policy underlying the Equitable Distribution Act is to wind up the marriage and distribute the marital property fairly with as much certainty and finality as possible. This policy is implicit in recent decisions of this court. *See Little v. Little*, 74 N.C. App. 12, 327 S.E. 2d 283 (1985) (court must rule as to all marital property); *Wade v. Wade, supra* (error to fail to identify property).

Decisions of other states under similar distribution statutes also reflect a policy favoring certainty and finality. *See Anspach v. Anspach*, 557 S.W. 2d 3 (Mo. App. 1977) (if all property evidenced in record not dealt with in judgment, judgment is interlocutory and appeal dismissed); *In re Tammen*, 63 Cal. App. 3d 927, 134 Cal. Rptr. 161 (1977) (error to award ten-year note in view of uncertain value of security at maturity and duty imposed on holder to protect security); *Hellwig v. Hellwig*, 100 Ill. App. 3d 452, 426 N.E. 2d 1087 (1981) (judgment mandating payment without specifying time to pay error).

In *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 393 A. 2d 583 (1978), the trial court awarded each party 50% of the stock of a corporation. The Appellate Division reversed, outlining its policy thus:

> It seems almost doctrinal that the elimination of the source of strife and friction is to be sought by the judge in devising the scheme of distribution, and the financial affairs of the parties should be separated as far as possible. If the parties cannot get along as husband and wife, it is not likely they will get along as business partners. [Citations.]
>
> . . . There is no restriction on the court with regard to ordering distribution in kind of the eligible assets or awarding a monetary equivalent thereof. But, nonetheless, the judge should consider the former relationship of the parties

> and the fact that post-divorce peace is more conducive to the welfare of the parties. [Citation.]

162 N.J. Super. at 443, 393 A. 2d at 586-87. The court there held that under the circumstances an equal stock split, although within the authority of the court, constituted an abuse of discretion and remanded for redetermination. *But see Hutchins v. Hutchins*, 135 Vt. 350, 376 A. 2d 744 (1977) (50% split not abuse of discretion where other assets unavailable and husband received option to buy out wife). While the *Borodinsky* decision is not directly on point, the policy underlying it is persuasive, since the present judgment creates an ongoing financial relationship between plaintiff and defendant which will last almost two decades beyond divorce.

F

[13] Based on the foregoing discussion, we interpret the language of G.S. 50-20(b)(3) as authorizing the court to make distributive awards for periods of "not more than six years after the date on which the marriage ceases," except upon a showing by the *payor* spouse that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period. *See Ruhnke v. Ruhnke*, 218 Neb. 355, 355 N.W. 2d 339 (1984) (award over 15 years proper where husband assumed farm debts and no other money available except upon sale of farm). Awards for periods longer than six years, if necessary, should be crafted to assure completion of payment as promptly as possible. This will serve both statutory goals: affording the recipient's share non-recognition treatment under the Code, and fairly wrapping up the marital affairs as quickly and certainly as possible.

No showing of legal or business impediments to an earlier distribution was made by defendant. We therefore hold that the payment schedule of the distributive award was erroneous *as a matter of law* and must be vacated.

DISPOSITION

Careful review of the record leads us to conclude that the trial court made a diligent and commendable effort to fairly distribute the marital property. The following errors nevertheless require further attention.

(1) Valuation of Preferred Savings & Loan stock;

(2) Designation and valuation of the interest in the appreciation of 16% inherited interest of LINC; and

(3) Duration of payment of the distributive award.

Accordingly, the case is remanded for proceedings not inconsistent with this opinion. The trial court may rely on the original record, except to the extent that further hearing may be necessary. *Wade v. Wade, supra.*

Reversed in part and remanded.

Judges ARNOLD and PHILLIPS concur.

JOHN E. KEITH v. CHARLES H. DAY AND ACE TOWN & COUNTRY HARDWARE STORE, INC.

No. 8510SC548

(Filed 3 June 1986)

1. **Contracts § 7— agreement not to compete in hardware business—enforceability**

An agreement not to compete could be enforced by plaintiff against defendant where the agreement was in writing and signed by defendant, a retired, experienced businessman; the agreement was supported by valuable consideration on its face with plaintiff and his partner having agreed fully to disclose their knowledge of the hardware business to defendant in exchange for the covenant not to compete; the covenant was incidental to and in support of their agreement to enter into the hardware business together; and the agreement not to compete for two years in the greater Raleigh area was reasonable in time and territory.

2. **Contracts § 7— contract not to compete with business—assignability**

A covenant not to compete with a business is assignable.

3. **Contracts §§ 7, 29.2— breach of covenant not to compete—lost profits—damages not speculative**

In an action for breach of contract based on an alleged breach of a covenant not to compete, plaintiff could properly recover his lost profits as a result of the breach, and his calculation of those damages was not speculative.

4. Quasi Contracts and Restitution § 1.1— express contract—no basis for quantum meruit claim

The trial court erred in denying defendant's motion for directed verdict on plaintiff's quantum meruit claim where the subject matter or basis of plaintiff's quantum meruit claim was the services plaintiff performed for defendant in helping establish his hardware store, but there was an express contract between the parties, which plaintiff alleged defendant had breached, covering the same subject matter.

APPEAL by defendants from *Lee, Judge.* Judgment filed 15 October 1984 in Superior Court, WAKE County. Heard in the Court of Appeals 19 November 1985.

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

Kimzey, Smith, McMillan & Roten by James M. Kimzey for plaintiff appellee.

COZORT, Judge.

This case has been before us once before: *Keith v. Day*, 60 N.C. App. 559, 299 S.E. 2d 296 (1983).

Defendant Day appeals from a jury verdict awarding plaintiff $85,782 in damages for Day's breach of a covenant not to compete in the hardware business. Both defendants appeal from plaintiff's recovery of $252,120 on the theory of *quantum meruit* for plaintiff having assisted Day in establishing the corporate defendant. We affirm on the covenant not to compete issue, reverse on the *quantum meruit* issue, and remand for entry of judgment consistent with this opinion.

Plaintiff John E. Keith and his business partner, Howard Jung, are officers and principal shareholders in Ace Hardware and Home Center, Inc., which operates two Ace hardware stores in the Raleigh area. In late 1978 defendant Charles H. Day, a retired executive of Miller Brewing Company and a resident of Wisconsin, approached Keith and Jung about the possibility of opening a third Ace hardware store in the Raleigh area. Day had the capital to invest in such a venture but no experience in the hardware business. Keith and Jung had insufficient capital at that time to establish a third store but had the knowledge, experience, and know-how to establish the new store.

On advice of their attorney, Keith and Jung would not discuss preincorporation matters until a letter agreement had been drafted and signed by Keith, Jung, and Day. That document, dated 7 December 1978, was signed by Keith, Jung, and Day, and by its terms, is a "mutual statement of intent and agreement to obtain and operate an Ace Hardware franchise in the Raleigh, North Carolina area." The agreement further provided, in pertinent part, the following:

> *Negotiation.* We intend to negotiate in good faith with a view to reaching final agreement on matters related to the successful operation of an Ace Hardware franchise. While we are confident that we can work out any obstacles which stand in the way of final agreements, in the event that we are unable to do so, we agree to share the legal expenses attributable to the effort. Additionally, in that the experience and know-how of hardware merchandizing [*sic*] will be contributed to the business association primarily by Howard and John, which fundamental know-how will be fully disclosed to Charles, Charles agrees that, in the unlikely event that we cannot reach mutually satisfactory agreements, he will not attempt to own or operate, in any form, any type of retail hardware operation in the greater Raleigh area (using the telephone book as the greater Raleigh index) for at least two years from the point at which any negotiations discontinue, as will be evidenced by our mutual statements that they have discontinued.

After Day signed the agreement, Keith showed Day a site in north Raleigh which Keith considered a good location for the new store. That site was selected.

Prior to the 7 December 1978 agreement, Keith told Day that he expected to be compensated for his services as a consultant. Day wrote Keith and suggested that in lieu of a cash outlay by Keith that his consulting services be used in a joint effort to make the operation a success for both of them.

During 1979, while Day was still residing in Wisconsin, Keith performed services related to obtaining the land and initial construction of the site. Day wanted to buy the land and build the building which he would then lease to the corporation which would be formed to operate the store. Keith did not want to be

financially involved in the real estate or in the ownership of the building to be constructed. Keith assisted in the real estate and construction projects because he wanted to be an owner and shareholder in the store. Keith told Day that gaining a percentage share in the new business was the compensation he wanted, and Day agreed that was to be Keith's compensation.

At trial, Keith testified that, in expectation of becoming an owner and shareholder, he continued to work on Day's behalf while Day was in Wisconsin. Keith's efforts included meeting with developers, bankers, engineers, the contractor, city government officials, property owners, salesmen, and Ace Hardware officials. Keith testified that he worked 35 to 50 hours per week for almost all of 1979 on the new hardware store project, in addition to working full time as president and chief operating officer of his own hardware company.

Negotiations for determining the shares of stock to be owned by Keith, Jung, and Day had begun in late 1978 and continued through 1979 and 1980. The parties tentatively agreed that Day was to own 50% of the stock with Keith and Jung owning 25% each. Day was to loan Keith and Jung the funds to purchase their shares. While no definite agreement had been worked out, Day assured Keith and Jung that the matter would be resolved when he moved to North Carolina.

In early 1980, Day moved to Raleigh. He set up his office directly in one of Keith's and Jung's stores in free office space. Day and employees for the new store were provided with access to books and accounts of Keith's business and were trained in the procedures which Keith and Jung used to run the hardware stores.

In early 1980 Ace Town & Country Hardware Store (hereinafter "Ace Town & Country Hardware") was incorporated with Day as 100% shareholder. Keith was made a director of the corporation and remained so until he resigned from the corporation on 6 February 1981. Jung was made a director of the corporation, but after a disagreement with Day, he resigned from the corporation on 18 July 1980.

On 8 October 1980 Day and Keith signed a letter which provided that Keith would acquire 50% ownership in Ace Town &

Country Hardware. In substance the 8 October 1980 agreement provided that Day was to sell one thousand shares of Ace Town & Country Hardware stock to Keith at $15.00 per share. The transfer of the shares was to take place between 8 October 1980 and 15 January 1981 at Day's option. Day was to loan $45,000 to Keith to purchase the shares and in return Keith was to loan $30,000 to the new corporation. The agreement set forth the terms of Day's loan to Keith and Keith's loan to Ace Town & Country Hardware, and provided that the corporate by-laws would be changed to give Day and Keith equal votes on the Board. No stock was ever transferred, however, from Day to Keith.

On 9 August 1981 Day informed Keith and Jung in writing that he was merging Ace Town & Country Hardware with Falls American Hardware. Joe Johnson, owner of Falls American Hardware, became co-owner and general manager of the merged corporation with Day as president and principal stockholder.

Keith obtained an assignment of Jung's rights on the 7 December 1978 agreement not to compete and filed suit against Day and Ace Town & Country Hardware on 30 October 1981. In the first count of the two count amended complaint Keith alleged that defendants breached the 7 December 1978 agreement not to compete and that defendants breached the 8 October 1980 agreement to sell him 50% of the Ace Town & Country Hardware stock by Day refusing to loan plaintiff the money to purchase the stock, causing plaintiff $500,000 in damages. In the second count, plaintiff alleged that

> [i]n the alternative to the breach of contract damage to which the Plaintiff is entitled, the Plaintiff is entitled to be compensated for his services rendered on the basis of *quantum meruit* to the Defendants as well as the unjust enrichment to the Defendants for the services rendered to the Defendants in training and importing knowledge and know-how of the hardware business to the Defendants.

Defendants answered denying any liability to the plaintiff though defendants admitted the validity of the 8 October 1980 agreement. Defendant Day counterclaimed alleging that it was plaintiff who had breached the 8 October 1980 agreement by failing to perform his obligations under the agreement. Defendant Day also counterclaimed for compensation on a *quantum meruit* basis for

helping plaintiff run his business successfully and for imparting business knowledge to the plaintiff.

This matter came on for trial before a jury on 17 September 1984.

At trial plaintiff's and defendants' versions of the facts concerning the 8 October 1980 agreement differed. Plaintiff presented evidence which tended to show the following:

T. Michael McLarry, an attorney, drafted a note in accordance with the 8 October 1980 agreement after clarification of certain issues through several meetings with Day. Though Day continued to promise Keith that he would sell him the stock with the stock itself as the only security for the note and though the 8 October 1980 agreement specified that the stock was to be delivered by 15 January 1981, Day transferred no stock when a promissory note signed by Keith was presented to him on 15 January 1981. Day told Keith that he had wadded up the note and thrown it in the fireplace. Other notes were drafted but were never signed by Keith because Day told McLarry it was useless to deliver the notes to Day. Day introduced new demands on 18 January 1981. He refused to sell the stock even on his own terms, even after Keith had obtained a release of rights on the covenant not to compete from Jung to allay Day's fears of being sued by Jung. Keith told Jung he planned to purchase 50% of the stock in Day's store and then resell it to the company owned by Keith and Jung.

Keith testified that Day would not sell half the shares because he wanted to sell 100% of the business. Keith and Jung discussed buying the entire 100% of the stock from Day but were unable to meet his price. Since Day was attempting to sell 100% of the business at that time, Keith gave him a letter claiming 50% interest in the hardware store.

Defendants' evidence surrounding the 8 October 1980 agreement showed the following:

Day never intended to be the sole owner of the hardware store. Attorney McLarry never drafted any documents in accordance with the 8 October 1980 agreement. Keith never told Day that he was willing to borrow funds to purchase the stock pursuant to the 8 October 1980 agreement and never presented Day

with a signed note in accordance with the agreement. McLarry did draft a note for Keith's signature but the note contained many terms contradictory to the 8 October 1980 agreement, one of which was that Keith's liability to repay the note was conditioned upon his being able to do so from profits to be made by the hardware store. Day made it clear to Keith, in writing, that he was not willing to provide Keith with such no-risk financing to purchase stock in the new company.

By January of 1981 Day felt that dealings had reached an end between Keith and him because of Keith's unwillingness to borrow the money pursuant to the 8 October 1980 agreement. Day wrote Keith a letter stating, in part, the following:

> I am ready, willing and able to transfer these [1,000] shares as per the terms of [the 8 October 1980 agreement] and did instruct Mike McLarry to prepare the notes that would be involved. You have told me, however, you could not sign such a note to me unless it specifically stated that the principal repayment would be contingent upon Ace Town & Country paying the principal on its proposed note to you. Although I fully realize it was, and still would be, hoped this is the way things would work out, there is no way, John, I can make this one of the terms of the note. Such a contingency would destroy any 50-50 relationship leaving me responsible for all of the stockholder debt and only allowing me 50% of any gains.
>
> Currently Ace Town & Country is in a serious financial bind because our planned additional bank loan has not been processed and it will not be processed until we resolve some means of transfering [*sic*] these shares.
>
> If we don't find a satisfactory way out of problem within the next few days, I will be forced to find some other means of financing the business.

Day offered to sell Keith and Jung all of the business, but they were unable to buy it. In October 1981 Day merged Town & Country Hardware with Falls American Hardware, having informed Keith in August 1981 of the upcoming merger.

At trial the following issues were submitted to and answered by the jury:

1. Did the defendant Day breach the contract of December 7, 1978, by entering the hardware business in the greater Raleigh area?

ANSWER: Yes

2. If so, what amount, if any, is the plaintiff Keith entitled to recover for the breach of that contract?

ANSWER: $85,782

3. Did the defendant Day breach the October 8, 1980, agreement by refusing to sell the stock to the plaintiff in accordance with the agreement?

ANSWER: No

4. If so, what amount, if any is the plaintiff Keith entitled to recover for the breach of the contract?

ANSWER: ____

5. Is the plaintiff Keith entitled to recover from the defendants on the basis of *quantum meruit*?

ANSWER: Yes

6. If so, what amount, if any, is the plaintiff entitled to recover for *quantum meruit*?

ANSWER: $252,120

7. Did the plaintiff breach the contract of October 8, 1980, by refusing to purchase the stock in accordance with the agreement?

ANSWER: No

8. If so, what amount, if any, is the defendant Day entitled to recover for the breach of that contract.

ANSWER: ____

The trial court instructed the jury to answer issue number five (*quantum meruit* issue) regardless of their answer to issue number three (concerning defendant Day's alleged breach of the 8 October 1980 agreement).

On 15 October 1984 the trial court entered judgment for the plaintiff on the verdict and against defendant Day in the amount

of $85,782, with interest, on the covenant not-to-compete claim and against both defendants in the amount of $252,120, with interest, on the *quantum meruit* claim. Defendants appealed.

While defendants have set forth thirty-eight assignments of error with some seven hundred and seventeen exceptions in the record on appeal, they argue in their brief only seventeen assignments of error.

[1] First, we address defendant Day's contention that the trial court erred in not dismissing plaintiff's claim for damages for wrongful competition based on the 7 December 1978 covenant not to compete.

Defendant Day contends that plaintiff had no enforceable agreement not to compete, and even if plaintiff had an enforceable agreement, plaintiff's evidence was insufficient to go to the jury on that claim. We disagree.

The reasonableness of a restrictive covenant is a question of law for the court to decide. The reasonableness of the restrictive covenant depends upon the circumstances of each case. *Jewel Box Stores Corp. v. Morrow*, 272 N.C. 659, 158 S.E. 2d 840 (1968). A covenant which prohibits a person from engaging in a similar business will be upheld if:

1. It is founded on valuable consideration;
2. It is necessary to protect the legitimate interest of the one who is to benefit from the covenant;
3. It is reasonable in respect to time and territory; and
4. It does not interfere with the public interest.

Bicycle Transit Authority, Inc. v. Bell, 314 N.C. 219, 333 S.E. 2d 299 (1985); *Jewel Box Stores Corp. v. Morrow, supra; Beam v. Rutledge*, 217 N.C. 670, 9 S.E. 2d 476 (1940); *Seaboard Industries, Inc. v. Blair*, 10 N.C. App. 323, 178 S.E. 2d 781 (1971). Additionally, the covenant not to compete must be in writing and signed by the one who agrees not to compete. G.S. 75-4.

We recognize the distinction between covenants not to compete in connection with the sale of a business and covenants not to compete in connection with a contract of employment. The latter are more closely scrutinized than the former. *See Seaboard*

Industries, Inc. v. Blair, supra; Jewel Box Stores Corp. v. Morrow, supra. The restrictive covenant in this case, however, does not fit neatly into either category. Rather, the restrictive covenant in this case is more closely akin to the type found in *Beam v. Rutledge, supra,* where there was a stipulation in a partnership agreement between two doctors that upon dissolution of the partnership the junior partner would not practice the profession in the same town or within one hundred miles thereof for five years. There the court noted that "a professional man who is the product of . . . [a] college education is supposed to have in his training an asset which should enable him adequately to guard his own interest, especially when dealing with an associate on equal terms." 217 N.C. at 674, 9 S.E. 2d at 478. It is in that light we judge the reasonableness of the restrictive covenant between the professional businessmen in this case.

We find the restrictive covenant to be reasonable as a matter of law. The 7 December 1978 agreement was in writing and signed by Day, a retired, experienced businessman. The covenant not to compete was supported by valuable consideration on the face of the agreement, with Keith and Jung having agreed to fully disclose their knowledge of the hardware business to Day in exchange for the covenant not to compete. Additionally, the covenant was incidental to and in support of their agreement to enter into the hardware business together. The courts ordinarily will not inquire into the adequacy of the consideration, unless the contract is a fraud upon the restrained party, for it is up to the parties themselves to determine the adequacy of the consideration to the restraint imposed. It is sufficient that the covenant not to compete shows on its face a legal and valuable consideration. *Jewel Box Stores Corp. v. Morrow, supra,* at 666, 158 S.E. 2d at 845. The covenant was necessary to protect the legitimate interests of Keith and Jung who did not want to fully disclose their knowledge of the hardware business and the particular inner workings and business practices of their two Ace hardware franchises to someone who, with this newly acquired knowledge, could go out and open an Ace hardware store franchise without them, in competition with them. The agreement was certainly reasonable in both time and territory. Its restriction upon Day not to own or operate a retail hardware store for two years in the greater Raleigh area, if and when negotiations discontinued, was rea-

sonable and necessary to protect plaintiff's interest. Further, it fits well within the scope of agreements previously upheld by our courts. *See Harwell Enterprises v. Heim*, 276 N.C. 475, 173 S.E. 2d 316 (1970); and *Jewel Box Stores Corp. v. Morrow, supra.* Nor can we say that the covenant not to compete in this case interferes with the public interest.

We hold the covenant not to compete is reasonable as a matter of law, and we reject defendant Day's contention that plaintiff presented insufficient evidence to go to the jury on that claim. Plaintiff produced a valid written and signed covenant not to compete and presented evidence from which a jury could find a breach of that agreement by defendant Day. As such the trial court did not err in refusing to dismiss plaintiff's claim for breach of the covenant not to compete.

[2] Next, we consider and reject defendant Day's assignment of error that Jung's interest in the covenant not to compete is not assignable to plaintiff Keith. A covenant not to compete with a business is assignable. *Anders v. Gardner*, 151 N.C. 604, 66 S.E. 665 (1910).

[3] We next consider defendant Day's argument that the trial court erred in admitting inadmissible and speculative evidence of the plaintiff's alleged damages for breach of the covenant not to compete.

While defendant sets forth some forty-six exceptions in support of this assignment of error, he does not specifically refer to a particular piece of evidence which he views as speculative and therefore inadmissible. Rather, he argues that "[i]t appears that Plaintiff, violating the general principle of law on the subject, used the gain to the Defendant corporation rather than the loss to the Plaintiff as the measure of damages." We do not find that plaintiff sought to recover the profits defendant Day obtained as a result of the breach, and we intimate no opinion as to whether the gain to the defendant is a proper measure of damages for the breach of a covenant not to compete. As we read the record, plaintiff sought to recover his lost profits as a result of the breach, and his calculation of those damages was not speculative.

Lost profits are recoverable in a breach of contract action

> "when it is made to appear (1) that it is reasonably certain that such profits would have been realized except for the breach of the contract, (2) that such profits can be ascertained and measured with reasonable certainty, and (3) that such profits may be reasonably supposed to have been within the contemplation of the parties, when the contract was made, as the probable result of the breach." *Perkins v. Langdon*, 237 N.C. 159, 171, 74 S.E. 2d 634, 644 (1953).

Gouger & Veno, Inc. v. Diamondhead Corp., 29 N.C. App. 366, 368, 224 S.E. 2d 278, 279-80 (1976). We also recognize that

> breach of non-competition agreements of the type with which we are here concerned necessarily involves damages which are difficult to calculate with absolute precision. [Citation omitted.] The indefiniteness consequent upon this difficulty does not, however, by itself preclude relief. . . .
>
> * * * *
>
> "What the law does require in cases of this character is that the evidence shall with a fair degree of probability establish a basis for the assessment of damages."
>
> . . . [To require otherwise] would encourage the violation of contracts with impunity, the breaching party resting secure in the knowledge that the injured party would be unable to prove damages with the nice precision which appellant would require.

Aiken Industries, Inc. v. Estate of Wilson, 477 Pa. 34, 41-42, 383 A. 2d 808, 812, *cert. denied*, 439 U.S. 877, 58 L.Ed. 2d 191, 99 S.Ct. 216 (1978), *quoting Massachusetts Bonding & Ins. Co. v. Johnstone & Harden, Inc.*, 343 Pa. 270, 278-80, 22 A. 2d 709, 714 (1941).

Defendant Day does not argue that lost profits were not within the contemplation of the parties. Rather, he argues that plaintiff's evidence of damages was too speculative. We find, however, that plaintiff's evidence establishes with reasonable certainty (1) that such lost profits would have been realized except for the breach, and (2) their amount. Plaintiff presented evidence of a three-mile primary and five-mile secondary competition area between defendant Day's store and plaintiff's Raleigh store. There was evidence that Ace Hardware Corporation would not let

any of its franchises locate within close proximity of each other. Plaintiff estimated that 10% of the sales of defendant Day's store would reasonably have been the sales for his store if defendant Day's store had not been in competition with plaintiff's Raleigh store. This percentage was based on the percentage of Day's sales which could reasonably be ascribed to the primary overlap area where defendant Day's store and plaintiff's store were in competition. Then plaintiff multiplied the ten percent of the sales by his own profit margin, not Day's. This assignment of error is overruled.

Defendant Day argues that the "trial court erred in admitting evidence of alleged wrongful competition more than two years after dealings between the plaintiff and the defendant came to an end, which was irrelevant and prejudicial." While in support of this assignment of error defendant Day also lists forty-six exceptions in his brief, he points to no specific piece of evidence which he contends was erroneously admitted. We have reviewed the exceptions noted and find no prejudicial error in the admission of evidence as it relates to damages for breach of the covenant not to compete. The covenant not to compete provided that defendant Day would not compete with plaintiff in the hardware business for two years from the date negotiations discontinued. With respect to damages, the trial court correctly instructed the jury that if it found plaintiff had sustained lost profits, then he would be entitled to recover those profits which were lost within a two-year period after they found the negotiations were finally discontinued, which was no earlier than January 1981 and no later than 9 August 1981. This instruction cured any error which may have occurred by the admission of evidence of lost profits more than two years after negotiations discontinued. This assignment of error is overruled.

[4] We next consider defendant Day's assignment of error that the trial court erred in denying defendant Day's motion for directed verdict on plaintiff's *quantum meruit* claim on the ground that there was an express contract on the same subject matter. We agree that the trial court erred on this issue.

The subject matter or basis of plaintiff's *quantum meruit* claim was the services plaintiff performed for defendant Day in helping establish Ace Town & Country Hardware. That is, plain-

tiff sought compensation for these services based upon an *implied* contract. The *express* contract of 8 October 1980, which plaintiff alleged defendant Day had breached, covered this same subject matter. At trial the evidence established that plaintiff agreed to perform these services in return for the right to become a shareholder in Ace Town & Country Hardware. The method by which plaintiff was to become a shareholder was set out in the 8 October 1980 agreement. Defendant Day did not deny the existence of the 8 October 1980 express contract. Rather, he admitted its validity but denied breaching it. Despite the fact that the validity of the express contract was admitted, the jury was allowed to decide whether the plaintiff was entitled to recover in *quantum meruit*, in addition to deciding whether defendant Day breached the 8 October 1980 agreement. This was error. As stated in *Vetco Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713-14, 124 S.E. 2d 905, 908 (1962):

> It is a well established principle that an express contract precludes an implied contract with reference to the same matter. *Supply Co. v. Clark*, 247 N.C. 762, 102 S.E. 2d 257; *Jenkins v. Duckworth & Shelton, Inc.*, 242 N.C. 758, 89 S.E. 2d 471; *Crowell v. Air Lines*, 240 N.C. 20, 81 S.E. 2d 178; *McLean v. Keith*, 236 N.C. 59, 72 S.E. 2d 44; *Manufacturing Co. v. Andrews*, 165 N.C. 285, 81 S.E. 418, Ann. Cas. 1916A 763; *Lawrence v. Hester*, 93 N.C. 79; *Klebe v. United States*, 263 U.S. 188, 68 L.Ed. 244; 12 Am. Jur., Contracts, Section 7, page 505; 17 C.J.S., Contracts, Section 5, page 321, *et seq.*
>
> It is stated in 12 Am. Jur., Contracts, Section 7, page 505: "There cannot be an express and an implied contract for the same thing existing at the same time. It is only when parties do not expressly agree that the law interposes and raises a promise. No agreement can be implied where there is an express one existing," citing, among other cases, *Manufacturing Co. v. Andrews, supra*, and *McLean v. Keith, supra*. It is further stated in a footnote that, "Perhaps it is more precise to state that where the parties have made a contract for themselves, covering the whole subject matter, no promise is implied by law.

The valid express contract precluded recovery in *quantum meruit* based on the same subject matter. It was error for the trial court not to dismiss plaintiff's *quantum meruit* claim.

Plaintiff argues, however, that it was not error to submit the issue of *quantum meruit* to the jury for he reasons "[s]ince it found that neither party breached that 'contract,' the jury might very well have concluded, on the testimony given, that there was no enforceable contract." Plaintiff also argues that there was "evidence presented from which it might be reasonably concluded that the express contract was abandoned . . . ." *See Campbell v. Blount*, 24 N.C. App. 368, 210 S.E. 2d 513 (1975). The jury, however, was not asked to decide whether the 8 October 1980 contract was valid or had been abandoned. The issue submitted to the jury assumed the validity of the contract and asked the jury to decide whether defendant Day had breached the 8 October 1980 contract, which the jury found he had not. Plaintiff has taken no exception to this finding nor has he appealed. We are bound by the jury's finding on this issue.

Additionally, plaintiff argues that the express contract and the *quantum meruit* claim are not on the same subject matter. Plaintiff's pleadings and the evidence make this argument untenable. In count one of his complaint plaintiff pled breach of the 8 October 1980 contract, and in count two plaintiff reincorporated by reference the essential allegation of count one and then alleged he was entitled to be compensated for his services on the basis of *quantum meruit, "[i]n the alternative* to the breach of the contract damages to which the Plaintiff is entitled . . . ." [Emphasis added.] Plaintiff was entitled to plead, in the alternative, for recovery in *quantum meruit. See Environmental Landscape Design Specialist v. Shields*, 75 N.C. App. 304, 330 S.E. 2d 627 (1985). There is no need to plead *quantum meruit* in the alternative, however, when the *quantum meruit* claim is not based on the same subject matter as the express contract claim. Plaintiff's evidence at trial showed that all the work he did for Day's benefit was in expectation of becoming a shareholder. It was error for the trial court to fail to dismiss plaintiff's *quantum meruit* claim when the parties had agreed in the pleadings and the evidence showed that an express contract existed on the same subject matter.

Ace Town & Country Hardware contends the trial court also erred in failing to dismiss the corporate defendant from the case. We agree. While the corporation may have benefited from plaintiff's services, it was not obligated to pay for them since these services were performed pursuant to an express contract with defendant Day only. *See Vetco Concrete Co. v. Troy Lumber Co., supra.*

Having responded to those assignments of error which resolve the case, we find it unnecessary to discuss the remaining assignments of error brought forward by defendants.

In summary, we affirm the award of damages for breach of the 7 December 1978 covenant not to compete; we reverse that part of the judgment awarding damages in *quantum meruit* against defendants Day and Ace Town & Country Hardware; we remand to the trial court for entry of judgment consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. JOHN RALPH THOMAS

No. 8518SC1128

(Filed 3 June 1986)

1. **Criminal Law § 75.1— incriminating statements—no coercion**

The trial court properly denied defendant's motion to suppress incriminating statements made by him to SBI agents inside their private office where the agents approached defendant at the baggage claim area of an airport and requested to see his ticket and driver's license; these items were returned and defendant was told that the agents were conducting an investigation and they would appreciate his cooperation; the agents asked defendant to accompany them down the concourse to their office so they could explain further what they were trying to do; defendant acquiesced without comment; and the agents at no time used any force or coercion.

2. **Searches and Seizures § 8— warrantless arrest—probable cause—search of luggage lawful**

There was no merit to defendant's contention that SBI agents lacked probable cause to arrest him and thus could not lawfully search his luggage

where the agents enumerated behavior of defendant which they contended was characteristic of persons trafficking in narcotics; in response to the agents' questions, defendant told them that he might have something on him which he shouldn't have; and defendant asked the agents if they wanted him to show it to them.

3. Searches and Seizures § 8— warrantless arrest—warrantless search of luggage improper

SBI agents could not lawfully search defendant's suitcase without a warrant as a search incident to a lawful arrest, since the suitcase was locked, extremely large and cumbersome; the unnamed defendant was in the private office of two SBI agents, one of whom was armed; two additional law enforcement officers were outside the small private office; and the suitcase was thus effectively reduced to the agents' exclusive control.

APPEAL by defendant from 26 June 1985 order of *Davis, Judge*, and 12 June 1985 judgment of *Beaty, Judge*, entered in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 February 1986.

On 12 June 1985 defendant pled guilty to possession of marijuana, a schedule VI controlled substance (N.C. Gen. Stat. 90-94), with the intent to sell and deliver. N.C. Gen. Stat. 90-95(a)(1). Pursuant to N.C. Gen. Stat. 15A-979(b), which provides that the denial of a motion to suppress evidence may be reviewed upon an appeal from a judgment entered upon a plea of guilty, defendant appeals the denial of his motion to suppress statements he made and evidence seized from his person.

Attorney General Thornburg, by Assistant Attorney General Thomas D. Zweigart, for the State.

Cofer and Mitchell, by William L. Cofer, for defendant appellant.

WHICHARD, Judge.

For reasons set forth below, we hold that the court properly denied the motion to suppress defendant's incriminating statements, but erred in denying his motion to suppress the physical evidence agents obtained when they searched his luggage without a warrant. Accordingly, the order denying defendant's motion to suppress is affirmed in part and reversed in part, and the judgment entered upon defendant's plea of guilty is vacated.

I.

Terry Turbeville and Steven G. Porter, narcotics agents for the North Carolina Bureau of Investigation (S.B.I.), were the only witnesses to testify at the suppression hearing. From their uncontradicted testimony the following facts can be adduced:

On the morning of 23 January 1985 defendant arrived at Greensboro Regional Airport aboard a regularly scheduled commercial flight. As he deplaned, defendant "made eye contact with" Turbeville, who was working with Porter and two other officers on a drug interdiction assignment. Turbeville recalled having seen defendant in the Greensboro terminal a day or two earlier wearing a leather jacket, jeans and boots. He further described defendant's appearance on that prior occasion as "rather unkempt." Defendant was now wearing a three-piece suit which "didn't fit him very well" and what appeared to be the same "unkempt boots."

The four members of the interdiction team, none of whom wore a uniform, followed defendant as he proceeded across the terminal and down an escalator toward the baggage claim area. Turbeville and Porter followed directly, while the two other officers followed at a distance. Twice defendant looked back at Turbeville and Porter.

Once inside the baggage claim area defendant positioned himself against a wall at the far end of the baggage conveyor belt, twenty to twenty-five feet from the other passengers. While waiting for his baggage, defendant "watch[ed] the people around him." He would repeatedly focus on Turbeville and Porter and then look away. After most of the passengers had claimed their luggage, defendant walked over to the conveyor belt, picked up a large American Tourister suitcase, and turned to walk out of the terminal. The suitcase was "obviously very heavy and cumbersome."

Turbeville and Porter approached defendant. Turbeville identified himself and Porter as S.B.I. agents and they both showed defendant their credentials. Turbeville asked to see defendant's airline ticket; defendant complied with the request. The ticket indicated that it had been purchased with cash, that the passenger's name was Mike Dees, and that he had flown from Greensboro,

North Carolina to Houston, Texas the day before. After both agents noted the above information, Turbeville returned the ticket to defendant.

Addressing defendant as "Mr. Dees," Turbeville inquired whether he had seen defendant in the terminal in the last day or two. Defendant replied, "No, I don't think so." Again addressing defendant as "Mr. Dees," Turbeville asked whether defendant had "further identification." Defendant produced a driver's license which bore the name Ralph Thomas and explained that a friend had made his travel reservation. Turbeville returned defendant's license. Turbeville testified that throughout the initial contact with defendant "he was very nervous, both in his manner of speech and in his not being able to move around too much without his hands shaking."

After returning defendant's license Turbeville explained to defendant that he and Porter were conducting a narcotics investigation and that they would appreciate his cooperation. He told defendant that they had an office down the concourse "aways" and asked if defendant would accompany them to that office so they "could explain further what it was [they] were trying to do" and so they could avoid causing him "any embarrassment by talking with him in the middle of the terminal."

Defendant acquiesced without commenting. Defendant carried the large suitcase which he had just claimed and Turbeville carried defendant's carry-on luggage, a blue nylon bag. Porter accompanied defendant and Turbeville to the office. The two other officers followed at a distance but remained outside the office.

Once inside the office Turbeville again told defendant that he and Porter were conducting a narcotics investigation. He further explained that they were "not trying to find everybody's small amount of marijuana they had for personal use," but what they "were looking for was large amounts of narcotics coming into the area." The following dialogue then took place:

> Agent Turbeville: "Do you have anything on you that you shouldn't have?"
>
> Defendant: "Yes, [pause] I might have."
>
> Agent Turbeville: "Well, why don't we go ahead and take care of that right now."

Defendant: "Well, what do you want me to do, show it to you?"

Agent Turbeville: "Well, yes."

Defendant: "I'm not sure I understand what my rights are."

Turbeville asked defendant to consent to a search of his person and his luggage. He explained that defendant had the right to refuse consent. Defendant chose to exercise that right and refused to consent to a search. Turbeville then placed defendant under arrest for "[p]ossession of controlled substances." After arresting defendant, Turbeville and Porter conducted a search of his person and luggage. The large American Tourister suitcase was locked and upon request defendant supplied the key. The suitcase contained twenty-five one pound packages of marijuana.

Based on the foregoing facts, the court concluded as a matter of law:

[1.] that Agent Turbeville had reasonable and articulable suspicion that the defendant had committed a felony;

[2.] that Agent Turbeville had reasonable grounds to stop the defendant and to arrest the defendant;

[3.] that the arrest of the defendant was, in all respects, lawful and valid; [and]

[4.] that the search of the person of the defendant and his two bags was, in all respects, reasonable, incident to a valid arrest.

Accordingly, the court denied defendant's motion to suppress.

II.

[1] Defendant contends the court erred in denying his motion to suppress the incriminating statements he made to Turbeville and Porter once inside the private office and the marijuana the agents seized following his arrest. He argues that this evidence was obtained in violation of his Fourth Amendment rights and therefore should have been excluded. In particular defendant maintains (1) that he was unlawfully seized when Turbeville and Porter escorted him from the public area of the airport terminal to a private office without having "reasonable suspicion" of his in-

volvement in criminal activity; (2) that he was arrested without probable cause; and (3) that Turbeville and Porter could not lawfully search his luggage following his arrest without first obtaining a search warrant.

On several occasions this Court has examined the Fourth Amendment implications raised by facts similar to those here. *State v. Perkerol*, 77 N.C. App. 292, 335 S.E. 2d 60 (1985), *disc. rev. denied*, 315 N.C. 595, 341 S.E. 2d 36 (1986); *State v. White*, 77 N.C. App. 45, 334 S.E. 2d 786, *disc. rev. denied*, 315 N.C. 189, 337 S.E. 2d 864 (1985); *State v. Sugg*, 61 N.C. App. 106, 300 S.E. 2d 248, *disc. rev. denied*, 308 N.C. 390, 302 S.E. 2d 257 (1983); *State v. Casey*, 59 N.C. App. 99, 296 S.E. 2d 473 (1982); *State v. Grimmett*, 54 N.C. App. 494, 284 S.E. 2d 144, *disc. rev. denied*, 305 N.C. 304, 290 S.E. 2d 706 (1982); *State v. Cooke*, 54 N.C. App. 33, 282 S.E. 2d 800 (1981), *aff'd*, 306 N.C. 132, 291 S.E. 2d 618 (1982). To a large extent leading United States Supreme Court decisions have guided this Court on the lawfulness of a law enforcement officer's questioning and/or search or seizure of an air traveler based on the belief that the traveler is engaged in criminal activity. *Florida v. Rodriquez*, 469 U.S. 1, 83 L.Ed. 2d 165, 105 S.Ct. 308 (1984); *Florida v. Royer*, 460 U.S. 491, 75 L.Ed. 2d 229, 103 S.Ct. 1319 (1983); *Reid v. Georgia*, 448 U.S. 438, 65 L.Ed. 2d 890, 100 S.Ct. 2752 (1980); *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed. 2d 497, 100 S.Ct. 1870 (1980). The analysis which has emerged from these decisions can be summarized as follows:

"1. Communications between police and citizens involving no coercion or detention are outside the scope of the fourth amendment;

2. Brief seizures must be supported by reasonable suspicion; and

3. Full-scale arrests must be supported by probable cause."

Perkerol, 77 N.C. App. at 298, 335 S.E. 2d at 64. *See also Sugg*, 61 N.C. App. at 108-09, 300 S.E. 2d at 250.

Defendant concedes that his Fourth Amendment rights were not implicated when Turbeville and Porter approached him in the baggage claim area and asked to see his airline ticket and further identification. *Rodriquez*, 469 U.S. at 5-6, 83 L.Ed. 2d at 170-71, 105 S.Ct. at 310-11; *Mendenhall*, 446 U.S. at 553-55, 64 L.Ed. 2d at

509-10, 100 S.Ct. at 1877-78; *see Casey*, 59 N.C. App. at 105, 296 S.E. 2d at 477; *Grimmett*, 54 N.C. App. at 498, 284 S.E. 2d at 148. He maintains, however, that he was unlawfully seized when the agents escorted him from the public area of the airport terminal to the private office.

Relying on *Mendenhall*, *supra*, and *White*, *supra*, the State maintains that defendant was not unlawfully seized when escorted by the agents to a private office because defendant voluntarily consented to accompany them. We agree.

In *Mendenhall* two Drug Enforcement Administration (DEA) agents working in the Detroit Metropolitan Airport approached respondent, an air traveler who had just arrived aboard a commercial flight from Los Angeles, because her conduct "appeared to the agents to be characteristic of persons unlawfully carrying narcotics." 446 U.S. at 547-48, 64 L.Ed. 2d at 505, 103 S.Ct. at 1873. Respondent complied with one agent's request to see her airline ticket and her driver's license. The agent returned respondent's ticket and license and asked her to accompany the agents to the DEA office, which was up a flight of stairs and approximately fifty feet from where the agents had first approached her. 446 U.S. at 547-48, 64 L.Ed. 2d at 505, 103 S.Ct. at 1873-74. The court stated that "[t]he question whether the respondent's consent to accompany the agents was in fact voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of the circumstances, . . . and is a matter which the Government has the burden of proving. [Citations omitted.]" 446 U.S. at 557, 64 L.Ed. 2d at 511, 103 S.Ct. at 1879. Emphasizing "that the respondent was not told that she had to go to the office, but was simply asked if she would accompany the officers," that "[t]here were neither threats nor any show of force," that "[t]he respondent had been questioned only briefly, and [that] her ticket and identification were returned to her before she was asked to accompany the officers," the Court found the "totality of the evidence . . . plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers to the DEA office." 446 U.S. at 557-58, 64 L.Ed. 2d at 512, 103 S.Ct. at 1879. *Cf. Royer*, 460 U.S. at 501, 75 L.Ed. 2d at 239, 103 S.Ct. at 1326 ("[W]hen the officers identified themselves as narcotics agents, told Royer he was suspected of transporting narcotics, and asked him to accompany them to the police room

while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment.").

In *White* and *Grimmett, supra*, this Court, faced with facts almost identical to those in *Mendenhall*, found the evidence sufficient to support a determination that defendants voluntarily accompanied narcotics agents to private offices within airports. We cannot distinguish the facts here from those in *Mendenhall*, *White*, and *Grimmett*. Before requesting that defendant accompany them to the private office, Turbeville and Porter had only briefly questioned defendant and had returned his ticket and license. The court specifically found that "defendant, without any force or coercion on the part of the officer, went with Agent Turbeville and Agent Porter . . . and he was not commanded to go with the officers." The court thus properly denied defendant's motion to suppress the incriminating statements he made shortly after entering the private office.

III.

[2] Defendant next contends the agents lacked probable cause to arrest him and thus could not lawfully search his luggage. "Probable cause exists when the facts and circumstances known to the arresting officer at the time of arrest were sufficient to warrant a prudent man in believing that the defendant had committed or was committing an offense." *State v. Gray*, 55 N.C. App. 568, 570, 286 S.E. 2d 357, 359 (1982). "The existence of probable cause so as to justify an arrest without a warrant 'is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in light of the particular circumstances and the particular offense involved.' " *State v. Phillips*, 300 N.C. 678, 684, 268 S.E. 2d 452, 456 (1980), *quoting* 5 Am. Jur. 2d, Arrest Sec. 48.

At the suppression hearing Porter enumerated "ten articulable facts" which led him and Turbeville to believe they had probable cause to arrest defendant:

(1) Defendant arrived from Houston, Texas, a city identified by a "Federal [Narcotics] Task Force" as a source city for marijuana distribution.

(2) Shortly after deplaning defendant made "distinct eye contact" with Turbeville.

(3) Turbeville had seen defendant in the airport a day or two earlier wearing "work clothes."

(4) As Turbeville and Porter followed defendant up the concourse, "he made an abrupt turn" and looked back at them. A similar incident occurred on the escalator.

(5) Once inside the baggage claim area defendant positioned himself twenty to twenty-five feet away from the other passengers. "He . . . began scanning the area. He would repeatedly focus . . . on Agent Turbeville and [Agent Porter], look away, and then look back." Defendant did not readily claim his luggage.

(6) Defendant paid for his ticket in cash.

(7) Defendant had flown from Greensboro to Houston the day before. The amount of luggage defendant carried—a carry-on bag and "an extremely large suitcase"—was disproportionate to the length of his stay. In addition, according to Porter, defendant's "American Tourister hard-shell type luggage" is often used to transport narcotics.

(8) When asked by Turbeville, "Did I see you in the airport in the last day or two," defendant responded, "No." Defendant's response was inconsistent with the fact that Turbeville had observed him in the airport terminal the day before.

(9) Defendant was travelling under an assumed name. Twice defendant acknowledged Turbeville's use of the name which appeared on the airline ticket. It was not until Turbeville asked to see defendant's driver's license that defendant explained that a friend had made the reservation and "Mike Dees" was not his name.

(10) After Turbeville explained that he and Porter were "looking for large amounts of narcotics coming into the area," Turbeville asked if defendant had anything on him he shouldn't have and defendant responded, "Yes, [pause] I might have." Turbeville asked defendant if they could "go ahead and take care of that right now," and defendant responded, "Well, what do you want me to do, show it to you?" Porter interpreted defendant's

statement as an admission: "He as much as told Agent Turbeville that he had narcotics on him."

Porter's particularization of defendant's conduct includes acts from which it would often be difficult to draw inferences of criminality. Using cash to purchase an airline ticket, carrying American Tourister luggage, and making short trips clearly can be the acts of an innocent traveler. According to Porter, however, such conduct is characteristic of persons trafficking in narcotics. The interception of narcotics traffickers as they move narcotics from "source cities" to points of distribution is "a highly specialized law enforcement operation designed to combat the serious societal threat posed by narcotics distribution." *Mendenhall*, 446 U.S. at 562, 64 L.Ed. 2d at 515, 103 S.Ct. at 1881 (Powell, J., concurring). Turbeville and Porter were well-trained in narcotics law enforcement. While "the fact that certain characteristics [are] claimed to be part of a drug courier profile in no way enhances the 'quantum of individualized suspicion' usually a prerequisite to a constitutional search and seizure," *Casey*, 59 N.C. App. at 111, 296 S.E. 2d at 481, *quoting United States v. Martinez-Fuerte*, 428 U.S. 543, 560, 49 L.Ed. 2d 1116, 1130, 96 S.Ct. 3074, 3084 (1976), trained law enforcement officers are " 'entitled to assess the facts in light of [their] experience.' " *Mendenhall*, 446 U.S. at 564, 64 L.Ed. 2d at 515, 103 S.Ct. at 1882 (Powell, J., concurring) *quoting United States v. Brignoni-Ponce*, 422 U.S. 873, 885, 45 L.Ed. 2d 607, 619, 95 S.Ct. 2574, 2582.

We find the totality of the facts and circumstances known to Turbeville and Porter "sufficient to warrant a prudent man in believing that defendant was in possession of a controlled substance" and thus sufficient to establish probable cause to arrest. *Gray, supra.* In so finding, we rely heavily on the incriminating statements defendant made shortly after entering the private office. *See Grimmett*, 54 N.C. App. at 504, 284 S.E. 2d at 151. The court thus properly rejected defendant's contention that the agents could not lawfully search his luggage because they lacked probable cause to arrest him.

IV.

[3] Defendant next contends the warrantless search of his luggage was in violation of the Fourth Amendment. We agree.

The Fourth Amendment requires that searches of private property be performed pursuant to a search warrant issued in compliance with the Warrant Clause whenever reasonably practicable. *Chimel v. California*, 395 U.S. 752, 758, 23 L.Ed. 2d 685, 691, 89 S.Ct. 2034, 2037 (1969). The United States Supreme Court has consistently held that "searches made without a valid search warrant are presumptively unreasonable unless the search falls within one of the well-recognized exceptions to the [warrant requirement]." *Cooke*, 54 N.C. App. at 38, 282 S.E. 2d at 804, *citing Stoner v. California*, 376 U.S. 483, 11 L.Ed. 2d 856, 84 S.Ct. 889 (1964). Exceptions to the search warrant requirement are "jealously and carefully drawn," *Jones v. United States*, 357 U.S. 493, 499, 2 L.Ed. 2d 1514, 1519, 78 S.Ct. 1253, 1257 (1958), and " 'the burden is on those seeking [an] exemption . . . to show the need for it . . . .' " *Chimel*, 395 at 762, 23 L.Ed. 2d at 693, 89 S.Ct. at 2039, *quoting United States v. Jeffers*, 342 U.S. 48, 51, 96 L.Ed. 59, 64, 72 S.Ct. 93, 95 (1951); *see also Mincey v. Arizona*, 437 U.S. 385, 390-91, 57 L.Ed. 2d 290, 299, 98 S.Ct. 2408, 2412 (1978).

The State relies on the court's conclusion that the search of defendant's luggage was proper as within the "search incident to arrest" exception to the warrant requirement. An officer may, incident to a lawful arrest, conduct a warrantless search of the arrestee's person and the area within the arrestee's immediate control. *Chimel, supra.* Such warrantless searches are justified by the need for police safety and the preservation of evidence. *Chimel*, 395 U.S. at 762-63, 23 L.Ed. 2d at 694, 89 S.Ct. at 2040. As "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation,' " *Mincey*, 437 U.S. at 393, 57 L.Ed. 2d at 300, 98 S.Ct. at 2413, *quoting Terry v. Ohio*, 392 U.S. 1, 25-26, 20 L.Ed. 2d 889, 908, 88 S.Ct. 1868, 1882 (1968), the scope of a search incident to arrest is limited to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Chimel*, 395 U.S. at 763, 23 L.Ed. 2d at 694, 89 S.Ct. at 2040. Thus, in essence the State contends that the search of defendant's luggage following his lawful arrest was proper because the luggage may have contained contraband that the defendant could destroy or weapons that he could use against the arresting agents. As applied to defendant's locked, "extremely large," "cumbersome" suitcase, the State's contention is implausible and contrary to the case law.

In *United States v. Chadwick*, 433 U.S. 1, 53 L.Ed. 2d 538, 97 S.Ct. 2476 (1976), at the time of their arrest respondents were in possession of a double-locked footlocker. In considering the constitutionality of a warrantless search of the footlocker by federal agents more than an hour after they had gained exclusive control of it, the Court stated:

> [W]arrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the "search is remote in time or place from the arrest," *Preston v. United States*, 376 U.S. at 367, or *no exigency exists.* Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest. [Emphasis supplied.]

Chadwick, 433 U.S. at 15, 53 L.Ed. 2d at 550-51, 97 S.Ct. at 2485. While Turbeville's search of defendant's luggage was less " 'remote in time or place from the arrest' " than the search held unconstitutional in *Chadwick*, as in *Chadwick* there were no exigent circumstances to justify the search. The large suitcase which defendant carried into the private office was not, at the time of defendant's arrest, "immediately associated" with defendant's person. A properly conducted search of defendant's person following his arrest revealed that defendant was unarmed. Turbeville had ascertained that the large suitcase was locked and had obtained the key. Defendant was in the immediate custody of two S.B.I. agents, at least one of whom was armed. Two additional law enforcement officers were outside the small private office. Defendant could not have reached the contents of the locked suitcase. The suitcase was effectively reduced to the agents' exclusive control and, as a result, the agents could not lawfully search it without first obtaining a warrant. *Chadwick, supra; see,* Note, 6 Am. J. Crim. Law 81, 94 (1978).

Arguably, *New York v. Belton*, 453 U.S. 454, 69 L.Ed. 2d 768, 101 S.Ct. 2860 (1981), lays the foundation for a different result. In *Belton* the Court abandoned use of the *Chimel* subjective inquiry to determine the proper scope of a search incident to arrest when

the arrestee is an occupant of a motor vehicle. 453 U.S. at 460, 69 L.Ed. 2d at 775, 101 S.Ct. at 2864. The court forged an objective "bright-line" rule that allows police officers incident to the arrest of an occupant of a motor vehicle, to "examine the contents of any containers found within the [vehicle's] passenger compartment . . . ." *Id.* The Court, however, expressly stated: "Our holding . . . does no more than determine the meaning of *Chimel's* principles *in this particular and problematic context.* It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to . . . arrests." [Emphasis supplied.] *Id.* at n. 3. In his dissenting opinion, Justice Brennan laments:

> By approving the constitutionality of the warrantless search in this case, the Court carves out a dangerous precedent that is not justified by the concerns underlying *Chimel.* Disregarding the principle "that the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement," . . . the Court for the first time grants police officers authority to conduct a warrantless "area" search under circumstances where there is no chance that the arrestee "might gain possession of a weapon or destructible evidence." . . . Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car. [Citations omitted.]

453 U.S. at 468, 69 L.Ed. 2d at 780, 101 S.Ct. at 2868.

We decline to extend the "bright-line" *Belton* approach to arrests outside the automobile context. Based in part on the automobile's inherent mobility, its occupants' expectation of privacy is diminished and, as a result, warrantless searches of automobiles are permitted "in circumstances in which [they] would not be reasonable in other contexts." *Chadwick,* 433 U.S. at 12, 53 L.Ed. 2d at 549, 97 S.Ct. at 2484. *Cf. State v. Isleib,* 80 N.C. App. 599, 343 S.E. 2d 234 (1986). However, "[u]nlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects. . . . [A] person's expectations of

privacy in personal luggage are substantially greater than in an automobile." *Chadwick*, 433 U.S. at 13, 53 L.Ed. 2d at 549, 97 S.Ct. at 2484. The *Belton* approach thus is properly confined to the automobile context and does not extend to personal luggage situated outside that context.

Insofar as the order denies defendant's motion to suppress his incriminating statements, it is affirmed. Insofar as it denies defendant's motion to suppress the physical evidence obtained when agents searched his luggage without a warrant following his arrest, it is reversed. Because the court erred in denying defendant's motion to suppress the physical evidence seized, the judgment entered upon defendant's plea of guilty is vacated.

Order affirmed in part, reversed in part; judgment vacated.

Judges WELLS and COZORT concur.

JAMES A. COLE, JR., ADMINISTRATOR OF THE ESTATE OF JAMES ANDERSON COLE, III v. DUKE POWER COMPANY

No. 8514SC1323

(Filed 3 June 1986)

1. **Damages § 11— punitive damages for gross negligence—gross negligence and willful and wanton negligence not the same**

N.C.G.S. § 28A-18-2 allows for a recovery of punitive damages upon a showing of "gross negligence," and "gross negligence" is not merely a restatement of the willful and wanton negligence test.

2. **Electricity § 5— high voltage wires in cabinet—child electrocuted—sufficiency of evidence of gross negligence**

Evidence in a wrongful death action was sufficient for the jury to find that defendant was grossly negligent where it tended to show that defendant maintained in a residential area a cabinet which contained extremely high voltage wires but which carried no signs warning of danger or high voltage; children played around the cabinet which was not bolted down and which was inspected no more than twice in nine years; decedent child entered the cabinet to hide during a children's game and was electrocuted; at the time of the accident, two of the cabinet's locks were found inside and one lock was never found; the inspection card on the cabinet could not have been correct because it bore entries regarding conditions of parts which were not even on the

cabinet in question; and the cabinet was not constructed in accordance with the National Electrical Safety Code.

3. **Electricity §§ 4, 5— child electrocuted—child not a trespasser—duty of power company**

There was no merit to defendant's contention in a wrongful death action that decedent was a trespasser and as such the only duty which it owed to him was to refrain from willfully or wantonly injuring him, since defendant did not own the property on which the accident occurred but merely had an easement over the property, and decedent had the permission of landowners to play on the property and thus was not a trespasser.

4. **Electricity § 9— high voltage wires in cabinet—child electrocuted—no insulating negligence**

There was no merit to defendant's contention that it was entitled to a directed verdict in a wrongful death action because any negligence on its part was insulated by the conduct of a third person who removed padlocks from defendant's cabinet containing high voltage wires, an act over which defendant had no control, since there was no direct or circumstantial evidence from which a jury could reasonably find that defendant's alleged negligence was insulated by the act of some third person, and, even if the jury had found that someone else had been responsible for removing the locks from the cabinet, it could still have held defendant liable because of its negligence in failing to warn, failing properly to construct the cabinet, failing to insulate the wires, or a combination of these reasons.

5. **Negligence § 44— child electrocuted—1.5 million dollars not excessive verdict**

In a wrongful death action where decedent was electrocuted when he entered an unlocked, unlabeled cabinet containing extremely high voltage uninsulated wires, the trial court did not err in refusing to set aside the verdict awarding 1.5 million dollars in compensatory damages as being excessive and not in accordance with the evidence.

APPEAL by defendant from *Brewer, Judge.* Judgment entered 25 January 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 13 May 1986.

This appeal arises out of an action for wrongful death brought pursuant to G.S. 28A-18-2. On 23 May 1978, James Anderson Cole III was electrocuted when he entered an unlocked, unlabeled cabinet containing uninsulated wires transmitting 12,470 volts of electricity. On 20 August 1982, the trial court entered summary judgment against the plaintiff. This Court reversed that decision in an opinion published in 68 N.C. App. 159, 314 S.E. 2d 808 (1984). In an order found at 311 N.C. 752, 321 S.E. 2d 129 (1984), the Supreme Court denied the defendant's petition for discretionary review.

At trial the evidence showed the following facts: In November 1968 the defendant, Duke Power Company, began installing an electrical system in the Hope Valley area of Durham. As part of the system Duke installed a padmounted primary cabinet in a wooded area near the Cole home. The location was on the property line of two of the Coles' neighbors. The metal cabinet, which contained two doors, was three and one-half feet wide, four feet deep, four and one-half feet high and weighed four hundred and sixty pounds. The cabinet contained wires, some parts of which were uninsulated, that transmitted 12,470 volts of electricity. The doors on the cabinet were designed to be padlocked. The cabinet carried no signs warning of danger or high voltage. The only thing which identified the box as belonging to Duke Power Company was the fact that Duke's name was engraved on the locks which were supposed to be used to secure the cabinet. There were no wires visible entering or leaving the cabinet. The reason a Duke employee gave for the failure to place warnings on the box was that the company was afraid warnings would scare the neighbors.

The neighborhood children, with the consent of the property owners, played in the wooded area where the cabinet was located. The evidence also showed that the children actually played on top of the cabinet and scratched their names in the cabinet. On 23 May 1978, at approximately 8:45 p.m., James Anderson Cole III and a friend were going to enter the unlocked cabinet to hide during a children's game. Once inside the cabinet Cole was electrocuted and his friend, who had not yet gotten into the cabinet, was burned.

There was evidence presented that the cabinet had been inspected on two occasions, the last time some seven weeks prior to the accident. The inspection card showed that the cabinet was locked and in good condition at that time. However, there was also evidence that the cabinet had been unlocked some six months prior to the accident and at the time of the accident two of the three locks were found inside the cabinet and the third lock was never found. There was further evidence that the inspection card could not have been correct because it bore entries regarding conditions of parts which were not even on the cabinet in question. Furthermore, there was evidence presented that the cabinet was not constructed in accordance with the National Electrical Safety

Code. Duke also presented evidence which was designed to persuade the jury that Cole had cut the lock off the cabinet with a hacksaw sometime prior to the night in question.

Based upon the evidence the court submitted issues of negligence, gross negligence, contributory negligence, and compensatory and punitive damages. The jury found that Duke was negligent, that Anderson Cole was not contributorily negligent and that Duke was also grossly negligent. The jury found that the plaintiff was entitled to recover $1,500,000.00 in compensatory damages and $1,500,000.00 in punitive damages. From a judgment of $3,000,000.00 entered upon the verdict, defendant appealed.

Pulley, Watson, King & Hofler, by W. Paul Pulley, Jr. and Tracy Kenyon Lischer, for plaintiff appellee.

William I. Ward, Jr., W. Edward Poe, Jr.; Parker, Poe, Thompson, Bernstein, Gage & Preston, by Irvin W. Hankins III; and Newsom, Graham, Hedrick, Bryson & Kennon, by Lewis A. Cheek and Joel M. Craig, for defendant appellant.

ARNOLD, Judge.

PUNITIVE DAMAGES

[1] Defendant first contends the trial court erred in refusing to dismiss plaintiff's claim for punitive damages, and in its instructions regarding the conduct which would justify an award of punitive damages. G.S. 28A-18-2 in pertinent part provides:

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. . . .
>
> (b) Damages recoverable for death by wrongful act include:
>
> . . . .

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence.

Defendant argues that the only types of conduct which can justify an award of punitive damages are an intentional tort, and wilful and wanton negligence. Defendant further contends that the words "gross negligence" do not create a new category of conduct for which punitive damages may be awarded in wrongful death actions, but that gross negligence is merely a restatement of the wilful and wanton negligence test. We disagree.

At common law punitive damages may be recovered only upon a showing of malicious, wilful or wanton conduct. *See Hinson v. Dawson*, 244 N.C. 23, 92 S.E. 2d 393 (1952). However, there is no right of action for wrongful death under the common law. *Willis v. Power Co.*, 42 N.C. App. 582, 257 S.E. 2d 471 (1979). The right to recover damages for wrongful death is purely statutory and exists only by virtue of the wrongful death statute. *Gay v. Thompson*, 266 N.C. 394, 146 S.E. 2d 425 (1966). Therefore, we must look to the terms of G.S. 28A-18-2 to determine when punitive damages may be awarded. The statute provides that:

> Damages recoverable for death by wrongful act include:
>
> . . . .
>
> Such punitive damages as the decedent could have recovered had he survived, *and* punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, *or* gross negligence.

G.S. 28A-18-2(b)(5) (emphasis added). In determining the meaning of the statute we must interpret its language in light of the following well-established canons of statutory construction.

> The intent of the Legislature controls the interpretation of a statute. *Burgess v. Brewing Co.*, 298 N.C. 520, 259 S.E. 2d 248 (1979). In ascertaining the intent of the Legislature, it is proper to consider judicial decisions affecting the constitutionality of prior statutes dealing with the same subject matter, and legislative changes, if any, made subsequent to such

decisions. *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978); *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548 (1967); *Ingram v. Johnson, Comr. of Revenue*, 260 N.C. 697, 133 S.E. 2d 662 (1963). Word and phrases of a statute may not be interpreted out of context; rather, individual expressions must be interpreted as part of a composite whole, in a manner which harmonizes with the other provisions of the statute and which gives effect to the reason and purpose of the statute. *Burgess v. Brewing Co., supra; In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978); *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E. 2d 505 (1952). To this end, a statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage. *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Harvey*, 281 N.C. 1, 187 S.E. 2d 706 (1972).

Jolly v. Wright, 300 N.C. 83, 86, 265 S.E. 2d 135, 139 (1980).

Application of these principles leads to the conclusion that G.S. 28A-18-2 allows for the award of punitive damages upon the proof of gross negligence. By providing for recovery of punitive damages upon a showing of "maliciousness, wilful or wanton injury, *or* gross negligence" it appears that the General Assembly intended to establish three separate categories of conduct which would afford a recovery. As Judge Whichard said in his concurring opinion in *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 386, 291 S.E. 2d 897, 905 (1982), "[t]o treat the G.S. 28A-18-2(b)(5) phrases 'wilful or wanton injury' and 'gross negligence' as synonymous . . . effectively renders one or the other mere surplusage, contrary to the . . . foregoing rule of construction." Thus, we hold that G.S. 28A-18-2 allows for a recovery of punitive damages upon a showing of "gross negligence."

[2] Gross negligence is not defined by the statute, however, under prior case law gross negligence is something less than wilful and wanton conduct. *See Smith v. Stepp*, 257 N.C. 422, 125 S.E. 2d 903 (1962); *see also Clott v. Greyhound Lines*, 9 N.C. App. 604, 177 S.E. 2d 438 (1970), *rev'd on other grounds*, 278 N.C. 378, 180 S.E. 2d 102 (1971). Using this definition, we find that there is

evidence from which the jury could find that Duke was "grossly negligent."

The court gave the following instruction as to the issue of gross negligence:

> Ordinary negligence is the lack of reasonable care. Gross negligence is an extreme departure from the ordinary standard of conduct. It is a very great danger. It is negligence materially greater than ordinary negligence. The difference is one of degree.
>
> Gross negligence is negligence of an aggravated character and a gross failure to exercise reasonable care.
>
> *The term implies a thoughtless disregard of consequences without exerting any effort to avoid it.*
>
> Gross negligence means a greater absence of reasonable care than is implied by the term, ordinary negligence.
>
> The plaintiff contends and the defendant denies that the defendant was grossly negligent in the following respects:
>
> The defendant failed to place warning signs on the padmounted cabinet in question. *Now, the law requires an electric utility company to use reasonable care to protect the public from exposure to dangerous electric wires.*
>
> Considering all precautions used by Duke Power Company to protect the public from the high-voltage wires within the padmounted cabinet on May the 23rd, 1978, *if you find that the failure additionally to place warning signs on the cabinet on or before the date in question constituted an extreme departure from reasonable care and evidenced a thoughtless disregard for protection of the public without any rational justification, then such failure would be gross negligence.*

As to this issue the plaintiff has offered evidence tending to show the padmounted cabinet was installed in 1969. The wires inside were extremely high voltage and deadly. The cabinet was located in a residential area where many children played. The cabinet was not bolted down. It was inspected no more than twice in nine years.

In 1975, one locking device failed and was replaced by hasp padlocks with exposed screws. There were no interior barriers and no double independent locking systems.

Warnings could have been placed on the cabinet at regular inspections at minimal cost and inconvenience.

The box, or cabinet, had nothing on it to indicate the danger inside or who owned the box.

The defendant offered evidence tending to show the cabinet had a reasonably secure locking system. Neither the 1973 *Code* nor industry practice required warning signs.

The cabinet had been inspected in April, 1978 and was found secure. The locking mechanisms provided adequate protection without warnings.

This is what some of the evidence offered by the plaintiff and defendant on this issue tends to show. You decide what the evidence does show.

Now, I instruct you that if the plaintiff has proved by the greater weight of the evidence that the defendant, Duke Power Company, was grossly negligent in the following respects:

That it failed to place warning signs on the padmounted cabinet on or before May 23rd, 1978; say, if the plaintiff has proved by the greater weight of the evidence that the defendant was grossly negligent in this respect and further proved that such gross negligence was a proximate cause of Anderson Cole's death as I have defined proximate cause to you, then you must answer this issue, yes, in favor of the plaintiff.

If the plaintiff has failed to prove such gross negligence or proximate cause, then you must answer this issue, no, in favor of the defendant, Duke Power Company.

If you answer the third issue, yes, in favor of the plaintiff, then you will answer both the fourth and fifth issues. (Emphasis added.)

These instructions were proper and correctly stated the law as to the issue of gross negligence. Indeed, the emphasized portions above seem favorable to defendant.

While we need not rule on this issue, we believe that there was also evidence from which a jury could have found that the defendant's actions rose to the level of wilful and wanton conduct. Thus, we believe the trial court could have submitted this issue also.

LEGAL DUTIES OF UTILITIES

[3] Duke also contends the trial court erred by denying its motion for a directed verdict as to the compensatory damage issue. Duke argues that Anderson Cole was a trespasser and as such the only duty which it owed to him was to refrain from wilfully or wantonly injuring him. Thus, they contend the court erred by allowing the jury to determine whether Duke was negligent by its failure to warn, failure to insulate the wires and by failing to have a double locking device on the cabinet. We disagree.

In *Hale v. Power Co.*, 40 N.C. App. 202, 204, 252 S.E. 2d 265, 267 (1979), this Court stated the following standard regarding the duty of utilities:

> Our courts have repeatedly stated that a supplier of electricity owes the highest degree of care. *See Small v. Southern Public Utilities Co.*, 200 N.C. 719, 158 S.E. 385 (1931), and cases cited therein. This is not because there exists a varying standard of duty for determining negligence, but because of the "very dangerous nature of electricity and the serious and often fatal consequences of negligent default in its control and use." *Turner v. Southern Power Co.*, 154 N.C. 131, 136, 69 S.E. 767, 769 (1910). "The danger is great, and care and watchfulness must be commensurate to it." *Haynes v. The Raleigh Gas Co.*, 114 N.C. 203, 211, 19 S.E. 344, 346 (1894). "The standard is always the rule of the prudent man," so what reasonable care is "varies . . . in the presence of different conditions." *Small v. Southern Public Utilities Co.*, *supra* at 722, 158 S.E. at 386.

Duke argues that their duty to Anderson Cole was lessened because he was a trespasser; and that because Cole was a tres-

passer they only had a duty not to wilfully and wantonly injure him.

Duke did not own the property on which this cabinet was located, but merely had an easement over the property. All the evidence showed that Anderson Cole had the permission of the landowners to play on the property. Thus, Cole was not a trespasser as that term has been defined by our case law. We hold, consistent with the rule announced by our Supreme Court in *Benton v. Public-Service Corporation*, 165 N.C. 354, 81 S.E. 448 (1914), that since Cole was not a trespasser on any real property owned by Duke the defendant is not entitled to have its legal duty reduced. Under the rationale proposed by Duke, the only time that the utility company would be liable to people who come into contact with any of their equipment is when the injury is caused by a wilful and wanton action of the utility. This is not the law. As we have consistently held, suppliers of electricity owe the public the "highest degree of care" because of the "very dangerous nature of electricity."

[4] Duke further argues that it was entitled to a directed verdict because any negligence on the part of Duke was insulated by the conduct of a third person. Duke argues that Cole would not have been killed "but for the intervening wrongful act of removal of the padlock which Duke Power placed on the cabinet, an act over which Duke Power Company had no control and of which it had no knowledge."

In *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 236-38, 311 S.E. 2d 559, 566-67 (1984), Justice Martin set forth the following statement of law regarding insulating negligence:

> Insulating negligence means something more than a concurrent and contributing cause. It is not to be invoked as determinative merely upon proof of negligent conduct on the part of each of two persons, acting independently, whose acts unite to cause a single injury. *Essick v. Lexington*, 233 N.C. 600, 65 S.E. 2d 220 (1951); *Evans v. Johnson*, 225 N.C. 238, 34 S.E. 2d 73 (1945). *See also* 65 C.J.S. *Negligence* § 111(2) (1966). Contributing negligence signifies contribution rather than independent or sole proximate cause. *Essick v. Lexington, supra; Noah v. R.R.*, 229 N.C. 176, 47 S.E. 2d 844 (1948).

The following analysis of the doctrine of insulating negligence is determinative with respect to this issue:

> "An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote. It is immaterial how many new elements or forces have been introduced, if the original cause remains active, the liability for its result is not shifted. Thus, where a horse is left unhitched in the street and unattended, and is maliciously frightened by a stranger and runs away: but for the intervening act, he would not have run away and the injury would not have occurred; yet it was the negligence of the driver in the first instance which made the runaway possible. This negligence has not been superseded nor obliterated, and the driver is responsible for the injuries resulting. If, however, the intervening responsible cause be of such a nature that it would be unreasonable to expect a prudent man to anticipate its happening, he will not be responsible for damage resulting solely from the intervention. The intervening cause may be culpable, intentional, or merely negligent."

Harton v. Telephone Co., 141 N.C. 455, 462-63, 54 S.E. 299, 301-02 (1906) (citation omitted).

> It is immaterial how many new events or forces have been introduced if the original cause remains operative and in force. In order for the conduct of the intervening agent to break the sequence of events and stay the operative force of the negligence of the original wrongdoer, the intervening conduct must be of such nature and kind that the original wrongdoer had no reasonable ground to anticipate it. . . .
>
> "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury." . . .

> In 38 Am. Jur., Negligence, Sec. 67, pp. 722 and 723, the principle is stated this way: "In order to be effective as a cause superseding prior negligence, the new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it, and adequate to bring about the injurious result; a cause which interrupts the natural sequence of events, turns aside their cause, prevents the natural and probable result of the original act or omission, and produces a different result, that reasonably might not have been anticipated."

Riddle v. Artis, supra, 243 N.C. at 671, 91 S.E. 2d at 896-97 (citations omitted).

> It is true that
>
> [a] man's responsibility for his negligence must end somewhere. If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause. It imposes too heavy a responsibility for negligence to hold the tort feasor responsible for what is unusual and unlikely to happen or for what was only remotely and slightly probable.

Phelps v. Winston-Salem, 272 N.C. 24, 30, 157 S.E. 2d 719, 724 (1967). *See also* Restatement (Second) of Torts § 435(2) (1965).

We have examined the record and have found no direct evidence or circumstantial evidence from which a jury could reasonably find that Duke's alleged negligence was insulated by the act of some third person. Even if the jury had found that someone else had been responsible for removing the locks from the cabinet, it could still have held Duke liable because of Duke's negligence in failing to warn, failing to properly construct the cabinet, failing to insulate the wires, or a combination of these reasons.

Defendant also argues the court erred by failing to instruct on insulated negligence and Anderson Cole as a trespasser. As we have previously stated, the trial court properly ruled on these issues. The defendant also argues the court erred in instructing

on the issue of the duty of electrical utilities. We have examined the court's instructions and find them to be fair, complete, and an accurate statement of the law.

COMPENSATORY DAMAGES

[5] Duke next contends the "court erred in refusing to set aside the verdict because the damages awarded were excessive and not in accordance with the evidence." The question of whether damages are excessive thus warranting the trial court to set aside the verdict or to render a judgment notwithstanding the verdict is within the sound discretion of the trial court. *Evans v. Coach Co.*, 251 N.C. 324, 111 S.E. 2d 187 (1959). The court's ruling on such a question will not be reversed absent a showing that the court abused its discretion. *Hinton v. Cline*, 238 N.C. 136, 76 S.E. 2d 162 (1953). This test was reaffirmed and explained by our Supreme Court in *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). In *Worthington* Justice Copeland, writing for the Court, stated:

> In conclusion, we note that the trial judges of this state have traditionally exercised their discretionary power to grant a new trial in civil cases quite sparingly in proper deference to the finality and sanctity of the jury's findings. We believe that our appellate courts should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial. Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case. Because of this, we find much wisdom in the remark made many years ago by Justice Livingston of the United States Supreme Court that "there would be more danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion." *Insurance Co. v. Hodgson*, 10 U.S. (6 Cranch) 206, 218 (1810). Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the

> trial judge's ruling probably amounted to a substantial miscarriage of justice.

Id. at 487, 290 S.E. 2d at 605. We are not convinced from the record that the court's denial of the defendant's motion to set aside the verdict amounted to a substantial miscarriage of justice. Thus, we find no error in the court's ruling.

EVIDENTIARY RULINGS

Defendant also contends the trial court erred by admitting and excluding certain evidence at trial. Duke argues that the court erred in admitting evidence regarding the condition of the padmounted cabinet, warning signs which other utilities use on their equipment, the absence of metal shavings in a photograph and evidence regarding the character of the deceased. We have reviewed each of these contentions and find no prejudicial error in the trial court's rulings.

Defendant next argues the court erred by excluding the testimony of one of their experts regarding the origin of certain metal shavings found on the pad under the cabinet. On the night of the accident Officer Robinson investigated the accident scene. At the time of his original investigation Robinson did not see any metal shavings. Approximately two hours later Duke's operations manager called Robinson back to the scene to collect some shiny brass shavings which the manager had discovered after Robinson left the scene. In June 1978, defendant sent these shavings to Pittsburgh Testing Laboratory. On 15 August 1978 the laboratory issued a report which contained the following pertinent findings:

> The lock is oxidized, more on those surfaces expected to be exposed: it is not much oxidized on the bottom and both ends of the shackle are virtually free of oxidation. No shavings have been removed from the bottom or sides of the lock; some shavings had been removed from the shackle but essentially all of this was done from the unoxidized free end of the shackle, i.e., from that part of the shackle "in" the lock, if the lock be locked. There is no possibility, in our opinion, for the quantity of brass shavings to have come from any place except this notched end of the shackle. If the shavings came from the lock, they were taken when the lock was open.

> The brass shavings look "brassy", have a brass color. But inspection shows that the collection is perhaps 30% brass shavings, the remainder being recognizable wood and brick fragments and, probably not proved, sand (silica), glaze, mica (muscovite probably), feldspars and several other darker minerals. The brass pieces themselves are all highly worked: most could easily be file shavings but some have the long curlicue shape of turnings, more probably drill than lathe (there is no indication anywhere on the outside of the lock that a drill bit had been used on it). A few (three, by count) of the brass pieces had high temperature "temper" colors over part of the surface—again not hand tool likely and these were file shavings like configurations. In sum the sample is not homogeneous, even in the type of shavings; all could not in any likelihood have come from the lock.

Based upon the defendant's report the plaintiff did not do tests on the shavings. On 4 January 1985, the Friday before the trial was to begin on Monday, 7 January, Duke informed the plaintiff that it intended to call a different expert from Pittsburgh Testing who would offer an opinion regarding the origin of the shavings. The plaintiff made a motion *in limine* to exclude this testimony. Defendant contends the court's order excluding the new evidence was error. We find no error in the trial court's action. The court properly concluded that it would be unfair to allow defendant to put on new evidence in support of its case when the plaintiff had not had an adequate opportunity to prepare for this evidence. If defendant intended to offer additional evidence regarding the source of the brass shavings they should have been able to acquire the evidence during the seven years this litigation was pending rather than attempting to "spring it" upon the plaintiff some three days prior to trial. We believe the trial court properly excluded the testimony.

We have also reviewed the other arguments regarding the exclusion of evidence and find no error in the court's actions.

Our review of the record convinces us that the trial court did an admirable job in the handling of this most difficult trial. We believe that both sides had a fair and impartial hearing of this matter. Thus, in this cause we find

No error.

Judges WELLS and BECTON concur.

NORTHWESTERN BANK v. CLARENCE EDWARD ROSEMAN AND WIFE, ANGELA B. ROSEMAN, AND DENTEX, INC.

No. 8529SC467

(Filed 3 June 1986)

1. **Fraud § 12— misrepresentation by concealment—reasonableness of reliance—jury questions**

The individual defendant's forecast of evidence was sufficient to establish an issue of fact as to whether his signature was obtained on a personal guaranty of a corporation's debt by fraud where it tended to show that defendant specifically told plaintiff bank's agent that there would be no factoring contract with the bank if he had to sign a personal guaranty; plaintiff's agent included the personal guaranty in a large package of factoring contract documents defendant thought he was signing as the corporation's president; plaintiff's agent had obtained the forged signature of defendant's wife on the guaranty; and plaintiff's agent arranged for a false notarization of the guaranty and other documents. Questions for the jury were presented as to whether the failure of plaintiff's agent to disclose to defendant that he was signing a personal guaranty amounted to a material misrepresentation by concealment and whether defendant's reliance on the misrepresentation without reading the document was reasonable.

2. **Fraud § 12— obtaining forged signature—liability of bank**

The female defendant's forecast of evidence was sufficient to establish an issue of fact as to fraud by defendant bank's agent in obtaining a forged signature of the female defendant on a personal guaranty of a corporation's debt. Furthermore, the bank was liable for the acts of its agent within the range of the agent's employment even if not expressly authorized by the bank.

3. **Unfair Competition § 1— fraudulent concealment and obtaining forged signature**

Defendants' forecast of evidence was sufficient to establish an unfair and deceptive trade practice by plaintiff bank in violation of N.C.G.S. § 75-1.1 where it tended to show that the bank's employee fraudulently obtained the female defendant's forged signature on a personal guaranty of a corporation's debt; the bank's employee concealed the personal guaranty in a large package of documents which the male defendant thought he was signing for the corporation after the male defendant had made it clear that he would not sign a personal guaranty; the bank engaged in the practice of having documents, including the personal guaranty, falsely notarized; and the employee was acting

as an agent of the bank in negotiating and obtaining the factoring agreement which included the personal guaranty.

Chief Judge HEDRICK dissenting.

APPEAL by defendants from *Owens, Judge* and from *Hyatt, Judge.* Partial summary judgment entered 6 February 1985 and final judgment entered 18 February 1985 in Superior Court, MCDOWELL County. Heard in the Court of Appeals 31 October 1985.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr., for plaintiff appellee.

Goldsmith & Goldsmith, by C. Frank Goldsmith, Jr., for defendant appellants.

BECTON, Judge.

This is an action for payment on a promissory note and a personal guaranty. The trial court entered partial summary judgment in favor of plaintiff, Northwestern Bank, on its claim against defendants, Clarence E. Roseman and Dentex, Inc. The same summary judgment order denied counterclaims asserted by Clarence and Angela Roseman for fraud, unfair and deceptive trade practices, and wrongful repossession and sale of personal property. The issues of fact remaining after entry of partial summary judgment were resolved by stipulation, and final judgment was entered. Defendants appeal. We reverse and remand the case for trial.

I

For purposes of this appeal the bank concedes the following relevant facts. In order to obtain financing for Dentex, Inc., Clarence Roseman, the president of Dentex, contacted Paul Richardson, the manager of the local branch of Northwestern Bank. Mr. Richardson referred Mr. Roseman to Northwestern Factors, Inc. (Factors). Mitchell Wiggs, an employee of Factors, contacted Mr. Roseman and negotiated a factoring arrangement: in exchange for immediate funds, Dentex would assign its accounts receivable to Factors for collection. Mr. Wiggs requested that Mr. Roseman execute a personal guaranty for the debts of Dentex. Mr. Roseman refused and said that if he had to sign a personal guaranty, there would be no factoring contract. Mr. Wiggs responded, "We'll have

to see what we can do about it." Mr. Wiggs never again spoke to Mr. Roseman about a personal guaranty.

On 5 August 1980, Mr. Wiggs brought documents to Dentex to close the factoring deal. He convinced Mr. Roseman's secretary, Ms. Miller, to sign Angela Roseman's name to a personal guaranty of the debts of Dentex to Factors, without Ms. Roseman's authorization, consent or knowledge. The secretary believed she was signing papers necessary to begin the factoring arrangement and did not know she had signed Ms. Roseman's name on a personal guaranty. Later that day, Mr. Wiggs and Mr. Roseman went to Mr. Richardson's office at the bank. A large package of documents was presented to Mr. Roseman. They were lined up on a table, and he signed them without reading them. One of the documents was the personal guaranty bearing the forged signature of Ms. Roseman. Subsequently, the guaranty was signed and sealed by the bank's notary public who represented on the document that the Rosemans' signatures had been properly executed before her on 5 August 1980. Mr. Richardson, the executive vice president and branch manager of the bank, testified in his deposition that it was "a practice of Northwestern Bank for the notary there to be asked to notarize signatures of people who do not, in fact, appear before her."

The factoring arrangement went into effect and continued for more than a year. In October 1981, the bank contacted Mr. Roseman regarding certain accounts receivable, and Mr. Roseman, on behalf of Dentex, executed a promissory note to Northwestern Bank for $145,000 to cover the accounts. A substitute promissory note was executed for the same amount on 28 December 1981.

Dentex defaulted on the note, and the corporation went out of business in 1983. The bank filed this action, alleging that Dentex had defaulted on the note and that the Rosemans had guaranteed the debt. During discovery, the bank dismissed its claim against Ms. Roseman. On 6 February 1985, the bank's motion for partial summary judgment was granted, and the court ordered that the defendants would recover nothing on their counterclaims. The only issues remaining for trial—the amount of principal due on the note and the extent to which interest had

been waived—were resolved by stipulation, and final judgment was entered.

Mr. Roseman argues that the trial court erred in granting summary judgment for the bank on its claim under the personal guaranty. Ms. Roseman asserts that the court improperly disposed of her counterclaim for fraud. And both argue that the court erred in entering summary judgment against them on their counterclaims for unfair and deceptive trade practices and wrongful repossession and sale of personal property. We agree that summary judgment was improper in this case.

II

Summary judgment is inappropriate when the pleadings, depositions, affidavits, admissions and other testimony or evidence reveal any genuine issue of material fact. "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action. The issue is denominated 'genuine' if it may be maintained by substantial evidence." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E. 2d 897, 901 (1972).

The bank's claim was based on the validity of the personal guaranty signed by Mr. Roseman. The bank asserts that Mr. Roseman had a duty to read the document and is bound by its terms absent proof of mistake, fraud, or oppression. *See Mills v. Lynch*, 259 N.C. 359, 130 S.E. 2d 541 (1963); *Harris v. Bingham*, 246 N.C. 77, 97 S.E. 2d 453 (1957). In order to defeat the bank's claim under the personal guaranty, Mr. Roseman asserted as a legal defense that his signature was obtained fraudulently. Therefore, Mr. Roseman was required to allege facts that, if believed, would prove each element of fraud.

> While fraud has no all-embracing definition and is better left undefined lest crafty [individuals] find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Ragsdale v. Kennedy, 286 N.C. 130, 138, 209 S.E. 2d 494, 500 (1974) (citations omitted). There also must be reasonable reliance on the deceptive representation. *Johnson v. Owens*, 263 N.C. 754, 140 S.E. 2d 311 (1965).

As an initial matter, we dispose of Mr. Roseman's argument that proof of fraud as to any matter embraced within the personal guaranty—for example, that Ms. Roseman's signature was a forgery or that the notarization was false—vitiates the entire guaranty. *See Mills v. Dunk*, 263 N.C. 742, 140 S.E. 2d 358 (1965); *Cowart v. Honeycutt*, 257 N.C. 136, 125 S.E. 2d 382 (1962). In the context of the case at bar, the applicability of this principle is limited. Proof of fraud in obtaining Ms. Roseman's signature vitiates the document as to her, but not as to Mr. Roseman. Neither the forgery nor the false notarization affected the substantive provisions of the guaranty as it related to Mr. Roseman. Nonetheless, a finding that Mr. Wiggs obtained an unauthorized signature and arranged for a false notarization would be relevant to demonstrate a plan of deception and fraudulent intent as to Mr. Roseman.

[1] The bank argues that there is no evidence of a material misrepresentation or of reasonable reliance on the deception. In *First-Citizens Bank and Trust Co. v. Akelaitis*, 25 N.C. App. 522, 214 S.E. 2d 281 (1975), this Court recognized that, even though a creditor and a guarantor are not in a fiduciary relationship, the obligation of good and fair dealing imposes a duty on the creditor to disclose material facts that the guarantor is unlikely to discover. This duty arises when the creditor knows or has grounds to believe that the guarantor is being misled or "induced to enter into the contract in ignorance of facts materially increasing the risks," and the creditor has the opportunity to inform the guarantor. *Id.* at 526, 214 S.E. 2d at 284 (The Court quoted from Section 1249 in 10 Williston, *Contracts* (3d ed. 1967), which relates to contracts of suretyship, and applied that Section to contracts of guaranty.). In such a case, "non-disclosure would in effect amount to a contrary representation to the [guarantor]." *Id.* (quoting *Harris and Harris Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1962)). "Where there is a duty to speak, fraud can be practiced by silence as well as by a positive misrepresentation." *Id.* at 525, 214 S.E. 2d at 284 (citation omitted).

We conclude that the evidence in this case would support a jury's finding that the failure to disclose that a personal guaranty was required and that one was included in the contract package, after Mr. Roseman specifically and unequivocally stated there would be no contract if he had to sign a personal guaranty, amounted to a representation that none was necessary. If Mr. Roseman's evidence was believed, Mr. Wiggs engaged in a course of conduct designed to induce Mr. Roseman to sign the guaranty: Mr. Wiggs obtained the forged signature of Ms. Roseman; he proceeded to close the deal with Mr. Roseman with the knowledge that Mr. Roseman would not knowingly sign a personal guaranty; Mr. Wiggs included the personal guaranty in a large package of documents that Mr. Roseman obviously thought he was signing *as president of Dentex*; and Mr. Wiggs arranged for a false notarization of the guaranty. Although the parties were not in a fiduciary relationship, *see, e.g., Vail v. Vail*, 233 N.C. 109, 63 S.E. 2d 202 (1951), good and fair dealing required that Mr. Wiggs disclose to Mr. Roseman that he was signing a personal guaranty. Failure to disclose this fact amounted to a material misrepresentation by concealment.

We distinguish the case of a guarantor who, after knowingly and intentionally signing a guaranty, pleads mere ignorance of the contents or legal effect of a guaranty. *See International Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 316 S.E. 2d 619, *disc. rev. denied*, 312 N.C. 493, 322 S.E. 2d 556 (1984).

The bank contends that Mr. Roseman's reliance on any silent misrepresentation was unreasonable as a matter of law. The law imposes a duty on individuals to exercise ordinary prudence in relying upon business associates. *Johnson v. Lockman*, 41 N.C. App. 54, 58, 254 S.E. 2d 187, 189, *disc. rev. denied*, 297 N.C. 610, 257 S.E. 2d 436 (1979).

> But the law does not require a prudent [person] to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of [people] or the transactions of business, trade and commerce could not be conducted with that facility and con-

> fidence which are essential to successful enterprise and . . . prosperity.

Walsh v. Hall, 66 N.C. 233, 238 (1872); *Johnson v. Owens*, 263 N.C. at 757-58, 140 S.E. 2d at 314 (1965); *Cowart*, 257 N.C. at 143, 125 S.E. 2d at 387; *Roberson v. Williams*, 240 N.C. 696, 83 S.E. 2d 811 (1954). Courts must cautiously balance the conflicting policies of suppressing fraud on one hand and discouraging neglect and inattention toward one's obligations on the other. *Johnson v. Owens.* "Just where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine." *Johnson v. Owens*, 263 N.C. at 758, 140 S.E. 2d at 314.

In close cases, courts should be loath to deny relief on the theory that had the victim been more attentive, the fraud would not have worked. *Id.; Roberson.* Whether reliance on a misrepresentation was reasonable generally is a question of fact for a jury. *Johnson v. Lockman*, 41 N.C. App. at 58, 254 S.E. 2d at 189 (citing numerous cases). It is only in exceptional cases that the issue of reasonable reliance may be decided by the summary judgment procedure. *Id.* at 61, 254 S.E. 2d at 191. The case at bar does not present an exceptional or extraordinary situation. In light of Mr. Roseman's specific allegations of intentional deception, we cannot attribute the failure to read the guaranty solely to the negligence of Mr. Roseman as a matter of law. *Cf. Griggs v. Griggs*, 213 N.C. 624, 626-27, 197 S.E. 165, 167 (1938) (Because the plaintiff did not allege trick or device and fraudulent intent, his failure to read what he signed must be attributed to his own negligence.). There is evidence that Mr. Wiggs willfully misled Mr. Roseman as to the contents of the package of factoring contract documents. *Cf. Williams v. Williams*, 220 N.C. 806, 809-10, 18 S.E. 2d 364, 366 (1942) ("There is no evidence whatever of any attempt on the part of anyone to keep the contents or significance of the paper from the plaintiff or to deceive her with respect thereto.").

Reasonable minds may differ as to whether Mr. Wiggs' conduct constituted an intentional misrepresentation or concealment of a material fact and, if so, whether Mr. Roseman's reliance was reasonable. Mr. Roseman will not be charged with knowledge of the contents of the guaranty he signed if it were obtained by trick or artifice. *Cowart; see Griggs.* Whether a reasonably pru-

dent man, under similar circumstances, would have signed without reading the document is a question for the jury. The trial court erred in granting summary judgment against Mr. Roseman on the personal guaranty.

III

[2] Angela Roseman argues that the trial court erred in entering summary judgment against her counterclaim for fraud. It is not disputed that Ms. Miller was acting as Mr. and Ms. Roseman's secretary and agent in processing the factoring documents that Mr. Wiggs brought to Dentex. The evidence was sufficient to show that Mr. Wiggs falsely represented to Ms. Miller the nature of the documents she was signing and, through deception and artifice, convinced her to forge the name "Angela Roseman" on a personal guaranty. There is sufficient evidence to support a finding by a jury that Mr. Wiggs' statements were reasonably calculated to deceive; made with intent to deceive; in fact deceived Ms. Miller; induced reliance; and resulted in the forging of Ms. Roseman's name. And at the least, Ms. Roseman was injured to the extent she incurred costs in defending against the bank's action on the guaranty before she was dismissed as a party. "[W]here a fraud is worked upon an agent by a third person, either by misrepresentation or by silence, the fraud is considered as worked upon the principal, and the latter has a right of action against the third person for redress." 3 Am. Jur. 2d *Agency* Sec. 289, at 650 (1962) (footnote omitted).

The bank argues that it is not liable for the intentional tort of Mr. Wiggs because the act was beyond the scope of his employment. The bank asserts that Mr. Wiggs was not hired to fraudulently obtain unenforceable documents and that, if he did so, he acted outside his employment. But the bank is liable for the acts of its agent acting within the range of the agent's employment, even if not expressly authorized by the bank. *See Snow v. De Butts*, 212 N.C. 120, 193 S.E. 224 (1937). In the case at bar, the bank admitted that Mr. Wiggs was its agent and was authorized to negotiate and secure the factoring agreement with Dentex.

> The general rule is that a principal is responsible to third parties for injuries resulting from the fraud of his [or her] agent committed during the existence of the agency and within the scope of the agent's actual or apparent authority

from the principal, even though the principal did not know or authorize the commission of the fraudulent acts.

Norburn v. Mackie, 262 N.C. 16, 23, 136 S.E. 2d 279, 284-85 (1964) (citations omitted); *see 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). If Mr. Wiggs fraudulently obtained Ms. Roseman's signature, he did so while procuring the factoring agreement for the bank.

The bank contends that, because the forged document could not be enforced, it could not have been obtained to further the interests of the principal. Therefore, the bank concludes, Mr. Wiggs' motives must have been personal. The impotence of this argument becomes apparent when one considers what personal motive Mr. Wiggs might have had to obtain a forgery for his employer. In any event, the motive of the agent is not a determining factor. *Snow.* There is ample evidence from which a jury could find that Mr. Wiggs was acting in the scope of his employment in obtaining the forgery, and that he was "attempting to do what he was employed to do." *Snow*, 212 N.C. at 123, 193 S.E. at 226. After all, Mr. Wiggs was advancing the bank's interest in starting the factoring process and earning fees. Perhaps there would be no default, and the guaranty would remain unused and therefore unchallenged. Whether Mr. Wiggs had the requisite fraudulent intent and whether the bank's branch manager actually participated in the fraud by having the factoring documents falsely notarized are issues of fact for the jury. Summary judgment was inappropriate as to Ms. Roseman's counterclaim for fraud.

IV

[3] The Rosemans next argue that the trial court erred in entering summary judgment against them on their counterclaim for unfair and deceptive trade practices under N.C. Gen. Stat. Sec. 75-1.1 (1985). There is no question that the allegedly unfair activity in this case comes within the meaning of "practices in or affecting commerce" under the statute. *See Johnson v. Phoenix Mutual Life Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). And for the purpose of testing the entry of summary judgment, the bank accepts as true the allegations that Mr. Wiggs fraudulently obtained Ms. Roseman's forged signature; that Mr. Wiggs concealed the personal guaranty in a large package of documents which Mr. Roseman thought he was signing for the corporation, after Mr.

Roseman made clear that he would not sign a personal guaranty; that the bank engaged in the practice of having documents, including the personal guaranty involved herein, falsely notarized; and that Mr. Wiggs was acting as an agent of the bank in negotiating and obtaining the factoring agreement.

The standards for evaluating whether a trade practice is unfair or deceptive are summarized in *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E. 2d 397, 403 (1981) (citations omitted):

> Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has in the marketplace. . . . A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . . [A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required. . . . [S]tate courts have generally ruled that the consumer need only show that an act or practice possessed the tendency or capacity to mislead, or created the likelihood of deception, in order to prevail under the states' unfair and deceptive practices act. . . .

Under the statute, it is irrelevant whether the consumer was in fact deceived or whether the act or practice was conducted in good faith. *Id.*

The bank argues that there could be no deception or unfairness in the case at bar because Mr. Roseman was free to read the documents he signed. But as discussed in Part II, *supra*, whether Mr. Roseman's failure to read the guaranty was reasonable under the circumstances is a question of material fact for the jury. Although proof of fraud is not the only way to establish an unfair and deceptive act, a finding by the jury that Mr. Roseman was in fact a victim of fraud, "would necessarily constitute a violation of the prohibition against unfair and deceptive acts." *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E. 2d 342, 346 (1975).

The bank relies on the decision in *Parsons v. Bailey*, 30 N.C. App. 497, 227 S.E. 2d 166, *disc. rev. denied*, 291 N.C. 176, 229 S.E. 2d 689 (1976) for the proposition that an employer corporation is not liable for the acts of its employee-agent when the employee was acting on his or her own behalf or on behalf of another cor-

poration. But in *Parsons* there was no evidence that the employee was "acting within the scope of authority" of his agency when he was negotiating with the plaintiff. *Id.* at 502, 227 S.E. 2d at 169. In contrast, the bank in the case at bar admitted that Mr. Wiggs was acting within the scope of authority of his agency when he negotiated with the Rosemans.

In the procedural posture of this case, we must determine whether the facts, if accepted by a jury as the Rosemans present them, would establish a violation of G.S. Sec. 75-1.1 as a matter of law. *Love v. Pressley,* 34 N.C. App. 503, 516, 239 S.E. 2d 574, 583 (1977), *disc. rev. denied,* 294 N.C. 441, 241 S.E. 2d 843 (1978). We hold that they would. Summary judgment is reversed on the counterclaim for unfair and deceptive trade practices, and the issue is remanded for trial.

V

The Rosemans' final argument is that the trial court erred in entering summary judgment against their counterclaim alleging the bank's wrongful refusal to allow them to redeem their property after repossession. Apparently, the Rosemans defaulted on a promissory note, separate from Dentex's note to the bank, which was secured by an airplane owned by the Rosemans. They contend that, although the repossession was proper, the bank wrongfully refused to allow them to redeem the airplane by repaying the balance of their obligation. The bank sold the airplane at a public auction and applied the surplus to the Rosemans' "personal guaranty indebtedness" resulting from the default of Dentex on its note to the bank. The bank relies on a security agreement with the Rosemans which provides that the airplane is collateral for all obligations of the Rosemans to the bank.

Both parties agree that if and only if the personal guaranty discussed above was valid, the application of the surplus from the public sale would have been proper because the Rosemans did not tender payment of all obligations secured by the collateral. *See* N.C. Gen. Stat. Sec. 25-9-506 (1985 Cum. Supp.). The outcome of this issue depends upon the jury's finding on remand as to whether Mr. Roseman's signature is valid and binding. *See* Part II, *supra.* Therefore, summary judgment on this claim is reversed. The trial court will consider this issue at the appropriate time on remand.

For the reasons set forth above, we

Reverse and remand.

Chief Judge HEDRICK dissents.

Judge WEBB concurs.

Chief Judge HEDRICK dissenting.

In my opinion the trial court did not err in entering summary judgment for plaintiff against defendant Clarence Edward Roseman. " 'In this State, it is held that one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was wilfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained.' " *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 180, 221 S.E. 2d 499, 503 (1976) (quoting *Williams v. Williams*, 220 N.C. 806, 18 S.E. 2d 364 (1942)). Defendant's testimony that he told plaintiff that he would not sign a guaranty does not amount to his having been misled or misinformed as to the contents of the thing he signed, or that the contents of the instrument were fraudulently kept from him.

I also believe the trial court was correct in entering summary judgment for plaintiff on defendant Angela Roseman's counterclaim for fraud. *See Perkins v. Insurance Co.*, 4 N.C. App. 466, 167 S.E. 2d 93 (1969).

In re Proposed Assessment v. Carolina Telephone

IN THE MATTER OF: THE PROPOSED ASSESSMENT OF ADDITIONAL FRANCHISE TAX FOR THE TAXABLE QUARTERS ENDED MARCH 31, 1980, JUNE 30, 1980 AND SEPTEMBER 30, 1980 BY THE SECRETARY OF REVENUE OF NORTH CAROLINA v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY

No. 8510SC1243

(Filed 3 June 1986)

Taxation § 26— franchise tax—revenues for yellow pages advertising—not gross receipts

The revenues received by Carolina Telephone from the sale of advertisements to appear in the "yellow page" classified directory are not includable as "gross receipts" of a telephone company for franchise tax purposes as defined in N.C.G.S. § 105-120.

APPEAL by petitioner from *Bailey, Judge.* Judgment entered 20 August 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 10 April 1986.

Carolina Telephone and Telegraph Company (Carolina) is a public utility corporation regulated by the North Carolina Utilities Commission. In addition to its "white page" directories, Carolina publishes "yellow page" directories and charges fees for advertisements that appear in the "yellow page" portion of the directories. One free listing is given to each business subscriber in the appropriate "yellow page" classification. The directory advertising aspect of Carolina's telephone system business is not regulated by the Utilities Commission.

Pursuant to G.S. 105-120(a) and (b) Carolina is required to make and deliver quarterly returns to the Secretary of Revenue (Secretary) showing its total gross receipts for each quarter for purposes of an annual franchise tax imposed by this State for the privilege of engaging in the telephone business. By letter dated 30 April 1979 to the North Carolina Department of Revenue (Department), Carolina reported its gross receipts for the first quarter of 1979 and included a check for $2,525,376.59 in payment of the tax due. Carolina also notified the Department that it had excluded from total gross receipts its receipts from "yellow page" advertising in the amount of $1,648,550.06. By letter dated 16 July 1979, the Franchise Tax Division of the Department concurred with Carolina's exclusion of receipts from "yellow page" advertis-

ing. On 24 January 1980 the Franchise Tax Division withdrew its concurrence contending that revenues from "yellow page" advertising should be included in Carolina's gross receipts franchise tax base.

Subsequently, Carolina forwarded to the Department franchise tax reports omitting the yellow page revenues for the taxable quarters ended 31 March 1980, 30 June 1980 and 30 September 1980. Notice of Tax Assessment for the additional franchise tax due for taxable quarters ending 31 March, 30 June and 30 September 1980 was forwarded to Carolina on 27 January 1981. Carolina objected to the assessment and pursuant to G.S. 105-241.1 filed a formal application for a hearing before the Secretary on 20 February 1981. The hearing was held on 25 May 1982 and on 1 March 1983 the Secretary affirmed the assessment against Carolina.

Pursuant to G.S. 105-241.2(a)(2) Carolina timely petitioned to the Tax Review Board for an administrative review of the Secretary's decision. The Tax Review Board held its hearing on 9 November 1983 and reversed the Secretary's decision. Pursuant to the provisions of Article 4, Chapter 150A of the General Statutes, the Secretary filed his petition for judicial review on 28 December 1983. The matter was heard in Superior Court, Wake County on 20 August 1985. Judge Bailey affirmed the decision of the Tax Review Board in its entirety, finding that the substantial rights of the Secretary as set forth in G.S. 150A-51 had not been prejudiced. The Secretary (petitioner) appealed.

Attorney General Thornburg by Special Deputy Attorney General Myron C. Banks, for the petitioner-appellant.

Dwight W. Allen, Vice President, Secretary and General Counsel, Carolina Telephone and Telegraph Company and Taylor & Brinson by Herbert H. Taylor, Jr., for respondent-appellee.

EAGLES, Judge.

The sole question presented for review is whether the revenues received by Carolina from the sale of advertisements to appear in the "yellow page" classified directory are includable as "gross receipts" of a telephone company for franchise tax pur-

poses as defined in G.S. 105-120. We find that they are not and accordingly affirm.

G.S. 105-120(b) imposes an annual franchise tax, payable quarterly, on the "gross receipts" of a telephone company. A telephone company is "[e]very person, firm, or corporation, domestic or foreign, owning and/or operating a telephone business for the transmission of messages and/or conversations to, from, through, in or across this State." G.S. 105-120(a). "Gross receipts" are defined in subsection (b): "Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina." This definitional portion of the statute determines this appeal. Our decision turns on the legislative intent and meaning of the phrase "rentals, other similar charges, and all tolls received from business."

In construing G.S. 105-120(b) we are guided by two general legal principles. First, we must determine the connotation which the legislature attached to the words used to define "gross receipts," construing the statute as the legislature intended it to be understood when it was enacted. *Cab Co. v. Charlotte*, 234 N.C. 572, 68 S.E. 2d 433 (1951). Second, we must construe tax statutes strictly, resolving ambiguities against the State and in favor of the taxpayer. *Watson Industries v. Shaw, Comr. of Revenue*, 235 N.C. 203, 69 S.E. 2d 505 (1950).

The statute declares that gross receipts shall include rentals, other similar charges and all tolls received from business. In the only North Carolina case interpreting the statutory definition of "gross receipts," *Telephone Co. v. Clayton, Comr. of Revenue*, 266 N.C. 687, 147 S.E. 2d 195 (1966), our Supreme Court held that telephone pole rentals charged by Southern Bell to electric power companies and other users of its poles were not the type of "rentals" contemplated in the statutory definition of "gross receipts." *Id.* at 692, 147 S.E. 2d at 198. Therefore, the Commissioner of Revenue could not include those rentals in computing Southern Bell's franchise tax base. *Id.* The Court determined that "rentals" meant rentals paid by customers for the use of telephone, i.e. local exchange rentals. *Id.* at 691, 147 S.E. 2d at 197. In its analysis of the statute, the *Clayton* court came to the following conclusions:

(1) At the time G.S. 105-120(a) and (b) was enacted in 1939, the word rental referred to the rental of the telephone itself. Charges similar to "rentals" were "monthly charges for special equipment such as outdoor sets, hand telephones, and extra lengths of cord for desk sets . . . colored sets, 'push-button dialing,' amplifiers and other accouterments." *Id.* at 690-91, 147 S.E. 2d at 197.

(2) The General Assembly used the word "include" to mean "shall consist of" so as to not broaden the tax base but exclude interstate tolls from the tax base. *Id.* at 691, 147 S.E. 2d at 197.

(3) If the General Assembly had intended to tax telephone companies' revenues from sources other than those services which telephone companies are obligated to furnish to the public, then the General Assembly would have specifically written the statute to include all receipts from any source whatsoever, excepting those expressly exempted. *Id.* at 691, 147 S.E. 2d at 198.

Following the analysis used by the *Clayton* court, we conclude that revenues received from the sale of advertisements displayed in the "yellow page" classified directory are not includable in Carolina's franchise tax base. These receipts clearly do not represent "rentals" or "tolls received from business." "Rentals" are the amounts paid by telephone customers for local exchange rentals. 266 N.C. at 691, 147 S.E. 2d at 197. "Tolls received from business" are the revenues received by Carolina from the telephone company business. A toll is defined as a sum of money paid for the use of something. Black's Law Dictionary 1334 (rev. 5th ed. 1979). Telephone "business" is defined in G.S. 105-120(a) as "the transmission of messages and/or conversations to, from, through, in or across this State." Therefore, "tolls received from business" are the charges paid to Carolina by its customers for the privilege of using Carolina's message transmission and communication equipment. This definition encompasses the transmission of messages and conversations but does not include revenues received from the sale of "yellow page" advertisements.

"Gross receipts" also include "other similar charges." This phrase appears in sequence immediately after the term "rentals": "gross receipts shall include all rentals, other similar charges. . . ." While the Court in *Clayton, supra,* did not specifically define

"other similar charges," the Court alluded to a definition by stating: "Charges similar to these rentals . . . were monthly charges for special equipment such as outdoor sets, hand telephones, and extra lengths of cord for desk sets. Today extra charges are made for colored sets, 'push-button dialing,' amplifiers and other accouterments." 266 N.C. at 690-91, 147 S.E. 2d at 197. In determining what is meant by the phrase "other similar charges" we are guided by the *ejusdem generis* rule of statutory construction, "where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated." *State v. Lee*, 277 N.C. 242, 244, 176 S.E. 2d 772, 774 (1970) (quoting *State v. Fenner*, 263 N.C. 694, 140 S.E. 2d 349 (1965). Applying this rule we find that the phrase "other similar charges" means charges of the same kind and character as rentals, for example, the type of charges listed by the Supreme Court in *Clayton*. Revenues from the sale of advertisements to appear in the "yellow page" classified directory do not fall within this description. They are not rentals, defined by the Court in *Clayton* to be local exchange rentals and they are not of like kind, character and nature.

Accordingly, we hold that the General Assembly did not intend to include as "gross receipts" revenues attributable to the sale of advertisements displayed in the "yellow page" classified directory.

We note that the legislative history of the franchise tax statute supports our holding. As early as 1911, a specific tax was levied on telephone companies although not on a gross receipts basis. N.C. Public Laws 1911, ch. 50 Section 49. By 1913, the tax was levied on "gross receipts" from all sources. There was no limitation specifying the scope or content of the receipts. N.C. Public Laws 1913, ch. 201 Section 81. In 1925 it was first provided that "gross receipts shall include all tolls received from business which both originates and terminates in the State of North Carolina . . . ," evincing a legislative intent to restrict the tax to gross receipts arising only from the telephone business. N.C. Public Laws 1925, ch. 101 Section 88. In 1929, the tax was first denominated a "franchise tax" and in that year assumed the

general form it now takes. N.C. Public Laws 1929, ch. 345 Sections 201, 207. The "gross receipts" tax began as a tax on gross receipts from all sources. It was later limited to a tax on receipts from the telephone business. Subsequently it was specifically defined as a tax on "rentals, other similar charges, and tolls received from business." G.S. 105-120(b).

We note too that the legislative policy behind franchise tax statutes generally supports our holding.

> Franchise taxes are imposed for the privilege of engaging in business in this State. G.S. 105-114. The amount of the tax varies with "the nature and magnitude of the privilege taxed, the relative financial returns to be expected of the business or activities under franchise, and the burden put on government in regulating, protecting and fostering the enterprise. . . ."

Clayton, supra, 266 N.C. at 690, 147 S.E. 2d at 197 (quoting *Power Co. v. Bowles*, 229 N.C. 143, 147, 48 S.E. 2d 287, 290 (1948)). The annual franchise tax on telephone companies, G.S. 105-120(a), by its terms applies to "[e]very person, firm, or corporation . . . owning and/or operating a telephone business for the transmission of messages and/or conversations" and is imposed "for the privilege of engaging in such business." G.S. 105-120(b). The telephone business is regulated by the North Carolina Utilities Commission pursuant to Chapter 62 of the General Statutes. G.S. 62-110 grants to a telephone company a monopoly on the rendering of telephone service within its service area. *State ex rel. Utilities Comm. v. Merchandising Corp.*, 288 N.C. 715, 220 S.E. 2d 304 (1975). "Nothing in Ch. 62 of the General Statutes, however, confers upon a telephone company a monopoly upon advertising by its business subscribers." *Id.* at 725, 220 S.E. 2d at 310.

Though we resolve the issue before us on the basis of principles of statutory construction, two opinions by our Supreme Court, each relied on by one of the parties, warrant discussion here. Appellant urges that *State ex rel. Utilities Comm. v. Southern Bell*, 307 N.C. 541, 299 S.E. 2d 763 (1983) (*Southern Bell*) requires reversal of the Superior Court's order. Appellee contends that *Gas House, Inc. v. Southern Bell Telephone Co.*, 289 N.C. 175, 221 S.E. 2d 499 (1976) (*Gas House*) supports the trial court's position.

Southern Bell, supra, was a ratemaking case in which the Court held that the Utilities Commission could consider the expenses, revenues and investments related to directory advertisements in its ratemaking proceedings. 307 N.C. at 547, 299 S.E. 2d at 767. The Utilities Commission found as fact that "[t]he classified directory in which advertising appears, is an *integral part* of providing adequate telephone service." *Id.* at 546, 299 S.E. 2d at 766. The Supreme Court held that there was sufficient evidence to support this finding of fact. *Id.*

Gas House, supra, concerned the validity of an exculpatory clause in a contract for the publication of an advertisement within the "yellow page" classified directory. The Supreme Court opinion noted that, "[t]he business of carrying advertisements in the yellow pages of its directory is not part of a telephone company's public utility business." 289 N.C. at 184, 221 S.E. 2d at 505. In *Southern Bell, supra,* the Court's majority opinion distinguished *Gas House* and specifically stated that the above-quoted language from *Gas House* was *obiter dictum* and not inconsistent with the result reached by the Court in *Southern Bell,* but that "[t]o the extent that the language in *Gas House* is inconsistent with our holding in the case *sub judice* that language is overruled." 307 N.C. at 547, 299 S.E. 2d at 766. Appellant here does not argue that *Southern Bell* overruled the quoted language from *Gas House* but merely refers to Justice Exum's dissent in *Southern Bell* disagreeing with the majority's designation of the *Gas House* language as *obiter dictum* and stating that by overruling the language in *Gas House* the Court, in effect, overruled the entire decision. 307 N.C. at 551, 299 S.E. 2d at 768-69 (Exum, J., dissenting in part and concurring in part).

We have carefully reviewed the opinions in *Gas House* and *Southern Bell* and conclude that they are not inconsistent and may be read together. As we read it, *Gas House* holds that the business of *carrying advertisements* in the yellow pages is not part of a telephone company's public utility business. *Southern Bell* holds that the *classified directory* in which advertising appears, is an integral part of the public utility's function of providing adequate service to citizens of North Carolina. We read *Southern Bell* strictly to mean that, for ratemaking purposes, it is the furnishing of the classified directory which is integral to providing reasonable, adequate telephone service and not the addi-

tional advertisements that appear in the classified directory. In *Southern Bell* the distinction is recognized: "This language [in *Gas House*] does not go so far as to say that the furnishing of a *classified listing of subscribers*, like that found in the yellow pages, to its customers is not an integral part of the public utility's function of providing adequate telephone service to the citizens of North Carolina." [Emphasis added.] 307 N.C. at 547, 299 S.E. 2d at 766.

While we can reconcile the language of *Gas House* with the holding in *Southern Bell*, neither opinion directly addresses the issue of what constitutes Carolina's franchise tax base. Our decision here does not conflict with the policy expressed and the result reached by the Court in *Southern Bell*. The inclusion for ratemaking purposes of revenues from yellow page advertisements does not require that the revenues also be included in the public utility's franchise tax base. We note that while telephone pole rentals are included for ratemaking purposes, they too are excluded from the franchise tax base, *Clayton, supra.*

For the reasons stated, we affirm the trial court's order affirming the Tax Review Board.

Affirmed.

Judges ARNOLD and PARKER concur.

SANDRA BINDER RICE v. JAMES PATRICK RICE

No. 8525DC1262

(Filed 3 June 1986)

1. **Divorce and Alimony § 24.5— 60% increase in child support—insufficient findings**

The trial court's order did not contain sufficient findings of fact and conclusions of law to warrant a 60% increase in child support payments over the amount agreed upon in the parties' separation agreement.

2. **Divorce and Alimony § 30— equitable distribution—order allowing further proceedings improper**

The trial court erred in ordering that further proceedings could be held to accomplish an equitable distribution of marital property, since the court's

order upheld the validity of the parties' separation agreement, and the agreement specifically provided for the distribution of some of the parties' property and then released the rights of each in any property of the other.

APPEAL by defendant from *Tate, McDowell S., Judge.* Judgment entered 7 January 1985 in District Court, CATAWBA County. Heard in the Court of Appeals 7 March 1986.

Plaintiff, Sandra Bender Rice, and defendant, James Patrick Rice, were married to each other on 7 May 1964. There were two children born to the marriage, Glenda Patrice Rice and Eric Vandlandingham Rice. The parties separated from each other and on 7 July 1981 the parties executed a separation agreement that was drafted by plaintiff's counsel. Defendant was not represented by legal counsel at the time the separation agreement was entered into. The terms of the separation agreement recited, *inter alia*, as consideration "the mutual promises and covenants of the parties hereinafter set forth, and other good and valuable considerations, the receipt whereof is hereby respectively acknowledged by the parties." The agreement, in pertinent part, provided for (1) division of property, (2) the effect of reconciliation on the property settlement, (3) the mutual release of all personal and real property claims that the parties may have against each other or might acquire under any statute of distribution, right of election or otherwise, and (4) the joint custody and support of the parties' two children.

On 17 June 1982, plaintiff filed her complaint in case number 82CVD1150. Plaintiff's complaint averred three claims. Plaintiff claimed that she was a fit and proper person to have the care and custody of the minor children; that defendant substantially breached the parties' separation agreement; and that through the mutual mistake of the parties certain provisions were not included in the separation agreement. Plaintiff requested of the court, *inter alia*, that she be awarded custody of the minor children and reasonable child support; that the court declare whether defendant has substantially breached the separation agreement and whether plaintiff is still bound thereunder; and that the separation agreement be reformed to reflect the matters in plaintiff's third claim. On 30 August 1982, defendant answered plaintiff's complaint in case number 82CVD1150. Defendant, in his answer, made a motion to dismiss for failure to state a claim upon

which relief may be granted, pleaded fraud as an affirmative defense and generally denied all pertinent allegations of plaintiff's complaint. Defendant further answered and counterclaimed that plaintiff had made it impossible for him to exercise visitation privileges; that the separation agreement should be adjudicated as binding between the parties; and that the ownership of various items of silver and china should be adjudicated since said items were not made reference to in the separation agreement. Plaintiff, answering defendant's counterclaim, generally denied all pertinent allegations. On 26 October 1983, plaintiff amended her complaint alleging, among other things, a substantial change of circumstances had occurred from the time the separation agreement was entered into, to wit: the needs of the children had increased and defendant's income had increased. Plaintiff further alleged that defendant had refused to pay their daughter's college expenses as per the terms of the separation agreement; that on or about 5 November 1981, defendant procured plaintiff to sign a release for which there was no consideration ever paid. Defendant's answer to plaintiff's amended complaint averred that defendant had paid $3000.00 which was used to meet the college expenses of their daughter, even though the separation agreement did not require him to do so. Defendant generally denied all pertinent allegations of plaintiff's amended complaint. With respect to plaintiff's allegations about a release, defendant averred that plaintiff did release all claims to the Duo Drugstore which defendant acquired ownership of. Defendant averred that plaintiff was seeing a married man in the family's home, which he paid for, and therefore requested the court to inquire into the custody of their children.

On 25 October 1983, plaintiff filed her complaint seeking an absolute divorce from defendant and an order of equitable distribution of marital property (83CVD1957). Defendant, in answer, also requested an absolute divorce and an order of equitable distribution of property. However, defendant alleged that only certain items of personal property were not provided for in the separation agreement. On 22 December 1983, a partial judgment was entered granting plaintiff an absolute divorce from defendant (83CVD1792). The court specifically retained the cause for future determination of all other issues, including equitable distribution of marital property.

The parties consented to the consolidation of cases 82CVD 1150 and 83CVD1957 for trial without a jury. On 7 January 1985, the court ordered, *inter alia*, that defendant pay $800.00 per month child support for their son, Eric; and that at either parties' request further proceedings may be held to accomplish an equitable distribution of marital property, including the Duo Drugstore. Defendant appeals.

Waddell, Mullinax & Childs, by Lewis E. Waddell, Jr., for defendant appellant.

Randy D. Duncan, for plaintiff appellee.

JOHNSON, Judge.

[1] Defendant first argues that the trial court's order does not contain sufficient findings of fact and conclusions of law to warrant a sixty percent (60%) increase of child support payment over the amount agreed upon in the parties' separation agreement. We agree.

Our discussion of defendant's argument begins with a rejection of defendant's contention that plaintiff must show a substantial change of conditions from the time the separation agreement was entered into. *See generally Perry v. Perry*, 33 N.C. App. 139, 234 S.E. 2d 449, *disc. rev. denied*, 292 N.C. 730, 235 S.E. 2d 784 (1977). This Court in *Perry, supra, quoting Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E. 2d 487, 491 (1963), ruled as follows:

> No [separation] agreement between the parents will serve to deprive the court of its inherent authority to protect the interests and provide for the welfare of infants. Husband and wife 'may bind themselves by a separation agreement or by a consent judgment but they cannot withdraw children of the marriage from the protective custody of the court.'

Perry, supra, at 142-43, 234 S.E. 2d at 452. *Williams v. Williams*, 261 N.C. 48, 134 S.E. 2d 227 (1964), and *Perry, supra*, reject defendant's suggestion that the court must have made findings that there was a substantial change of circumstances from the time the parties entered into their separation agreement.

Defendant contends that the trial court abused its discretion by failing to make the requisite findings of fact and conclusions of

law in the court's order increasing defendant's child support payments from the amount the parties agreed to in their separation agreement. The statutory authority for an action for support of a minor child is G.S. 50-13.4, which states in pertinent part the following:

> (b) In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child, and any other person, agency, organization or institution standing in loco parentis shall be secondarily liable for such support. Such other circumstances may include, but shall not be limited to, the relative ability of all the above-mentioned parties to provide support or the inability of one or more of them to provide support, and the needs and estate of the child. The judge may enter an order requiring any one or more of the above-mentioned parties to provide for the support of the child, as may be appropriate in the particular case, and if appropriate the court may authorize the application of any separate estate of the child to his support.
>
> (c) Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and home maker contributions of each party and other facts of the particular case.

G.S. 50-13.4. The trial court has great discretion in establishing the amount of payments toward the support of minor children. *Plott v. Plott*, 65 N.C. App. 657, 310 S.E. 2d 51 (1983), *modified*, 313 N.C. 63, 326 S.E. 2d 863 (1985).

The parties' separation agreement required defendant to pay not less than $500.00 per month as a total of child support for the two children. The trial court ordered that defendant shall pay $800.00 per month as support for his minor son Eric. This represents a $300.00 increase in support payments above the $500.00 monthly payments, which was for the support of two minor children. Since the parties' daughter is no longer a minor, defendant was not required to make child support payments for her benefit.

The following conclusion of law engendered the court's order requiring defendant to pay $800.00 for the support of his minor son:

> 3. A material and substantial change affecting the welfare of the minor son, Eric, has taken place with regard to his support, particularly the contribution toward that support which should be made by his father, defendant based upon:
>
> (a) Eric's increased age and greater needs;
>
> (b) Increases in costs of items needed for his support;
>
> (c) The loss by plaintiff of $250 per month formerly received from defendant for Glenda [the parties' daughter];
>
> (d) The added drain on plaintiff's resources caused by her trying to support a daughter in college; and
>
> (e) Defendant's increased earnings and property.

The finding by the court that plaintiff has lost $250.00 per month formerly received from defendant for Glenda is an improper consideration. Glenda is no longer a minor and her personal expenses should not serve as a basis for more than tripling the $250.00 child support payments for Eric, as agreed upon in the separation agreement, to $800.00. Moreover, we note that defendant had by the separation agreement manifested his intent to assist his daughter with her college expenses. Glenda became eighteen years of age on 31 October 1982. The court found as fact that the monthly expenses of Eric were $583.00. There are no specific findings with respect to what basis exists for the difference between the $583.00 monthly expenses of Eric and the $800.00 that the court ordered defendant to pay in child support payments for Eric. The court did find as fact that in the fall of 1983 defendant gave Glenda twelve undated checks, each in the amount of $250.00, and that defendant had withdrawn his financial support of his daughter because of the then pending litigation. It appears that this finding of fact, in part, engendered the court's conclusion of law that defendant had not breached the parties' separation agreement. Thus, the court concluded as a matter of law that plaintiff had lost the $250.00 per month payments contributed by defendant for the support of the emancipated child, Glenda; however, the findings of fact indicate that Glenda received and will continue to receive financial assistance from defendant. We hold

that the findings of fact in the instant case do not support the court's conclusions of law that defendant pay $800.00 per month for the support of Eric.

[2] Defendant next contends that the trial court erred in its order upholding the validity of the parties' separation agreement while at the same time ordering, "Further proceedings to accomplish an equitable distribution of marital property, including but not limited to the Duo Drugstore, will be scheduled upon request of either party." For reasons to follow we agree with defendant.

In *Perry, supra,* this Court recognized the binding effect of a valid separation agreement between the parties with respect to marital property rights. Also, in a recently filed opinion, this Court ruled that a separation agreement constituted a full and final settlement of all marital property. *See Hartman v. Hartman,* 80 N.C. App. 452, 342 S.E. 2d 11 (1986). The trial court in the instant case made conclusions of law in pertinent part as follows:

> 4. *The Separation Agreement is valid,* and should not be set aside nor modified. The difficulty with it lies not in any ambiguity but simply in its failure to take account of and deal with the most valuable property and assets of the parties.
>
> 5. Defendant has not breached the Separation Agreement.
>
> 6. The Release of 5 November 1981 should be set aside for failure of consideration.
>
> 7. Property owned by the parties on 7 July 1981 and not mentioned or dealt with in the Separation Agreement is subject to equitable distribution.

(Emphasis supplied.) The parties' separation agreement specifically provides for the distribution of some of the parties' property and then releases each other's rights as follows:

> 8. MUTUAL RELEASE OF ALL PROPERTY CLAIMS. Husband and wife grant, release, and forever quitclaim each to the other, *all right, title, interest, claim and demand whatsoever in the real estate* of which either is now seized or may hereafter become seized; *and each releases all rights* he or she now has

> or may hereafter acquire *in the personal estate of the other, whether such rights arise under any statute of distribution* or by virtue of any right of election or otherwise. . . .

(Emphasis supplied.) In another section of the settlement agreement the parties renounce and release each other's estates from "*All other rights*, claims, demands and obligations *of every kind and character* for past and future support and maintenance *and for property settlement*." (Emphasis supplied.) Moreover, in the section entitled "Subsequent Divorce" the parties agreed that should a divorce be decreed, the separation agreement should be incorporated in, merged with and become a part of such decree. With respect to household goods the parties stated in their separation agreement, which was drafted, redrafted and finalized by plaintiff's counsel, that the parties had agreed upon a division of said household and kitchen furniture. The agreement further stated that "after the parties have divided the household and kitchen furniture and the husband has removed such furniture as has been assigned to him from their home, each party shall then become the individual owner of the household and kitchen furniture distributed to each of them." Without making reference to any of the releases or provisions from the separation agreement, quoted *supra*, the court found the following:

> The instrument recited that the parties had 'agreed upon the division of the household and kitchen furniture . . . accumulated by them during their married life,' but contained no other description of how this division either had been or would be carried out, and specifically disclaimed making or attempting any 'division of the personal property' other than 'household and kitchen furniture.' There is no mention anywhere in the document of the Duo Drug Store, stock certificates, bonds, bank accounts, silverware, china, jewelry, nor any other species of personal property except automobiles.

This finding by the court, in light of the explicit release contained in the agreement, is insufficient to support a conclusion of law that the separation agreement failed "to take account of and deal with the most valuable property and assets of the parties." In effect the court's order, contrary to its conclusion that the separation agreement should not be modified, removes the mutual

releases of the parties' rights which may accrue as a result of equitable distribution as set forth in the separation agreement, triples defendant's child support payments, and leaves intact defendant's agreement to pay the college expenses of the parties' children contingent upon his financial ability to do so. In *Blount v. Blount*, 72 N.C. App. 193, 323 S.E. 2d 738 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 389 (1985), this Court held that a separation agreement settled the property rights of the parties and barred a claim under equitable distribution where the parties had relinquished such a claim despite the absence in the agreement of a specific enumeration of the property in question. In accordance with *Blount, supra*, we hold that the trial court erred in ordering that further proceedings may be held to accomplish an equitable distribution of marital property.

In light of the foregoing we need not reach defendant's remaining exceptions to the trial court's order.

Reversed and remanded.

Judges BECTON and MARTIN concur.

ELMER JOE PATTERSON v. LINDA J. PATTERSON

No. 859DC797

(Filed 3 June 1986)

1. **Divorce and Alimony § 16.6— alimony—defendant as dependent spouse—insufficiency of evidence**

Evidence was insufficient to support the trial court's determination that defendant was a dependent spouse and the court's order awarding defendant alimony is therefore vacated where defendant earned on her own a gross income which was nearly the same as that which the parties had earned as a unit, and defendant was therefore not actually substantially dependent upon plaintiff for her support, and where the trial court made no findings as to the parties' standard of living, present and prospective earnings, and reasonable expenses so as to determine whether defendant was "substantially in need."

2. **Divorce and Alimony § 24.1— child support—determination as to which expenses unreasonable—absence of findings**

The trial court's order awarding defendant child support must be vacated in the absence of crucial findings as to which of the child's expenses claimed

by the mother and which of the claimed expenses of plaintiff father were considered unreasonable by the court.

3. **Divorce and Alimony § 30— division of property not equal—child custody as basis**

The trial court's finding that an equal division of marital property would not be equitable was justified by its finding that defendant had sole custody of the minor child of the marriage.

4. **Divorce and Alimony § 30— equitable distribution—valuation and division of property proper**

There was no merit to plaintiff's contention that the valuation of the marital property given by the court-appointed appraiser was erroneous and that erroneous totals misled the trial judge into giving defendant more property than she otherwise would have received, since the parties had consented to the appointment of the appraiser and had agreed to be bound by his conclusions, and the trial judge considered each piece of marital property individually and divided the property appropriately.

5. **Divorce and Alimony § 30— equitable distribution—valuation of car proper**

In making an equitable distribution of marital property, the trial court did not improperly value the automobile owned by the parties at the time of separation at $1,000, where defendant testified that she believed the car to be worth $1,000 but she admitted to receiving $2,995 when trading the car in on a new automobile, while the blue book showed the car to be worth $3,250, since the subjective opinions of the owner of the property as to its value are admissible and competent, and the evidence tended to show that defendant invested $1,700 in repairing the car between the separation and the trade-in.

6. **Divorce and Alimony § 30— equitable distribution—failure to make findings as to joint bank accounts**

The trial court's order making an equitable distribution of marital funds existing at the separation must be vacated where the court made no findings at all as to joint checking and savings accounts.

7. **Divorce and Alimony § 18.16— attorneys' fees—insufficient findings as to dependency of spouse**

Where there were insufficient findings to support a determination that defendant was a dependent spouse, an award of attorneys' fees to defendant was improper; furthermore, attorneys' fees are not recoverable in an action for equitable distribution so that, in a combined action, the fees awarded must be attributable to work by the attorneys on the divorce, alimony and child support actions.

APPEAL by plaintiff from *Senter, Judge.* Judgment and order entered 1 April 1985 in District Court, FRANKLIN County. Heard in the Court of Appeals 7 January 1986.

Plaintiff appeals from a judgment ordering him to pay alimony, child support and attorneys' fees to defendant and ordering

an unequal distribution of the marital property. The parties were married on 18 April 1965 and separated on 23 March 1983. Plaintiff instituted an action for divorce and equitable distribution on 28 March 1984. Defendant counterclaimed for divorce, alimony, child custody and support and equitable distribution. The decree of absolute divorce was entered 11 June 1984, with the trial court retaining jurisdiction over the remaining matters. Those matters came on for hearing on 11 March 1985, and Judge Senter rendered judgment on 1 April. That judgment awarded defendant custody of the one minor child of the marriage with visitation privileges for plaintiff, $225.00 per month in child support and $125.00 per month in alimony. The judge found that "an equal division of the marital property would not be equitable" and ordered a distribution of the marital property which favored the defendant wife. Finally, plaintiff was ordered to pay $1,700.00 for his wife's attorneys' fees.

Boyce, Mitchell, Burns and Smith, P.A., by Carole S. Gailor for plaintiff appellant.

E. Gregory Stott and Yarborough, Jolly and Williamson by W. M. Jolly for defendant appellee.

PARKER, Judge.

Plaintiff challenges the portions of the judgment below relating to alimony, child support, equitable distribution and attorneys' fees. We shall consider each of these challenges separately.

I. Alimony

[1] General Statute 50-16.2 provides that only a "dependent spouse" is entitled to alimony when one of the ten grounds listed in that statute is present. In this case, plaintiff stipulated that he had abandoned defendant. G.S. 50-16.2(4). His challenge to the award of alimony is based on the conclusion of the trial judge that defendant is, in fact, a "dependent spouse."

"Dependent spouse" is defined in G.S. 50-16.1(3) as a spouse "who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." Our courts have interpreted "actually substantially dependent" to mean that

the spouse seeking alimony must be actually dependent upon the other "in order to maintain the standard of living in the manner to which that spouse became accustomed during the last several years prior to separation." *Williams v. Williams*, 299 N.C. 174, 180, 261 S.E. 2d 849, 854 (1980). The phrase "substantially in need of" has been interpreted as requiring the spouse seeking alimony to "establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without financial contribution from the other." *Id.* at 182, 261 S.E. 2d at 855.

The evidence in this case relating to these issues was that in the several years prior to the separation, the parties' joint income was variable because Mrs. Patterson operated a small business out of her home, the income from which was unsteady. The couple's federal income tax return for 1981 shows a joint income of $15,958.96; the 1982 return shows income of $12,656.49; and the 1983 return shows income of $16,284.58. Mrs. Patterson testified that she now has a weekly gross income of $306.80, or approximately $15,900 annually. She is thus making, on her own, a gross income which is very nearly the same as the couple was making as a unit. Therefore, we cannot say that defendant is one "actually without means of providing for his or her accustomed standard of living," *Williams* at 180, 261 S.E. 2d at 854; for this reason she does not qualify as a "dependent spouse" under the first test for determining dependency.

However, as stated in *Williams, supra*, the second test, "substantially in need," refers to something less than being "actually substantially dependent." The analysis under this test is much more extensive and requires detailed and specific findings by the trial court. *See Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). These findings must determine the standard of living of the parties as a family unit, the present earnings and prospective earnings of each spouse at the time of the hearing, the reasonable expenses of the party seeking alimony, and the financial worth of both spouses. No findings appear in the record as to the crucial issue of the standard of living enjoyed by the couple in the years prior to the separation. Further, an alimony award should follow equitable distribution, duly taking into account the division of the marital property and the resulting estates of the parties. *Talent v. Talent*, 76 N.C. App. 545, 334 S.E. 2d 256 (1985).

Therefore, that portion of the order awarding alimony to defendant is vacated, and the cause is remanded for further findings on the issue of alimony.

II. Child Support

[2] The trial judge, as part of the judgment below, ordered plaintiff to pay $225 per month in child support to defendant, the custodial parent. The trial judge found as fact that the reasonable expenses of the child were "in excess of $500 per month." The incomes and monthly expenses of both parties were also found by the trial court. When supported by the proper findings of fact, the amount of child support is determined by the trial judge in the exercise of discretion. *Plott v. Plott,* 313 N.C. 63, 326 S.E. 2d 863 (1985). Absent a showing of abuse of that discretion, a judge's determination of what is a proper amount of support will not be disturbed on appeal. *Id.*

In his findings, the trial judge found that the reasonable expenses of the child were "in excess of $500." Yet, the child's mother claimed the child's expenses were $855.16. No finding was made by the trial court as to which expenses he considered unreasonable. This is a critical finding relating to the reasonable needs of the child. *See id.* The same is true as to the finding of the reasonable living expenses of the child's father. The trial court found those expenses to be $800, rejecting the claimed figure of $1,196.80. Again, the judge made no finding as to what claimed expenses of the father he considered unreasonable. Such a finding is critical for determining the father's ability to pay. Failure to make these crucial findings in its child support order requires us to vacate the order and remand the cause for further findings. *Id.* at 74, 326 S.E. 2d at 870.

III. Equitable Distribution

[3] General Statute 50-20 governs the distribution of marital property upon divorce, absent an agreement of the parties. Subsection (c) of that statute states, "There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable." There are then enumerated factors which the court is to consider in determining whether an equal division is equitable. Contrary to appellant's assertion, a trial judge is not required, in the findings of fact, to

recite each factor and state the reasons for considering it or rejecting it. Rather, all that is required is for the trial judge to list the factors, statutory and non-statutory, that are supported by the evidence and which justify an unequal distribution. *See Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). The judge below found that an equal division would not be equitable for five listed reasons, but all relate to the fact that the defendant has sole custody of the minor child of the marriage. General Statute 50-20(c)(4) provides that the "need of a parent with custody of a child . . . of the marriage to occupy . . . the marital residence and to use or own its household effects . . ." is one factor to consider in determining whether an equal division would be equitable. Under the facts of this case, this factor alone justifies the unequal distribution of marital property without requiring the trial judge to simply recite the other factors. *See White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985); *Ellis v. Ellis*, 68 N.C. App. 634, 315 S.E. 2d 526 (1984).

[4] Appellant also contends that the trial judge erred in the values assigned to various pieces of marital property. First, appellant argues the valuation of the marital property given by the court-appointed appraiser was erroneous. The parties had consented to the appointment of the appraiser and had agreed to be bound by his conclusions. The appraiser valued each individual piece of property and then totalled the values of the pieces in various rooms. The totals for the items located in the living room, the master bedroom and at the wife's father's house were erroneous on account of a mathematical error in adding the values of the individual pieces. Appellant contends that these erroneous totals misled the trial judge into giving defendant more property than she otherwise would have received. We cannot agree. The record demonstrates that the judge considered each piece of marital property individually, and divided the property appropriately, taking into consideration that the wife had sole custody of the child of the marriage. Therefore, we do not believe that the erroneous totals assigned by the appraiser to arbitrary groupings of marital property affected the trial judge's decision. *See McManus v. McManus*, 76 N.C. App. 588, 334 S.E. 2d 270 (1985).

[5] Appellant next argues that the court improperly valued the automobile owned by the parties at the time of separation. When

the divorce action is based on the ground of one year separation, the marital property must be valued as of the date of separation. G.S. 50-21(b). The defendant testified that she believed, at the time of separation, the car to be worth $1,000. However, she admitted to receiving $2,995 when trading the car in on a new automobile. The appellant produced at trial photocopied pages of the National Automobile Dealers Association "Blue Book" showing the car to be worth $3,250. The trial court refused to admit this evidence, ruling that it was inadmissible hearsay. Assuming, without deciding, that this evidence was admissible, we still believe competent evidence supports the finding of the trial judge valuing the automobile at $1,000. The subjective opinions of the owner of property as to its value are admissible and competent. *See Responsible Citizens v. City of Asheville*, 308 N.C. 255, 302 S.E. 2d 204 (1983). The wife testified that, at the time of the separation, she was having tremendous maintenance problems with the car. She invested $1,700 in repairing the car between the separation and the trade-in. As for the "Blue Book" value, it is an estimate of the value of cars in good condition for their age; the problems Mrs. Patterson was experiencing with the car would reduce that assigned value. The finding that the car was worth $1,000 at the time of the separation is supported by competent evidence and, thus, was proper and is binding on this Court.

[6] Appellant further contends that the trial court improperly allocated marital funds existing at the time of the separation. The trial court found that the defendant had gotten the benefit of $1,322 in marital funds, while the plaintiff had gotten the benefit of $5,487 in marital funds. Plaintiff contends the actual allocation was $5,347 to defendant and $4,722 to him. Part of plaintiff's argument on this point is his contention that the trial judge erroneously valued the jointly owned automobile, but we have already rejected that contention. Even so, plaintiff would still contend the trial court should have found $3,087 in marital funds benefitted defendant and $4,722 benefitted plaintiff. Plaintiff's argument is that the trial court erroneously found that plaintiff got the $765 joint tax refund for 1982, and erroneously failed to find that defendant got the benefit of $1,000 in joint checking and savings accounts. However, the testimony as to the tax refund conflicted. After plaintiff testified that he believed his wife received the sole benefit of these funds, she was recalled and denied ever receiving them. The trial judge, as the fact-finder,

weighs the credibility of the witnesses. *See Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980). He found that plaintiff received the $765 tax refund. Where the issue is credibility of the witnesses, the findings made below are binding on this Court. *Id.*

However, no findings at all were made as to the joint checking and savings accounts. Thus, this Court is incapable of determining whether the trial court rejected plaintiff's testimony or simply neglected to include the claimed $1,000 amount in his findings. As part of the equitable distribution order, the court divided funds held in escrow which represented the remaining proceeds from the foreclosure sale of the marital home. Defendant was awarded $7,596.40 of these proceeds, while plaintiff was awarded only $6,403.40. Undoubtedly, the trial court's finding as to who got the benefit of the other marital funds affected the division of these funds. Without a finding concerning the $1,000 in joint accounts, we cannot say that the trial court properly divided these funds. The equitable distribution order is vacated and remanded to the trial court for further findings as to the joint accounts and a possible reallocation of the escrowed funds.

IV. Attorneys' Fees

[7] In order to be awarded attorneys' fees in an action for divorce, alimony, custody and child support, a spouse must be found to be a "dependent spouse," *Owensby v. Owensby*, 312 N.C. 473, 322 S.E. 2d 772 (1984), in addition to being found to be unable to "defray the expense of the suit." G.S. 50-13.6. We concluded in part I, *supra*, that there were insufficient findings to support a determination that defendant is a "dependent spouse." Additionally, attorneys' fees are not recoverable in an action for equitable distribution so that, in a combined action, the fees awarded must be attributable to work by the attorneys on the divorce, alimony and child support actions. Therefore, the award of attorneys' fees is vacated and remanded to the district court for further findings.

V. Conclusion

In addition to the lack of sufficient findings of fact in each of the parts of the district court's order discussed above, we note further that, throughout the order, items that are, in reality, conclusions of law are designated "Findings of Fact." In the absence

of other findings supporting these conclusions, this, too, requires that the orders below relating to alimony, child support, equitable distribution and attorneys' fees be vacated and the cause remanded to the district court for proper and sufficient findings of fact. *Coble, supra*, at 713, 268 S.E. 2d at 189.

Proper findings of fact and conclusions of law are necessary for effective appellate review, which ensures that the trial court properly exercised its duty to find the facts and apply the law thereto. Because the order appealed from does not contain findings of fact sufficient to support its conclusions, the judgment is vacated and the cause remanded to the District Court for proceedings consistent with this opinion.

Vacated and remanded.

Judges WHICHARD and BECTON concur.

ARLENE H. NARRON AND HUSBAND, ARTIS M. (JACK) NARRON, PLAINTIFFS v. UNION CAMP CORPORATION, A VIRGINIA CORPORATION AND STEPHEN R. BOYKIN AND WIFE, MAE TEDDER BOYKIN, DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. JOHN L. STONE AND WIFE, JOSEPHINE T. STONE, THIRD-PARTY DEFENDANTS

No. 857SC1053

(Filed 3 June 1986)

1. Costs § 2— amount of prosecution bond

It was within the authority of the trial court to require a prosecution bond in the amount of $2,700, notwithstanding the language of N.C.G.S. § 1-109 setting the sum of the bond at $200.

2. Costs § 2— failure to post prosecution bond—dismissal proper

The trial court had authority to dismiss the action on its own initiative when plaintiffs failed to post a prosecution bond within 30 days as required by N.C.G.S. § 1-109.

APPEAL by plaintiffs from *Winberry, Judge*. Judgment entered 29 April 1985 in Superior Court, NASH County. Heard in the Court of Appeals 11 March 1986.

This is an appeal by plaintiffs from an order dismissing their action for failure to post a prosecution bond.

Narron, O'Hale, Whittington and Woodruff, by Gordon C. Woodruff, for plaintiff-appellants.

Davis, Sturges & Tomlinson, by Aubrey S. Tomlinson, Jr., for defendant-appellee Union Camp Corporation.

John L. Whitley for defendant-appellees Boykin.

Fields, Cooper, Henderson & Cooper, by Milton P. Fields, for third party defendant-appellees Stone.

EAGLES, Judge.

The trial court dismissed this action for failure to post bond as required by a prior order, and plaintiffs appeal. The litigation stretches back almost ten years; it has never come to trial in that time.

THE PREVIOUS LITIGATION

Plaintiffs began litigation in 1977 seeking damages and injunctive relief for Union Camp's alleged wrongful cutting of timber on their land. Plaintiffs sued the Boykins in 1981, seeking to quiet title and to extinguish any claims the Boykins might make to the same land. The cases were consolidated and the court appointed a surveyor to perform the "complicated survey" required to resolve the dispute. Pretrial conference was set for July 1982. The case was continued several times on plaintiffs' motion. Plaintiffs' attorney withdrew by consent order in December 1983. Union Camp's motion for peremptory setting was allowed, and the cases came on for hearing in April 1984. Plaintiffs appeared and asked for continuance, not being prepared to proceed, and the court dismissed their claims, without prejudice, for failure to prosecute.

THE PRESENT LITIGATION

In July 1984 plaintiffs commenced the present action, realleging substantially the same cause of action previously dismissed.

Defendants answered, and third party defendants Stone moved to compel plaintiffs to post a prosecution bond. The Stones alleged that surveys would be necessary to resolve the dispute and that these would cost about $3,000.00. On 9 January 1985 Judge Frank R. Brown, after hearing, found that surveys costing approximately $2,500.00 would be necessary and allowed the motions. He ordered plaintiffs to post the $200.00 bond specified in G.S. 1-109 and "that such bond should be increased by the amount of $2,500.00 making a total of $2,700.00." Plaintiffs did not appeal the order, nor did they post the bond. The case was calendared and came before Judge Winberry on 29 April 1985. The record is not clear whether the case was calendared for trial or simply for a motion hearing. Judge Winberry inquired as to why no bond had been posted, and found that no cause was presented why the action should not be dismissed. Judge Winberry, *ex mero motu*, dismissed the action with prejudice, relying on G.S. 1-109. Plaintiffs appeal. After the action had been dismissed, plaintiffs posted the bond.

I

[1] Plaintiffs argue that the trial court lacked authority to require a bond in the amount of $2,700.00 and to dismiss the action for failure to post that bond. Plaintiffs additionally argue that they were denied due process by having their action dismissed *ex mero motu* without notice that their noncompliance with the bond order would be the subject of the 29 April 1985 hearing. They do *not* contend that there was any other good cause for their failure to post the bond. Unless the amount of the bond was itself unlawful, we are bound by Judge Winberry's finding that there was no sufficient cause.

II

We turn first to the statute, G.S. 1-109:

> At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

(1) Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

(2) Deposit two hundred dollars ($200.00) with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant all costs which the latter recovers of him in the action.

(3) File with him a written authority from a superior or district court judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond.

This language is similar in its operative provisions to G.S. 1-111, which deals with defendant's bond. Were we to apply G.S. 1-109 literally without the benefit of earlier decisions, we might conclude that plaintiffs are correct in their assertion that the court may require a bond of $200.00 and no more.

However, our Supreme Court has construed this statutory language otherwise. The operative portions of G.S. 1-109 and G.S. 1-111 have been in effect for many years. 1 Revisal of 1908 of N.C. Section 450 (Pell ed. 1908); 1 Code of N.C. Sections 209, 237 (1883); Public Statutes of N.C., Code of Civ. P. Sections 71, 382 (Battle rev. ed. 1873). A line of older authority, never overruled and unaffected by subsequent, merely formal amendments, has consistently construed these statutes as allowing the court in its discretion to require additional security for costs beyond the $200.00 statutory figure.

In *Kenney v. Seaboard Air Line Ry. Co.*, 166 N.C. 566, 82 S.E. 849 (1914), the court approved orders requiring an additional bond to cover costs of an appeal to the Supreme Court:

> If it should appear that the costs of this Court will probably exhaust the prosecution bond, and leave those of the court below unsecured, there is ample remedy to avoid the supposed unjust result by application to increase the penalty of bond—a not unusual procedure in the courts. [Citations.]

Id. at 571-72, 82 S.E. at 850. In *Vaughan v. Vincent*, 88 N.C. 116 (1883), the court affirmed an order striking defendant's answer for failing to post additional bond. In *Rollins v. Henry*, 77 N.C. 467 (1877), the court approved setting the bond in excess of the statutory amount to protect innocent parties against damage from what it apparently considered unnecessarily vexatious litigation. *See also In re Winborne*, 231 N.C. 463, 57 S.E. 2d 795 (1950) (general discretionary authority of trial court in matters of prosecution bonds); *Adams v. Reeves*, 76 N.C. 412 (1877) (motion for additional security addressed solely to discretion of trial judge). These precedents establish the court's authority to set bond in an amount above the $200.00 statutory limit. Defendant's motion for an additional bond was timely and plaintiffs have not disputed the facts found by the court to support the additional bond required. Judge Brown's order was proper. It follows from the clear language of the statute that plaintiffs' failure to post the bond subjected their action to dismissal. *See Vaughan v. Vincent, supra.*

III

We consider now whether the trial court acted properly in dismissing the action.

A

[2] Plaintiffs argue that there should have been some motion by defendants prior to the court's considering whether to dismiss their action. While that practice may be usual and customary, it is not required. Dismissal for failure to post a required bond is a matter "incidental to jurisdiction," not the merits. *Mintz v. Frink*, 217 N.C. 101, 6 S.E. 2d 804 (1940). Courts have continuing power to supervise their jurisdiction over the subject matter before them, including the power to dismiss *ex mero motu. See Munchak Corp. v. McDaniels*, 15 N.C. App. 145, 189 S.E. 2d 655 (1972) (jurisdiction of Court of Appeals); *Dale v. Lattimore*, 12 N.C. App. 348, 183 S.E. 2d 417 (trial court may raise jurisdictional defects on

own initiative), *cert. denied*, 279 N.C. 619, 184 S.E. 2d 113 (1971); G.S. 1A-1, R. Civ. P. 12(h)(3). Particularly in cases involving surveyors and other court-appointed experts, the court must have power to act *ex mero motu* or without motion by the parties in order to protect innocent third parties. *See Ward v. Taylor*, 68 N.C. App. 74, 314 S.E. 2d 814, *disc. rev. denied*, 311 N.C. 769, 321 S.E. 2d 157 (1984).

B

Plaintiffs next argue that they were denied due process by the dismissal of their action without advance notice that the court was contemplating dismissal. We believe that the statute provided plaintiffs ample notice that failure to comply with the order *within 30 days* would make their action subject to dismissal at any time. From entry of the bond order until dismissal was 110 days. Plaintiffs had an opportunity to explain to the court their failure to comply, but have not suggested any good reason for their failure. Previously plaintiffs had taken a voluntary dismissal for failure to prosecute the same claims, *seven years* after they were originally filed. Plaintiffs did file the bond following dismissal and have not contended they are paupers or otherwise unable to comply. Under the circumstances, we conclude they cannot now complain of lack of adequate notice and hearing.

C

In reaching this result we rely in part on *Link v. Wabash R.R. Co.*, 370 U.S. 626, 8 L.Ed. 2d 734, 82 S.Ct. 1386, *reh'g denied*, 371 U.S. 873, 9 L.Ed. 2d 112, 83 S.Ct. 115 (1962). There plaintiffs appealed from an order *ex mero motu* dismissing their action for failure to prosecute. The Supreme Court held that due process does not necessarily require notice and adversary hearing before entry of the dismissal order. The adequacy of notice and hearing depends rather "on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." *Id.* at 632, 8 L.Ed. 2d at 739, 82 S.Ct. at 1390. The Court reviewed the history of the litigation, replete with evidence of delay and inattention by plaintiff and plaintiff's counsel, and held that under the circumstances plaintiff must be charged with knowledge that failure to attend pre-trial conference subjected the action to dismissal. The Court also cited as grounds for deny-

ing relief on appeal plaintiff's failure to file a motion under F. R. Civ. P. 60(b). *Link* is very persuasive here, particularly since North Carolina allows similar motions for post-dismissal relief. G.S. 1A-1, R. Civ. P. 60(b). *See also Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F. 2d 1194 (7th Cir. 1977) (affirming *sua sponte* dismissal of complaint following preliminary opinion and no response from plaintiff; procedure "not ideal," but sufficient), *cert. denied*, 435 U.S. 905, 55 L.Ed. 2d 495, 98 S.Ct. 1450 (1978). Under the circumstances of this litigation, we think plaintiffs must be charged with knowledge that their failure to comply with the bond requirement within thirty days subjected their action to dismissal at any time in the discretion of the court.

D

On this record we conclude that Judge Winberry did not abuse his discretion. He had before him a long history of foot-dragging by plaintiffs. Plaintiffs gave no good reason at hearing for failure to post the bond, to which they did not object at the time it was set. Rather, plaintiffs chose simply to ignore the bond requirement. We note also that plaintiffs never moved in the trial court for relief under G.S. 1A-1, R. Civ. P. 60(b). The action was properly dismissed.

CONCLUSION

The trial court did not abuse its discretion in requiring a prosecution bond of $2,700.00. It had authority to dismiss the action on its own initiative when plaintiffs failed to post the bond within the statutory period. It did not abuse its discretion in ordering the dismissal. Accordingly, the order appealed from is

Affirmed.

Judges WEBB and PARKER concur.

EDWIN WAYNE JOYCE AND GLADYS GALLIMORE JOYCE v. CLOVERBROOK HOMES, INC., AND CITICORP ACCEPTANCE COMPANY, INC.

No. 8519SC1213

(Filed 3 June 1986)

1. **Uniform Commercial Code § 47— mobile home—notice of foreclosure sale required**

There was no merit to defendant's contention that it was not required to give notice of a foreclosure sale under N.C.G.S. § 25-9-504(3) because the mobile home in question constituted real property not covered by Article 9, since the Article governs security interests in goods; goods are defined to include all tangibles which are "moveable at the time the security interest attaches"; and the mobile home in question was moveable, tangible property.

2. **Uniform Commercial Code § 47— installment loan contract and deed of trust assigned—notice of foreclosure sale required**

Where defendant had a repurchase agreement with the company to which it had assigned a retail installment loan contract and deed of trust, N.C.G.S. § 25-9-504(5) conferred the rights and duties of a secured party on defendant, and it was therefore required pursuant to N.C.G.S. § 25-9-504(3) to give reasonable notice of foreclosure sale.

3. **Uniform Commercial Code § 47— breach of duty to give notice of foreclosure sale—calculation of damages**

There was no merit to defendant's contention that the trial court erred in applying N.C.G.S. § 25-9-507(1) to calculate damages for breach of defendant's duty to give notice of foreclosure sale under N.C.G.S. § 25-9-504(3), since the mobile home in question was a "consumer good" covered by that statute.

4. **Consumer Credit § 1— sale of mobile home—security interest in real estate—no notice to purchasers—violation of Truth-in-Lending Act**

The trial court did not err in concluding that defendant violated the Truth-in-Lending Act and Federal Reserve Regulation Z, regardless of which Regulation Z was in effect, since the record showed that defendant did not give plaintiff a document disclosing that it acquired a security interest in real property located in Randolph County.

5. **Sales § 13.1; Consumer Credit § 1— purchase of mobile home—Reg. Z—no right to rescind**

The trial court erred in granting plaintiffs the right to rescind their purchase of a mobile home, since the newer version of Regulation Z explicitly provided that a person purchasing a mobile home for use as a residence could not rescind the transaction pursuant to 12 C.F.R. 226.23 (1983), and the older version of the Regulation implied that rescission was possible when the purchase of something other than the purchaser's principal residence was secured by

the purchaser's principal residence, but plaintiffs here intended to dwell in their mobile home.

APPEAL by defendant, Cloverbrook Homes, Inc., from *Helms, Judge.* Order granting plaintiffs' motion for summary judgment and denying defendant's motion for summary judgment entered 22 May 1985. Heard in the Court of Appeals 9 April 1986.

Plaintiffs, husband and wife, purchased a mobile home from defendant Cloverbrook Homes, Inc., on 20 October 1981. The purchase was financed through a retail installment loan secured by a security agreement covering the mobile home and a deed of trust covering real property located in Randolph County. Cloverbrook assigned the retail installment loan contract and the deed of trust to Citicorp Acceptance Company. On 2 December 1981 Mr. Joyce instituted a small claims action against Cloverbrook alleging misrepresentation and breach of warranty. The small claims action was dismissed with prejudice because the magistrate found that Mr. Joyce failed to meet his burden of proof.

The plaintiffs became delinquent in their payments and executed a consent to foreclose on 15 April 1982. On 26 April 1982 Citicorp mailed a notice of repossession and sale stating that the mobile home had been repossessed and would be sold at public auction on 6 May 1982. The mobile home was not sold at public auction. Instead, some time after 6 May 1982, Cloverbrook took the mobile home, placed it on its sales lot and sold it to a third party.

On 1 October 1982 plaintiffs filed an action against Cloverbrook and Citicorp asserting five claims for relief: 1) breach of contract resulting in $6,000 damage; 2) breach of contract giving rise to a right to revoke acceptance; 3) violation of the Truth-in-Lending Act, 15 U.S.C. Sec. 1601 *et seq.* and Federal Reserve Regulation Z, 12 C.F.R. Sec. 226.1 *et seq.* by failing to make adequate disclosure of the loan provisions; 4) failure to conduct a commercially reasonable foreclosure sale; and 5) unfair and deceptive trade practices under G.S. 75-1.1. Plaintiffs settled with Citicorp and entered a voluntary dismissal with prejudice in their action against Citicorp.

Both Cloverbrook and plaintiffs moved for summary judgment. Judge Helms granted plaintiffs' summary judgment motion regarding Cloverbrook's failure to comply with the notice requirements of G.S. 25-9-504(3) and Cloverbrook's failure to comply with the disclosure requirements of the Truth-in-Lending Act and Federal Reserve Regulation Z. Judge Helms denied Cloverbrook's motion for summary judgment regarding plaintiffs' breach of contract claims. From an order of summary judgment granting plaintiffs $49,307.45 in compensatory damages, and $500 in attorney's fees, declaring the deed of trust void, and denying Cloverbrook's motion for summary judgment, Cloverbrook appealed.

Richard M. Pearman, Jr., for plaintiffs, appellees.

William A. Vaden for defendant, appellant.

HEDRICK, Chief Judge.

Although this case is subject to dismissal for failure to comply with all the rules of Appellate Procedure, we grant defendant's petition for a writ of certiorari in order to address this case on its merits.

[1] Cloverbrook first contends that the trial court erred in granting summary judgment on plaintiffs' claim based upon failure to give notice under G.S. 25-9-504(3) because the mobile home in question constituted real property not covered by Article 9 and because Cloverbrook was not a secured party subject to the duty to give notice. We disagree.

Chapter 25, Article 9 of the North Carolina General Statutes governs security interests in goods. G.S. 25-9-102(1)(a). Goods are defined to include all tangibles which are "moveable at the time the security interest attaches. . . ." G.S. 25-9-105(h). The mobile home in question was moveable, tangible property, and the security interest at issue is governed by Article 9. *See In re Knapp*, 575 F. 2d 341 (1978 2d Cir.). Furthermore, G.S. 41-2.5(a), which provides that "[w]hen a husband and wife become co-owners of a mobile home, in the absence of anything to the contrary appearing in the instrument of title, they become tenants by the entirety with all the incidents of an estate by the entirety in real property," does not dictate a contrary result. G.S. 41-2.5(b).

[2] A party need not be a secured party in order to have a duty to give proper notice of a foreclosure sale. G.S. 25-9-504(5) provides:

> A person who is liable to a secured party under a guaranty, endorsement, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

Cloverbrook had a repurchase agreement with Citibank. A person who is liable to a secured party under a repurchase agreement and takes possession of collateral pursuant to an agreement with the secured party has the rights and duties of a secured party. *See Shields v. Bobby Murray Chevrolet*, 44 N.C. App. 427, 261 S.E. 2d 238, *affirmed*, 300 N.C. 366, 266 S.E. 2d 658 (1980); *Western National Bank of Casper v. Harrison*, 577 P. 2d 635 (Wyo. 1978). Cloverbrook's contention that it was a mere agent of Citicorp without a duty to give notice is without merit. G.S. 25-9-504 (5) confers the rights and duties of a secured party on Cloverbrook.

G.S. 25-9-504(3) requires that "reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor." It is undisputed and the record affirmatively demonstrates that this requirement was not met. The trial court did not err in entering an order of summary judgment against Cloverbrook for violating G.S. 25-9-504(3).

[3] Cloverbrook next contends that the trial court erred in applying G.S. 25-9-507(1) to calculate damages for breach of Cloverbrook's duty to give notice under G.S. 25-9-504(3). Cloverbrook argues that the mobile home at issue was not a consumer good and therefore the formula for damages in G.S. 25-9-507(1) should not have been used.

G.S. 25-9-109(1) defines consumer goods as goods "used or bought for use primarily for personal, family or household purposes." The mobile home in question is a consumer good. *See In*

re Knapp, 575 F. 2d 341 (1978 2d Cir.). G.S. 25-9-507(1) provides the remedy for failure to give proper notice under G.S. 25-9-504(3):

> If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by a failure to comply with the provisions of this part. *If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service plus 10 percent (10%) of the principal amount of the debt or the time price differential plus 10 percent (10%) of the cash price.*

G.S. 25-9-507(1) (emphasis added).

The trial court did not err by applying the consumer goods provisions of G.S. 25-9-507(1) to the case at hand. We note that Cloverbrook merely contends that it is not liable under G.S. 25-9-507(1). Cloverbrook does not contend that the trial court erred in its calculation of damages.

[4] Cloverbrook next contends that the court erred in concluding that Cloverbrook violated the Truth-in-Lending Act, 15 U.S.C. 1601 *et seq.*, and Federal Reserve Regulation Z which was promulgated under authority granted in the Truth-in-Lending Act. We cannot agree.

At the time the transaction in question occurred, 20 October 1981, two versions of Regulation Z were in effect. The Board of Governors of the Federal Reserve System in their "repeal of regulation" statement, pronounced that:

> These regulations, as in effect on March 31, 1981, have been deleted effective October 1, 1982. The new regulations which will replace these regulations are set out following these regulations. They are effective April 1, 1981, but compliance is optional until October 1, 1982.

If there is a genuine issue of material fact as to whether Cloverbrook complied with either Regulation Z in effect on 20 October 1981, then summary judgment for plaintiffs was improper.

It is undisputed and the record before us affirmatively demonstrates that Cloverbrook did not give plaintiffs a document disclosing that Cloverbrook acquired a security interest in real property located in Randolph County. Regardless of which Regulation Z was in effect, Cloverbrook was required to give plaintiff a document disclosing Cloverbrook's security interest in the real property. 12 C.F.R. 226.8(a) (1982); 12 C.F.R. 226.8(a)(5) (1982); 12 C.F.R. 226.5(a)(1) (1983); 12 C.F.R. 226.6(c) (1983). Thus summary judgment on plaintiffs' Truth-in-Lending Act and Regulation Z claim was proper. We note once again that Cloverbrook does not contend that the amount of damages or attorney's fees was improper. It contends merely that it was not liable under the Truth-in-Lending Act.

[5] Cloverbrook also contends that the trial court erred in granting plaintiffs the right to rescind under 12 C.F.R. 226.9 (1982) because the transaction in question is exempt under 12 C.F.R. 226.9(g)(1) (1982). We are again faced with the difficult task of determining the effect of two Regulation Z's simultaneously in force. Just as Cloverbrook had a choice of which Regulation Z disclosure requirements it would meet, plaintiffs may elect which Regulation Z remedies section to use when receiving compensation for Cloverbrook's failure to meet either set of disclosure requirements.

The newer version of Regulation Z explicitly provides that a person purchasing a mobile home for use as a residence may not rescind the transaction pursuant to 12 C.F.R. 226.23 (1983). 12 C.F.R. 226.23(a) (1983); 12 C.F.R. 226.2(19) (1983). While a literal reading of the older version of Regulation Z would allow rescission in the present case, the clear intent of both versions of Regulation Z is to allow rescission when the purchase of something other than the purchaser's principal residence is secured by the purchaser's principal residence. Plaintiffs intended to dwell in their mobile home. The security interests at issue were in plaintiffs' dwelling and secured the purchase price of plaintiffs' dwelling. Therefore, plaintiffs have no right to rescind under

Regulation Z. Summary judgment granting plaintiffs the right to rescind is reversed.

Finally, Cloverbrook argues that the trial court erred in denying its motion for summary judgment on plaintiffs' breach of contract claims. An order denying a motion for summary judgment is interlocutory and ordinarily not appealable. *Golden v. Golden*, 43 N.C. App. 393, 258 S.E. 2d 809 (1979). The appeal with respect to this claim, therefore, is dismissed.

Summary judgment as to plaintiffs' claims based on G.S. 25-9-504(3) and Federal Reserve Regulation Z is affirmed. Summary judgment allowing plaintiffs to rescind under Regulation Z is reversed. Appeal from the denial of defendant's motion for summary judgment is dismissed.

Affirmed in part, reversed in part, dismissed in part and remanded.

Judges WELLS and MARTIN concur.

GLYN G. PRESLAR, EMPLOYEE v. CANNON MILLS CO., EMPLOYER, SELF INSURED

No. 8510IC1226

(Filed 3 June 1986)

Master and Servant § 68— workers' compensation—occupational hearing loss—augmentation of disability—amount of compensation

Plaintiff was entitled to compensation for his entire occupational hearing loss rather than compensation only for the difference between his hearing loss established in 1984 and his hearing loss established prior to the 1 October 1971 effective date of N.C.G.S. § 97-53(28) where the evidence showed augmentation of plaintiff's occupational hearing loss proximately resulting from his employment with defendant after 1 October 1971. Plaintiff's use of hearing aids beginning in 1968 which he could turn off did not preclude plaintiff from claiming that he was last injuriously exposed to harmful noise after 1971 where the Commission found that plaintiff's hearing aids did not decrease the noise levels below 90 decibels.

APPEAL by plaintiff and defendant from the opinion and award of the North Carolina Industrial Commission. Order entered 26 June 1985. Heard in the Court of Appeals 10 April 1986.

In 1933 plaintiff Glyn G. Presler (now deceased) began his employment with defendant Cannon Mills. During plaintiff's forty-seven years of employment with defendant, he was employed as a weaver, fixer, loom fixer and foreman in the weave department. The majority of plaintiff's tenure with defendant was spent in number two (2) weave room in plant number four (4), which housed approximately five hundred weaving looms. Plaintiff spent a lesser amount of time in other weave rooms, including weave room number one (1), which contained approximately one thousand weave looms. Weaving looms generate an extremely loud mechanical noise.

In 1968, plaintiff purchased hearing aids and on a daily basis began wearing them to work; plaintiff would turn the hearing aids off and use the inserted molds to shield his ears from the noise levels in the weave rooms, which defendant measured as being up to 104 decibels on the A scale of noise. The weave looms were operated simultaneously in a room with wooden floors and ceilings. Approximately two (2) years after plaintiff began his employment with defendant, plaintiff began experiencing a loud ringing in his ears. In 1981, plaintiff terminated his employment with defendant. On 6 March 1984, plaintiff filed a claim with the North Carolina Industrial Commission alleging an occupational hearing loss. On 3 October 1984 and 7 November 1984, hearings were held before Deputy Commissioner McCrodden. On 30 January 1985, Deputy Commissioner McCrodden entered an opinion and award and found as fact, *inter alia*, the following:

> 5. In 1972, an audiogram conducted for plaintiff showed threshold levels in both ears of 40, 55, and 60 decibels for the frequencies of 500, 1000, and 2000 Hz respectively. These measurements approximate plaintiff's hearing levels on 1 October 1971, at which time his binaural sensorineural hearing impairment was 38.5 percent.
>
> 6. In 1984 another audiogram showed threshold levels in the left ear of 55, 60, and 60 decibels for the frequencies of 500, 1,000, and 2,000 Hz respectively. For the right ear, plaintiff's

threshold of hearing was 50 decibels for 500 Hz, 60 decibels for 1,000 Hz, and 65 decibels for 2,000 Hz. Plaintiff's binaural sensorineural hearing impairment is 48.5 percent, ten percent greater than established prior to 1 October 1971.

Deputy Commissioner McCrodden concluded that defendant was liable for the difference between the 48.5% occupational hearing loss determined as of the date of disability and the 38.5% occupational hearing loss established prior to the effective date of G.S. 97-53(28). As compensation for plaintiff's ten percent (10%) occupational loss of hearing, defendant was ordered to pay plaintiff at a rate of $210.00 for fifteen (15) weeks. Plaintiff and defendant appealed to the Full Commission. The Full Commission overruled the exceptions and assignments of error as filed by the parties and adopted the opinion and award filed by Deputy Commissioner McCrodden. Plaintiff and defendant appeal.

Lore & McClearen, by R. Edwin McClearen, for plaintiff appellant.

Smith, Helms, Mullis & Moore, by J. Donald Cowan, Jr. and Caroline Hudson, for defendant appellant.

JOHNSON, Judge.

Although the cumulative effect of both parties appealing is an exception to virtually every action taken by the Full Commission, the primary issue brought forth by the parties' appeals is whether the Full Commission erred in awarding plaintiff compensation for the ten percent (10%) difference between his hearing loss established in 1984 and his hearing loss established prior to the 1 October 1971 effective date of G.S. 97-53(28). Plaintiff asserts that the Full Commission erred in not awarding him compensation for the entire occupational hearing loss (48.5%) to which his employment contributed. Defendant contends that the Full Commission was correct in concluding that G.S. 97-53(28) allows for no compensation for occupational loss of hearing occurring before 1 October 1971, but defendant further contends that the Full Commission erred in concluding that plaintiff was last injuriously exposed to the harmful noise from 1971 until 1981, the date of plaintiff's termination of his employment with defendant.

The identical issues that the parties have briefed and argued before this Court were decided by this Court in *Clark v. Bur-*

lington Ind., Inc., 78 N.C. App. 695, 338 S.E. 2d 553 (1986) (defendant employer may be held liable for plaintiff's entire disability if plaintiff could show any augmentation of his occupational hearing loss, however slight, proximately resulting from his employment with defendant and occurring after 1 October 1971). In *Clark, supra*, this Court held the following:

> Following the principles of *Wood, supra*, and *Rutledge, supra*, we conclude that if plaintiff could show any augmentation of his condition, however slight, proximately resulting from his employment with Burlington, and occurring after 1 October 1971, then defendant Burlington could properly and constitutionally be liable for the entire disability. This is especially appropriate here, since Burlington does not deny that plaintiff has suffered occupational hearing loss and that his entire exposure to harmful noise came while employed with Burlington. The Commission's ruling that no compensation may be awarded for the loss of hearing existing prior to 1 October 1971 must also be reversed since it too was based upon an error of law.

Clark at 701, 338 S.E. 2d at 557.

Unlike *Clark, supra*, in the case *sub judice*, the Full Commission made findings of fact and conclusions of law which do not necessitate a remand "so that evidence may be considered in its true legal light." *Id.* Findings of fact made by the Industrial Commission are conclusive on appeal when they are supported by competent evidence. *Vause v. Vause Farm Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951). The Full Commission adopted Deputy Commissioner McCrodden's findings that plaintiff did not have any problems with his hearing prior to his employment with defendant and that plaintiff did not engage in any outside activities that would adversely affect his hearing. Defendant's own noise level measurements indicate that in plaintiff's work areas measurements were of an intensity greater than 90 decibels on the A scale. Thus, excluding the provisions of G.S. 97-53(28)(k), plaintiff was exposed to harmful noise within the meaning of G.S. 97-53 (28)(a). Defendant contends that the hearing aids worn by plaintiff since 1968 removed him from exposure to harmful noise. Deputy Commissioner McCrodden found as fact that plaintiff's hearing aids did not decrease the noise level below 90 decibels. Defendant

did not except to this finding when it sought the Full Commission's review of the opinion and award filed by Deputy Commissioner McCrodden. Upon reviewing the record on appeal, we find that this finding is supported by competent evidence and therefore is conclusive. *Id.* Moreover, there was testimony that plaintiff's exposure to decibel levels over 100 on the A scale while he was young set the stage for an accelerated rate of hearing loss and was a major contributing factor to the development of plaintiff's sensorineural hearing loss.

Defendant further contends that plaintiff's use of his hearing aids precludes him from claiming that he was last injuriously exposed to harmful noise after 1971. There was competent evidence to the effect that plaintiff's exposure to industrial noise from 1972 until his last day of work was an injurious exposure that augmented his permanent sensorineural hearing loss. Based on the competent evidence presented to the Industrial Commission, upon which its findings of facts are based, we find no error in its conclusion of law that, "During the course of plaintiff's employment with defendant he suffered permanent sensorineural loss of hearing in both ears caused by prolonged exposure to harmful noise in his employment." The burden was on defendant to present evidence that plaintiff, through the use of a hearing protective device, was removed from exposure to noise levels above 90 decibels after 1971. *See McCuiston v. Addressograph - Multigraph Corp.*, 308 N.C. 665, 303 S.E. 2d 795 (1983). *See also Clark, supra.* Defendant did not carry his burden and thus the Full Commission was also correct in its conclusions of law as follows:

> 2. On 1 October 1971, as a result of injurious exposure to harmful noise in his employment, plaintiff had suffered permanent sensorineural loss of hearing in both ears. G.S. 97-53(28).
>
> 3. Plaintiff was last injuriously exposed to harmful noise while he was employed by defendant from 1971 until his termination of employment in 1981. G.S. 97-53(28).

The Industrial Commission's conclusions of law, along with its findings of facts supported by competent evidence, are sufficient under *Clark, supra,* to entitle plaintiff to an award of compensation for his entire disability.

In light of the foregoing we need not address plaintiff's remaining Assignment of Error pertaining to his discovery requests which were denied by the Industrial Commission.

Reversed and remanded.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. LINDA BRASWELL BROWN

No. 8524SC1230

(Filed 3 June 1986)

1. **Embezzlement § 4— embezzlement from partnership—indictment not fatally defective**

Indictments charging defendant with embezzlement from a partnership were not patently defective and the trial court erred in dismissing them, since the indictments did not allege that defendant was a partner in the firm from which she allegedly misapplied and converted funds unlawfully.

2. **Embezzlement § 4— motion to dismiss indictment—insufficiency of evidence**

Even if the trial court could consider extraneous evidence in ruling on defendant's motion to dismiss indictments, no such evidence was presented, since only the unsworn representations of defense counsel at the hearing on defendant's motion were before the court, and such representations did not put the State to the burden of proving that defendant was not a partner in the victimized partnership.

3. **Embezzlement § 1.1— no prosecution of partner**

A partner cannot be prosecuted for embezzlement. N.C.G.S. § 14-97.

APPEAL by the State from *Beaty, Judge*. Order entered 19 August 1985 in Superior Court, WATAUGA County. Heard in the Court of Appeals 10 April 1986.

The State appeals from an order allowing defendant's motion to dismiss six indictments charging her with embezzlement in violation of N.C. Gen. Stat. 14-90.

Attorney General Thornburg, by Special Deputy Attorney General Charles J. Murray, for the State, appellant.

Finger, Watson, di Santi & McGee, by Anthony S. di Santi and John A. Turner, for defendant appellee.

WHICHARD, Judge.

The issue is whether the court erred in dismissing, on the basis of unsworn representations by defense counsel that defendant was a partner in the victimized partnership, indictments which on their face sufficiently charge the offense of embezzlement. We hold that it did.

On 29 July 1985 the Watauga County Grand Jury issued six indictments charging defendant with violations of N.C. Gen. Stat. 14-90, the embezzlement statute, as follows:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did embezzle, fraudulently and knowingly misapply and convert to [her] own use, and take and make away with and secrete with the intent to embezzle and fraudulently misapply and convert to [her] own use [various amounts of] US currency belonging to Lott-Brown, d/b/a Jean Lott, a partnership. At the time the defendant was over 16 years of age and was the administrator, agent, bailee, consignee, clerk, employee, executor, guardian, officer, public officer, receiver, servant, trustee, and fiduciary of Lott-Brown, d/b/a Jean Lott, a partnership and in that capacity had been entrusted to receive the property described above and in that capacity [s]he had received and taken that property into [her] care and possession.

Prior to trial defendant moved to dismiss the indictments pursuant to N.C. Gen. Stats. 15A-952(b) and 954. The motion alleges: "At the time of the incidents alleged by the . . . indictments, and as stated in the indictments, [defendant] was a partner in the partnership known as Lott-Brown, doing business or trading as Jean Lott . . . ." The motion further alleges that: a person engaged in a partnership business in North Carolina cannot be charged with embezzlement pursuant to N.C. Gen. Stat. 14-90 because the partner is an owner of the property allegedly embezzled and the property thus cannot be that of another; the Superior Court has no jurisdiction because the only offense with which defendant could be charged is that of appropriation of partnership funds by a partner to personal use, a misdemeanor under N.C. Gen. Stat. 14-97 over which the District Court has exclusive

original jurisdiction (N.C. Gen. Stat. 7A-272); and the indictments, having failed to charge an offense, should be dismissed.

At the hearing on defendant's motion to dismiss the following dialogue occurred:

> THE COURT: Was there a formal partnership between Gene Lott and [defendant]?
>
> MR. DI SANTI [defense counsel]: Yes, sir; 50-50 partners.
>
> . . . .
>
> THE COURT: Is there any contention or allegation that [defendant] was an employee of the corporation [sic] rather than a partner [?]
>
> MR. DI SANTI [defense counsel]: No, sir; there is not. The partnership agreement requires 50-50 payment of all proceeds or losses.

At the end of the hearing the court stated: "I will allow the defendant's motion to quash the indictment." The court subsequently entered a written order which provided that "the Motions to Dismiss and the Motion to Quash . . . [are] hereby allowed and the indictments are dismissed with prejudice." The State appealed pursuant to N.C. Gen. Stat. 15A-1445(a)(1).

[1] The State contends the court erred in allowing defendant's motion to dismiss because the indictments are not patently defective. We agree. Contrary to the allegations of defendant's motion to dismiss, the indictments do not allege that defendant is a partner in the firm from which she allegedly misapplied and converted funds unlawfully. While the indictments allege that the funds belonged to "Lott-Brown," they do not allege that defendant is the "Brown" in the firm name. Courts take judicial notice of subjects and facts of common knowledge. *Smith v. Kinston*, 249 N.C. 160, 166, 105 S.E. 2d 648, 653 (1958); *McClure v. McClure*, 64 N.C. App. 318, 322, 307 S.E. 2d 212, 215 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E. 2d 651 (1984). Pursuant to this principle, we take judicial notice of the commonly known fact that innumerable persons bear the surname "Brown." We thus find the mere presence of defendant's surname in the partnership name insufficient to allege that she is a partner in the firm.

An indictment couched in the language of the statute is generally sufficient to charge a statutory offense. *State v. Palmer*, 293 N.C. 633, 637-38, 239 S.E. 2d 406, 409 (1977); *State v. Barneycastle*, 61 N.C. App. 694, 697, 301 S.E. 2d 711, 713 (1983). The indictments here generally track the language of N.C. Gen. Stat. 14-90. They do not allege that defendant is a partner in the victimized firm, and they are sufficient on their face to charge the offense of embezzlement.

Prior to enactment of Chapter 15A of the General Statutes, the sufficiency of an indictment to allege a criminal offense was challenged by a motion to quash the indictment. It was well-established law that a motion to quash would not lie unless it appeared from an inspection of the bill of indictment that no crime was charged, and the court was not permitted to consider extraneous evidence in ruling on the motion. As stated in *State v. Lee*, 277 N.C. 242, 245, 176 S.E. 2d 772, 774 (1970):

> A motion to quash can be properly allowed on the ground that the matter charged does not constitute a criminal offense. . . . In ruling on a motion to quash, however, the court is not permitted to consider extraneous evidence, and when the defect must be established by evidence *aliunde* the record, the motion must be denied. [Citations omitted.]

See also State v. Underwood, 283 N.C. 154, 161, 195 S.E. 2d 489, 493 (1973); *State v. Vestal*, 281 N.C. 517, 520-21, 189 S.E. 2d 152, 155 (1972).

A motion to dismiss under N.C. Gen. Stat. 15A-954(a)(10) for failure of the indictment to charge an offense as provided in N.C. Gen. Stat. 15A-924(e) is the functional equivalent of a motion to quash under the pre-15A practice. Indeed, the court here stated orally that it was allowing "defendant's *motion to quash* the indictment," and the written order states that it allows "the Motions to Dismiss and *the Motion to Quash* the Indictment[s]." (Emphasis supplied.) Since a motion to dismiss under N.C. Gen. Stat. 15A-954(a)(10) for failure of the indictment to charge an offense is the functional equivalent of a pre-15A motion to quash, the foregoing principles regarding motions to quash indictments appear equally applicable to a motion to dismiss an indictment under N.C. Gen. Stat. 15A-954(a)(10). We find nothing in Chapter 15A or in the case law thereunder that suggests otherwise. We thus hold

that the court erred in allowing the motion to dismiss the indictments, which on their face sufficiently allege the offense of embezzlement.

[2] Assuming, *arguendo*, that the court could consider extraneous evidence in ruling on the motion, no such evidence was presented. Only the unsworn representations of defense counsel at the hearing on defendant's motion were before the court. We do not believe such representations put the State to the burden of proving that defendant was not a partner in the victimized partnership. We thus hold that even if extraneous evidence may properly be considered, there was none here and the court thus erred in allowing the motion. The indictments on their face adequately charge defendant with six counts of embezzlement, and the record establishes no basis for dismissing them for failure to charge a crime.

[3] We note that the prosecuting attorney made the following statement at the hearing on defendant's motion: "[U]nder the Common Law a partner cannot be prosecuted for embezzlement. The State concedes that." While the issue apparently has not been decided in this jurisdiction, we agree with that statement of the law. In 50 Am. Jur. 2d, Larceny Sec. 84, we find the following:

> Because of the general principle that an owner or co-owner of property cannot ordinarily be guilty of its larceny in the absence of a statute, a partner cannot steal partnership property, joint owners and tenants in common cannot steal from each other, and members of a voluntary organization having an interest in its funds cannot commit larceny of such funds.

See also 29A C.J.S., Embezzlement Sec. 16 at 44 ("In the absence of statutes otherwise providing, it may be stated as a general rule that partners cannot embezzle partnership funds which come into their possession, because of their joint interest or ownership therein."); Annot., 82 A.L.R. 3d 822, 825 ("Each partner is said to have an undivided interest in [partnership] property, and it is this indivisibility which has led, at least in part, to the legal theory that a partner cannot be convicted of embezzlement or larceny of partnership property which comes into his possession or under his control during the course of the partnership business by reason of his being a partner."). The following cases, *e.g.*, are per-

tinent: *Hudson v. State*, 408 So. 2d 224 (Fla. App. 1981); *State v. Elsbury*, 63 Nev. 463, 175 P. 2d 430 (1946); *Patterson v. Bogan*, 261 S.C. 87, 198 S.E. 2d 586 (1973); *State v. Birch*, 36 Wash. App. 405, 675 P. 2d 246 (1984).

In light of these authorities, upon remand the State should consider attempting to determine defendant's status in the victimized firm at the pre-trial stage. If it determines that defendant is in fact a partner in the firm, it should consider dismissing the indictments in the interest of judicial economy. Because of the time limitation established by N.C. Gen. Stat. 15-1, the State cannot now proceed with new indictments pursuant to N.C. Gen. Stat. 14-97, which establishes the misdemeanor offense of appropriation of partnership funds by a partner to his or her own personal use.

The order is reversed, and the cause is remanded for further proceedings on the facially valid indictments.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. CARL ANDERSON PAIT

No. 8516SC1292

(Filed 3 June 1986)

1. Criminal Law § 23.3— guilty plea—coercion—denial of assistance of counsel

Defendant's guilty plea was not voluntary but was coerced by the trial judge in violation of defendant's constitutional rights to a fair trial and effective assistance of counsel where counsel undertook to plead not guilty for defendant; the judge became visibly agitated and said in what appeared to be an angry voice that he was tired of "frivolous pleas"; the judge then asked defendant if he had made an incriminating statement to police and, upon receiving an affirmative answer, directed counsel to confer with defendant and return with an "honest plea"; defendant feared that the judge would be hard on him if he did not change his plea; and defendant did change his plea despite counsel's advice that he faced a maximum sentence of 60 years and had a right to plead not guilty.

2. Constitutional Law § 44— denial of effective assistance of counsel—no time to prepare defense

Defendant was denied the right to effective assistance of counsel where defendant's counsel was informed of his appointment only a short time before the arraignment; he did not meet with defendant until after the arraignment session of court had begun; the only items then in defendant's file were the arrest warrants; defendant told counsel of the charges against him and said that he thought he was guilty of them; defendant was coerced into entering a guilty plea by the judge; and counsel thus had no opportunity to obtain knowledge about the case and to advise and assist defendant.

ON writ of certiorari from *Ellis, Judge.* Order entered 13 September 1984 in Superior Court, ROBESON County. Heard in the Court of Appeals 16 April 1986.

On 1 June 1982, defendant was indicted on six counts each of forgery and uttering a forged instrument. That same day he was arrested, had counsel appointed, was arraigned, pleaded guilty before Judge Bailey, and was convicted of all charges. At the sentencing hearing a week later, defendant received consecutive two-year presumptive terms for each offense to begin at the expiration of another sentence that had been reactivated as a result of the convictions. In January, 1984 defendant filed a motion for appropriate relief pursuant to G.S. 15A-1415 on the ground that his guilty plea had been coerced in violation of his constitutional rights. The motion, supported by his own affidavit and that of his mother and court-appointed counsel, was heard by Judge Ellis. The evidence bearing thereon may be summarized as follows:

Defendant's counsel, informed of his appointment only a short time before the arraignment, did not meet with defendant until after the afternoon arraignment session of court had begun. The only items then in defendant's file were the arrest warrants. Defendant told counsel of the charges against him and said that he thought he was guilty of them; counsel indicated that he nevertheless would plead him not guilty since he had not talked to any of the witnesses, did not know enough about the case to advise him, and needed time to investigate and prepare a defense. Later in court when counsel undertook to plead not guilty for the defendant Judge Bailey became visibly agitated and said in what appeared to be an angry voice that he was tired of "frivolous pleas." The judge then asked defendant whether he had made an incriminating statement to the police and upon defendant saying that he

had, he directed counsel to confer with defendant and return with an "honest plea." In the conference that followed between defendant and counsel they discussed the judge's statement and apparent agitation, and defendant was anxious and feared that Judge Bailey would be hard on him if he did not change his plea; and he changed his plea, despite counsel's advice that he faced a maximum sentence of 60 years and had a right to plead not guilty. The transcript of the plea entered before Judge Bailey indicates that defendant discussed his case with counsel and was satisfied with him; that he knew and understood the charges which carried a maximum sentence of 60 years; that he was in fact guilty; that he knew he had a right to plead not guilty; that he understood the consequences of waiving that right; that he was under no threat to plead guilty; and that he did so knowingly and voluntarily. Judge Bailey accepted the plea and delayed sentencing for one week to allow counsel time to review the file. At the sentencing hearing though aggravating and mitigating factors were found Judge Bailey imposed the presumptive terms as stated above.

After finding facts essentially as stated above Judge Ellis concluded that defendant's guilty plea was not induced by Judge Bailey and denied the motion. The matter is here under a writ of certiorari authorized by G.S. 15A-1422(c) and 15A-1444(f).

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

Appellate Defender Hunter, by Assistant Appellate Defender Geoffrey C. Mangum, for defendant appellant.

PHILLIPS, Judge.

[1] The only issue before us is whether defendant entered his guilty plea voluntarily and knowingly or whether it was coerced by the trial judge in violation of defendant's constitutional rights to a fair trial and effective assistance of counsel. At the hearing on the motion defendant had the burden of establishing the facts essential to his claim by a preponderance of the evidence. G.S. 15A-1420(c)(5). The findings made by the trial court are binding if they are supported by any competent evidence, *State v. Stevens*, 305 N.C. 712, 291 S.E. 2d 585 (1982), and the trial court's ruling on facts so supported may be disturbed only when there has been a

manifest abuse of discretion, *State v. Sprinkle*, 46 N.C. App. 802, 266 S.E. 2d 375, *disc. rev. denied*, 300 N.C. 561, 270 S.E. 2d 115 (1980), or when it is based on an error of law. *State v. Wheeler*, 249 N.C. 187, 105 S.E. 2d 615 (1958). The facts in this case are not in substantial dispute; the only question is whether they show a violation of defendant's constitutional rights. In our opinion the facts do show such a violation and the trial court erred in concluding to the contrary.

Essential to the preservation of the constitutional guarantee of a fair trial is the right of a criminal defendant to plead not guilty and force the State to establish his guilt beyond a reasonable doubt. *State v. Lewis*, 274 N.C. 438, 164 S.E. 2d 177 (1968). "No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial." *State v. Boone*, 294 N.C. 702, 712, 239 S.E. 2d 459, 465 (1977). By pleading guilty a defendant not only relieves the State of its burden but also waives many of his own rights, including the right to have a jury determine his guilt. The right to plead not guilty is absolute and neither the court nor the State should interfere with the free, unfettered exercise of that right; its surrender by a plea of guilty must be voluntary and with full knowledge and understanding of the consequences. *Brady v. U.S.*, 397 U.S. 742, 25 L.Ed. 2d 747, 90 S.Ct. 1463 (1970); *State v. Ford*, 281 N.C. 62, 187 S.E. 2d 741 (1972). To guard against the violation of this right Article 58 of Chapter 15A of the North Carolina General Statutes was enacted. While G.S. 15A-1021(a) specifically allows the trial judge to participate in plea bargain discussions, G.S. 15A-1021(b) specifically forbids any representative of the State from improperly pressuring a defendant into a plea of guilty or *nolo contendere*. A guilty plea that is procured through threats or intimidation is constitutionally invalid. *State v. Benfield*, 264 N.C. 75, 140 S.E. 2d 706 (1965). In *Benfield*, the trial judge after trial began indicated to defense counsel that if the jury found defendant guilty, as he believed it would do, he would be inclined to give defendant a long, active sentence. Defendant, who knew that his co-defendant had pleaded guilty and received a suspended sentence, changed his plea to guilty and when asked by the court indicated that it was freely made. In a *per curiam* opinion the Supreme Court held that defendant changed his plea because of what the trial judge

said and that it was not done voluntarily under the circumstances. We believe that *Benfield* clearly controls this case. Though Judge Bailey did not explicitly threaten defendant with a longer sentence, that he influenced him to plead guilty is clear from the court's findings and the evidence supporting them. Indeed, the self-evident purpose and effect of the judge's remarks was to provoke a plea of guilty; and Judge Ellis should have so concluded as a matter of law. That a trial judge's unguarded remarks may unduly affect jurors is commonly known by the profession and has been noted by our courts many times; it is just as well known that such remarks can also unduly affect those whose punishment, if any, for crime will be determined by the one making the remarks. Thus, the judgments of conviction based on the involuntary pleas of guilty are vacated and the cases are remanded to the Superior Court for a new trial.

[2] Though involuntariness of the plea is sufficient to warrant a new trial, the course taken by the judge also denied defendant the effective assistance of counsel. A criminal defendant is entitled to the assistance of counsel at all critical stages of the criminal trial process, including arraignment. *State v. Sanders*, 294 N.C. 337, 240 S.E. 2d 788 (1978); G.S. 15A-942. In order to effectuate this right defense counsel must be allowed reasonable time and opportunity for preparation. *State v. Moore*, 39 N.C. App. 643, 251 S.E. 2d 647, *appeal dismissed*, 297 N.C. 178, 254 S.E. 2d 39 (1979). In this case, as the found facts plainly show, because of the unusual celerity with which the State and court moved defendant's counsel was not, and could not have possibly been, prepared to effectively advise and assist his client as Judge Bailey appointed him to do. The constitutional requirement for the assistance of counsel is not satisfied merely by an order of appointment; counsel must be given the opportunity to both advise and assist the defendant and neither can be done without knowledge of the case, which defendant's counsel did not have and had no opportunity to get.

Vacated and remanded.

Judges BECTON and COZORT concur.

IN RE: SUSPENSION OF THE LICENSE TO OPERATE A MOTOR VEHICLE OF STEPHEN WAYNE VALLENDER NCDL #: 3181140

No. 855SC1280

(Filed 3 June 1986)

Automobiles § 126.3— breathalyzer test—30-minute delay—point from which 30 minutes begin

Pursuant to N.C.G.S. § 20-16.2(a)(6), a person charged with an implied consent offense has the right to contact an attorney and select a witness to view the testing procedures impliedly consented to, "but the testing may not be delayed for these purposes longer than 30 minutes from the time he is notified of his rights"; therefore, there was no merit to defendant's contention that his 30 minutes began to run when the formal request to submit to the test was made rather than when he was advised of his rights.

APPEAL by petitioner from *Winberry, Judge.* Judgment entered 22 July 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 April 1986.

Petitioner Vallender's driving privilege was suspended by respondent Division of Motor Vehicles for willful refusal to submit to chemical analysis. He petitioned for judicial review pursuant to G.S. 20-25. The trial court found that all conditions for suspension were met and that petitioner's refusal was willful. Accordingly, the trial court dissolved all restraining orders and affirmed the suspension. Petitioner appeals.

The facts are not disputed. Petitioner was charged with an implied consent offense, and the charging officer, Fields, had reasonable grounds to believe he had committed the offense. Officer Fields informed petitioner that he was taking him in for chemical breath analysis and brought him before Deputy Sheriff Murphy, a duly qualified and authorized chemical analyst at the New Hanover Law Enforcement Center. Murphy first saw petitioner at 1:35 a.m., read petitioner a form entitled "Rights of Person Requested to Submit to a Chemical Analysis to Determine Alcohol Concentration under G.S. 20-16.2(a)" and then gave him a copy of the form.

The form, which was read *verbatim* and then given to petitioner, contained the following language:

> You have been charged with operating a vehicle upon a highway or public vehicular area while committing an implied

consent offense. In my presence the charging officer will request you to submit to a chemical analysis to determine the alcohol concentration of your body. It is first required that you be informed both orally and given a notice in writing of your rights, which are as follows:

* * *

6. You have the right to call an attorney and select a witness to view for you the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of your rights.

At 1:39 a.m. petitioner answered that he understood each of his rights and signed the form.

Petitioner made several phone calls. At 1:54 a.m. Fields formally requested that petitioner submit to the test. Petitioner refused. Murphy informed petitioner that he would wait the full 30 minutes. At 2:10 a.m., Murphy again requested that petitioner submit to the test. Again petitioner refused. Murphy made written notation that petitioner had refused to submit. At no time before or after 2:10 a.m. did petitioner agree to take the test. On these facts the court found that petitioner's refusal was willful.

Attorney General Thornburg, by Assistant Attorney General William B. Ray, for respondent-appellee Division of Motor Vehicles.

Hewlett & Collins, by John C. Collins, for petitioner-appellant.

EAGLES, Judge.

The sole question presented by this appeal is whether the court erred in finding that petitioner willfully refused to submit by concluding that the thirty minute period began to run at 1:39 a.m., when he was advised of his rights, instead of at 1:54 a.m., when the formal request was made.

By statute, a person charged with an implied consent offense has the right to contact an attorney and select a witness to view the testing procedures impliedly consented to, "but the testing

may not be delayed for these purposes longer than 30 minutes *from the time he is notified of his rights.*" G.S. 20-16.2(a)(6) (emphasis added). The 30 minute period from the advising of rights is a matter of legislative grace. *State v. Howren*, 312 N.C. 454, 323 S.E. 2d 335 (1984). Petitioner had no constitutional right to refuse to submit to chemical analysis under the implied consent statutes, nor did he have a constitutional right to any waiting period longer than 30 minutes. *Id.* His right to the waiting period was purely statutory. G.S. 20-16.2(a)(6) allowed him 30 minutes from the time he was advised of his rights. We are aware of no other statutory waiting periods. Nothing else appearing, the court's finding was entirely correct.

Petitioner relies solely on *Mathis v. N.C. Div. of Motor Vehicles*, 71 N.C. App. 413, 322 S.E. 2d 436 (1984). Mathis was advised of his rights and was requested to submit to the test by the charging officer at the same time. Thirty minutes later, Mathis, having contacted his attorney, refused a third request to submit and a refusal affidavit was prepared. Twenty minutes later, Mathis volunteered to take the test, but the officers refused to administer it. This Court affirmed the trial court's finding that Mathis' refusal was willful and affirmed the suspension. Chief Judge Vaughn wrote:

> The standard of "willful refusal" in this context is clear. *Once apprised of one's rights and having received a request to submit, a driver is allowed 30 minutes in which to make a decision. A "willful refusal" occurs whenever a driver "(1) is aware that he has a choice to take or to refuse to take the test; (2) is aware of the time limit within which he must take the test; (3) voluntarily elects not to take the test; and (4) knowingly permits the prescribed thirty-minute time limit to expire before he elects to take the test." Etheridge v. Peters*, 301 N.C. 76, 81, 269 S.E. 2d 133, 136 (1980).

71 N.C. App. at 415, 322 S.E. 2d at 437-38. [Emphasis added.]

Relying on the emphasized sentence, petitioner argues that his 30 minute period began to run *only when he received a formal request* after being advised of his rights, and he therefore did not receive the entire 30 minutes in which to make a decision. We disagree. The emphasized sentence must be read in light of the facts in *Mathis*, which were that the rights were read and a formal re-

quest made at the same time. The *Mathis* court did not reach the question presented here and the language relied on by petitioner is essentially *dicta* which does not control here. More persuasive is our review of the criteria set out by the Supreme Court in *Etheridge*: there is no mention of a requirement for a "formal request." Instead, *Etheridge* focuses on the driver's awareness of his rights and of the consequences of refusal. Here there is no dispute that petitioner was apprised of those matters both orally and in writing, and received all the protection the law requires.

We note that the *Mathis* court went on to consider a contention that the charging officer must make a "present request" rather than a "future" one. The court rejected the contention that there is a need for any "precise terminology" or "contrived precision" which would hamper effective enforcement of drunk driving laws. 71 N.C. App. at 416, 322 S.E. 2d at 438; *see also Rice v. Peters*, 48 N.C. App. 697, 269 S.E. 2d 740 (1980). Like the court in *Rice*, the *Mathis* court found the suspect's rights sufficiently protected and affirmed the suspension.

Here petitioner was arrested and brought to a law enforcement office at 1:30 in the morning for a breath test. He was informed of the charges against him and informed that "the charging officer *will* request you to submit to a chemical analysis." [Emphasis added.] He was then advised of his right to 30 minutes to contact an attorney. Petitioner was well advised of what was to happen and that he had 30 minutes from the time he was advised of his rights in which to decide whether to submit to the breath test.

Petitioner received the protection required by the law. The court's findings are supported by the record and they in turn support the judgment. No other error appears on the face of the record.

Affirmed.

Judges WEBB and PARKER concur.

MARJORIE B. HARTON v. JOHN W. HARTON

No. 8526DC839

(Filed 3 June 1986)

1. **Husband and Wife § 12.1— separation agreement—fraudulent representation as to insurance policies alleged—no fiduciary relationship—no duty to disclose**

Where plaintiff claimed that defendant fraudulently concealed the fact that he had borrowed money against the cash value of life insurance policies which he promised in a separation agreement to maintain for her benefit, there was no fiduciary relationship between the parties which would require disclosure on defendant's part, since the parties had separated sometime before plaintiff sought out an attorney to draw up a separation agreement, and she was represented by counsel during the negotiations over the separation agreement.

2. **Husband and Wife § 12.1— separation agreement—fraudulent representation as to insurance policies alleged—no duty to disclose**

Where plaintiff claimed that defendant fraudulently concealed the fact that he had borrowed money against the cash value of life insurance policies which he promised in a separation agreement to maintain for her benefit, defendant was under no duty to disclose since the evidence tended to show that plaintiff made no effort herself, through her children or her attorney, to discover if any loans had been taken out against the insurance policies; plaintiff knew or should have known of two of the loans before the separation; and the separation agreement, drafted by plaintiff's attorney, provided that defendant would not borrow against the policies "in the future" but did not provide that defendant pay off any existing loans against the policies.

APPEAL by defendant from *Brown, L. Stanley, Judge.* Judgment entered 4 March 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 14 January 1986.

Plaintiff instituted this action on 14 December 1982 alleging that defendant, her husband, had fraudulently induced her to enter into a "Separation Contract." She claimed defendant had fraudulently concealed the fact that he had borrowed money against the cash value of life insurance policies which he promised in the agreement to maintain for her benefit. Defendant filed a general denial, then amended his answer to plead the statute of limitations as a bar to the action.

The matter came on for trial before Judge Brown, sitting without a jury. He found that the statute of limitations did not bar the action and that defendant had concealed a material fact in

a situation where he had a duty to disclose. The trial judge concluded that plaintiff had been damaged in the amount of $8,689.20, and awarded plaintiff that amount, plus legal interest from the date of judgment. Defendant appeals.

Glover and Petersen, P.A., by Ann B. Petersen and James R. Glover; and Bailey, Patterson, Caddell and Bailey, P.A., by Thomas W. Dickinson for defendant-appellant.

Berry, Hogewood, Edwards and Freeman, P.A., by Lawrence W. Hewitt and Glenn J. Reid for plaintiff-appellee.

PARKER, Judge.

Plaintiff and defendant were married for thirty-six (36) years prior to their separation in September 1984. The parties entered into a separation contract drafted by an attorney representing plaintiff, which provided, *inter alia*, for a division of certain marital property and for the support of plaintiff by defendant. The separation contract also contained a provision dealing with three life insurance policies owned by defendant naming plaintiff as beneficiary. That provision read, in relevant part:

> Husband agrees . . . to maintain in full force and effect, those three life insurance policies for a face amount of Four Thousand Dollars ($4,000.00), Five Thousand Dollars ($5,000.00) and Six Thousand Dollars ($6,000.00) respectively that husband carries with the Penn Mutual Life Insurance Company and to retain his wife, Marjorie B. Harton, as the beneficiary of said life insurance policies and husband agrees that in the future, he will not borrow against said policies nor accept the cash surrender value thereof, or change the beneficiary to any person other than his wife, Marjorie B. Harton; . . .

At the time the parties executed this document, defendant had already borrowed against the cash value of each of the policies. These loans had an outstanding principal balance of $5679.09 and were accumulating interest due at the rate of five percent (5%) per annum.

During their marriage, defendant handled all of the financial affairs of the parties. After their separation, plaintiff relied on

her son-in-law to advise her on financial matters. He recommended that she obtain ownership of the three policies so that she could borrow against the cash value. Defendant consented to transfer ownership of the policies, which took place in March 1979. In May plaintiff obtained a loan of $1843.43 against the insurance policies.

There was evidence that after ownership of the policies was transferred to plaintiff, the insurance company began sending her the annual reports on each policy, which showed the outstanding loan balance on each. Plaintiff also should have received a detailed statement concerning the loans when she borrowed against the policies. However, plaintiff contended it was not until December 1981 that she became aware of the earlier loans taken out by defendant against the policies. This action resulted.

Appellant's first assignment of error is that the trial judge erred in concluding that defendant had a duty to disclose to plaintiff the existence of the outstanding loans against the policies. A cause of action for fraud is based on an affirmative misrepresentation of a material fact, *e.g., Harbach v. Lain and Keonig, Inc.*, 73 N.C. App. 374, 326 S.E. 2d 115 (1985), or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose. *Curl ex rel. Curl v. Key*, 311 N.C. 259, 316 S.E. 2d 272 (1984). In the instant case, there is no evidence that defendant affirmatively misrepresented a material fact. Rather, the contention is that defendant failed to disclose a material fact.

[1] A duty to disclose arises in three situations. The first instance is where a fiduciary relationship exists between the parties to the transaction. *See, e.g., Link v. Link*, 278 N.C. 181, 179 S.E. 2d 697 (1971). The relationship of husband and wife creates such a duty. *Id.* However, that duty ends when the parties separate and become adversaries negotiating over the terms of their separation. *Joyner v. Joyner*, 264 N.C. 27, 140 S.E. 2d 714 (1965). Termination of the fiduciary relationship is firmly established when one or both of the parties is represented by counsel. *Id.; Murphy v. Murphy*, 34 N.C. App. 677, 239 S.E. 2d 597 (1977).

In this case, the parties had separated sometime before plaintiff sought out an attorney to draw up a separation agreement. Although plaintiff had relied solely on defendant to handle finan-

cial matters during their marriage, she had not consulted him since the separation, but was relying on her son-in-law for advice. During the negotiations over the separation agreement, plaintiff was represented by counsel. Defendant was not. The relationship of "trust and confidence" normally present between fiduciaries had ended. Defendant, then, had no duty to disclose arising out of the relationship between the parties.

The two remaining situations in which a duty to disclose exists arise outside a fiduciary relationship, when the parties are negotiating at arm's length. The first of these is when a party has taken affirmative steps to conceal material facts from the other. *See, e.g., Ragsdale v. Kennedy,* 286 N.C. 130, 209 S.E. 2d 494 (1974). There is no evidence that any such action was taken in this case.

[2] A duty to disclose in arm's length negotiations also arises where one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence. *See, e.g., Brooks v. Ervin Construction Co.,* 253 N.C. 214, 116 S.E. 2d 454 (1960). The evidence in this case discloses that plaintiff made no effort herself, through her children or through her attorney, to discover if any loans had been taken out against the insurance policies. Evidence was produced which tended to show plaintiff knew, or should have known of two of the loans before the separation. The agreement, drafted by plaintiff's attorney, provided that defendant would not borrow against the policies "in the future." No provision was inserted requiring defendant to pay off any existing loans against the policies. In our view, plaintiff could have discovered, prior to the signing of the separation agreement, the existence of the loans outstanding against these policies through the exercise of reasonable diligence.

The essential elements of fraud in the inducement are: (i) that defendant made a false representation or concealed a material fact he had a duty to disclose; (ii) that the false representation related to a past or existing fact; (iii) that defendant made the representation knowing it was false or made it recklessly without knowledge of its truth; (iv) that defendant made the representation intending to deceive plaintiff; (v) that plaintiff reasonably relied on the representation and acted upon it; and (vi) plaintiff

suffered injury. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Where plaintiff fails to establish each and every element of her cause of action, judgment must be entered for the defendant. *See, e.g., Briggs v. Mid-State Oil Co.*, 53 N.C. App. 203, 280 S.E. 2d 501 (1981). We hold that plaintiff failed as a matter of law to establish that defendant made a false representation or concealed a material fact which he had a duty to disclose, an essential element of fraud. Having concluded that plaintiff failed to establish an essential element of her cause of action, we need not address defendant's contentions relating to the statute of limitations.

The judgment below is

Reversed.

Judges WHICHARD and BECTON concur.

STATE OF NORTH CAROLINA v. BOBBY ALLEN RAINES

No. 8528SC1233

(Filed 3 June 1986)

1. **Rape and Allied Offenses § 1— second degree rape—no lesser offenses**

Engaging in a sexual act and engaging in vaginal intercourse with a person over whom one's employer has custody are not lesser included offenses of second degree rape or committing a sex act in violation of N.C.G.S. § 14-27.5.

2. **Rape and Allied Offenses § 1— engaging in sexual act with one over whom one's employer has custody—meaning of custody**

As used in N.C.G.S. § 14-27.7, the statute which makes it a felony to engage in a sexual act with a person over whom a defendant's employer has custody, "custody" does not mean legal control or restraint; rather, the statute is intended to protect from abuse all hospital patients, voluntary and committed alike.

3. **Rape and Allied Offenses § 6— engaging in sexual act with one over whom one's employer has custody—instructions on custody proper**

In a prosecution of defendant for engaging in a sexual act and engaging in vaginal intercourse with a person over whom defendant's employer had custody, the trial court did not err in instructing the jury that "[a] medical hospital's housing of a patient would be custody," since the court, in so charging, stated a correct legal conclusion.

4. Rape and Allied Offenses § 7; Criminal Law § 138.27— engaging in sexual act with one over whom one's employer has custody—sentence—finding of aggravating factor improper

In a prosecution of defendant for engaging in a sexual act and engaging in vaginal intercourse with a person over whom defendant's employer had custody, conviction required a showing that defendant took advantage of his custodial position in committing the offenses involved; therefore, the trial court erred in finding as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense, since evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation.

APPEAL by defendant from *Lamm, Judge*. Judgments entered 15 July 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 12 March 1986.

Defendant was convicted of two violations of G.S. 14-27.7— engaging in a sexual act with a person over whom his employer had custody; and engaging in vaginal intercourse with a person over whom his employer had custody. Both offenses allegedly occurred on 13 July 1983 and in each instance defendant's employer was St. Joseph's Hospital in Asheville and the person the hospital allegedly had custody of was Sarah Horne Grindstaff, a patient in the hospital. In an earlier case based on the same events defendant was charged with second degree rape under G.S. 14-27.3 and acquitted; was charged with committing a sex act on a person who was *physically helpless* under G.S. 14-27.5 and was acquitted; and was charged and convicted of engaging in a sex act "by force and against her will" in violation of G.S. 14-27.5. That conviction was vacated upon appeal, however, because there was no evidence that defendant exerted any physical or constructive force in committing the offense. *State v. Raines*, 72 N.C. App. 300, 324 S.E. 2d 279 (1985). Thereafter, the grand jury indicted defendant for the two violations of G.S. 14-27.7 that are the subject of this appeal.

The State's evidence at trial tended to show the following: On the morning of 13 July 1983 Mrs. Grindstaff was voluntarily admitted into St. Joseph's Hospital suffering from a migraine headache, severe nausea, and vomiting; that afternoon she appeared to be having seizures and was moved into the intensive care ward, where she was connected to a heart monitoring device and an I.V. unit containing nutrients and medicines; the defend-

ant, an employee of the hospital, was the nurse in charge of the intensive care ward that night; during the course of the night, while Mrs. Grindstaff lay weak and ill in bed, on one occasion defendant inserted his hand into her vagina and on another occasion he had sexual intercourse with her. Defendant, testifying in his own behalf, denied having any improper contact with Mrs. Grindstaff.

Attorney General Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Elmore & Powell, by Stephen P. Lindsay and Bruce A. Elmore, Sr., for defendant appellant.

PHILLIPS, Judge.

Defendant makes three contentions in regard to his convictions—that the evidence was insufficient to prove his guilt of the crimes he was tried for; that the court erred in instructing the jury; and that because of the earlier trial this prosecution is barred by the double jeopardy clauses of the Fifth Amendment to the United States Constitution and Article One, Section 19 of the North Carolina Constitution. None of these contentions have merit and we overrule them.

[1] As to defendant's double jeopardy pleas his contention is that the offenses he was convicted of are lesser included offenses of the crimes that he was acquitted of in the previous case and thus within the ambit of the Fifth Amendment under the rule laid down in *Brown v. Ohio*, 432 U.S. 161, 53 L.Ed. 2d 187, 97 S.Ct. 2221 (1977) and *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932). While the rule there laid down is as defendant states it, it does not apply to this case inasmuch as the offenses that defendant was convicted of are not lesser included offenses of the crimes that he was earlier tried for. This is because each of the crimes defendant was convicted of has essential elements—that defendant was an employee and his employer had custody of the alleged victim—that neither second degree rape, G.S. 14-27.3, nor committing a sex act in violation of G.S. 14-27.5 have. Thus the former trial did not put defendant in jeopardy of being convicted of the custodial offenses that are the basis for this case and the constitutional provisions relied upon do not apply. *State v. Revelle*, 301 N.C. 153, 270 S.E. 2d 476 (1980).

[2] Defendant's position as to the insufficiency of the evidence is that the State failed to prove the hospital had "custody" of Mrs. Grindstaff, as the indictment alleged and G.S. 14-27.7 requires. In pertinent part, G.S. 14-27.7 provides:

> . . . [I]f a person having custody of a victim of any age or a person who is an agent or employee of any person, or institution, whether such institution is private, charitable, or governmental, having custody of a victim of any age engages in vaginal intercourse or a sexual act with such victim, the defendant is guilty of a Class G felony.

Defendant contends that the word "custody" as used in the statute means legal control or restraint, which was not present since Mrs. Grindstaff voluntarily entered the hospital, a private institution, and could have left any time she wanted to. But in enacting this statute and making it applicable to private and charitable institutions, whose patients are nearly all voluntary, the General Assembly obviously used the word "custody" in its broadest sense, intending thereby, we believe, to protect from abuse all hospital patients, voluntary and committed alike. Certainly voluntary patients need the protection that the statute provides no less than committed patients; for though they have the power to terminate their stay, while they remain as patients of a hospital they are as vulnerable as committed patients to abuse by employees who have ready access to their quarters and supply them with food, drink, medication, assistance, and other necessary care. We therefore hold that the evidence tends to show that defendant's employer, St. Joseph's Hospital, had custody of Mrs. Grindstaff within the meaning of G.S. 14-27.7 when the alleged crimes were committed.

[3] The jury instruction that defendant objected to and cites as error also had to do with the hospital having "custody" of Mrs. Grindstaff. After correctly instructing that the State had to prove beyond a reasonable doubt that St. Joseph's Hospital had custody of Mrs. Grindstaff, that defendant was an employee of the hospital, and that he committed the sex acts charged, the court further charged: "Custody is the care, keeping or control of one person by another. A medical hospital's housing of a patient would be custody." This, too, is a correct instruction in our opinion. Though defendant sees the instruction that "[a] medical hospital's housing

of a patient would be custody" as dispensing with proof of an element of the crime that the State was required to prove, in so charging the court but stated a correct legal conclusion—as judges do who charge that a gun, knife or club is a deadly weapon, etc., *State v. Parker*, 7 N.C. App. 191, 171 S.E. 2d 665 (1970)—and it was the jury's province, as the court had charged, to determine as a fact whether custody had been proved beyond a reasonable doubt.

[4] But defendant's final contention, that the trial court erred in sentencing him on both counts by finding as an aggravating factor that the defendant "took advantage of a position of trust or confidence to commit the offense," is well taken. "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), and the evidence necessary to convict defendant tended to show he took advantage of his custodial position in committing the offenses involved. That the sentences imposed were less than the presumptive terms is not decisive. The defendant is entitled to a sentencing hearing on this count unaffected by an erroneously founded factor in aggravation. *State v. Gaynor*, 61 N.C. App. 128, 300 S.E. 2d 260 (1983).

No error in the trial.

Judgments vacated and remanded for resentencing.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. PHILLIP LAMONT SLADE

No. 8517SC1252

(Filed 3 June 1986)

Narcotics § 2— providing inmate with marijuana—no variance between indictment and proof

There was no merit to defendant's contention that there was a fatal variance between the indictment which charged that he "did give" a controlled substance to an inmate and the evidence which showed that defendant attempted to induce a deputy to give marijuana to an inmate by hiding the drug inside a jar of cold cream, since the indictment which correctly stated the date

of the offense, the name of defendant, the name of the inmate to whom he attempted to give marijuana and the jail where the offense took place and which cited the relevant statute was sufficient to enable defendant adequately to prepare for trial and to protect him from twice being put in jeopardy for the same offense.

APPEAL by defendant from *Wood, Judge.* Judgment entered 16 July 1985 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 10 April 1986.

Defendant was indicted for the offense of furnishing contraband to an inmate. On 16 December 1984, defendant's wife was incarcerated in the Rockingham County Jail. On that day, defendant had visited with his wife through the end of regular visiting hours. He returned to the jail a little while later and asked one of the deputies on duty to give his wife a package. The deputy searched through the package and found personal care products such as Noxzema skin cream, deodorant, letters and pictures. Having been tipped off to expect contraband, the deputy stuck her fingers into the skin cream and found a foil package containing marijuana. Defendant was immediately arrested.

At trial, the State presented the testimony of the two deputies on duty at the jail that day. Defendant testified and denied knowing the marijuana was in the jar. He further testified that his wife had asked him to pick up a package for her from a friend, Michelle Holland. Defendant's wife testified that her husband did not know of the marijuana and that he did not even know she had started smoking the drug since she had been in jail. Finally, Ms. Holland testified that she had put the marijuana in the jar without defendant's knowledge.

Defendant's motion to dismiss was denied and the case was submitted to the jury. Defendant was found guilty and was sentenced to five years imprisonment. He appeals.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General James B. Richmond for the State.

Appellate Defender Malcolm Ray Hunter by Assistant Appellate Defender Geoffrey C. Mangum for defendant-appellant.

PARKER, Judge.

Defendant's sole assignment of error is that the trial court erred in denying his motion to dismiss the charge against him. He contends that the indictment charged that he "did give" marijuana to an inmate but the evidence only showed that he "attempted to procure" the deputy to give the marijuana to defendant's wife. A motion to dismiss is a proper method to raise a fatal variance between indictment and proof. *State v. Law*, 227 N.C. 103, 40 S.E. 2d 699 (1946); *State v. Pulliam*, 78 N.C. App. 129, 336 S.E. 2d 649 (1985).

Defendant was convicted of a violation of G.S. 14-258.1(a) which reads:

> (a) If any person shall *give* or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, or if any person shall combine, confederate, conspire, aid, abet, solicit, urge, instigate, counsel, advise, encourage, *attempt to procure*, or procure another or others to give or sell to any inmate of any charitable, mental or penal institution, or local confinement facility, any deadly weapon, or any cartridge or ammunition for firearms of any kind, or any controlled substances included in Schedules I through VI contained in Article 5 of Chapter 90 of the General Statutes except under the general supervision of a practitioner, poison or poisonous substance, except upon the prescription of a physician, he shall be punished as a Class H felon . . . (emphasis added).

The indictment refers to the statute violated and charges that defendant "did give" a controlled substance to an inmate of a local confinement facility. The evidence presented at trial showed that defendant had given a deputy at the jail a package to give to his wife and that the package contained marijuana. The trial judge instructed the jury that defendant should be convicted if he "knowingly attempted to procure [the deputy] . . . to give marijuana" to his wife in the jail. Defendant contends that the jury was allowed to convict him upon a completely different theory than that stated in the indictment, and that the evidence was insufficient as a matter of law to support a conviction for the offense set forth in the indictment.

Clearly, a defendant must be convicted, if at all, of the offense charged in the indictment. *State v. Joyner*, 301 N.C. 18, 269 S.E. 2d 125 (1980). In determining whether there is such a variance between indictment and proof as to affect substantive rights of the accused, the primary consideration for the reviewing court is the role of the indictment in informing the defendant of the charges so that he may prepare his defense and in protecting the defendant from double jeopardy. *See State v. Sturdivant*, 304 N.C. 293, 283 S.E. 2d 719 (1981). Thus, not every variance between the indictment and proof is a material variance. *State v. Furr*, 292 N.C. 711, 235 S.E. 2d 193, *cert. denied*, 434 U.S. 924, 98 S.Ct. 402, 54 L.Ed. 2d 281 (1977).

By statute in North Carolina, an indictment charging a completed offense is deemed sufficient to support a conviction for an attempt to commit the crime charged. G.S. 15-170; *State v. Gray*, 58 N.C. App. 102, 293 S.E. 2d 274, *disc. rev. denied*, 306 N.C. 746, 295 S.E. 2d 482 (1982). This statute applies even though the completed crime and the attempt are not in the same statute. In *State v. Arnold*, 285 N.C. 751, 208 S.E. 2d 646 (1974), defendant had been indicted for the common-law felony of arson, but was convicted of the statutory felony of attempted arson. The Supreme Court held that, in light of G.S. 15-170, the indictment charging the completed offense of arson sufficiently served the requirements of an indictment in order to support a conviction for attempted arson. *Arnold* at 755, 208 S.E. 2d at 649.

The same is true in this case. The indictment charging defendant with the completed offense of giving a controlled substance to an inmate was sufficient to enable him to adequately prepare for trial and to protect him from being twice put in jeopardy for the same offense. *See State v. Greer*, 238 N.C. 325, 77 S.E. 2d 917 (1953). The indictment correctly stated the date of the offense, the name of the defendant, the name of the inmate to whom he attempted to give marijuana and the jail where the offense took place. The relevant statute was also cited. This information adequately protects defendant's rights to be accurately informed of the charge against him and his right to be free from double jeopardy. Changing "did give" to "did attempt to procure the deputy to give" would have made no difference in the way defendant presented his defense, as he denied any knowledge of the marijuana at all.

In order to convict defendant of an attempt crime, the State must show: (i) an intent to commit the crime and (ii) an overt act done toward the commission of the crime, beyond mere preparation. *State v. Powell*, 277 N.C. 672, 178 S.E. 2d 417 (1971). In this case, the evidence, viewed in the light most favorable to the State, shows defendant intentionally attempted to induce the deputy into giving marijuana to an inmate by hiding the drug inside a jar of cold cream.

We hold that the indictment was sufficient to support the conviction of an attempt to give a controlled substance to an inmate, and that the evidence was sufficient to survive defendant's motion to dismiss. We find

No error.

Judges WEBB and EAGLES concur.

HARRY BRUMMER v. BOARD OF ADJUSTMENT OF THE CITY OF ASHEVILLE

No. 8528SC1250

(Filed 3 June 1986)

Municipal Corporations § 30.6— interpretation of variance—impropriety

An order by respondent board interpreting its earlier grant of a variance was unsupported by the evidence where the evidence tended to show that respondent had no intention at all concerning the mark from which elevation of petitioner's house was to be measured but instead left that and other details affecting the variance for petitioner and opposing neighboring property owners to agree on, and the evidence also showed that the agreement made by petitioner and opposing property owners was ambiguous.

APPEAL by respondent Board of Adjustment from *Snepp, Judge*. Order entered 16 July 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 14 March 1986.

On 24 September 1984 the Board of Adjustment of the City of Asheville, under its zoning ordinance, granted petitioner a variance which reduced the setback requirement for his residential lot from 35 to 20 feet. Petitioner soon obtained a building per-

mit and began constructing a house, the entire front of which was closer to the street than 35 feet. Since the lot was steeply sloped moving the whole structure closer to the road also moved it uphill and increased its elevation, which displeased some neighboring property owners. At their request, on 19 November 1984 the city zoning and planning office, maintaining that the variance applied to only a portion of the house, asked the Board to interpret its grant. The Board determined that the staff's understanding of the variance was correct and that petitioner was in violation, but allowed him to apply for a retroactive variance of 15 feet applicable to the entire structure. This variance was granted by the Board on 26 November 1984, subject to petitioner complying with an agreement made with adjacent property owners pertaining thereto. The agreement, drafted by petitioner's attorney and the attorneys for the opposing property owners and incorporated into the variance, contained the following provision, among others:

> (1) . . . The height of the building is to be 114' [elevation] plus 3'6" said 3'6" consists of an 8" thick concrete wall surrounding the roof, and 6" metal railing, making a total height of 117'6". [elevation] The top of the roof will be level with no elevator shaft extending above roof line. The previous plan was to have a total height of 123'6". [No protrusion extending above 6" metal railing. Bench elevation as shown on exhibit "A" attached hereto certified by Frank McGahren 11/21/84. Drawing No. D-8283-T-1 Rev. 2].

(The bracketed portions were written in and initialed by the agreeing parties.) Exhibit "A," a topographical survey print, shows the elevation of various parts of the lot and the location of the house, the superstructure of which was already in place. The print indicates that the surveyor used as a bench mark of 100 feet a sewer lid in the street at the northeast corner of petitioner's lot. The agreement also required petitioner to provide the Board with a complete set of plans for the house by 7 December 1984, and plans that showed the ceiling height, dimensions and layout of each floor of the house were duly delivered.

Some weeks later the neighboring property owners complained to the planning and zoning staff that the construction was in violation of the agreement and the variance. After a new survey based on the sewer lid shown on Exhibit "A" indicated that the structure exceeded the allowed elevation by approxi-

mately two and a half feet, the Board was asked to interpret the 26 November 1984 variance. Though the purpose of the hearing in April, 1985 was to determine the location of the bench elevation referred to in the agreement no new evidence was received and petitioner, who was ill, was not there. Some Board members and the attorney for the adjoining property owners argued that the mark was the aforesaid sewer lid; petitioner's counsel argued that since the house was in place it was the center of the property line at the base of the house. The Director of Planning and Zoning advised the Board, as one of its findings of fact stated, that he was unable to determine what mark should be used in measuring for the maximum height of the structure. After the arguments were over the Board found that "the bench mark identified on Exhibit A as 'B.M.EL. 100.00 SEWER LID' was intended by this Board on November 26, 1984, as the reference point for the measuring of the elevation restriction contained in the Agreement incorporated in said variance," and directed the Building Inspector to enforce the zoning ordinance accordingly. Upon review pursuant to a writ of certiorari, the Superior Court found that the Board's finding and conclusion as to the meaning of its variance was not supported by evidence and vacated the order of enforcement.

Reynolds & Stewart, by G. Crawford Rippy, III, for petitioner appellee.

Roberts, Cogburn, McClure & Williams, by Max O. Cogburn, Isaac N. Northup, Jr. and Glenn S. Gentry, for respondent appellant.

PHILLIPS, Judge.

Respondent Board first contends that the Superior Court had no jurisdiction to consider petitioner's challenge to the 15 April 1985 order because it was a collateral attack upon the 26 November 1984 order which allowed the variance and was not appealed. This contention has no merit. The validity of the 26 November 1984 order is not, and has not been, challenged by petitioner, who had no occasion to appeal from it since it granted him the variance that he requested. What petitioner's appeal challenged was the validity of the respondent Board's 15 April 1985 interpretation of the 26 November 1984 variance. Since petitioner was aggrieved by the latter order the Superior Court clearly had

jurisdiction under G.S. 160A-388(e) to review the matter under its writ of certiorari and we thus have jurisdiction to review the court's decision. In doing so we will follow the principles stated in G.S. 150A-51. *Coastal Ready-Mix Concrete Co. v. Board of Commissioners of the Town of Nags Head*, 299 N.C. 620, 265 S.E. 2d 379, *rehearing denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980).

The authority of the Board to grant a variance with conditions, clearly established by our law, *Lee v. Board of Adjustment of Rocky Mount*, 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1 (1946), is not at issue. The only real issue raised by the respondent's appeal is whether the record as a whole shows that the Board's interpretative order is supported by competent, material and substantial evidence. *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

The Superior Court found that the order is not so supported and we agree. The record plainly shows, as the Superior Court found, that the Board had no intention at all concerning the mark from which the elevation of the structure was to be measured, but left that and other details affecting the variance for the petitioner and the opposing property owners to agree on; and it also shows that the agreement made by the petitioner and opposing property owners was ambiguous. While the agreement can be construed as providing for the height of the structure to be computed from the aforesaid sewer lid, since the existence of the house with its superstructure in place and the plans showing the height of each room were facts upon which the agreement was based, it can also be construed as requiring the measurement to be made from the base of the house. In all events, the enforcement order cannot stand, since the finding of fact upon which it rests has no evidentiary support.

Affirmed.

Judges BECTON and COZORT concur.

MARK A. SPROUSE AND WIFE, BESSIE A. SPROUSE, WILLIAM F. POTTS, JR., SUBSTITUTE TRUSTEE UNDER DEED OF TRUST RECORDED IN THE BUNCOMBE COUNTY PUBLIC REGISTRY IN BOOK 927 AT PAGE 727; AND MID-STATE HOMES, INC. v. THE NORTH RIVER INSURANCE COMPANY

No. 8528SC1198

(Filed 17 June 1986)

1. **Insurance § 115; Mortgages and Deeds of Trust § 29— fire insurance policy—foreclosure sale—rights of parties**

There was no merit to defendant's contention that because a foreclosure sale had taken place and no upset bid had been filed, any insurable interest of plaintiff mortgagors had been extinguished and they could not recover, since the only rights which are "fixed" pursuant to N.C.G.S. § 45-21.29A upon expiration of the 10-day period for filing upset bids are the contractual rights of the high bidder to delivery of the deed upon tender of the purchase price and of the trustee to hold the bidder liable for that price; until the purchase price is paid and the deed delivered, the mortgagor retains some interest in the property; and the Uniform Vendor and Purchaser Risk Act, N.C.G.S. § 39-36 *et seq.*, places the risk of loss with the vendors pending the high bidder's acquiring title or possession.

2. **Insurance § 115— fire insurance—assignment of mortgagee's interest—no notice to insurer—insurable interest of assignee**

Where the named mortgagee in a fire insurance policy transferred its mortgagee rights to a third party prior to a fire, the assignee owned an insurable interest in the property at the time of the fire and was not barred from recovery for failure to notify defendant insurer that it, rather than the named mortgagee, was mortgagee at the time of the fire, since there was no express language in the policy stating plainly that the policy would become invalid upon change of mortgagee without notification.

3. **Mortgages and Deeds of Trust § 25— foreclosure sale—obligation of trustee to enforce sale—fire damage to property—insurer's action for indemnity against trustee improper**

In an action to recover on a fire insurance policy where a foreclosure sale had taken place and no upset bid had been filed prior to the fire, defendant insurer was not entitled to summary judgment on its claim for indemnity against the trustee under a deed of trust on the subject property where defendant claimed that the trustee failed to enforce the foreclosure sale, since pursuant to N.C.G.S. § 39-39, the trustees could not have enforced the sale to the high bidder and therefore could not be liable to defendant for his failure to do so; it was within the power of the trustee to postpone the foreclosure sale or resale pending resolution of the insurance claim and was therefore equally within his power to abandon or withdraw the sale proceeding, the high bid of which was unenforceable, particularly since this was with the consent of the mortgagee at whose request the sale was commenced in the first place and with the consent of the mortgagors; and summary judgment did not defeat defendant's right to

subrogation against the high bidder because the trustee could not compel performance on the high bid and defendant therefore had no better right.

4. Attorneys at Law § 7.5— trustee in foreclosure sale—fire insurer's action for indemnity—absence of justiciable issue—award of attorney fees to trustee proper

In an action to recover on a fire insurance policy when there had been a foreclosure sale, the trial court properly awarded attorney fees to the trustee under a deed of trust on the subject property where there was a complete absence of a justiciable issue in defendant's counterclaim against the trustee for failure to enforce the foreclosure sale, since defendant's contention that the trustee was required to enforce rested solely on a strained construction of an isolated sentence in N.C.G.S. § 45-21.29A, ignored the substantial discretionary powers of the trustee, ignored the existence of the Uniform Vendor and Purchaser Risk Act, and was unsupported by any N. C. law; defendant never suggested how, if at all, any action or inaction by the trustee justified its total refusal to honor any claims when the amount due on the policy exceeded the amount of the mortgage debt; and defendant never alleged that the trustee acted in anything other than a good faith manner. G.S. 6-21.5.

APPEAL by defendant from *Snepp, Judge*. Judgments entered 23 July 1985 and order allowing attorney fees entered 12 August 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 8 April 1986.

This is an action by plaintiff homeowners and mortgagees, joined by the trustee under the deed of trust, to recover on an insurance policy for loss of home in fire.

Plaintiffs Sprouse ("the Sprouses") owned a home in Fairview, North Carolina. They executed a note and deed of trust against their home in favor of plaintiff Mid-State Homes, Inc. ("Mid-State"). In February 1983 the Sprouses obtained homeowners' insurance with defendant North River Insurance Company. The policy declaration listed the Sprouses as the named insureds and Mid-State as the "first mortgagee" loss payee. No other mortgagees were listed.

Under the policy, defendant agreed to cover the property against fire loss. The policy contained language limiting defendant's liability to those with an insurable interest in the property:

> Even if more than one person has an insurable interest in the property covered, we shall not be liable:

a. to the *insured* [by the terms of the policy, the Sprouses] for an amount greater than the *insured's* interest; nor

b. for more than the applicable limit of liability. [Emphasis in original.]

The policy also contained a "Mortgage Clause":

The word "mortgagee" includes trustee.

If a mortgagee is named in this policy, any loss payable under [the relevant coverage] shall be paid to the mortgagee and you [the Sprouses], as interests appear. If more than one mortgagee is named, the order of payment shall be the same as the order or precedence of the mortgages.

If we [defendant] deny claim, that denial shall not apply to a valid claim of the mortgagee, if the mortgagee:

a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

b. pays any premium due under this policy on demand if you have neglected to pay the premium;

c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

If the policy is cancelled or non-renewed by us, the mortgagee shall be notified at least 10 days before the date cancellation or non-renewal takes effect.

If we pay the mortgagee for any loss and deny payment to you:

a. we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

b. at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we shall receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

> Subrogation shall not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

The policy did not contain any provision expressly avoiding liability or requiring notification in the event the mortgagee assigned its interest in the insured property.

In March 1983 plaintiff Potts ("Potts") was substituted for the original trustee on the deed of trust. In September 1983, Mid-State assigned the note and deed of trust to Jim Walter Homes, Inc. ("Jim Walter"), without notice to defendant. Mid-State and Jim Walter are both Florida corporations. All directors of Mid-State are also directors of Jim Walter, and the two corporations share many of the same officers.

In October 1983 Potts as trustee began a foreclosure proceeding on the Sprouse property. A foreclosure sale took place on 13 December 1983, with Jim Walter making the high bid. Potts filed the report of sale the same day, and no upset bid was made within the ten day period allowed by law. The Sprouses remained in possession, but were removing their belongings, when, after the ten day period had expired, the house was destroyed by fire. Mid-State notified defendant immediately of the loss, but received only a notice of cancellation addressed to it as mortgagee.

The subject property was never conveyed to Jim Walter. Instead, Jim Walter, the Sprouses and Potts joined in a dismissal of the foreclosure action in October 1984. The Sprouses simultaneously assigned their beneficial interest in any insurance proceeds to Mid-State. Jim Walter also made a similar assignment along with an assignment of the note and deed of trust.

Plaintiffs (the Sprouses, Potts, and Mid-State) commenced this action on 31 October 1984 seeking to recover under the policy for the fire loss. Defendant denied liability and set up a counterclaim for indemnity from Potts, on the ground that he failed to enforce the foreclosure sale. Both sides moved for summary judgment. The court allowed plaintiffs' summary judgment motions, denied defendant's, dismissed the counterclaim, and ordered defendant to pay Potts' attorney fees. Defendant appeals.

Van Winkle, Buck, Wall, Starnes and Davis, by Roy W. Davis, Jr. and Larry C. Harris, Jr., for defendant-appellant.

Barnes & Tomberlin, by W. Faison Barnes and Richard H. Tomberlin, for plaintiff-appellee Mid-State Homes, Inc.

Robin S. Lymberis for plaintiff-appellee William F. Potts, Jr.

Stephen Barnwell for plaintiff-appellees Sprouse.

EAGLES, Judge.

Plaintiffs' claim for punitive damages remains to be adjudicated, and the trial court did not certify that there was no just reason for delay. Though the appeal is technically interlocutory, *see* G.S. 1A-1, R. Civ. P. 54(b), in our discretion we proceed to the merits.

This case is here on appeal from summary judgment. Summary judgment is appropriate where there is no genuine issue as to any material fact, and the case presents only questions of law. *Thomas v. Ray*, 69 N.C. App. 412, 317 S.E. 2d 53 (1984). Since in ruling on summary judgment motions the trial court rules only on questions of law, the order 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). There does not appear to be any dispute as to the facts here.

I

[1] Defendant's first assignment of error challenges the grant of summary judgment in favor of the Sprouses. Defendant contends that because the foreclosure sale had taken place and no upset bid had been filed, any insurable interest of the Sprouses had been extinguished and they cannot recover.

A

Defendant relies on the statutes governing foreclosure under power of sale, G.S. Chapter 45, in particular G.S. 45-21.29A:

> No confirmation of sales of real property made pursuant to this Article shall be required except as provided in G.S. 45-21.29(h) for resales. If in case of an original sale under this Article no upset bid has been filed at the expiration of the

10-day period, as provided in G.S. 45-21.27, the rights of the parties to the sale become fixed.

The fixing of rights, argues defendant, operates to terminate any interest of the mortgagor, in this case the Sprouses. We disagree.

The instant case is not a foreclosure by judicial action. G.S. 45-21.2. Rather, the sale here took place under contractual powers granted the trustee, made subject to certain statutory constraints of due process imposed by the General Assembly. *In re Burgess*, 47 N.C. App. 599, 267 S.E. 2d 915, *appeal dismissed*, 301 N.C. 90 (1980). Doubts as to the interpretation of the statutes should be resolved not in favor of the unrestricted power of the trustee or the automatic loss of equitable title, but in favor of preserving the equitable title of the mortgagor. *Spain v. Hines*, 214 N.C. 432, 200 S.E. 25 (1938).

The deed of trust results in legal title to the property being in the trustee. In a foreclosure title remains in the trustee until he conveys it to the high bidder. Title does not pass before the conveyance. G.S. 22-2. The legislature recognized that until actual transfer of title, the high bidder may default on the obligation to pay the bid price; in that case, because he continues to hold title, the trustee may (but is not required to) hold a resale. G.S. 45-21.30(c). The high bidder is not entitled to an order of possession until payment of the purchase price. G.S. 45-21.29(k)(3). This is consistent with the general rule: "The sale is executed only by the delivery of the deed. The prior proceedings amount merely to a contract of sale." 10 G. Thompson, Real Property Section 5185 at 258 (J. Grimes repl. ed. 1957). Therefore the only rights that are "fixed" upon expiration of the 10-day period are the contractual rights of the high bidder to delivery of the deed upon tender of the purchase price and of the trustee to hold the bidder liable for that price. The rights of other parties, including those in possession, are not necessarily affected.

B

Until the purchase price is paid and the deed delivered, then, the mortgagor retains some interest in the property. If there are surplus proceeds from the sale, the mortgagor ordinarily will be entitled to them. *See In re Castillian Apartments, Inc.*, 281 N.C. 709, 190 S.E. 2d 161 (1972). If for some reason the high bidder

defaults entirely and cannot be compelled to pay, the mortgagor remains personally liable. *See Jerome v. Great American Ins. Co.*, 52 N.C. App. 573, 279 S.E. 2d 42 (1981). The mortgagor may remain in possession pending closing. *Id.* These interests constitute some sufficient risk of pecuniary loss and chance of benefit that the Sprouses had an insurable interest in the house. *Id.*

C

The provisions of the Uniform Vendor and Purchaser Risk Act ("the Act"), G.S. 39-36 *et seq.*, support this result. If neither legal title nor possession has been transferred, and all or a material part of the subject property is destroyed without fault of the purchaser, as happened here, the vendor generally has no rights of enforcement as against the purchaser. G.S. 39-39(1). Though we have found no North Carolina case directly on point, the policy underlying the statute applies with equal force to sales contracts entered into through foreclosure sales. The purchaser's bid price reflects the same expectations of value. Saddling the purchaser with all the risk pending closing would be equally unfair, whether the price is set on the open market or at foreclosure. The Act places the risk of loss with the vendor(s) pending the high bidder's acquiring title or possession.

The legislatively approved policy of uniform interpretation is supported by this result. G.S. 39-38. New York has enacted a substantially similar statute. N.Y. Gen. Oblig. Law Section 5-1311 (McKinney 1978). In *N.Y. Medical College v. 15-21 E. 111th St. Corp.*, 90 N.Y.S. 2d 591 (Sup. Ct. 1949), the court held that sale at a judicial foreclosure sale created a contract for sale governed by the Act, noting the remedial nature of the Act. There the purchaser at the judicial sale was entitled to a refund of money paid under the unexecuted contract, since the premises suffered material damage without fault of the purchaser. *See also Approved Properties, Inc. v. City of New York*, 52 Misc. 2d 956, 277 N.Y.S. 2d 236 (Sup. Ct. 1966) (purchaser at city auction entitled to abatement for preclosing damage by vandals, but not for fire damage where memorandum of sale expressly shifted risk). Therefore under the Act the making of the high bid does not operate to extinguish the seller's interests and shift all the risks to the purchaser.

D

Here there is no dispute that the fire destroyed the house and that the Sprouses retained possession. There is nothing in the record documents of the foreclosure sale contractually shifting the risk of loss pending closing to Jim Walter, the high bidder, or anything suggesting Jim Walter was at fault for the fire. Accordingly Jim Walter would have had a valid defense to any action for specific performance of its commitment to purchase or to any action for deficiency under G.S. 45-21.30. If Potts had attempted a resale of the damaged premises after the fire, it is unlikely he would have obtained any sum approaching the mortgage debt. The Sprouses would have been liable for the deficiency under the note and deed of trust. Under the circumstances, they clearly had an insurable interest in the property. For these reasons, we hold that the court did not err in granting summary judgment to the Sprouses.

II

[2] Defendant's next assignment challenges the summary judgment in favor of Mid-State. At the time of the fire Mid-State was the named mortgagee under the policy, but previously had transferred its mortgagee rights to Jim Walter. There is no question about the validity or effect of the assignment as between Jim Walter and Mid-State. Mid-State's reacquisition of the debt from Jim Walter after the loss did not automatically restore its former position under the insurance policy. Mid-State acquired only whatever rights Jim Walter may have had at the time of the reassignment since the rights under the policy were fixed as of the time of the fire. *Pressley v. American Cas. Co.*, 14 N.C. App. 561, 188 S.E. 2d 734, *cert. denied*, 281 N.C. 623, 190 S.E. 2d 466 (1972). An assignee cannot acquire any greater right than the assignor possessed. *William Iselin & Co., Inc. v. Saunders*, 231 N.C. 642, 58 S.E. 2d 614 (1950). Therefore the real question is whether Jim Walter was barred from recovering under the policy. If Jim Walter could recover under the policy, then Mid-State may recover, but only by virtue of Jim Walter's subsequent undisputed and legitimate assignment of its rights under the policy, and *not* because Mid-State remained named as mortgagee.

A

Mid-State argues that we should disregard the existence of the two corporations and treat them as a single entity for purposes of this litigation. It does appear that the two corporations are controlled by substantially the same officers. Nevertheless, they are separate, have chosen to register separately in North Carolina, and here must be treated as separate entities. *Beech Mountain Property Owners' Ass'n v. Current*, 35 N.C. App. 135, 240 S.E. 2d 503 (1978). We have been shown no compelling equitable reasons for disregarding their status as separate corporate entities. *See Glenn v. Wagner*, 313 N.C. 450, 329 S.E. 2d 326 (1985). This argument is rejected.

B

Jim Walter clearly owned an insurable interest in the property at the time of the fire based on its acquisition of the note and Mid-State's rights to demand foreclosure on default. *Crouse v. Vernon*, 232 N.C. 24, 59 S.E. 2d 185 (1950); *Tech Land Development, Inc. v. South Carolina Ins. Co.*, 57 N.C. App. 566, 291 S.E. 2d 821, *disc. rev. denied*, 306 N.C. 563, 294 S.E. 2d 228 (1982). The question is whether Jim Walter would be barred from recovery for failure to notify defendant that it, rather than Mid-State, was the mortgagee at the time of the fire.

C

Defendant relies primarily on *Shores v. Rabon*, 251 N.C. 790, 112 S.E. 2d 556 (1960). There the Supreme Court enforced the policy in favor of the original mortgagee, who had acquired a one-half interest in the property at foreclosure, even though the mortgagee had given no notice of the sale and change in the nature of his interest. The *Rabon* court held that the mortgagee had no duty to give the insurer notice of foreclosure proceedings, since "[u]ntil moment of delivery of the deed there remained a possibility of redemption by the owners." *Id.* at 796, 112 S.E. 2d at 561. The Court cited with approval *Pioneer Sav. & Loan Co. v. St. Paul Fire & Marine Ins. Co.*, 68 Minn. 170, 70 N.W. 979 (1897), to the effect that clauses *requiring* notification of changes in ownership related to changes resulting not from acts of the mortgagee but from acts of the mortgagor or owners of the equity of redemption. We do not view *Rabon* as authority for summary

judgment for defendant. *Pressley v. American Cas. Co., supra,* is the only other case cited by defendant. There the unsuccessful plaintiffs were the named insureds, with no remaining insurable interest whatsoever in the property. As we have noted, Jim Walter clearly had in insurable interest either as mortgagee or as high bidder at foreclosure. The only question is the effect of their failure to give the insurer notice of the change of mortgagees.

D

More persuasive is *Jerome v. Great American Ins. Co., supra.* There we upheld summary judgment where the fire insurance policy listed only plaintiff husband as the named insured though he had transferred all his interest to his wife as trustee for their children and for various lenders. Husband had transferred all his title even *before* he took out the policy of insurance. Nevertheless, we held not only that he had an insurable interest but also that since the "mortgage clause" in the policy did *not* state explicitly that the policy would become invalid upon change of mortgagee without notification, the insurer could not assert the mortgage clause as a bar to recovery. The mortgage provisions at issue here similarly contain no language invalidating the policy upon change of mortgagees.

Defendant argues that the policy does contain an anti-assignment provision, "Assignment of this policy shall not be valid unless we give our written consent." The policy itself was never assigned, however, only the note and deed of trust. The mortgagee's rights to maintain the policy would arise only upon the policyholders' failure to pay premiums. In addition, the mortgage clause specifically makes certain policy provisions applicable to the mortgagee, but not the anti-assignment clause, suggesting by its exclusion that it does not apply.

E

The courts of other jurisdictions have uniformly held that an assignment of the note and mortgage by the mortgagee named in a policy carries with it the rights that existed in the assignor with respect to the policy without the consent of the insurer. *Kintzel v. Wheatland Mut. Ins. Ass'n,* 203 N.W. 2d 799 (Iowa 1973); *Central Union Bank v. New York Underwriters' Ins. Co.,* 52 F. 2d 823 (4th Cir. 1931); *Reinhardt v. Security Ins. Co.,* 312 Ill.

App. 1, 38 N.E. 2d 310 (1941); Annot., 78 A.L.R. 499 (1932). Only where the mortgage clause contains express language voiding the clause if the mortgagee's name does not appear therein has a different result been reached. *Lititz Mut. Ins. Co. v. Barnes*, 248 F. 2d 241 (5th Cir. 1957), *cert. denied*, 355 U.S. 931, 2 L.Ed. 2d 414, 78 S.Ct. 411 (1958). *Compare, Jerome v. Great American Ins. Co., supra.* The rationale for this "general rule," was explained cogently in *Central Union Bank*:

> There can be no question, of course, but that the mortgagee may transfer with his debt such rights as arise from the pledge of the policy with him, or that the assignee of the mortgagee upon such transfer has the right to enforce same. The question is the narrower one as to whether the right of the mortgagee to recover on the policy, unaffected by the acts and defaults of the mortgagor, may be thus transferred; and this involves a consideration of the nature of the mortgage clause. Does that clause evidence a particular trust and confidence in the mortgagee, or is the trust rather in the mortgagor? Does the transfer of the rights of the mortgagee increase the hazard, or substitute a different risk, or is the hazard for all practical purposes the same? We think it clear that the latter is the case. The whole of the added protection of the clause relates, not to acts and omissions of the mortgagee, but to those of the mortgagor. Its purpose is that the policy shall stand as security for the debt unaffected by the mortgagor's conduct; and the agreement of the company to remain bound notwithstanding the acts or omissions of the mortgagor evinces confidence, not in the mortgagee but in the mortgagor, in whose possession the property remains, and the risk of whose conduct in violation of the terms of the policy is, to the extent of the debt, assumed by the company. So also the transfer of the debt and of the rights of the mortgagee in the policy does not affect the hazard; for the property remains in the possession of the insured, the mortgagor, and the right to apply the proceeds of the policy to the satisfaction of the debt, which is all that the mortgagee has, is neither increased nor diminished by the transfer.

The contention that the company contracted to pay the loss under the policy only to the mortgagee named is hypertechnical. We have seen that no relation of personal con-

> fidence is involved; and there would be as little reason in holding that the rights of the mortgagee in such case are not assignable as in holding that he might not assign a collateral note made payable to him, on the ground that only he had been named as payee.

52 F. 2d at 825. We find this reasoning persuasive.

F

We therefore conclude that Jim Walter was covered as mortgagee under the policy at the time of the fire. By valid assignment following the loss, Mid-State acquired Jim Walter's right to the proceeds. Therefore, nothing else appearing, summary judgment for Mid-State was properly entered. We note that Jim Walter itself never filed proof of loss; however, defendant received timely notification of the loss and does not assert Jim Walter's failure as a bar to recovery. Nor does defendant contend that Jim Walter would be barred from recovering for failure to give notice of its status as mortgagee within a reasonable time after the original assignment, and we need not reach that question either. Defendant's second assignment is overruled.

G

Defendant argues that this holding unfairly expands its liability, apparently relying on the terms of the mortgage clause "as interests appear." It is universally held that that language does not describe interests in the property, but in the mortgage debt. 5A J. Appleman & J. Appleman, Insurance Law & Practice Section 3401 at 285-86 (1970). Defendant contracted and accepted premiums to cover the fire damage, not particular property interests. The Sprouses remained liable on the entire note, and Mid-State had a valid claim for that amount. How the Sprouses and Mid-State divided the proceeds is immaterial to the insurer.

III

[3] By its third assignment defendant contends that the trial court erred by denying its motion for summary judgment against Potts on the ground that Potts failed to compel Jim Walter to perform on its bid, and in allowing Potts' motion for summary judgment in his favor.

A

Defendant relies again on its strained construction of the fixing of rights language in G.S. 45-21.29A. As we have seen, however, the rights fixed by that statute are solely contractual in nature and do not involve any transfer of title. They are subject to the provisions of G.S. 39-39, under which Potts, had he attempted to compel Jim Walter to perform, would have been unable to do so. Contrary to defendant's contention, nothing in G.S. 45-21.29A shifts the risk of loss prior to closing to the high bidder. In fact, the high bidder cannot compel relinquishment of the premises until the price has been paid in full, G.S. 45-21.29(k), and the mortgagor remains subject to personal liability on the note until then. *Jerome v. Great American Ins. Co., supra.* If Potts could not enforce the sale to Jim Walter, he could not be liable to defendant for his failure to do so.

B

If Potts could not compel Jim Walter to perform on its bid, what other action could he take? Defendant claims Potts is liable to it for dismissing the foreclosure proceedings without its consent.

The deed of trust creating the trusteeship is a contract. It simply authorizes the trustee to exercise the power of sale in accordance with the provisions of G.S. Chapter 45. The trustee is not *required* to do so (the noteholder being protected by its right to initiate judicial foreclosure proceedings). The trustee may postpone an announced sale for "good cause" and apparently without limit on the length of postponement. G.S. 45-21.21. If a sale has been held, and the high bidder defaults, the trustee may, but is *not required to*, hold a resale. G.S. 45-21.30. It appears that the trustee has substantial discretion in discharging his responsibilities, which are to attempt to satisfy the debt while getting the highest price for the mortgagor and protecting the mortgagor's rights and equity. As long as the trustee does not violate the fiduciary duty of the office, and does not give unfair advantages to any party, *see Gregg v. Williamson*, 246 N.C. 356, 98 S.E. 2d 481 (1957); *Furst v. Loftin*, 29 N.C. App. 248, 224 S.E. 2d 641 (1976), the exercise of that discretion is not reviewable by the courts.

In this case Potts could have held a resale or even sued Jim Walter for the purchase price. G.S. 45-21.30; 59 C.J.S. Mortgages Section 580 (1949). On the other hand, Potts was aware that there was a valid policy of insurance, which, if paid, would not only satisfy the debt but might completely protect the mortgagor's equity in the property. Under the circumstances, it was within his power as trustee to postpone the sale or resale pending resolution of the insurance claim. G.S. 45-21.21. We see no reason why it was not equally within his power to abandon or withdraw the sale proceeding, the high bid of which was unenforceable, particularly since this was with the consent of the mortgagee at whose request the sale was commenced in the first place and with the consent of the mortgagors. If the insurance claim later proved unenforceable, Potts could simply commence a new sale at that time.

Kentucky Farm Bureau Mut. Ins. Co. v. Conley, 498 S.W. 2d 122 (Ky. App. 1973), cited by defendant, is clearly distinguishable. That case relied on the doctrine of equitable conversion, which no longer applies in North Carolina since the enactment of the Uniform Vendor and Purchaser Risk Act. J. Webster, Real Estate Law in N.C. Section 151 (Hetrick rev. ed. 1981).

C

Defendant claims unfair prejudice from the dismissal, claiming that it defeated its right to subrogation against the high bidder and expanded the Sprouses' insurable interest. Defendant's subrogation rights depended on the rights of the trustee under G.S. 45-21.30. If the trustee could not compel performance on the high bid, as we have seen he could not, defendant had no better right. *Thomas v. Ray*, 69 N.C. App. 412, 317 S.E. 2d 53 (1984). The expansion of the Sprouses' interest has been discussed earlier. Defendant contracted, and received premiums, to pay "as interests appear." As to the division of the proceeds to pay the debt and otherwise, defendant is without standing to complain.

D

We therefore conclude that Potts was entitled to summary judgment. Defendant's third assignment of error is overruled.

IV

[4] Defendant's final assignment of error challenges the award of attorney fees to Potts under G.S. 6-21.5. Defendant does not con-

test the trial court's findings supporting the *amount* awarded, but argues (1) that the trial court failed to make any findings as to the "complete absence of a justiciable issue" in its counterclaim and (2) that its claim against Potts was in fact justiciable.

A

The statute, G.S. 6-21.5, was enacted in 1984, and applies to actions begun after 1 October 1984. 1983 N.C. Sess. Laws (Reg. Sess. 1984) c. 1039, s. 2. This action was begun 31 October 1984, and therefore the statute applies. It reads in relevant part:

> In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. . . . A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees. The court shall make findings of fact and conclusions of law to support its award of attorney's fees under this section.

This statute has not been construed by our courts to date.

B

As to the sufficiency of the findings, the court did make an appropriate finding "that there was a complete absence of any justiciable issue of either law or fact raised by defendant in its counterclaim" against Potts in its order allowing summary judgment, reserving judgment as to the amount until a later hearing. The absence of the finding in the second order is thus insignificant.

The statute involves the absence of justiciable issues in *pleadings*. The sufficiency of a pleading is after all a question of law for the court. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). The trial court ordinarily makes no findings in determining that a complaint is insufficient, and even if it does, they may be of no effect. *White v. White*, 296 N.C. 661, 252 S.E. 2d 698 (1979). This court is equally qualified to pass on the sufficiency of defendant's pleadings, in light of the record, to raise a justiciable issue. The court's finding is therefore formally sufficient. We need only determine if it was justified.

C

A "justiciable issue" is not defined by our statutes or case law. A "justiciable controversy" is a real and present one, not merely an apprehension or threat of suit or difference of opinion. *See Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 316 S.E. 2d 59 (1984). Presumably, a "justiciable controversy" involves "justiciable issues," thus those which are real and present, as opposed to imagined or fanciful. "Complete absence of a justiciable issue" suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss. *See Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980); *Sutton v. Duke, supra.*

D

Upon review of defendant's counterclaim, we hold that such absence of a real issue as to Potts' liability does conclusively appear and that the court properly awarded attorney fees. Defendant's claim against Potts rests on its contention that Potts was required to enforce Jim Walter's high bid. As discussed above, this contention rests solely on a strained construction of an isolated sentence in G.S. 45-21.29A, ignores the substantial discretionary powers of the trustee, ignores the existence of the Uniform Vendor and Purchaser Risk Act, G.S. 39-39(a), and is unsupported by any North Carolina law. These are all matters of which defendant should have been aware. Defendant has furthermore never suggested how, if at all, any action or inaction by Potts justified its *total* refusal to honor any claims, when the amount due on the policy exceeded the amount of the mortgage debt. Finally, defendant never alleged that Potts acted in any other than a good faith manner, nor has it specifically suggested how if at all Potts breached his fiduciary obligations. A trustee should not, in the absence of *some* such breach, be required to expend his or her own resources defending against meritless claims and delaying tactics. The award of attorney fees was entirely proper.

CONCLUSION

Defendant has failed to demonstrate any error in the grant of summary judgment against it or in the award of attorney fees to Potts. The judgment and order appealed from are therefore

Affirmed.

Judges WEBB and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM DOUGLAS CONNARD

No. 8527SC1249

(Filed 17 June 1986)

1. Searches and Seizures § 31— search warrants—drugs and stolen goods—provisions severable

Provisions of a search warrant directing officers to search defendant's house and van for dilaudid, valium, and "stolen goods" were severable so that police could constitutionally search for the listed drugs or items of the same class, but the warrant could not authorize a general exploratory search of defendant's home and inventory of its contents.

2. Searches and Seizures § 33— search of house and van—stolen items not in plain view

With the exception of a television from which the outside serial number had been removed, stolen goods were illegally seized from defendant's house and van and should have been suppressed where officers could not identify any of the "stolen property" mentioned in the search warrant until after they had entered the house and van, inventoried the items they found, and compared them against stolen property lists, and there was no evidence of other circumstances which might properly have excited further inquiry, such as unusual quantity or types of items or unusual storage arrangements.

3. Receiving Stolen Goods § 7— sufficiency of verdict

There was no merit to defendant's contention that the verdict reached, "Guilty of Possession of Personal Property of Ronald Hewitt," constituted prejudicial error because the verdict reached was not a crime, since there is no requirement that the written verdict contain each and every element of the subject offense; it is sufficient if the verdict can be properly understood by reference to the indictment, evidence and jury instructions; and the record, including the indictment and the instructions, made it abundantly clear, beyond mistake by the jury, that knowing possession of goods stolen from Hewitt was at issue.

Judge WEBB dissenting.

APPEAL by defendant from *Lewis (Robert D.), Judge*. Judgments entered 25 July 1985 in Superior Court, GASTON County. Heard in the Court of Appeals 10 April 1986.

Defendant was tried on two separate indictments alleging felonious possession of stolen goods, the property of Gaston Memorial Park and one Ronald Hewitt, respectively. Before trial, defendant moved to suppress the stolen goods.

At the *voir dire* hearing, police officers testified that they went to defendant's residence with a search warrant. The warrant was based on information from a confidential and reliable informant. According to the affidavit attached to the warrant, at defendant's home the informant had seen drugs for sale. The informant also stated that there were "several stolen items" in the house and that defendant also kept stolen goods in his van. The applicant officer stated that he knew defendant and knew that defendant had "been charged before with drugs and stolen goods." The search warrant directed officers to search defendant's house and van for dilaudid, valium, and "stolen goods." No more specific description of the "stolen goods" was given.

Police searched the house and the van, finding drugs in both. Also inside the van they found tools and garden equipment in plain view. There was nothing about the tools suggesting they had been stolen, though police radioed the serial numbers in to police headquarters. The items were identified from the serial numbers as having been stolen from Gaston Memorial Park. Without the radio information, the officers would not have known they were stolen. The officers seized the van and all its contents and the following day sorted through them. Many items seized in the van were not stolen. Inside the house the officers also found in plain view a TV set from which the outside serial number had been removed. Officers took it to headquarters where they opened it up the next day and found the inside serial number. This number identified the set as having been stolen from Hewitt.

The trial court denied defendant's motion to suppress based on the fact that the officers acted in "objectively reasonable reliance" on the search warrant to investigate items found in plain view while they were lawfully on the premises searching for the drugs.

The evidence at trial was substantially the same as that presented on *voir dire*. Defendant presented no evidence. The jury found defendant guilty of felony possession of stolen goods with respect to the tools and garden equipment, but only guilty of

misdemeanor possession with respect to the TV. From judgment imposing sentences aggregating five years, defendant appeals.

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

Dolley and Warshawsky, by Steve Dolley, Jr., Mark Warshawsky and Page Dolley Morgan, for defendant-appellant.

EAGLES, Judge.

I

In his first assignment of error defendant challenges the court's ruling denying his motion to suppress. He argues that authorization to search for "stolen goods" violated constitutional requirements that warrants particularly describe the object(s) of the search, and that police thereby engaged in an unlawful "fishing expedition" through his house and van.

A

The Fourth Amendment to the United States Constitution requires, in the absence of consent or exigent circumstances, that searches be conducted pursuant to warrant. *Steagald v. United States*, 451 U.S. 204, 68 L.Ed. 2d 38, 101 S.Ct. 1642 (1981). The search warrant may issue only ". . . upon probable cause, supported by Oath or Affirmation, and *particularly describing* the place to be searched and the persons or things to be seized." U.S. Const. Amend. IV. (Emphasis added.) The requirement of particular description responds to the abhorred practice in colonial times of issuance of "general warrants," also barred by the Constitution of North Carolina. N.C. Const. Art. I, Section 20; *State v. Richards*, 294 N.C. 474, 242 S.E. 2d 844 (1978). Indeed, the practice (originating in the Star Chamber) of issuing general warrants (or "writs of assistance"), empowering English officers to search suspected places *in their discretion*, provided the impetus for the first open resistance to British oppression. *See Boyd v. United States*, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886). The particularity requirement serves to limit the discretion of the searching officer(s), and keep the search focused on its ostensible objects. *Marron v. United States*, 275 U.S. 192, 72 L.Ed. 231, 48 S.Ct. 74 (1927), *reh'g denied*, 277 U.S. 613, 72 L.Ed. 1016, 48 S.Ct.

206 (1928). The particularity requirement does not necessarily guard against the initial entry into the home, but in light of the Fourth Amendment's policy to keep searches limited, it operates primarily to prevent "general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 29 L.Ed. 2d 564, 583, 91 S.Ct. 2022, 2038, *reh'g denied*, 404 U.S. 874, 30 L.Ed. 2d 120, 92 S.Ct. 26 (1971); *Steagald v. United States*, *supra*.

B

Where the items described are contraband by their very nature, *e.g.* drugs or gambling equipment, the courts have generally approved warrants which simply authorize a search for that class of contraband. *See People v. Schmidt*, 172 Colo. 285, 473 P. 2d 698 (1970); 2 W. LaFave, Search & Seizure Section 4.6(b) (1978). This court has routinely approved the admission of drugs seized pursuant to such language. *State v. Keitt*, 19 N.C. App. 414, 199 S.E. 2d 23 ("heroin"), *cert. denied*, 284 N.C. 257, 200 S.E. 2d 657 (1973), *cert. denied*, 415 U.S. 990, 39 L.Ed. 2d 887, 94 S.Ct. 1589 (1974); *State v. Altman*, 15 N.C. App. 257, 189 S.E. 2d 793 ("marijuana and other narcotic drugs"), *cert. denied*, 281 N.C. 759, 191 S.E. 2d 362 (1972); *State v. Foye*, 14 N.C. App. 200, 188 S.E. 2d 67 (1972) ("narcotic drugs, the possession of which is a crime"). In *State v. Shirley*, 12 N.C. App. 440, 183 S.E. 2d 880, *cert. denied*, 279 N.C. 729, 184 S.E. 2d 885 (1971), we rejected defendant's contention that a search warrant authorizing a search for "illegally held narcotic drugs" did not permit the introduction of both marijuana and LSD, even though the affidavit on which the warrant rested contained only information about marijuana.

C

Stolen goods, on the other hand, do not qualify automatically as contraband, but generally are innocuous except for the extrinsic circumstance that they have been stolen. Therefore the courts require a higher degree of specificity in determining the legality of searches for stolen goods. *See* 2 W. LaFave, Search & Seizure Section 4.6(c) (1978). In *State v. Myers*, 266 N.C. 581, 146 S.E. 2d 674 (1966), our Supreme Court considered a warrant that commanded a search of a home that the applicant believed "unlawfully contain[ed] contrary to law stolen merchandise." The Court held summarily that the application and warrant were factually

insufficient and therefore illegal under the prohibition against general warrants. Accordingly evidence obtained pursuant to the warrant should not have been admitted. *See also United States v. Burch*, 432 F. Supp. 961 (D. Del. 1977) (similar), *aff'd*, 577 F. 2d 729 (3d Cir. 1978) (mem).

In certain cases where the circumstances have made an accurate description impossible, the courts have occasionally relaxed the more stringent specificity requirements regarding stolen goods. *See for example State v. Withers*, 8 Wash. App. 123, 504 P. 2d 1151 (1972) ("merchandise" from ship; adequate, since ship had been severely damaged by fire and accurate inventory impossible); *State v. Salsman*, 112 N.H. 138, 290 A. 2d 618 (1972) ("42 sheets of plywood"; no more accurate description possible); *United States v. Scharfman*, 448 F. 2d 1352 (2d Cir. 1971) ("fur coats, stoles, jackets and other finished fur products"; "legion of fur experts" would have been required to meet specificity requirements), *cert. denied*, 405 U.S. 919, 30 L.Ed. 2d 789, 92 S.Ct. 944 (1972). None of these exceptions apply here, however.

D

Here the warrant authorized police to search both for drugs *and* for "stolen goods." The search for the drugs would therefore have been legal even if the warrant had not contained the "stolen goods" language, while without the references to drugs the warrant would have been invalid on its face under *State v. Myers*, *supra*. We now consider the efficacy of the search warrant in light of the internal conflict. This appears to be a question of first impression in this State. It involves two conflicting considerations: the policy against general exploratory searches discussed earlier, and the "plain view" doctrine.

E

Under the plain view doctrine, objects in the plain view of an officer who has a right to be in the position to have that view may lawfully be seized even in the absence of a description in the warrant, provided the officer did not already know of the existence and location of the objects at the time the warrant issued and provided that their contraband nature is "immediately apparent." *Coolidge v. New Hampshire, supra; State v. Richards, supra*. The lack of prior knowledge or "inadvertence" requirement

is an important part of the plain view doctrine, without which police could easily evade the constitutional particularity requirements. *Coolidge v. New Hampshire, supra*; 2 W. LaFave, Search & Seizure Section 4.11(c) (1978). It could be argued that since the officers here had the right to search defendant's house and van for drugs, any other previously unknown items they saw during such a search properly were in plain view. The subsequent radio communication between the police, lawfully in the house and van, and headquarters did not impinge on any constitutionally protected interests of defendant. *See United States v. Kitowski*, 729 F. 2d 1418 (11th Cir. 1984). By this reasoning, police seizure of items found inadvertently during the search for drugs and subsequently identified as stolen by radio check would be permissible.

The Supreme Court of North Dakota recently reached this very result. *State v. Riedinger*, 374 N.W. 2d 866 (N. Dak. 1985). There police had probable cause, and obtained a warrant, to search a house for "controlled substances." The officers merely suspected that the occupants had stolen goods on the premises, and used the ultimately successful drug search as "an opportunity to see stolen goods." They found a microwave oven in the basement, radioed in the serial number, and discovered that the oven was stolen. The court held the oven admissible, since it was in "plain view"; no privacy interest was disturbed by the noting of the serial number; and officers had no reason to know of the presence or location of the oven before they entered the house, but that the contraband nature of the oven became "immediately apparent" upon receipt of the radio message. *But see United States v. Szymkowiak*, 727 F. 2d 95 (6th Cir. 1984) (decision to call in numbers and identification expert meant that criminal nature of goods not "immediately" apparent).

F

A substantial body of case law supports a different approach, *i.e.*, that the provisions of the warrant are severable. *See* Annot., 32 A.L.R. 4th 378 (1984); Annot., 69 A.L.R. Fed. 522 (1984). Under this analysis, adopted by the majority of courts which have considered the question, *id.*, items adequately described in the warrant may be seized and admitted into evidence, while items seized under unlawfully broad or "catch-all" provisions of the warrant should be suppressed. For example, a warrant which specifically

authorized a search for twelve large plastic bags of marijuana and "any other contraband which is unlawfully possessed" supported the seizure and admission of the bags of marijuana but not, by severance, other contraband seized in a general search. *People v. Niemczycki*, 67 A.D. 2d 442, 415 N.Y.S. 2d 258 (1979). Likewise, in *United States v. Giresi*, 488 F. Supp. 445 (D.N.J. 1980), firearm silencers described in the warrant were allowed into evidence, but the court suppressed those items seized under illegally broad descriptions such as "United States currency" or "stolen property." *See also Sovereign News Co. v. United States*, 690 F. 2d 569 (6th Cir. 1982) (language "other magazines and movies of the same kind and nature" did not make warrant prejudicially general, where agents seized only described items), *cert. denied*, 464 U.S. 814, 78 L.Ed. 2d 83, 104 S.Ct. 69 (1983).

Our research indicates that the severance principle has not been expressly passed upon by the United States Supreme Court although it has been approved in *dicta*. *Andresen v. Maryland*, 427 U.S. 463, 49 L.Ed. 2d 627, 96 S.Ct. 2737 (1976).

As a policy matter, the severance principle appears to strike a legitimate balance between protecting individuals against unconstitutional exploratory searches while making sure that thorough law enforcement work does not go unrewarded. *See Sovereign News Co. v. United States, supra; State v. Noll*, 116 Wis. 2d 443, 343 N.W. 2d 391, *cert. denied*, --- U.S. ---, 83 L.Ed. 2d 73, 105 S.Ct. 133 (1984).

G

[1] We therefore hold that the provisions of this warrant were severable, that police could constitutionally search for the listed drugs or items of the same class, but that the warrant could not authorize a general exploratory search of defendant's home and inventory of its contents. To rule otherwise would mean the phrase "stolen goods" in a warrant would automatically allow a complete inventory of a person's personal property, any time officers got in the front door, and even after the more precisely described objects of the search had been discovered. We rely on both the Fourth Amendment and Article I, Section 20 of our Constitution which we believe forbid these general inventory searches. In *State v. Noll, supra*, the Supreme Court of Wisconsin reached this result: there officers entered a home with a valid

search warrant for described stolen goods and found the described goods immediately. They proceeded to inventory the goods in the house, which upon check of police files revealed additional stolen items. The court ruled that the inventory evidence was properly suppressed.

H

The State argues that notwithstanding the general nature of the warrant the officers acted in "objectively reasonable reliance" on the warrant and the exclusionary rule should not apply, relying on *United States v. Leon*, --- U.S. ---, 82 L.Ed. 2d 677, 104 S.Ct. 3405 (1984). *Leon* dealt however with a warrant based on what turned out to be insufficient probable cause, where the evidence was "sufficient to create disagreement among thoughtful and competent judges as to the existence of probable cause." *Id.* at ---, 82 L.Ed. 2d at 701, 104 S.Ct. at 3423. The Supreme Court distinguished the *Leon* fact situation from situations where "a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.* at ---, 82 L.Ed. 2d at 699, 104 S.Ct. at 3422. We think this warrant falls into this latter class with respect to stolen goods: as we have seen, our search and seizure law provides no basis for the kind of exhaustive rummaging and inventory conducted here.

I

Massachusetts v. Sheppard, --- U.S. ---, 82 L.Ed. 2d 737, 104 S.Ct. 3424 (1984), also is clearly distinguishable. There the Court allowed admission of evidence of a murder seized under a warrant for "controlled substances." Police had submitted an affidavit explicitly describing the evidence they wanted to search for, and eventually found, but the judge used a form warrant for "controlled substances" searches. The judge simply neglected to change the objects of the search warrant and affirmatively assured the officers that the warrant was in order. These unusual facts, not present here, supported the officers' "objectively reasonable reliance."

J

[2] Turning to the particular items seized in this case, it is undisputed that officers could not identify any of the "stolen proper-

ty" mentioned in the warrant until after they had entered the house and van, inventoried the items they found, and compared them against stolen property lists. In their encounter with the property here there was no evidence of other circumstances which might properly have excited further inquiry, such as unusual quantity or types of items or unusual storage arrangements.

The only exception was the TV set, from which the outside serial number was missing. It does appear that a missing serial number, in connection with other suspicious circumstances, does constitute sufficient "immediately apparent" indicia of the contraband nature of an item to justify seizure. *See DePalma v. State*, 228 Ga. 272, 185 S.E. 2d 53 (1971) (number removed from pistol, probable cause to believe it was stolen); *State v. Sanders*, 431 So. 2d 1034 (Fla. App. 1983) (expensive TV set with serial number removed, probable cause); *State v. Mazzadra*, 28 Conn. Sup. 252, 258 A. 2d 310 (1969) (vehicle identification number). *But see Dill v. State*, 697 S.W. 2d 702 (Tex. App. 1985) (mere possession of item without serial number not probable cause to believe it was stolen).

The State does not argue, nor does it appear, that simply because the other goods were in the van that a lower expectation of privacy existed. *See Coolidge v. New Hampshire, supra* (automobile exception not applicable where car parked at house). We therefore hold that with the exception of the TV set the stolen goods were illegally seized and should have been suppressed. The court erred in denying the motion to suppress in its entirety. Our holding here also disposes of defendant's second, third, and fifth assignments of error.

II

[3] By his next assignment, defendant contends that the verdict submitted to the jury with regard to the TV set was fatally defective. The jury found defendant "Guilty of Possession of Personal Property of Ronald Hewitt." This, argues defendant, constituted prejudicial error, since the verdict reached was not a crime. We note that the record does not reflect that defendant ever objected at trial to the form of the issues submitted, and the question does not appear to be properly before us. App. R. 10; *Hall v. Mabe*, 77 N.C. App. 758, 336 S.E. 2d 427 (1985). Even if it were, there is no requirement that the written verdict contain each and every ele-

ment of the subject offense. G.S. 15A-1237; *State v. Sanderson*, 62 N.C. App. 520, 302 S.E. 2d 899 (1983). It is sufficient if the verdict can be properly understood by reference to the indictment, evidence and jury instructions. *Id.*; *State v. Perez*, 55 N.C. App. 92, 284 S.E. 2d 560 (1981), *disc. rev. denied*, 305 N.C. 590, 292 S.E. 2d 573 (1982). The record, including the indictment and the instructions, makes it abundantly clear, beyond mistake by the jury, that knowing possession of goods stolen from Hewitt was at issue. The assignment is overruled.

III

Defendant has abandoned his remaining assignment of error. No other error appears on the face of the record. With respect to the charge of possessing property stolen from Gaston Memorial Park, the court erred in admitting illegally seized evidence and there must be a new trial. With respect to the charge of possessing property stolen from Hewitt, we find no prejudicial error.

In case No. 85CRS8429 new trial.

In case No. 85CRS8431 no error.

Judge PARKER concurs.

Judge WEBB dissents.

Judge WEBB dissenting.

I dissent. Assuming the search warrant was invalid to search for stolen goods, the officers were rightfully on the premises to search for illegally possessed controlled substances. The stolen goods were in plain view. I believe these stolen goods were lawfully seized by the officers and evidence of the goods was properly admitted. I vote to find no error.

MICHAEL LLOYD BEST AND DOLLY BEST v. VIVIAN ANN DODSON BEST

No. 8515DC1389

(Filed 17 June 1986)

1. **Parent and Child § 6.3— custody hearing—hearsay evidence—children's statements to grandmother**

Defendant could not complain that the trial court in a custody hearing committed prejudicial error by admitting hearsay evidence, since defendant did not technically preserve an objection to the admission of the evidence; statements by a grandmother as to what the children in question had told her were in many cases the same as statements made by the children to a psychologist, and these statements were admissible as statements made to a psychologist for purposes of medical diagnosis or treatment; and the mere admission of incompetent hearsay evidence over proper objection does not require reversal, rather, defendant must show some prejudice, which she failed to do.

2. **Parent and Child § 6.3— modification of child custody—reliance on record generated in original hearing**

In a hearing on a motion for modification of child custody, the trial court was not required to start with a "clean slate" but could in fact rely on the record generated in the original custody hearing.

3. **Parent and Child § 6.3— modification of child custody—changed circumstances**

Evidence was sufficient to support the trial court's finding that changed circumstances justified a modification of child custody where the evidence tended to show that custody had previously been awarded to the mother; the attitude of the children toward their mother had changed; a psychologist who had examined the children testified that the children's behavior had "deteriorated" and become dramatically worse in the past few months and that the children were expressing distress over their situation with their mother; the mother allowed a boyfriend to live in her home; the psychologist testified that the deterioration in the children's behavior corresponded with the boyfriend's involvement with their mother; in light of a prior instance of sexual abuse by one of the mother's boyfriends and the court's express instruction that the mother not bring dates to the same residence with the children, the mother's admission necessarily was a substantial change of circumstance; the court found that the father had improved after finding him totally uninvolved at the time of the prior order; and the court found that the mother failed to understand the needs of the children.

APPEAL by defendant from *Peele, Judge.* Order entered 30 September 1985 in District Court, ORANGE County. Heard in the Court of Appeals 14 May 1986.

Defendant mother, Vivian Ann Best ("mother"), appeals from an order transferring custody of two minor children due to

changed circumstances. Prior to the order, custody was in mother, with visitation by the paternal grandmother, third party plaintiff Dolly Best ("grandmother"). No specific custody provision was in effect as to plaintiff father Michael Best ("father"). The order appealed from transferred custody to grandmother and awarded visitation rights to both mother and father.

Mother and father married in 1977. Two children were born of their marriage, Tabitha Best in 1978, and Wendy Best in 1979. The marriage deteriorated, however, and mother and father separated in May 1983 and later divorced. Father has remarried.

Father commenced this litigation in July 1983, filing a complaint seeking custody of the children. He alleged a general pattern of neglectful and irresponsible parental behavior by mother, as well as violent conduct on her part towards him which provoked him into regrettable acts. Mother counterclaimed for custody, divorce from bed and board, and support. She alleged *inter alia* that father had abandoned her and the children, had physically assaulted her and had committed adultery. Temporary custody was awarded to grandmother, who was made a party to the action.

Upon a hearing to determine permanent custody, the court in August 1984 entered an order and made findings as follows: Following the parents' separation, the children were shifted around in a chaotic manner until temporary custody was awarded to grandmother. Mother had difficulty adjusting to the court-ordered visitation schedule and in cooperating with counselors. At one point she left the children alone with a man, knowing that this was unsafe, and the man sexually abused them. Mother thereafter cooperated somewhat better with counselors, but remained generally uncooperative. Father simply played no real role in the children's life.

The court ordered permanent custody to mother, with visitation by grandmother. The court ordered the psychologist who had been counselling the children to prepare a report on the family situation. The court also gave mother specific "instructions," including: (1) she should not hinder or delay visitation, (2) she should not bring dates to her residence with the children, (3) she should not consume alcohol around the children, and (4) she should continue counselling. Neither side appealed.

In May 1985, grandmother filed a motion for modification of custody. Grandmother alleged that the children had told her that they were kept in a filthy place, that mother had a man ("Daryl") living and drinking with her and had other overnight male guests, and that mother threatened the children with beatings if they told anything to grandmother or their counselor.

A hearing followed in June 1985. Evidence was presented as follows: Grandmother testified and related what the children had told her about the housing conditions and mother's misconduct. The psychologist testified generally to the same effect. She stated that the demeanor of both children had changed, that both were anxious and depressed, and both were "expressing clear distress with their living situation" and a desire "to live elsewhere." The psychologist stated that this change in demeanor became noticeable at about the time that Daryl became regularly involved with mother. The psychologist had prepared the report ordered by the court in August 1984. The judge and all parties had received a copy. The contents of the report were not disclosed at this hearing and the report is not in the record. Father and his second wife testified, generally stating their increased maturity and sense of responsibility and a desire for increased involvement with the children. Mother testified and denied the alleged misconduct. She did admit that Daryl had moved in with her, but testified that he left after three weeks and now lived elsewhere though she continued to see him. Although plaintiffs suggested that the children speak to the judge, and mother stated she had no objection, the children did not testify nor were they examined by the judge.

By order of September 1985, the court made extensive findings of fact, and identified the following changes of circumstances: the children's change in attitude toward mother, their deterioration, father's improvement, the presence of Daryl in mother's home and mother's failure to understand the children's needs. The court ordered grandmother to assume custody with visitation by mother and father. Mother appeals.

Cheshire & Parker, by D. Michael Parker, for defendant-appellant.

George P. Doyle for third-party plaintiff-appellee Dolly Best.

No brief for plaintiff Michael Lloyd Best.

EAGLES, Judge.

This appeal presents two questions: (1) Did the court commit prejudicial error by admitting hearsay evidence? and (2) Did the court err by finding that changed circumstances justified a modification in custody? We answer both questions "No" and accordingly affirm.

I

[1] As noted earlier, both grandmother and the psychologist testified about statements made to them by the children. Mother contends that she is entitled to have the order vacated, since this hearsay evidence was improperly admitted and without it grandmother failed to show any change of circumstances.

We begin by considering whether this argument is properly presented to this Court. Review in the Court of Appeals is limited to those exceptions set out in the record on appeal immediately following the record of the judicial action addressed by the exception. App. R. 10(a); App. R. 10(b)(1). Failure to object to the admission of evidence generally results in no judicial action and hence nothing upon which to base an exception. *See for example State v. Wilson*, 237 N.C. 746, 75 S.E. 2d 924 (1953); *State v. Smith*, 50 N.C. App. 188, 272 S.E. 2d 621 (1980). General, or broadside, exceptions or assignments of error have always been considered ineffectual on appeal. *See Hines v. Frink*, 257 N.C. 723, 127 S.E. 2d 509 (1962). The transcript submitted as the record of the taking of evidence in this case contains few objections and no exceptions, and mother argues a single general assignment of error on this subject. Technically, the court's admission of the hearsay evidence is not before us.

Mother relies on her exception to the following finding:

> When the Grandmother was asked about what the children had said to her, Mr. Parker [counsel for mother] objected to this as hearsay. The Court overruled the objection and announced that it would hear what people alleged they heard the children say. Therefore, a large amount of evidence at this hearing was hearsay.

In interpreting findings of fact such as this one, we construe them in favor of the validity of the judgment. *See Bradham v. Robin-*

son, 236 N.C. 589, 73 S.E. 2d 555 (1952) (admitting that more specific findings preferable, but affirming judgment); *Phelps v. McCotter*, 252 N.C. 66, 112 S.E. 2d 736 (1960) (general presumption of regularity).

The fact that evidence is hearsay does not automatically render it inadmissible or incompetent. Numerous exceptions to the hearsay rule are recognized; the theory underlying the exceptions is generally that although the statements *are hearsay*, they possess sufficient circumstantial guarantees of trustworthiness to be admissible even though the declarant may be available to testify. *See* G.S. 8C-1, R. Ev. 803, Commentary. We therefore do not interpret the court's finding to necessarily mean that the hearsay evidence it heard was *incompetent*, merely that it was hearsay. Accordingly it appears that mother has not technically preserved an objection to the admission of the evidence.

Even assuming that mother had properly preserved objections on hearsay grounds to all statements by the children, it appears that at least some of the statements would have been admissible as statements made to a psychologist for purposes of medical diagnosis or treatment. G.S. 8C-1, R. Ev. 803(4). We reached this same result in *In re Helms*, 77 N.C. App. 617, 335 S.E. 2d 917 (1985), holding that statements to a treating psychologist by a child victim of sexual abuse were admissible even though the child did not testify. *See also State v. Spangler*, 314 N.C. 374, 333 S.E. 2d 722 (1985) (statements to psychiatrist admissible); *see under identical federal rule United States v. Iron Shell*, 633 F. 2d 77 (8th Cir. 1980) (admitting hearsay testimony as to narrative statements of non-testifying child victim), *cert. denied*, 450 U.S. 1001, 68 L.Ed. 2d 203, 101 S.Ct. 1709 (1981). The psychologist testified without any objection to many of the same statements that grandmother did, and therefore they could be properly admitted. Mother does not address the psychologist's testimony in any way in her brief and has failed to properly except to its admission. *See* App. R. 28(b)(5); *State v. Davis*, 68 N.C. App. 238, 314 S.E. 2d 828 (1984) (questions not argued abandoned).

Finally, the mere admission of incompetent hearsay evidence over proper objection does not require reversal. Rather, the appellant must also show that the incompetent evidence caused some prejudice. Where the court sits as finder of fact, the ap-

pellant must show that the court relied on the incompetent evidence in making its findings. *Wood-Hopkins Contracting Co. v. N.C. State Ports Authority*, 284 N.C. 732, 202 S.E. 2d 473 (1974). Where there is competent evidence in the record supporting the court's findings, we presume that the court relied upon it and disregarded the incompetent evidence. *In re Annexation Ordinance*, 66 N.C. App. 472, 311 S.E. 2d 898, *disc. rev. denied*, 310 N.C. 744, 315 S.E. 2d 701 (1984). For reasons discussed *infra* in our consideration of the sufficiency of the evidence, and for the reasons discussed above, we conclude that under these standards of review mother has failed to demonstrate prejudicial error.

II

Mother contends that as the natural parent she is presumptively entitled to custody absent convincing proof that the best interests of the children require a different arrangement. *See In re Cusson*, 43 N.C. App. 333, 258 S.E. 2d 858 (1979). The presumption in favor of the natural parent(s) is rebuttable, however. *Wilson v. Williams*, 42 N.C. App. 348, 256 S.E. 2d 516 (1979). The primary concern of the trial court in awarding custody is not the rights of the parent(s), but the best interest of the child. *In re Gwaltney*, 68 N.C. App. 686, 315 S.E. 2d 750 (1984). We note that it is not necessary for the natural parent to be found unfit for the presumption to be overcome. *Comer v. Comer*, 61 N.C. App. 324, 300 S.E. 2d 457 (1983).

[2] In its August 1984 order, the court made specific findings that mother knowingly allowed an unfit man access to the children, resulting in sexual abuse, and that mother took no corrective action. The court also found that mother had failed to cooperate with its directives, causing the children confusion and stress, and had not testified forthrightly about her relationship with another man or her consumption of alcohol. While the court ordered custody to the mother in August 1984, it did so recognizing that "grandmother should probably have custody for awhile." In the interest of avoiding further litigation, however, the court awarded custody to mother. It did so with the "instructions" noted above. Under the circumstances, it is clear that the original presumption in favor of mother had been substantially diminished by the findings and conditions of the August 1984 order. We are aware of no authority that each successive custody hearing starts

with a "clean slate" and that the court cannot rely on the record previously generated. To the contrary, custody proceedings generally are continuing in nature, *see Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E. 2d 177 (1971); and the court expressly referred to its prior orders in the order appealed from here.

III

[3] Mother contends that the trial court erred in finding that changed circumstances justified a modification of custody in this case.

The trial court has wide discretion to fashion particular relief in what are often difficult child custody matters. *Pruneau v. Sanders*, 25 N.C. App. 510, 214 S.E. 2d 288, *cert. denied*, 287 N.C. 664, 216 S.E. 2d 911 (1975). Since the trial judge sees and hears the live witnesses and observes their demeanor, his or her exercise of discretion should not be upset absent a showing of clear abuse. *Glesner v. Dembrosky*, 73 N.C. App. 594, 327 S.E. 2d 60 (1985); *King v. Demo*, 40 N.C. App. 661, 253 S.E. 2d 616 (1979).

Modification of a custody decree in the discretion of the court must be supported by findings of fact that there has been a substantial change in circumstances affecting the welfare of the children. *Rothman v. Rothman*, 6 N.C. App. 401, 170 S.E. 2d 140 (1969). The court's findings are conclusive if supported by competent evidence even if there is evidence *contra* or incompetent evidence in the record. *See In re McCraw Children*, 3 N.C. App. 390, 165 S.E. 2d 1 (1969). As noted above, it is presumed that the court disregarded the incompetent evidence and relied on competent evidence. We consider the findings of changed circumstances in light of these standards.

The court found that the attitude of the children toward their mother had changed. The psychologist testified that the children's behavior had "deteriorated" and "became dramatically worse" in the past few months, and that the children were "expressing distress" over their situation with their mother. Previously the children had acted happy to be living with their mother when they came to see the psychologist. Mother did not object to the psychologist's testimony and it would probably have been admissible anyway. G.S. 8C-1, R. Ev. 803(4). The psychologist's opinion as to the general condition of the children would also appear

properly admissible. R. Ev. 703. This evidence supported the finding, regardless of hearsay statements testified to by grandmother.

The court found that mother allowed Daryl to live in her home. She admitted this on the stand, although she testified that Daryl moved out several weeks later. Mother continues to see Daryl. The psychologist testified that the deterioration in the children's behavior corresponded with Daryl's involvement with their mother. In light of the prior instance of sexual abuse by one of mother's boyfriends and the court's express instruction that she not "bring dates to the same residence with the children," mother's admission necessarily was a substantial change of circumstance and a cause of grave concern to the court. By comparison, in *Blackley v. Blackley,* 285 N.C. 358, 204 S.E. 2d 678 (1974), where unfitness was not demonstrated by overnight stays of a boyfriend, there had been no prior history of abuse and the boyfriend subsequently married the mother.

The court found that the children had "deteriorated." It is clear that it derived this finding from the psychologist's testimony. The psycholoigst used the term "deteriorated" repeatedly; no other witness did. As we have noted, the court could properly rely on the psychologist's testimony.

The court found that father had improved, after finding him totally uninvolved at the time of the prior order. In *Perdue v. Perdue,* 76 N.C. App. 600, 334 S.E. 2d 86 (1985), we held that evidence that a parent had made substantial progress in rehabilitating herself from problems with alcohol could support a finding of changed circumstances. *See also Spence v. Durham,* 283 N.C. 671, 198 S.E. 2d 537 (1973) (recovery from emotional instability), *cert. denied sub nom., Spence v. Spence,* 415 U.S. 918, 39 L.Ed. 2d 473, 94 S.Ct. 1417 (1974). This finding of the father's improvement rests on substantial evidence to which no objection was made, and represents a changed circumstance justifying some modification at least with respect to the father.

Finally, the court found that mother failed to understand the needs of the children. While this finding is vague and does not rest on any specific testimony, it would appear to be generally inferred from the foregoing findings regarding mother's continuing association with Daryl and the concomitant deterioration of the children.

The previous discussion shows that the court did not rely on grandmother's testimony in its findings of changed circumstances. The findings were otherwise properly supported. That the changed circumstances found by the court existed and that they affected the welfare of the children is beyond dispute. Even disregarding the imprecisely worded finding regarding lack of understanding of the children's needs, the findings support the court's determination that there were changed circumstances justifying a modification in custody.

We note that grandmother's testimony served generally to corroborate the other competent testimony. Mother did not produce any contradictory testimony concerning what the children may have said. We therefore conclude that the court had before it ample evidence to justify findings supporting the exercise of its discretion.

The case law supports this result. Undoubtedly because of the infinite variety of possible family situations, the authorities do not point overwhelmingly to any preferred result. Grandparents have been awarded custody, though natural parents were available, in a number of cases. *See* Annot., 31 A.L.R. 3d 1187 (1970). These cases include *In re Craigo*, 266 N.C. 92, 145 S.E. 2d 376 (1965). The legislature has not mandated any statutory presumption in favor of natural parents, but has directed the award of custody "to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child." G.S. 50-13.2(a). The best interest of the child, not the interest of any particular class or group, is paramount. *In re Gwaltney, supra.* On the particular facts of this case, we conclude that the court did not abuse its discretion by determining that changed circumstances justified transfer of primary custody to grandmother in the best interest of the children.

CONCLUSION

The motion for a modification in custody due to changed circumstances was addressed to the discretion of the trial court. The trial court, with the live witnesses before it, reached a decision supported by competent evidence. No prejudicial error has been shown in the conduct of the hearing, nor has appellant shown a clear abuse of the trial court's discretion. Accordingly the order appealed from is

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. WALLACE CHRISTOPHER COLLINS

No. 8525SC1385

(Filed 17 June 1986)

1. **Conspiracy § 5.1— conspiracy to sell cocaine—statements of coconspirator—admissibility**

Evidence that defendant brought two people to a restaurant pursuant to a previously agreed upon plan to sell cocaine was sufficient to establish a conspiracy involving defendant so that extrajudicial statements by one coconspirator were admissible in a joint trial of the three conspirators; moreover, the statements were made during the course of and in furtherance of the conspiracy where, so far as the coconspirator knew, the original plan to sell cocaine was still in effect when he made his statements; he even took the SBI agent involved in the sale to a coconspirator's home and hangouts after the statements were made; and the statements were made to assure the SBI agent that one coconspirator would return with the cocaine and that the conspiracy would achieve its ends.

2. **Criminal Law § 75.9— volunteered statement—no improper interrogation—statement admissible**

Defendant's statement that he was at a particular restaurant where a cocaine sale was supposed to take place was not the product of improper interrogation where defendant himself testified on *voir dire* that he admitted being present without being provoked by the arresting officer; in addition, the State produced substantial other evidence that defendant was the driver of the truck which delivered the coconspirators to the crime scene so that admission of defendant's statement, even if improper, was not prejudicial.

3. **Conspiracy § 8— conspiracy to sell cocaine—severity of sentence—no passing of drugs immaterial**

In a prosecution for conspiracy to traffick in cocaine, defendant's argument that no drugs were actually delivered and that he was therefore unduly harshly punished by a sentence of seven years imprisonment and a $50,000 fine was without merit, since it was the illegal agreement, not the amount of illicit drugs delivered, which controlled, and defendant received the statutory minimum sentence mandated by the legislature for all persons convicted of this class of crime.

APPEAL by defendant from *Saunders (Chase B.), Judge.* Judgment entered 26 July 1985 in Superior Court, CATAWBA County. Heard in the Court of Appeals 12 May 1986.

Defendant was tried upon proper indictment for conspiracy to traffick in cocaine. He was tried along with his alleged coconspirators, Grant Bowers and Cara Lipford. At trial, none of the defendants presented evidence. The State presented evidence as follows:

SBI Agent Stubbs drove to a fast-food restaurant in Hickory with an unnamed informant for the purpose of negotiating a drug purchase with Lipford. They waited awhile but no one showed up so they drove away. When they returned to the restaurant half an hour later, Bowers was standing at the curb. Other officers in the area had seen a light blue pickup truck drop Bowers off while Stubbs was gone. Stubbs and the informant stopped to pick Bowers up and he got in the back seat. Stubbs' car then parked in the restaurant parking lot. Bowers stated that "Cara and Chris" had dropped him off and would return shortly.

Ten minutes later a light blue pickup truck entered the parking lot and pulled up next to the driver's side of Stubbs' car. Lipford got out of the truck and got in the back seat of Stubbs' car. Stubbs, in the passenger seat of his car, could see that the truck was driven by a white male with dark hair and a yellow baseball cap, but he did not positively identify the driver. The other officers got the license number of the truck, which was registered to defendant's brother.

Stubbs told Lipford he wanted 1½ ounces of cocaine. Lipford got out and went back to the truck. After a few minutes in the truck, she returned to Stubbs' car and told him she could get the cocaine and what it would cost. Lipford said she needed the money first, that she would go and get the drugs, and that she would leave Bowers with Stubbs until she returned. Stubbs gave Lipford $2,850.00 and she said she would be back in 20 minutes. Lipford went back to the truck and left with the same white male driver going toward Lenoir.

Lipford did not return, however. Stubbs, the informant, and Bowers waited together in Stubbs' car at the restaurant for approximately six hours. During this time, Bowers made statements to the effect that he had been involved in drug deals with Chris for approximately five years, that Chris was "all right," and that there was no reason to suspect foul play. Stubbs and Bowers to-

gether drove to Lipford's home and hangouts but they could not find her anywhere.

Police observed the same light blue pickup truck parked at defendant's home in Lenoir early that morning, about six hours after it left the restaurant. They saw defendant, who is a white male, driving it later the same day, while wearing a yellow baseball cap.

Defendant was arrested in Lenoir three days later by Officer Clontz. Clontz stopped defendant on the street and told him he had a warrant for his arrest for trafficking in cocaine in Catawba County. Clontz testified that defendant said "What is this shit all about?" Clontz replied that defendant was supposed to have been at the (named) restaurant. Defendant responded, according to Clontz, "I was down there."

The jury found defendant guilty as charged. The court imposed the mandatory minimum sentence. Defendant appeals.

Attorney General Thornburg, by Special Deputy Attorney General Ann Reed, for the State.

Ronald E. Bogle for defendant-appellant.

EAGLES, Judge.

Defendant argues seven assignments of error. However, he failed to place any exceptions in the record "immediately following the record of judicial action" which his assignments and exceptions purport to address. *See* App. R. 10(b)(1). Rather, defendant's exceptions simply direct us to various groups of pages in the record where he contends the erroneous actions occurred. Defendant has therefore not properly presented his questions for review by this Court. App. R. 10(a); *State v. Smith*, 50 N.C. App. 188, 272 S.E. 2d 621 (1980). Nevertheless, in our discretion we consider the merits of the case.

I

[1] Defendant first argues that the court erred in joining the three defendants' cases for a single trial. The question of joinder was addressed to the sound discretion of the trial court. *State v. Samuel*, 27 N.C. App. 562, 219 S.E. 2d 526 (1975). Abuse of that discretion must be shown by demonstrating some palpable prej-

udice, as opposed to mere general grievances. *See State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence vacated*, 429 U.S. 809, 50 L.Ed. 2d 69, 97 S.Ct. 47 (1976). The only specific prejudice claimed consisted of the admission of Bowers' statements.

A

Defendant argues that Bowers' statements should have been excluded under *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968). Generally the *Bruton* rule provides that extrajudicial confessions of a non-testifying co-defendant implicating a defendant are inadmissible as violative of the Sixth Amendment. *See State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968). The *Bruton* rule is a limited one, however. *La Grenade v. Gordon*, 60 N.C. App. 650, 299 S.E. 2d 809 (1983). Where the incriminating admissions of a non-testifying co-defendant are admissible under other well-recognized rules of evidence, *Bruton* does not apply. *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977).

B

One well-recognized exception to the general proscription against the introduction of hearsay evidence is that statements made by coconspirators during the course of and in furtherance of the conspiracy are admissible. G.S. 8C-1, R. Ev. 801(d)(E). We have recently held that *Bruton* does not apply to evidence admissible under this exception. *State v. Brewington*, 80 N.C. App. 42, 341 S.E. 2d 82 (1986). *See also State v. Mettrick*, 54 N.C. App. 1, 283 S.E. 2d 139 (1981) (suggesting, but not reaching, similar result), *aff'd*, 305 N.C. 383, 289 S.E. 2d 354 (1982). This is consistent with federal decisions considering coconspirator statements and the *Bruton* rule. *See e.g. United States v. Norton*, 755 F. 2d 1428 (11th Cir. 1985); *United States v. Archbold-Newball*, 554 F. 2d 665 (5th Cir. 1977) (would be admissible if tried jointly *or* separately), *cert. denied*, 434 U.S. 1000, 54 L.Ed. 2d 496, 98 S.Ct. 644 (1977). *See also Dutton v. Evans*, 400 U.S. 74, 27 L.Ed. 2d 213, 91 S.Ct. 210 (1970) (distinguishing right to confrontation and rules excluding hearsay evidence). *Bruton* accordingly did not require exclusion of Bowers' statements.

II

The key question is whether Bowers' statements fit the coconspirator exception to the hearsay rule. Defendant argues (1) that not only did the State fail to prove a conspiracy, but (2) that at the time Bowers made the incriminating statements the alleged conspiracy had failed and terminated, making the statements outside its scope. We disagree.

A

A conspiracy may be proven by direct or circumstantial evidence. *State v. Rozier*, 69 N.C. App. 38, 316 S.E. 2d 893, *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984). The crime is established upon a showing of an *agreement* to do an unlawful act or to do a lawful act by unlawful means, whether or not overt acts occurred. *State v. Bindyke*, 288 N.C. 608, 220 S.E. 2d 521 (1975). A conspiracy may be shown by a number of indefinite acts, which, taken individually, might be of little weight, but taken collectively point to its existence. *State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933). An *express* agreement need not be shown; a mutual, implied understanding is sufficient. *Id.; State v. Rozier, supra.* The evidence is considered in the light most favorable to the State. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Ordinarily the factual issue of the existence or nonexistence of a conspiracy is for the jury. *State v. Rozier, supra.*

We think the evidence presented sufficed to establish *prima facie* the existence of a conspiracy sufficient to allow admission of statements of coconspirators and to go to the jury. Stubbs went to the restaurant to make a drug contact. A truck similar to one later identified as belonging to defendant's brother and driven by defendant dropped off Bowers. Rather than enter the restaurant or go about any other business, Bowers waited and was picked up by Stubbs, indicating a prior arrangement. Stubbs testified without objection that Bowers said "Cara and Chris" dropped him off. The pickup then returned and pulled up immediately next to Stubbs' car though the parking lot was not crowded, again indicating a prior arrangement. Lipford entered Stubbs' car and a drug deal was discussed. Only after Lipford had gone back to the driver of the truck and returned to Stubbs' car was the deal with Stubbs finalized and the money handed over. This evidence, that the meeting with Bowers and Lipford was arranged in advance

and that the drug deal was not finalized until Lipford had gone back to the truck, sufficed to establish the participation of the driver of the truck (who came to the restaurant twice) in whatever transaction was arranged. There was sufficient evidence that defendant was the driver in the testimony that "Chris" dropped Bowers off, the match of the yellow baseball cap, and the facts that the truck was registered to defendant's brother, defendant was driving it six hours later and it was seen parked at his home.

In *State v. Caldwell*, 68 N.C. App. 488, 315 S.E. 2d 362, *disc. rev. denied*, 312 N.C. 86, 321 S.E. 2d 901 (1984), we reached a similar result. There was evidence that a dealer came to defendant's house, was seen talking to defendant (there was no evidence of the words exchanged), went away with defendant and returned with defendant and the drugs (no evidence that defendant ever possessed drugs), and gave money to defendant. Likewise, in *State v. Allen*, 57 N.C. App. 256, 291 S.E. 2d 341 (1982), we affirmed a conviction for conspiracy to rob a store where the only substantive evidence was that defendant was present when the robbery was suggested and volunteered to provide a gun. He got the gun but did not participate in the robbery. Here there was evidence from which the jury could find that defendant brought Bowers and Lipford to the restaurant pursuant to a previously agreed plan, and that the plan was to sell cocaine. This evidence, taken collectively in the light most favorable to the State, sufficed to establish a conspiracy involving defendant. Bowers' statements, if they met the other criteria of G.S. 8C-1, R. Ev. 801(d)(E), were therefore admissible.

B

Defendant argues that the statements implicating him in an extended course of cocaine dealings came *after* Lipford had absconded and therefore did not occur *during the course of* the conspiracy. Statements made prior to or subsequent to the conspiracy are not admissible under R. Ev. 801(d)(E). *State v. Gary*, 78 N.C. App. 29, 337 S.E. 2d 70 (1985), *disc. rev. denied*, 316 N.C. 197, 341 S.E. 2d 586 (1986). When a conspiracy ends under the rule is a question of fact. *Id.* This determination can be a difficult one. *See generally* 4 J. Weinstein & M. Berger, Weinstein's Evidence Section 801(d)(2)(E)[01] at 801-247 *et seq.* (1985) (discussing identical federal rule).

In *United States v. Mason*, 658 F. 2d 1263 (9th Cir. 1981), defendant contended that a statement by an unarrested coconspirator (which tended to identify defendant as a participant in the conspiracy), made after all other conspirators, including defendant, had been arrested, was inadmissible. The court rejected the argument on two main grounds: (1) the conspirator at large may still act in furtherance of the conspiracy and (2) *from the perspective* of the unarrested conspirator, the conspiracy was still in existence. Likewise, in *United States v. Rucker*, 586 F. 2d 899 (2d Cir. 1978), the court concluded that the original conspiracy to rob a bank still existed even though the gunman assigned to carry out the actual robbery lost his nerve and fled before he carried out the robbery. Therefore statements made after the aborted attempt were admissible. These decisions are persuasive.

Here, as far as Bowers knew, the original plan to sell cocaine was still in effect. In fact, he took Stubbs to Lipford's home and hangouts *after* the statements were made. The court did not err in finding that Bowers' statements were made "in the course of" the conspiracy.

C

Defendant also contends that the statements were not "in furtherance of" the conspiracy. Again, we turn to federal decisions, which have regularly held that statements of "reassurance" are in furtherance of a conspiracy. *United States v. Mason, supra* (statement that source not scared off); *United States v. Sandoval-Villalvazo*, 620 F. 2d 744 (9th Cir. 1980) (reassurance during 3½ hour wait that source would produce drugs); *United States v. Cambindo Valencia*, 609 F. 2d 603 (2d Cir. 1979) (reassurance of steady supply), *cert. denied sub nom. Bermudez Prado v. United States*, 446 U.S. 940, 64 L.Ed. 2d 795, 100 S.Ct. 2163 (1980). Bowers' statements were made to reassure Stubbs that Lipford would return and that the conspiracy would achieve its ends. His statements of reassurance were clearly in furtherance of the conspiracy.

D

Accordingly, we overrule defendant's assignments regarding joinder of the cases, the admission of Bowers' statements, and the sufficiency of the evidence.

III

Defendant next contends that the court erred in denying his motion for mistrial, based on the State's attempt to use certain statements of the three codefendants. Defendant contends these had not been properly supplied pursuant to his discovery requests. The versions provided to defendant in discovery and those presented at trial appear substantially similar, and none of the new material was introduced. The court allowed a recess to consider the statements. We condemn the practice of withholding portions of statements from discovery, but under the circumstances of this case, we cannot say that any error was prejudicial.

IV

[2] Defendant also contends that the court erred in admitting into evidence his own statement that he was at the restaurant. He relies on *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297, 100 S.Ct. 1682 (1980), arguing that Officer Clontz elicited the evidence by making statements intended to provoke an incriminating response before defendant had been read his rights, thus making the statement inadmissible. Defendant himself testified on *voir dire* that he admitted being present without being provoked by Clontz ("I just said that"). This was evidence permitting the court to find, as it did, that the statement was not the product of interrogation. In addition, the State produced substantial other evidence that defendant was the driver of the truck. We find no error, but even assuming error, we find it insufficiently prejudicial to warrant reversal.

V

Defendant argues that the court erred in denying his motions to dismiss and to set aside the verdict. As we have noted, the motions were correctly denied even without Bowers' incriminating statements. With those statements, the evidence clearly sufficed to go to the jury.

VI

[3] Finally, defendant contends that the punishment received, the statutory minimum seven years imprisonment and $50,000 fine, was unconstitutionally disproportionate to the crime proven. He argues that no drugs were ever actually delivered, and he was therefore unduly harshly punished. We note that it is the *illegal agreement*, not the amount of illicit drugs delivered (even if none

at all) that controls. *State v. Rozier, supra.* This is simply not one of those "exceedingly rare" non-capital cases where the Eighth Amendment requires resentencing. *See Solem v. Helm,* 463 U.S. 277, 77 L.Ed. 2d 637, 103 S.Ct. 3001 (1983), *relying on Rummel v. Estelle,* 445 U.S. 263, 63 L.Ed. 2d 382, 100 S.Ct. 1133 (1980). We note too that defendant received the statutory minimum sentence mandated by the legislature for *all persons* convicted of this class of crime. This assignment is overruled.

CONCLUSION

The jury convicted defendant on sufficient evidence and the sentence was the minimum set by law. He received a fair trial, free of prejudicial error.

No error.

Chief Judge HEDRICK and Judge COZORT concur.

ROANOKE CHOWAN REGIONAL HOUSING AUTHORITY, PLAINTIFF v. MALACHI AND CARRIE VAUGHAN, DEFENDANTS

No. 861DC11

(Filed 17 June 1986)

1. **Landlord and Tenant § 13; Social Security and Public Welfare § 1— lease of public housing—sufficiency of notice of termination**

There was no merit to defendants' contention that plaintiff's notice of termination of a lease in public housing was fatally defective (1) because it incorrectly cited § 7 of the Dwelling Lease as grounds for termination, since the notice correctly spelled out that the grounds for termination were that defendants allowed individuals not named on the lease to reside in their apartment, and (2) because the notice did not inform defendants of their right to request a grievance hearing, since defendants received the benefit of a full jury trial in state court.

2. **Landlord and Tenant § 13; Social Security and Public Welfare § 1— lease of public housing—good cause for termination—sufficiency of evidence**

Evidence was sufficient to establish that good cause existed to warrant termination of defendants' lease in public housing where it tended to show that members of defendants' family living in the apartment and not listed in the Dwelling Lease were not guests or visitors, and this constituted a breach of the lease agreement.

Roanoke Chowan Housing Authority v. Vaughan

APPEAL by defendants from *Long, Nicholas, Judge.* Judgment entered 13 August 1985 in District Court, HERTFORD County. Heard in the Court of Appeals 8 May 1986.

On 1 June 1982, defendants were placed in a public housing unit administered by plaintiff. On 1 May 1985, plaintiff instituted an action in magistrate's court for summary ejectment (85CVM 229), claiming defendants breached the lease by allowing "numerous individuals not permitted under the lease to reside" in their three-bedroom apartment. Defendants were ordered to appear before a magistrate on 20 May 1985. Defendants contacted Legal Services of the Coastal Plains and obtained counsel. On 17 May 1985 defendants filed an answer which denied all pertinent allegations in the complaint. From a judgment entered 20 May 1985 in favor of plaintiff, defendants appealed to district court. On 28 May 1985, defendants obtained a stay of execution on the judgment for summary ejectment. On or about 12 August 1985, the matter was heard before a jury. The jury answered "yes" to the issue did the defendants breach the dwelling lease of plaintiff Roanoke Chowan Regional Housing Authority. Judge Long entered judgment in accordance with the jury's verdict. Defendants appealed. On 22 August 1985, execution on the judgment for summary ejectment was again stayed.

Plaintiff appellee gave written notice to the North Carolina Court of Appeals of its decision not to file a brief and not to appear for oral arguments.

Legal Services of the Coastal Plains, by Marcus W. Williams, for defendant appellants.

JOHNSON, Judge.

The evidence presented tended to show the following: defendants, Carrie Vaughan and Malachi Vaughan, three daughters and a granddaughter were certified as eligible for public housing. On 1 June 1982, they moved into public housing administered by plaintiff. Because neither Carrie nor Malachi Vaughan can read or write, Ms. Betty Jane Vaughan, a daughter and tenant at the time, signed the lease agreement. The Vaughans have resided continuously in the three-bedroom apartment located at 622 South Drive in Murfreesboro since June 1982.

On 7 February 1985, Ms. Marilyn C. Powell, Food Stamp Supervisor for Hertford County Social Services, received a January 1985 food stamp report from the Vaughans, which contained an application for food stamps for twelve people. Ms. Powell reported this information to plaintiff. Mrs. Rosaline Harris, Eligibility Specialist and fraud worker for the Department of Social Services of Hertford County, investigated and determined that ten or twelve persons lived at the Vaughan residence.

On 20 February 1985, Mr. Leroy Hill, then Acting Executive Director of the Roanoke Chowan Regional Housing Authority, met with defendants and informed them that, based upon the information he had received from the Department of Social Services, he would take action to evict them. He did not apprise defendants of their right to request a grievance hearing.

In a letter to defendants dated 21 February 1985 and entitled "TERMINATION NOTICE," Leroy Hill gave defendants notice that their lease would be terminated as of 23 March 1985, showing as grounds for the termination "Section 7 of Lease Agreement[:] by allowing individuals not named on the lease to reside in your apartment." The letter concluded as follows:

> You have the right to defend this action in Court if any Court action is brought.
>
> You have ten (10) days within which to discuss the proposed termination of tenancy with the Housing Authority.

The letter did not inform defendants of their right to a grievance hearing.

The defendants each testified that they thought the lease allowed guests. Carrie Vaughan testified that in mid-January 1985, defendants allowed their daughter and their grandchildren to visit with them for two weeks. Defendant Carrie Vaughan testified that she did not intend to receive anything of value for their accommodation, that she did not herself apply or authorize her visiting daughter to apply for additional food stamps, that she tried to return the increased allotment of food stamps and refused to apply for food stamps, even for those under the prior allotment, in all subsequent months since the increased allotment was received in March 1985.

In defendants' first Assignment of Error defendants contend that plaintiff's fatal noncompliance with the termination of tenancy procedures precluded the court from having subject matter jurisdiction and, therefore, their motion to dismiss at the outset of the trial was improvidently denied. We disagree.

We agree with defendants that special legal safeguards articulated in the Housing and Urban Development (HUD) regulations must be adhered to before a tenant of a Public Housing Authority (PHA) can be evicted. Those regulations governing termination of a lease provide, in pertinent part, as follows:

> (1) The lease shall set forth the procedures to be followed by the PHA and by the tenant in terminating the lease which shall provide:
>
> (1) That the PHA shall not terminate or refuse to renew the lease other than for serious or repeated violation of material terms of the lease . . . or for other good cause.
>
> (2) That the PHA shall give written notice of termination of the lease. . . .
>
> (3) That the notice of termination to the tenant shall state reasons for the termination, shall inform the tenant of his right to make such reply as he may wish and of his right to request a hearing in accordance with the PHA's grievance procedure.

24 C.F.R. sec. 966.4(1) (1985). "Grievance" is defined as "any dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations, which adversely affect the individual tenant's rights, duties, welfare or status." 24 C.F.R. sec. 966.53(a).

Section 12 of defendants' Dwelling Lease states as follows:

> 12. TERMINATION OF LEASE.
>
> . . . .
>
> This lease may be terminated by the Management at any time by giving written notice as set forth in Section 11. Such notice shall be given in accordance with the following.
>
> . . . .

> Such notice may only be given for good cause, such as non-payment of rent, serious or repeated violations of the material terms of the lease. Such notice shall state the reasons for the termination, shall inform the tenant of his/her right to make such a reply as he/she may wish and his/her right to request a hearing in accordance with the Grievance Procedure. At the time of lease termination, all charges shall become due and collectible.

We hold that the above provision of the lease is in strict compliance with the above-stated HUD regulation governing termination of a lease.

[1] Defendants contend that, even though the lease contains a precise statement of the necessary termination procedure as required by the HUD regulations, notice of termination was still fatally defective because the written notice defendants received failed to satisfy Section 12 of the Dwelling Lease. Specifically, defendants contend that the 21 February 1985 letter of notice of termination contained two defects: (1) the grounds asserted as the basis for termination incorrectly cite Section 7 of the Dwelling Lease and (2) a statement informing defendants of their right to request a grievance hearing was completely omitted.

Although the letter of notice of termination incorrectly cited Section 7 of the lease, the specific grounds for termination are also stated, to wit: "by allowing individuals not named on the lease to reside in your apartment." This statement controls and is sufficient to put defendants on notice regarding the specific lease provision deemed to have been violated.

The Dwelling Lease, Section 12, does provide that the mandatory written notice of termination "shall inform the tenant of his/her right to . . . request a hearing in accordance with the Grievance Procedure." Notice is a due process consideration, required under the fourteenth amendment to the United States Constitution and art. 1, sec. 19 of the state constitution. *City of Randleman v. Hinshaw*, 267 N.C. 136, 140, 147 S.E. 2d 902, 905 (1966) (citing N.C. Const. of 1868, art. 1, sec. 17). A tenant in a publicly subsidized housing project is entitled to due process protection. *Swann v. Gastonia Housing Authority*, 675 F. 2d 1342 (4th Cir. 1982); *Caulder v. Durham Housing Authority*, 433 F. 2d 998

(4th Cir. 1970). Before an eviction determination is administratively made, due process requires, succinctly stated:

> (1) timely and adequate notice detailing the reasons for a proposed termination,
>
> (2) an opportunity on the part of the tenant to confront and cross-examine adverse witnesses,
>
> (3) the right of a tenant to be represented by counsel, provided by him to delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination and generally to safeguard his interests,
>
> (4) a decision, based on evidence adduced at the hearing, in which the reasons for decision and the evidence relied on are set forth, and
>
> (5) an impartial decision maker.

Caulder, supra, at 1004, *citing Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed. 2d 287, 90 S.Ct. 1011 (1970).

An eviction proceeding in a North Carolina state court pursuant to the North Carolina eviction statute "will provide the tenant with all the process that is due." *Swann, supra*, at 1348. A hearing before the housing agency therefore is not constitutionally required. *Id.* Defendants cannot claim injury resulting from the omission of a statement in the letter of notice of termination informing defendants of their right to request a grievance hearing when they received the benefit of a full jury trial in state court. We hold no reversible error occurred.

Due process expresses the requirement of fundamental fairness. *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 68 L.Ed. 2d 640, 101 S.Ct. 2153 (1981). Our holding does not offend due process when due process is couched in terms of fundamental fairness. These tenants had notice of their right to air their grievance pursuant to the Grievance Procedure as stated in the Dwelling Lease, section 13, which was signed by defendants' daughter who, unlike defendants, could read and write. Further, the project is required to post the Grievance Procedure in the project's office at all times, in its entirety. Defendants had notice of their right to request a

grievance hearing. Further, defendants were duly notified of the state eviction proceeding. Defendants had adequate time to obtain counsel to fully litigate whether good cause existed to terminate their lease. A decision was reached, based on the evidence presented before a jury of twelve impartial decision makers. Defendants' constitutional right to due process was well protected. The injury claimed by defendants would be more appropriately addressed as a breach of the Dwelling Lease, wherein plaintiff specifically contracted to provide written notice in compliance with Section 12. Defendants' first Assignment of Error is overruled.

[2] In defendants' second Assignment of Error, they contend the court erred in denying their motions for a directed verdict and judgment notwithstanding the verdict. Specifically, defendants contend that there was no evidence sufficient to establish that good cause existed to warrant a termination of tenancy. Defendants' argument is without merit.

A motion for a directed verdict presents the question of law whether the plaintiff's evidence was sufficient for submission to the jury. *Stewart v. Nation-Wide Check Corp.*, 279 N.C. 278, 283, 182 S.E. 2d 410, 413 (1971). The propriety of granting a motion for judgment notwithstanding the verdict is determined by the same considerations as that of a motion for a directed verdict. *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 184, 188 S.E. 2d 441, 447 (1972), *vacated on other grounds on rehearing*, 283 N.C. 277, 196 S.E. 2d 262 (1973). The trial judge must determine whether the evidence was sufficient, taken in the light most favorable to the plaintiff and giving it the benefit of every reasonable inference which can be drawn therefrom. *Sawyer v. Shackleford*, 8 N.C. App. 631, 636, 175 S.E. 2d 305, 309 (1970).

We have carefully reviewed the evidence before the court. We find there was ample evidence from which one could reasonably infer that the members of defendants' family living in the apartment not listed in the Dwelling Lease were not guests or visitors, and that this constituted a breach of the lease agreement. Whether these family members were temporary guests as opposed to unauthorized persons residing with defendants was a question of fact properly to be decided by the jury. This Assignment of Error is overruled.

In defendants' last Assignment of Error they contend the court erred (1) by failing to rule on their objection at trial to plaintiff's closing argument and (2) by later refusing to poll the jury so that closing arguments could be reconstructed.

In defendants' brief they maintain that during plaintiff's closing argument they asserted a specific objection to plaintiff's attorney's statement that "the defendants were thieves, who had been caught and who should be evicted" (quoting from defendants' brief). They now claim unfair prejudice resulting from the court's refusal to rule or otherwise comment upon their objection.

On 26 November 1985, a hearing was conducted for the purpose of settling the record on appeal in accordance with Rule 11(c), N.C. Rules App. P. The court ordered what narrative of arguments and evidence presented at trial was to be included in the record on appeal. This narrative of the transcript is devoid of a closing argument, or any objection thereto. Matters discussed in the brief outside the record will not be considered on appeal. *Elliott v. Goss*, 254 N.C. 508, 509, 119 S.E. 2d 192, 193 (1961). This Court will not speculate as to matters outside the record. *C. C. T. Equipment Co. v. Hertz Corp.*, 256 N.C. 277, 123 S.E. 2d 802 (1962).

At the 26 November 1985 hearing to settle the record on appeal, defendants moved the court to poll the jury for the purpose of reconstructing closing arguments. Defendants so moved the court because the recorded transcript of the August 1985 trial did not contain the closing arguments. We find no abuse of discretion in the court's failure to attempt to poll a jury that had been discharged. Defendants' third Assignment of Error is overruled.

No error.

Judges WEBB and WHICHARD concur.

GEORGIA-PACIFIC CORPORATION v. WILLIAM H. BONDURANT, SR.; DOROTHY B. BONDURANT; AND WILLIAM H. BONDURANT, JR.

No. 8525DC1276

(Filed 17 June 1986)

1. Rules of Civil Procedure §§ 8.2, 36— general denial to complaint—failure to respond to request for admissions—effect—action not barred by statute of limitations

By failing to respond in any way to plaintiff's request for admissions and by filing only a general denial to plaintiff's complaint, defendants thereby admitted the existence of a debt, their liability for it under a guaranty agreement signed by them, and facts establishing the timeliness of plaintiff's action; therefore, the trial court erred in allowing defendant's motion for directed verdict based on the statute of limitations on the ground that plaintiff "failed to plead or place in evidence the thing which may show that it does not come within the statute of limitations." N.C.G.S. § 1A-1, Rule 8(b) and (d).

2. Guaranty § 2— summary judgment improperly denied

The trial court erred in denying plaintiff's motion for summary judgment in an action to recover on a guaranty where the only possible ground for denying summary judgment was the affirmative defense of failure of consideration, but the language of the guaranty was unambiguous and conclusively controlling over defendants' unwritten interpretation of the contract.

APPEAL by plaintiff from *Noble, Judge.* Judgment entered 1 October 1984, and order denying new trial entered 28 June 1985 in District Court, CATAWBA County. Heard in the Court of Appeals 15 April 1986.

This is an action by wholesale supplier against defendant guarantors. Defendants signed an unconditional guaranty agreement in 1977, by which they undertook to pay all sums then or thereafter owing to plaintiff for plywood supplied to Plywood Sales Company, Inc. ("Plywood"), of which the individual defendants were the chief officers. Plywood went into receivership in June 1979, at which time it owed plaintiff $1,895.00. This balance due has never been paid either by Plywood or by defendants. Plywood is now defunct.

In December 1979, plaintiff filed an action against defendants, Catawba County No. 79CVD2110, seeking to recover on the guaranty agreement. (Plaintiff had earlier filed an unsuccessful action, Catawba County No. 79CVD353, against Plywood on the unpaid account.) In March 1982 plaintiff took a voluntary dismissal of its

claim in case 79CVD2110 pursuant to G.S. 1A-1, R. Civ. P. 41(a). In May 1982 plaintiff filed this action on the guaranty. The complaint, as amended in November 1982, alleged that this was the same claim which had been dismissed in case 79CVD2110 and incorporated the record by reference. Defendants answered, denying all material allegations and pleading the statute of limitations and failure of consideration.

Discovery ensued. Plaintiff submitted requests for admissions in August 1982. Defendants never answered them. Plaintiff moved for summary judgment, but that motion was denied.

The case came on for trial in October 1984. A jury was impaneled. Plaintiff introduced the requests for admissions, the court received them into evidence, and plaintiff rested. Defendants immediately moved for a directed verdict, raising a variance between the allegation and proof of the name of the corporate debtor ("Plywood Sales Company" instead of "Plywood Sales Company, Inc."), as well as the statute of limitations. The court rejected the variance argument. It did however allow the motion based on the statute of limitations, on the ground that plaintiff "failed to plead or place in evidence the thing which may show that it does come within the statute of limitations." Defendants never presented any evidence.

Plaintiff timely moved for a new trial, pursuant to G.S. 1A-1, R. Civ. P. 59, and for other relief, pursuant to R. Civ. P. 60. That motion was denied 28 June 1985, and plaintiff immediately gave notice of appeal.

Oma H. Hester, Jr. for plaintiff-appellant.

Rudisill & Brackett, by J. Steven Brackett, for defendant-appellees.

EAGLES, Judge.

Notice of appeal was timely given. G.S. 1-279; App. R. 3. The appeal is properly before us.

I

[1] North Carolina, apparently alone among American jurisdictions, continues to adhere to the rule that once the statute of limitations has been properly pleaded in defense the burden of

proof shifts to the plaintiff to show that the action was filed within the statutory period. *Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E. 2d 164 (1983); *Little v. Rose*, 285 N.C. 724, 208 S.E. 2d 666 (1974); *see* 54 C.J.S. Limitations of Actions Section 386 (1948). This anomalous rule survived the adoption of the Rules of Civil Procedure, which specifically list the statute of limitations as an affirmative defense and operate generally to place the burden of proof of those defenses on the party raising them. G.S. 1A-1, R. Civ. P. 8(c); *Shaw v. Shaw*, 63 N.C. App. 775, 306 S.E. 2d 506 (1983).

II

Whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. *Little v. Rose, supra.* Ordinarily it will be for the jury. *Id.* Where the facts are admitted or established, the question becomes one of law for the court. *Pembee Mfg. Corp. v. Cape Fear Constr. Co., Inc.*, 69 N.C. App. 505, 317 S.E. 2d 41 (1984), *aff'd*, 313 N.C. 488, 329 S.E. 2d 350 (1985). The courts have generally applied this latter rule to allow the trial court to summarily dispose of stale claims. *See id.; Teele v. Kerr*, 261 N.C. 148, 134 S.E. 2d 126 (1964).

We see no reason why this rule should not apply equally to allow the court to deny defense motions based on the statute of limitations where the defense has already admitted all facts necessary to bring the claim within the statute. The purpose of the Rules of Civil Procedure is after all to efficiently reach judgment on the merits and eliminate surprise and technicality as weapons of litigation. J. Sizemore, General Scope and Philosophy of the New Rules, 5 Wake Forest Int. L. Rev. 1, 4-7 (1968). Matters which are admitted do not require further proof and may be summarily disposed of. *See Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E. 2d 809 (1986). Where the defense admits that the statute of limitations does *not* bar the claim, it would follow that the question should be summarily treated (if at all) by the court, not the jury. *Pembee Mfg., supra.*

III

An action on a guaranty not under seal must be commenced within three years of the breach triggering the obligation of the guarantors. G.S. 1-52(1); *Wachovia Bank & Trust Co. v. Clifton*,

203 N.C. 483, 166 S.E. 334 (1932). When a party properly takes a first voluntary dismissal of an action filed within the statute of limitations, that party then has one year to refile the same action even though the refiling may be beyond the general statute of limitations. G.S. 1A-1, R. Civ. P. 41(a); *Parrish v. Uzzell*, 41 N.C. App. 479, 255 S.E. 2d 219 (1979); *Whitehurst v. Virginia Dare Transp. Co., Inc.*, 19 N.C. App. 352, 198 S.E. 2d 741 (1973). These limitations periods apply to this case.

IV

Defendants never responded to plaintiffs' requests for admissions, nor did they move to amend or withdraw the admissions nor explain their failure to respond. Accordingly, those matters were conclusively admitted and established. G.S. 1A-1, R. Civ. P. 36. The admissions established that defendants executed the guaranty and acknowledged the execution before a notary on 31 January 1977, that the copy of the guaranty agreement attached to the request was a true copy, that defendants had received goods worth $1,895.00 from plaintiff in July 1978, that neither defendants nor Plywood had ever paid for those goods, that Plywood was defunct, and that defendants were obligated jointly and severally for the unpaid balance by virtue of the guaranty agreement. In sum defendants admitted their liability under the guaranty agreement on the merits, unless they could prove their failure of consideration defense. The statute of limitations would expire on the admitted facts at the earliest in January 1980.

V

In its complaint in this action, plaintiff by amendment included the following averment.

> 11. This is a new action based on the same claim which was dismissed by the Plaintiff by filing a Notice of Voluntary Dismissal, pursuant to Rule 41(a)(1)(i), in Catawba County Civil Action File Nr. 79CVD2110, which Notice of Voluntary Dismissal was made and served on March 9, 1982, and filed of record on March 10, 1982. The record in Catawba County File Nr. 79CVD2110, entitled Georgia-Pacific Corporation, Plaintiff, vs. William H. Bondurant, Sr., et al, Defendants, is incorporated herein by reference thereto.

The complaint in 79CVD2110, dated 28 December 1979, along with a copy of the same guaranty agreement, defendants' answer and the notice of dismissal, all of which were duly certified as the record of that case by the Clerk of Superior Court of Catawba County, were filed along with the amendment. Defendants answered the amendment by general denial: "The Defendants . . . deny the allegations contained in Paragraph 11. . . ."

G.S. 1A-1, R. Civ. P. 8(b), "Defenses; Form of Denials," is virtually identical to the Federal R. Civ. P. 8(b). The federal rule reflects a legislative intent to discourage general denials because of their "essentially evasive and uninformative quality." 5 C. Wright & A. Miller, Federal Practice & Procedure: Civil Section 1265 at 281-82 (1969). Under the federal rule, a general denial does not automatically create an issue where the facts (ordinarily jurisdictional) are conclusively established, and may be construed in light of the good faith requirement of Rule 8(b) and the provisions of Rule 8(d) governing failure to deny as admitting those allegations. In *Biggs v. Public Service Coordinated Transp.*, 280 F. 2d 311 (3d Cir. 1960), the court held that a general denial constituted an admission of plaintiff's allegation of defendant's citizenship, refusing to hold that counsel in good faith intended to deny the citizenship allegation when there was no actual dispute.

Likewise, defense counsel in this case did not by general denial raise any specific objection to the record of case 79CVD 2110 or to the case history alleged in the amendment. We therefore deem it abundantly clear that defendants admitted that the record so pleaded and filed was what it purported to be. Therefore the only question raised by their answer was a legal one, *i.e.*, the legal effect of the prior action.

We have noted earlier that defendants admitted the existence of the debt, their liability for it under the guaranty agreement, and that the action arose at the earliest in January 1977. By failing to deny specifically any allegations of the amendment, defendants also admitted the following: A complaint was filed against them on 28 December 1979, alleging that these same defendants owed the same plaintiff the same unpaid balance as alleged in this action. The complaint in the prior action was based solely on a guaranty agreement, attached to the complaint and dated 31 January 1977, which agreement appears to be a photo-

copy of the same agreement attached to the complaint in the present action. (In fact most of the material allegations of the two complaints are identical.) The prior action was dismissed pursuant to G.S. 1A-1, R. Civ. P. 41(a) on 10 March 1982.

The only further information needed to conclusively establish the timeliness of plaintiff's action was compliance with the one-year extension period allowed by Rule 41(a). The record itself shows that defendants answered the refiled complaint 8 July 1982. We therefore conclude that defendants admitted all the facts necessary to establish plaintiff's compliance with the statutes of limitation. The question was one of law for the court, not the jury. *Pembee Mfg. Corp. v. Cape Fear Constr. Co., supra.*

Defendants rely on *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965) and *Poore v. Norfolk Southern Ry.*, 30 N.C. App. 104, 226 S.E. 2d 170, *disc. rev. denied*, 290 N.C. 777, 229 S.E. 2d 33 (1976). In those cases, consistent with the general authority of this State, it was held that failure of the plaintiff to introduce evidence of compliance with the statute of limitations entitled the defendant to judgment. However, those cases involved situations where the allegations and theory of the complaint, *if true*, would support a finding that the action was not timely. *Id.* We have found no authority nor has defendant directed us to any, requiring that result where the defendant has *admitted, and the record conclusively reflects*, that the action was timely filed. Our holding here that the court erred in granting defendants a directed verdict, does not conflict with those prior decisions.

VI

The parties argue in their briefs the question of judicial notice. A court may take judicial notice of its own prior proceedings, *West v. G. D. Reddick, Inc.*, 302 N.C. 201, 274 S.E. 2d 221 (1981), and if requested to take notice of its prior proceedings it must do so. G.S. 8C-1, R. Ev. 201(d). In that case, the court simply instructs a civil jury to accept the fact(s) noticed. R. Ev. 201(g).

Plaintiff never *formally* requested that the court take judicial notice of the file in this case which contained the record of case 79CVD2110. Everywhere else in our rules of procedure and evidence, however, the law favors substance over form. *See* G.S.

8C-1, R. Ev. 103(a); G.S. 1A-1, R. Civ. P. 8(a); *Childress v. Forsyth County Hosp. Authority, Inc.*, 70 N.C. App. 281, 319 S.E. 2d 329 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E. 2d 484 (1985). We see no reason why the law of judicial notice should not be likewise.

The transcript reflects that the prior proceedings were discussed at length. Plaintiff pointed out on several occasions to the court that the record in case 79CVD2110 was in the file in this case expressly to show that the action had been timely filed. Plaintiff described to the court what the record contained, and even suggested at one point reopening the evidence. Defendants never disputed in the arguments on their motion that the file was incorrect or that the two cases were not one and the same cause of action. Under the circumstances, the court could probably have taken judicial notice of the file of the prior action. Since we have already decided on other grounds that it erred in granting defendants' motion, we need not reach the question of whether plaintiff's arguments alone were adequate as a request, albeit informal, that the court take judicial notice of the earlier case records.

VII

[2] Plaintiff assigns error to the denial of its motion for summary judgment. We have already determined that defendants admitted liability on plaintiff's claim and that the action was timely brought. The only possible ground for denying summary judgment is the affirmative defense of failure of consideration. Defendants contend that they only agreed to guarantee payment on credit extending over and above their credit line existing at the time of execution of the guaranty, and that therefore a genuine issue existed. They rely only on their conclusory affidavits to the same effect. The language of the guaranty agreement contains no such language. Instead defendants, "for the purpose either of inducing extension of credit . . . or of inducing temporary forbearance from collection of accounts due . . . [did] guarantee, . . . absolutely and unconditionally, the due and prompt payment . . . of all sums now owing or which may hereafter become owing. . . ." It is undisputed that plaintiff thereafter supplied plywood to defendants. The contractual language is unambiguous and conclusively controlling over defendants' unwritten interpretation of the contract (which from this record was never communicated to

plaintiff). *Brown v. Scism*, 50 N.C. App. 619, 274 S.E. 2d 897, *disc. rev. denied*, 302 N.C. 396, 276 S.E. 2d 919 (1981). Under substantially similar language and circumstances this court has upheld summary judgment against defendant guarantors on a failure of consideration defense. *Int'l Harvester Credit Corp. v. Bowman*, 69 N.C. App. 217, 316 S.E. 2d 619, *disc. rev. denied*, 312 N.C. 493, 322 S.E. 2d 556 (1984). Plaintiff was entitled to judgment here.

Defendants' contention that a genuine issue of fact exists as to whether the underlying debt is one of "Plywood Sales Company, Inc." or "Plywood Sales Company" is frivolous.

CONCLUSION

The court erred in directing verdict for defendants. The court should have entered summary judgment for plaintiff. The case is remanded for the entry of summary judgment for plaintiff.

Reversed and remanded.

Judges WEBB and PARKER concur.

JOHN W. SHERRILL AND JOSEPH T. WALSH v. TOWN OF WRIGHTSVILLE BEACH, NORTH CAROLINA, BOARD OF ALDERMEN OF THE TOWN OF WRIGHTSVILLE BEACH, NORTH CAROLINA; EUGENE N. FLOYD, INDIVIDUALLY AND AS MAYOR; CORNIELLE SINEATH, INDIVIDUALLY AND AS ALDERMAN, FRANCES L. RUSS, INDIVIDUALLY AND AS ALDERMAN, CARLTON B. HALL, AS ALDERMAN AND JAMES W. SUMMEY, III, INDIVIDUALLY AND AS ALDERMAN; JOHN T. NESBITT, TOWN BUILDING INSPECTOR

No. 855SC1279

(Filed 17 June 1986)

1. **Municipal Corporations § 31— zoning ordinance—challenge barred by statute of limitations**

Plaintiffs' challenge to the ordinance originally zoning plaintiffs' property for single family dwellings only was barred by the nine-month statute of limitations of N.C.G.S. § 160A-364.1.

2. **Municipal Corporations § 30.22— denial of petitions to rezone—proper procedures followed**

Plaintiffs failed to show that the board of aldermen failed to follow proper procedures in denying petitions to rezone part or all of the town, and they did

not meet their burden of showing the invalidity of the refusal of the board to amend the zoning ordinance.

3. **Municipal Corporations § 30.15— refusal to allow building of duplexes—no improper enforcement of zoning ordinance**

There was no merit to plaintiffs' contention that the refusal of defendant to allow them to build duplexes on their lots amounted to an invalid arbitrary and discriminatory enforcement of the zoning ordinance, since the evidence showed that defendant was very lax in the enforcement of its zoning laws, but mere laxity of enforcement will not invalidate restrictions; there was no denial of equal protection to plaintiffs because classification of their property had a rational basis and was not enacted with the intent to discriminate against plaintiffs; and plaintiffs bought their lots when the single family restriction was in place so that neither was losing any "investment backed expectations" by not being allowed to construct a duplex so that there was no "taking" by the town.

APPEAL by plaintiffs from *Smith (Donald L.), Judge.* Judgment entered 15 April 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 15 April 1986.

Plaintiffs each own a vacant parcel of land in the Town of Wrightsville Beach. Plaintiffs applied for building permits from the Town to build duplexes on their vacant lots. Their applications were denied on the ground that plaintiffs' lots are in a land use district which allows only single-family residences, the R-1 district under the Wrightsville Beach ordinance. Plaintiffs then applied to the Town Board of Aldermen, which sits as the Board of Adjustment under the town's zoning ordinance, for variances from the R-1 restrictions to allow them to build the desired duplexes. Their applications were denied, but plaintiffs were encouraged by some members of the Board to gather signatures on a petition seeking a rezoning of the entire district from R-1 to R-2, which would allow duplexes.

When this petition came up for a vote, the Board then decided that it should consider rezoning all residential districts in the Town of Wrightsville Beach to permit duplexes. A vote was delayed so that a public hearing could be held. At the public hearing, no one spoke out against the zoning change, yet at the next Board meeting, the proposal was defeated. Such a sweeping rezoning required unanimous approval for passage under the town's zoning ordinance.

Plaintiffs were then requested by the Board to resubmit their applications for a variance, but they were again denied. The

denial of their variances was upheld by the superior court, and on appeal by this Court, *Sherrill v. Town of Wrightsville Beach*, 76 N.C. App. 646, 334 S.E. 2d 103 (1985).

In the meantime, plaintiffs had instituted this suit, alleging that the actions of the Town of Wrightsville Beach violated the Federal and State Constitutions, the North Carolina zoning statutes, G.S. 160A-360, *et seq.*, and the town's own zoning ordinance. Plaintiffs also asserted a claim for damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The trial court, with consent of the parties, severed the liability issue from the damage issue and held a bench trial on the issue of liability alone. Prior to trial, the court ruled that any challenge to the original zoning of plaintiffs' property was barred by the nine-month statute of limitations under G.S. 1-54.1.

After hearing the evidence, the trial court concluded that, while defendants had acted in an arbitrary and capricious manner in enforcing the town's zoning laws, defendants' actions had not violated any constitutional or statutory rights of plaintiffs. Plaintiffs gave notice of appeal. Defendants moved to dismiss the appeal for defective notice. That motion was denied by Judge Napoleon Barefoot and defendants cross-appeal from this denial.

James A. MacDonald; and John W. Sherrill, pro se, for plaintiffs-appellants.

Womble Carlyle Sandridge and Rice, by Anthony H. Brett, for defendants-appellees.

PARKER, Judge.

[1] Plaintiffs assign error to the ruling by the trial court that any challenge to the ordinance originally zoning plaintiffs' property for single-family dwellings only was barred by the applicable statute of limitations since the ordinance was in effect at the time plaintiffs acquired their interest in the properties. The Town of Wrightsville Beach passed its first zoning ordinance in 1972. Plaintiffs' property was included in an R-1 district, which at that time permitted duplexes. The ordinance was amended in 1975 to delete duplexes as a permissible use in R-1 districts.

General Statute 160A-364.1 provides that the nine-month statute of limitations in G.S. 1-54.1 will govern challenges to zon-

ing ordinances or amendments. Clearly, then, any challenge by plaintiffs to the 1975 amendment prohibiting duplexes in R-1 districts as being violative of the purposes of zoning is barred by the statute of limitations. Plaintiffs' arguments to the contrary are unpersuasive.

The nine-month statute of limitations does not, as plaintiffs contend, deny disaffected property owners adequate avenues of redress. Instead, the property owner is merely required to go through the statutorily mandated procedures for an amendment or variance. Whatever action was taken by the town's legislative body on the amendment would then be appealable.

In this case, plaintiffs are limited to challenging the refusal of the Wrightsville Beach Board of Aldermen to amend the town's zoning ordinance to allow them to build duplexes and to challenging the allegedly arbitrary enforcement of the single-family restriction against their property.

Plaintiffs also contend that the action of the Board of Aldermen denying their petition to rezone the Coral Drive area of Wrightsville Beach to allow duplexes was invalid because the charter of the Town of Wrightsville Beach requires a unanimous vote of the Board to pass a zoning change. Plaintiffs assert that this requirement of unanimity violates G.S. 160A-75, which says local ordinances must pass by a majority vote, and G.S. 160A-385, which provides that a zoning change requires a three-fourths vote of a town's governing body only if twenty percent of the local homeowners sign a "protest petition." Since four out of five Aldermen voted against their rezoning petition, plaintiffs were not prejudiced by the requirement of unanimity. This assignment of error is overruled.

[2] Plaintiffs further contend that the denial of their rezoning petition was invalid due to the failure of the Board of Aldermen to follow their own procedures, established by town ordinances. The procedures allegedly violated include the failure of the Town to give proper notice and publication of various zoning votes, the failure of the Town to maintain an ordinance book containing all amendments to the zoning ordinance, and the failure of the Town to maintain a file of decisions by the Board on variances and special use permits. Plaintiffs also assert the denial of their rezoning request was arbitrary and capricious as no members of the

public spoke out against the proposed change and the Town Attorney recommended that the change be made. Although the Board is not required by the ordinances to follow the public sentiment or the recommendations of the Town Attorney, plaintiffs assert that such was the routine practice of the Board and departure from it demonstrates the arbitrary nature of the Board's decision to deny their petition.

The Board of Aldermen have clearly violated their own established procedures in enacting various changes to their zoning laws. Such a failure to follow procedures can result in the particular action taken being declared void and invalid by the courts. *See Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). However, plaintiffs made no evidentiary showing that the Board had not followed proper procedures for the votes at issue here—the denials of the petitions to rezone Coral Drive or to rezone the entire town. Plaintiffs rely solely on isolated comments by members of the Board to allege that improper factors were considered by the Board members in voting down plaintiffs' petition. For example, one Alderman allegedly said that plaintiffs' plight should be used as a "lever" to alter the zoning scheme of the entire town. Even if this were said, it is not improper, as it is the duty of the zoning authority to consider the needs of the entire community when voting on a rezoning, and not just the needs of the individual petitioner. *See Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E. 2d 432 (1971).

Rezoning is a legislative act, whereas a proceeding to grant a variance or special use permit is quasi-judicial in nature. *See Application of Rea Construction Co.*, 272 N.C. 715, 158 S.E. 2d 887 (1968). A court may not substitute its judgment for that of the law-making body. *See Blades v. City of Raleigh*, 280 N.C. 531, 550, 187 S.E. 2d 35, 46 (1972). The original zoning ordinance is presumed to be valid. *See Helms v. City of Charlotte*, 255 N.C. 647, 122 S.E. 2d 817 (1961). In the instant case, plaintiffs are not asking the court to set aside an ordinance improperly enacted, but rather to order the Town of Wrightsville Beach to enact an amendment. For us to do so, plaintiffs would have to meet an extraordinarily high burden of showing the invalidity of the refusal of the Board to amend the zoning ordinance. In order for such an action to be constitutionally invalid, it must be shown that "the governmental body could have had no legitimate reason for its decision."

Shelton v. City of College Station, 780 F. 2d 475, 483 (5th Cir. 1986). Plaintiffs did not meet this burden, and the assignment of error based on the failure of trial court to conclude that the actions of the Town violated their due process rights is overruled.

[3] Next, plaintiffs argue that the refusal of the Town to allow them to build duplexes on their lots amounts to an invalid arbitrary and discriminatory enforcement of the zoning ordinance. In support of this argument, plaintiffs have shown that thirteen of the twenty-four residences in their zoning district are duplexes. Some of these duplexes were in existence in 1975 when the zoning ordinance was amended to prohibit duplexes in R-1 districts. Those, then, are valid nonconforming uses. However, the trial court did find as a fact that the Board had allowed at least one nonconforming duplex which had been destroyed to be rebuilt as a duplex in violation of the zoning ordinance. The court also found the following: (i) the Town allowed a single-family residence in R-1 zone to be converted to a duplex, ostensibly by variance but without the findings of facts or conclusions of law required by law; (ii) the Town allowed the owner of a nonconforming duplex to resume duplex use after being discontinued for twelve months, in violation of the ordinance; (iii) the Town allowed a quadruplex to be built on a lot split between C-3 and R-1 zoning; and (iv) the Town allowed enlargement of a nonconforming residence in an R-1 zone ostensibly by variance but again without the required findings and conclusions. The court was unable to determine which of the other duplexes were validly nonconforming or were illegal, but specifically found that the Town had violated its duty to make that determination itself. There were two instances found by the court where the Town had taken action to force an end to an illegal duplex.

The Town has no formal enforcement plan and takes action only when the zoning violation is brought to its attention even though there are two readily available sources which list the number of units at a given address. These fairly reliable sources are the list of water line connections and the list of trash cans (each unit is required by ordinance to have one trash can). Plaintiffs contend that by utilizing these lists, the Town could easily discover the illegal duplexes and enforce its zoning laws. According to plaintiffs, the enforcement as to their property is arbitrary,

and they seek an order enjoining enforcement of the single-family restriction against their property.

Clearly, the Town of Wrightsville Beach has violated its own zoning ordinance. Equally clear is the fact that the Town is very lax in the enforcement of its zoning laws. However, as plaintiffs admit in their brief, mere laxity of enforcement will not invalidate the restrictions. *See City of Gastonia v. Parrish*, 271 N.C. 527, 157 S.E. 2d 154 (1967). *See generally* 16A Am. Jur. 2d, Constitutional Law, § 803 (1979), and cases cited therein. For plaintiffs to prove a violation of their constitutional rights entitling them to relief, they must show that the Town's actions were arbitrary and capricious so as to violate their due process rights; or that the enforcement infringes upon their constitutional guarantee of equal protection; or that the alleged arbitrary enforcement amounts to a "taking" of their property without just compensation. We have already discussed the failure of appellants to show that the Town's actions, as applied to them, were a violation of due process.

To establish that the actions of the Town in enforcing the zoning ordinance resulted in a denial of equal protection, plaintiffs must show that the Board created a classification with the intent to discriminate. *See Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S.Ct. 1536, 39 L.Ed. 2d 797 (1974); *Kresge Co. v. Davis*, 277 N.C. 654, 178 S.E. 2d 382 (1971). The classification of plaintiffs' properties as single-family residential, as discussed above, has a rational basis, and was not enacted with the intent to discriminate against plaintiffs. The fact that the differences between the permitted use, single-family residential, and the desired use, duplexes, are relatively insignificant is also indicative of the lack of discriminatory intent. *See Blades, supra*, at 548, 187 S.E. 2d at 45. Nothing more appears in the record of this case than that the Town was extraordinarily lax in enforcing its zoning laws. No equal protection violation has been shown.

Zoning restrictions on property may be so strict as to amount to a taking of that property by the Town. *See A-S-P Assoc. v. City of Raleigh*, 298 N.C. 207, 258 S.E. 2d 444 (1979). However, for there to be such a "taking," the restriction must deprive the owner of the property of virtually all the beneficial uses of his land. *Id.* In this case, plaintiffs' lots are in a neighborhood which

is roughly half single-family and half duplex. Both lots are clearly suitable for the construction of a single-family dwelling. Both plaintiffs acquired their property after the single-family restriction was in place. Neither is losing any "investment-backed expectations" by not being allowed to construct a duplex. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed. 2d 631 (1978). Therefore, no "taking" has occurred.

Having found that no constitutional rights of plaintiffs have been violated, their claims for damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983, must also fail.

Plaintiffs' final assignment of error is that the trial court erred in not admitting into evidence a newspaper article entitled "Beach Residents Flout Zoning Laws." This assignment is without merit. Substantial evidence of violations of the zoning laws had already been admitted, and the article was redundant. No prejudice could have resulted to plaintiffs in any event as the trial judge allowed a witness to read many quotes from the article while on the stand. This assignment of error is overruled.

While certain actions of the Board of Aldermen of the Town of Wrightsville Beach unrelated to plaintiffs' property were in violation of the law as established in the town's own ordinances, such actions did not infringe upon any constitutionally protected rights of plaintiffs so as to entitle them to the relief sought.

In view of our disposition of plaintiffs' appeal, we do not address defendants' cross-assignment of error.

Affirmed.

Judges WEBB and EAGLES concur.

PERRY H. MURRAY, EMPLOYEE-PLAINTIFF v. T. ORAS BIGGERSTAFF D/B/A BIGGERSTAFF'S GIN AND SEED CLEANER, EMPLOYER-DEFENDANT, AND LUMBERMENS MUTUAL CASUALTY COMPANY, CARRIER-DEFENDANT

No. 8510IC1105

(Filed 17 June 1986)

1. **Master and Servant § 55.4— workers' compensation—employee's accident arising out of and in course of employment**

Evidence was sufficient to support the deputy commissioner's findings which in turn supported the conclusion that plaintiff suffered an injury by accident arising out of and in the course of employment where the evidence tended to show that plaintiff was a full-time employee of defendant and had been so employed for three months prior to the accident; he worked on Saturdays by choice and with the agreement of his employer; he was not merely a casual employee; plaintiff's injury occurred while he was "bush hogging" a field leased by his employer; though not one of his normal job duties, "bush hogging" was related to his employer's business; and the injury occurred during plaintiff's normal Saturday hours while he was performing a task at the direction of his employer.

2. **Master and Servant § 49.1— workers' compensation—processing agricultural commodities for seed—employee not farm laborer**

Plaintiff was not a farm laborer and therefore excluded from workers' compensation coverage under N.C.G.S. § 97-13(b) where plaintiff's work involved the commercial processing of agricultural commodities for seed; furthermore, the fact that plaintiff was operating a tractor in a field in which crops were eventually to be planted did not make his labor farm labor within the meaning of the statute, since plaintiff's injury occurred during a one time excursion out of the ginning process and into an activity more akin to farming or agricultural labor.

APPEAL by defendants from Opinion and Award of Industrial Commission filed 5 April 1985. Heard in the Court of Appeals 5 May 1986.

Defendants appeal from an award to the plaintiff. The parties stipulated that the injury arose by accident on 6 August 1983 and that the workers' compensation carrier for defendant-employer was Lumbermens Mutual Casualty Company.

Plaintiff began working for Oras Biggerstaff d/b/a Biggerstaff's Gin and Seed Cleaner on 2 May 1983. Plaintiff's duties included processing soybeans, oats and barley through a gin, bagging the seeds and other by-products of the process, stacking the

bags, and loading and unloading the bags from trucks. Plaintiff had asked his employer if he could work on Saturdays to earn some extra money and Mr. Biggerstaff agreed. Plaintiff was the only employee who worked on Saturdays.

On Saturday, 6 August 1983, plaintiff reported to work. Since the only other work available involved lifting heavy machinery which required more than one employee and plaintiff was the only employee present, Mr. Biggerstaff instructed the plaintiff to "bush hog" in the area around the gin and in a field that Mr. Biggerstaff leased.

"Bush hogging" involves mowing down high weeds with a heavy rotary mower ("bush hog") attached to the back of the tractor. The plaintiff had never used a "bush hog" before. The plaintiff proceeded to first "bush hog" in the area around the gin and then moved on into the field. While "bush hogging" in the field the front wheels of the tractor hit a gully hidden by high weeds causing the tractor's steering wheel to turn abruptly, catching plaintiff's arm within the steering wheel and throwing plaintiff off and under the tractor. The "bush hog" mower ran over plaintiff's right leg causing a laceration from hip to foot. Plaintiff was hospitalized for seven weeks.

Deputy Commissioner Sellers found as fact that plaintiff was an employee of Biggerstaff Gin and Seed Cleaner when he sustained his injury by accident arising out of and in the course of employment. The deputy commissioner awarded to plaintiff temporary total disability compensation at a weekly rate of $95.13 beginning 7 August 1983 and continuing until plaintiff reached maximum medical improvement or returned to work, whichever occurred first. In addition, the deputy commissioner awarded plaintiff compensation for permanent partial disability sustained as a result of the injury by accident. On appeal the Full Commission adopted the findings and conclusions of the deputy commissioner and affirmed the award of benefits. Defendants appealed.

Jim R. Funderburk for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe by Scott M. Stevenson for defendant-appellants.

EAGLES, Judge.

I

[1] We first consider whether plaintiff sustained an injury arising out of and in the course of his employment with Biggerstaff Gin and Seed Cleaner. Defendants contend that plaintiff's injuries occurred while performing a task outside his regular job duties and that therefore plaintiff's employment was casual which would exclude plaintiff from benefits under the Workers' Compensation Act (the Act) pursuant to G.S. 97-13(b). We disagree.

The standard of review on appeal from an opinion and award of the Industrial Commission is two-fold: (1) are the findings of fact supported by competent evidence, and (2) are the conclusions of law supported by the findings. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 105 (1980). "Whether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Id.* at 331, 266 S.E. 2d at 678.

Deputy Commissioner Sellers' findings of fact include the following:

> 1. Plaintiff began working for the defendant-employer, Oras Biggerstaff, d/b/a Biggerstaff's Gin and Seed Cleaner on 2 May 1983 assisting in the processing of soybeans, oats and barley. This job required placing the product into shoots for cleaning, bagging up the seeds and as well as the trash, stacking bags, and loading and unloading the trucks. On occasion plaintiff worked a six-day week.
>
> 2. When plaintiff reported to work on Saturday, 6 August 1983, the only work inside the gin to be done involved heavy lifting of new equipment requiring the strength of two individuals and, there being no other employees present, Oras Biggerstaff instructed plaintiff to "bush hog" the area around the gin building and a field which Biggerstaff rented.
>
> 3. While "bush hogging" in the latter location, the front wheels of the tractor hit a gully hidden by high weeds causing the steering wheel to abruptly turn, catching plaintiff's arm within the wheel, and then throwing him off and under

the tractor where he was run over by a portion of the vehicle. He sustained a laceration of this right leg from the hip to his foot for which he was hospitalized for a period of at least seven weeks.

4. Plaintiff was paid for his services on this day by a check drawn on the account of Biggerstaff's Gin and Seed Cleaner, just as he had always been paid. Plaintiff had not done "bush hogging" on any prior occasion, as he had always performed the tasks involved directly in the ginning process.

The deputy commissioner then found as fact and concluded as a matter of law that plaintiff sustained an injury arising out of and in the course of his employment.

A compensable injury under the Act is one that arises out of and in the course of employment. G.S. 97-2(6). The two requirements are separate and distinct and both requirements must be met in order for the injury to be compensable. *Barham, supra.* Casual employees are excluded from coverage under the Act. G.S. 97-13(b).

"An injury arises out of employment when it is the result of a condition or risk created by the job." *Martin v. Bonclarken Assembly,* 296 N.C. 540, 544, 251 S.E. 2d 403, 405 (1979). For an injury to "arise out of" employment there must be some causal connection between employment and the injury. *Bare v. Wayne Poultry Co.,* 70 N.C. App. 88, 318 S.E. 2d 534 (1984), *disc. rev. denied,* 312 N.C. 796, 325 S.E. 2d 484 (1985). "The words 'in the course of,' as used in G.S. 97-2(6), refer to the time, place and circumstances under which the accident occurred." 296 N.C. at 544, 251 S.E. 2d at 405. "An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." *Id.* (quoting *Perry v. Bakeries Co.,* 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964)). Employment is casual when it is irregular, unpredictable, sporadic and brief in nature. *Clark v. Mills, Inc.,* 12 N.C. App. 535, 183 S.E. 2d 855 (1971).

Here, there is competent evidence to support the deputy commissioner's findings and the findings support the conclusion that plaintiff suffered an injury by accident arising out of and in

the course of employment. All of the evidence discloses that plaintiff was a full-time employee of Biggerstaff Gin and Seed Cleaner and had been so employed three months prior to the accident. He worked on Saturdays by choice and with the agreement of his employer. He was not merely a casual employee. His employment was neither irregular, unpredictable, sporadic nor brief. *Clark, supra.*

Plaintiff's primary duties involved processing soybeans, oats and barley through the gin. However, plaintiff testified that when he was hired, his employer informed him that he might be required to do other work. On Saturday, August 6th the gin was not in operation. Mr. Biggerstaff, his employer, instructed the plaintiff to "bush hog" in the area around the gin and in a field leased by Mr. Biggerstaff. While "bush hogging" was not one of plaintiff's normal job duties, it was related to his employer's business. Plaintiff's evidence was that Mr. Biggerstaff intended to plant cotton in the field, which would later be processed through the gin and sold.

The injury occurred during plaintiff's normal Saturday work hours and in a field rented by Mr. Biggerstaff. The fact that defendant was off his employer's gin premises does not preclude a finding that the injury occurred in the course of employment. "If the employee is doing work at the direction and for the benefit of the employer, the time and place of work are for the benefit of the employer and a part of the employment of the employee. This satisfies the condition of time and place although the work is done off the premises of the employer and after regular working hours." *Brown v. Service Station,* 45 N.C. App. 255, 257, 262 S.E. 2d 700, 702 (1980). Furthermore, "the fact that the employee is not engaged in the actual performance of the duties of his job does not preclude an accident from being one within the course of employment." *Harless v. Flynn,* 1 N.C. App. 448, 456, 162 S.E. 2d 47, 53 (1968).

When the accident and resulting injury occurred, plaintiff was engaged in an activity which he was authorized and directed to undertake by his employer. The activity indirectly benefited and furthered his employer's business. The injury was, therefore, a direct result of plaintiff's employment. Accordingly, plaintiff's injury by accident arose out of and in the course of his employment.

II

[2] The second question presented for review is whether plaintiff was a farm laborer and therefore excluded from coverage pursuant to G.S. 97-13(b). Defendants contend that the activity of processing agricultural commodities like soybeans, oats and barley for seed is an agricultural activity and that therefore plaintiff is a farm laborer and excluded from coverage under G.S. 97-2(1) and G.S. 97-13(b).

Agricultural employment is excluded from the definition of covered employment under G.S. 97-2(1). In arguing that plaintiff's employment is agricultural, defendants rely on the definition of agriculture given in *Hinson v. Creech*, 286 N.C. 156, 209 S.E. 2d 471 (1974):

> Traditionally, agriculture has been broadly defined as "the science or art of cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding, and management of livestock thereon, including every process and step necessary and incident to the completion of products therefrom for consumption or market and the *incidental* turning of them to account."

Id. at 159, 209 S.E. 2d at 474 (quoting 3 Am. Jur. 2d *Agriculture* Section 1). As further stated by the Court in *Hinson*, "the line of demarcation between agricultural and nonagricultural employment often becomes 'extremely attenuated.'" *Id.* at 160, 209 S.E. 2d at 474. "The question in marginal factual situations must frequently turn upon whether the employment is a separable, commercial enterprise rather than a purely agricultural undertaking." *Id.*

We do not believe, given the facts of this case, that the commercial processing of agricultural commodities for seed is an agricultural activity within the definition given by the Court in *Hinson, supra.* In viewing the "line of demarcation between agricultural and nonagricultural employment" we find that the gin and seed cleaner business of defendant-employer is a "separate, commercial enterprise" and not a "purely agricultural undertaking."

G.S. 97-13(b) states that the Act shall not apply to farm laborers. "Whether an employee is a farm laborer depends, in a

large degree, upon the nearness of his occupation to the planting, cultivation, and harvesting of crops." *Hinson, supra*, 286 N.C. at 158, 209 S.E. 2d at 473. In determining whether an employee is a farm laborer, emphasis is placed on the nature of the employee's work rather than the nature of the employer's business. *Id.* The nature of the employee's work is determined from the "whole character" of his employment and not from the particular work he was performing when injured. *Id.* (quoting *H. J. Heinz Co. v. Chavez*, 36 Ind. 400, 140 N.E. 2d 500 (1957)).

Examining the "whole character" of plaintiff's employment, we find that he was not a farm laborer under G.S. 97-13(b). Plaintiff was employed to process oats, soybeans and barley through the gin process, including other work incidental to the ginning operation. Plaintiff's occupation could not be characterized as being closely related to the planting, cultivating and harvesting of crops. Plaintiff's employment involved the commercial processing of agricultural commodities after they had been harvested.

We also note that the fact that plaintiff was operating a tractor in a field in which crops were eventually to be planted does not make his labor farm labor within the meaning of G.S. 97-13(b). Plaintiff's injury occurred during a one-time excursion out of the ginning process and into an activity more akin to farming or agricultural labor. However, plaintiff's temporary assignment to farm related work does not interrupt his compensation coverage. 1C A. Larson, The Law of Workmen's Compensation Section 53:40 (1986). For example, coverage has been allowed for the following agricultural excursions: A garage employee sent to clean a farm well, *Utica Mut. Ins. Co. v. Winters*, 77 Ga. App. 550, 48 S.E. 2d 918 (1948); employee at a grain elevator sent by employer to work at employer's farm, *Friend v. Industrial Commission*, 237 N.E. 2d 491 (Ill. 1968); a general maintenance man temporarily shifted to farming because of weather conditions, *White v. Barrett*, 285 App. Div. 909, 137 N.Y.S. 2d 430 (1955); a brick manufacturer's employee baling hay for the use of factory horses, *Harding v. Industrial Commission of Utah*, 83 Utah 376, 28 P. 2d 182 (1934).

We hold that the full Commission properly affirmed Deputy Commissioner Sellers' award of benefits. Plaintiff's injury arose out of and in the course of plaintiff's employment with Biggerstaff Gin and Seed Cleaner. Further, plaintiff's employment was not

agricultural and plaintiff was not a farm laborer. Accordingly, defendants' assignments of error are overruled.

Affirmed.

Judges WEBB and COZORT concur.

OPAL L. CARROLL v. BURLINGTON INDUSTRIES AND LIBERTY MUTUAL INSURANCE COMPANY AND AMERICAN MOTORISTS INSURANCE COMPANY

No. 8510IC1346

(Filed 17 June 1986)

1. **Master and Servant § 96— Industrial Commission's findings—findings supported by evidence—court on appeal bound**

If there is any evidence of substance in the record to support the Industrial Commission's findings, the court on appeal is bound by those findings, even though the record may contain evidence supporting findings contra.

2. **Master and Servant § 68— workers' compensation—finding of no byssinosis—finding supported by evidence**

There was some competent evidence to support the finding of the Industrial Commission that plaintiff employee did not suffer from byssinosis where a doctor who had examined plaintiff on three occasions both before and after the end of her employment testified positively that plaintiff suffered from asthma with only a possibility of byssinosis and that she had suffered no permanent impairment consistent with byssinosis.

3. **Master and Servant § 68— workers' compensation—byssinosis—objectionable evidence—similar evidence introduced by plaintiff**

Plaintiff who claimed disability from byssinosis could not complain that the Industrial Commission erred in admitting into evidence pulmonary function tests conducted by plaintiff's last employer, since plaintiff's own exhibit introduced by her contained the results of the same tests.

4. **Master and Servant § 68— workers' compensation—byssinosis—Industrial Commission's findings proper**

There was no merit to plaintiff's contention in a workers' compensation case that the Industrial Commission erroneously "discounted" a doctor's favorable testimony by failing to make detailed findings relative to it, since the Commission's majority expressly considered that the deputy commissioner had had conflicting medical evidence before her; with the entire record before it, the Commission concluded that she had correctly weighed the evidence; the Commission had authority to and did give another physician's testimony

greater weight; and failure to make findings summarizing the first doctor's testimony was not prejudicial.

Judge WELLS dissenting.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 8 July 1985. Heard in the Court of Appeals 7 May 1986.

Plaintiff appeals the decision of the Industrial Commission, adopting the Opinion and Award of Deputy Commissioner Dianne C. Sellers which denied plaintiff's claim for compensation for occupational disease, byssinosis. The evidence presented at hearing in September 1983 was as follows:

Plaintiff was born in 1923 and worked in textile mills for approximately 40 years. She worked the last 17 years for defendant Burlington Industries ("Burlington"). When Burlington's Phoenix plant closed in March 1982, she collected unemployment for a year, but was unable to find new employment. She is now retired. Plaintiff had some limited history of smoking but had no breathing problems before going to work in the mills. The mills processed cotton and cotton blends.

Plaintiff worked in plants with varying levels of dust. The Phoenix mill was the last mill she worked in, and it, like the others, was dusty and linty. Plaintiff wore a mask at various times in her last few years of work. She first noticed breathing problems in the early 1970's, and now suffers shortness of breath whenever she exerts herself physically. She stated, "I get short-winded and I give out when I do the least little thing."

Two medical experts testified. Dr. Owens testified that he had examined plaintiff in October 1982. Based on his examination and plaintiff's work record, he formed an opinion that plaintiff had chronic obstructive lung disease, probably due to byssinosis. On cross examination, Dr. Owens was asked about the results of pulmonary function tests (PFT's) conducted by Burlington since 1971. Dr. Owens declined to state what weight should be given to the test results, although he did admit that there was at least one "good curve" (apparently meaning "reliable test") for each year group. Dr. Owens did not testify that he detected or diagnosed any asthma.

Dr. Harris testified, having examined plaintiff in 1981, 1982 and 1983. He testified that plaintiff demonstrated a pattern of "marked reversibility" (meaning that her shortness of breath was treatable), not found in individuals with byssinosis. Dr. Harris testified that the data indicating reversibility were "classic" for asthma. A typical patient with byssinosis, on the other hand, would show a steady, permanent decrease in function over time.

Dr. Harris admitted that asthma and byssinosis were symptomatically difficult to distinguish, and that with plaintiff's history he "would not be surprised" if she had byssinosis. However, as he had in 1981, Dr. Harris diagnosed plaintiff's condition as asthma with the possibility of byssinosis. Dr. Harris relied in part on the PFT data supplied by Burlington. In his opinion, plaintiff showed no permanent lung damage or decrease in function consistent with byssinosis.

On cross examination, Dr. Harris testified that an asthmatic worker would probably suffer an exacerbation of the asthma from working in a dusty environment just as plaintiff had. However, he found that plaintiff's symptoms were "acute" (temporary), and that the extent of any occupational exacerbation of plaintiff's asthmatic condition would be difficult to measure since she did not have much permanent impairment.

Based on this evidence, Deputy Commissioner Sellers made findings of fact as follows:

> Plaintiff has chronic obstructive pulmonary disease, asthma. A significant portion of her pulmonary obstruction, . . . markedly improves with bronchodilator therapy. Although the cotton dust exposure did, in fact, aggravate symptomatically her asthmatic condition, just as would other nonspecific irritants such as fumes, dust, and pollens, the cotton dust exposure during her employment with [Burlington] was not a significant causal factor in the development of this asthmatic condition. Furthermore, said cotton dust exposure did not affect the underlying nature of her disease or the progression of her disease and did not cause any permanent lung damage. In fact, there was an absence of significant decrement of pulmonary function as measured before and after exposure to cotton dust during pulmonary function testing at intervals from 1971 through 1982.

Sellers concluded that plaintiff had failed to carry her burden of proof that her pulmonary condition resulted from occupational disease, and denied the claim.

On appeal, a divided Commission affirmed. Chairman Stephenson, joined by Commissioner Brooks, found that plaintiff stopped worked only because the Phoenix plant closed down. The majority found that the physicians' testimony conflicted, but that Deputy Commissioner Sellers had weighed the evidence and reached the correct result. The majority adopted as its own Sellers' findings. Commissioner Clay dissented on the ground that the majority had failed in its responsibility by weighing the evidence in the light most favorable to defendants.

From the Commission's order denying compensation, plaintiff appeals.

Frederick R. Stann for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by J. A. Gardner, III, for defendant-appellees Burlington Industries and American Motorists Insurance Company, and Golding, Crews, Meekins & Gordon, by Michael K. Gordon, for defendant-appellees Burlington Industries and Liberty Mutual Insurance Company.

EAGLES, Judge.

On appeal from a final order of the Industrial Commission, this Court has only a limited role. Where the Commission acts under a misapprehension of law in its fact finding function, we may remand so that the facts may be reconsidered in their true legal light. *Clark v. Burlington Industries, Inc.*, 78 N.C. App. 695, 338 S.E. 2d 553, *cert. denied*, 316 N.C. 375, 342 S.E. 2d 892 (1986). We also may remand for evidentiary or other procedural error clearly prejudicial to one of the parties. *E.g. Citizens Bank & Trust Co. v. Reid Motor Co.*, 216 N.C. 432, 5 S.E. 2d 318 (1939) (error to rely on testimony where witness refused to submit to cross examination).

[1] With respect to considering the evidence, however, the Commission has sole authority to make findings of fact. *Yelverton v. Kemp Furniture Co.*, 51 N.C. App. 675, 277 S.E. 2d 441 (1981). This Court does not weigh the evidence. *Porterfield v. RPC Corp.*, 47 N.C. App. 140, 266 S.E. 2d 760 (1980). We determine only whether there is *any* evidence of substance in the record to sup-

port the Commission's findings; if there is, we are bound by the findings, even though the record may contain evidence supporting findings *contra*. *Id.* There must be a complete lack of competent supporting evidence to justify disregarding the Commission's findings of fact. *See Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E. 2d 747 (1981). Where medical testimony is conflicting, the Commission decides which testimony to give the greater weight. *See Register v. Administrative Office of the Courts*, 70 N.C. App. 763, 321 S.E. 2d 24 (1984); *Caulder v. Waverly Mills*, 67 N.C. App. 739, 314 S.E. 2d 4 (1984), *aff'd*, 314 N.C. 70, 331 S.E. 2d 646 (1985). The Commission is under no duty to view the evidence in the light most favorable to the claimant. *Cauble v. Macke Co.*, 78 N.C. App. 793, 338 S.E. 2d 320 (1986). Only this Court applies that standard, and then only in the course of reviewing an award allowing, not denying, compensation. *Id.; see Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E. 2d 389 (1980).

[2] In our limited role as a reviewing court we must conclude that the Commission's findings are supported by some competent evidence, and hence are binding on this Court. Dr. Harris testified positively that plaintiff suffered from asthma with only a possibility of byssinosis, and that she had suffered no permanent impairment consistent with byssinosis. Dr. Harris had examined plaintiff on three occasions both before and after the end of her employment. His testimony sufficed to support the result reached by the Commission. In *Thompson v. Burlington Industries*, 59 N.C. App. 539, 297 S.E. 2d 122 (1982), *cert. denied*, 307 N.C. 582, 299 S.E. 2d 650 (1983), we affirmed a similar order. Plaintiff had many symptoms typically associated with byssinosis, including shortness of breath, fatigue, and sputum production, and had worked in very dusty environments for at least 11 years. The Commission found that she had asthma, exacerbated by exposure to dust, but no permanent functional impairment. The Commission denied compensation and we affirmed: "Since plaintiff suffered from asthma, an ordinary disease of life, and did not retain any permanent functional pulmonary impairment after she quit her job, she did not have an occupational disease." 59 N.C. App. at 542, 297 S.E. 2d at 124.

Accordingly we must accept the Commission's findings of fact. We are bound to do so though we recognize the policy inherent in the Workers' Compensation Act favoring liberal treat-

ment of employee claims and disfavoring denying claims on technical grounds.

[3] Plaintiff raises several procedural assignments of error. She argues that the Commission erred in admitting into evidence the pulmonary function tests. Plaintiff's own Exhibit 2, *introduced by her*, contained the results of the same tests to which she later objected. A party necessarily waives the benefit of an objection when it introduces evidence of the same import in its own behalf. *State v. Tysor*, 307 N.C. 679, 300 S.E. 2d 366 (1983). The fact that defendants later introduced somewhat more detailed evidence of the tests is not of importance; the key portions of the evidence, the results, had already come in. No prejudice occurred. *See State v. Jones*, 287 N.C. 84, 214 S.E. 2d 24 (1975).

[4] Plaintiff also argues that the Commission erroneously "discounted" Dr. Owens' favorable testimony by failing to make detailed findings relative to it. The Commission's majority *expressly* considered that Deputy Commissioner Sellers had had conflicting medical evidence before her. With the *entire record* before it, the Commission concluded that she had correctly weighed the evidence. This did not amount to "discounting" of Dr. Owens' evidence. The Commission had authority to, and did, give Dr. Harris' testimony greater weight. Failure to make findings summarizing Dr. Owens' testimony was not prejudicial.

Plaintiff also argues that the Commission erred in concluding that she had failed to carry her burden of proof that she suffered an occupational disease. It is well established that the claimant generally carries the burden of proof of entitlement to compensation in proceedings before the Commission. *See e.g. Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). While plaintiff did present a *prima facie* case through the testimony of Dr. Owens, the Commission chose to give the conflicting testimony of Dr. Harris greater weight. This was within its power. The Commission's conclusion that plaintiff did not carry her burden simply is a logical extension of this weighing of the evidence, and upon the factual findings as made does not constitute error.

The findings of the Commission were supported by some competent evidence and its conclusion that compensation must be denied follows logically from those findings. Plaintiff has failed to

show any procedural error prejudicially affecting her. The opinion and award of the Commission is therefore

Affirmed.

Judge COZORT concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

It seems clear to me that in its findings of fact the Commission has not properly resolved the issue of plaintiff's disability raised by the medical evidence. While Dr. Harris did testify that plaintiff had symptoms of asthma which were treatable, he also testified that asthma and byssinosis were practically indistinguishable and that plaintiff probably had byssinosis. While much of Dr. Harris' testimony was equivocal, he made one telling unequivocal statement totally ignored by the Commission: "In my opinion, Ms. Carroll is not employable in the cotton textile industry, which was her previous employment. I strongly urge her not to seek such employment."

Dr. Owens' testimony clearly established that plaintiff suffered from work-related chronic obstructive lung disease which rendered her disabled to work. This evidence was altogether ignored.

The Commission's conclusion that plaintiff failed to carry her burden of proof that her pulmonary condition is due to her contracting an occupational disease is simply not supported by the evidence and the Commission has obviously boot-strapped that conclusion by failing to properly find the facts.

In my opinion, this case should be remanded for appropriate findings of fact on the question of whether plaintiff has occupationally related disabling chronic obstructive lung disease.

IN RE: APPEAL OF BRUNSWICK COUNTY

No. 8510SC1106

(Filed 17 June 1986)

1. **Administrative Law § 5— county as person aggrieved by final agency decision —appeal proper**

Brunswick County was an aggrieved person pursuant to N.C.G.S. § 150A-43 where the board of the department of social services resolved to reinstate respondent, a dismissed employee, and to pay her back wages and attorney fees; this resolution was then sent to the County Commissioners for funding; this ruling affected the expenditure of county revenues; and the county was thus a person aggrieved by a final agency decision.

2. **Administrative Law § 5— county's failure to intervene in administrative proceedings—no bar to judicial review**

Brunswick County's failure to intervene in the administrative proceedings regarding reinstatement of a dismissed employee did not bar the county's right to seek judicial review of any resulting final agency decision, since the intervention statute, N.C.G.S. § 150A-23, is permissive only and did not require the county to intervene.

3. **Administrative Law § 5— county not served with administrative ruling—judicial review not blocked by statutory time limitation**

Brunswick County was never properly served with a copy of a declaratory ruling by the Director of the Office of State Personnel, and so the thirty-day period for seeking review established by N.C.G.S. § 150A-45 never commenced so that the county's petition for review of the final agency ruling seven months after the ruling was filed was not barred.

4. **Social Security and Public Welfare § 1— department of social services—hiring and firing of personnel—"local appointing authority"—agency ruling improper**

The Director of the Office of State Personnel erred in concluding that the local board of the department of social services became the "local appointing authority" pursuant to N.C.G.S. § 126-37 in the absence of a permanent full-time director, since N.C.G.S. § 108A-14(2) gives the director the exclusive power to hire and fire the department's personnel; the statute makes no distinction between acting and permanent directors; and there is no implied or implicit authority in the statutes that the local board has any authority to appoint personnel in the absence of a permanent full-time director.

APPEAL by respondent from *Bailey (James H. Pou), Judge.* Order entered 1 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 5 March 1986.

Alinda Meares (hereinafter "respondent") was hired by the Brunswick County Department of Social Services as an Adminis-

trative Secretary (V) on 15 January 1979, under the competitive service system which required adherence to a merit system of personnel administration. Respondent was discharged from her position on 8 September 1981 by Jamie Orrock, then the Director of the Brunswick County Department of Social Services (hereinafter "DSS" or "Board"), who then abolished her position. Respondent appealed her dismissal to the DSS Board. At a hearing held on 14 September 1981, the Board voted unanimously to reinstate respondent to her former position because of procedural and substantive deficiencies. Thereafter, Orrock refused to follow the recommendation of the Board.

On 18 September 1981, respondent filed an appeal with the North Carolina Office of State Personnel; however, on 4 January 1982 and before any action was taken by the Personnel Commission, she dismissed that appeal upon advice of the State Personnel Office that she seek injunctive relief in the Brunswick County Superior Court. On 10 December 1981, respondent filed an action seeking a writ of mandamus requiring her reinstatement. After an evidentiary hearing, the trial court ruled that respondent had failed to exhaust her administrative remedies prior to the institution of that action, and dismissed her action by Order dated 30 August 1982. Respondent appealed the dismissal of her action to this Court. In an unpublished opinion filed 15 November 1983, this Court affirmed the trial court and held that respondent "failed to exhaust her remedy of appeal to the State Personnel Commission despite the fact that its decision might only be advisory." Subsequent to that decision, the Office of State Personnel reopened the case for hearing.

During the pendency of this matter, the Board dismissed Director Orrock for personal conduct and appointed an "Acting Director." Thereafter, the Board instructed its attorney, Avery Bordeaux, to negotiate a settlement with respondent. The resulting settlement was presented to the Board on 15 May 1984, and the Board adopted a resolution reinstating respondent to her former position, with back pay from date of termination and accumulated leave, plus expenses and attorney fees of $8,500.00. The resolution was forwarded to the Brunswick County Board of County Commissioners (hereinafter "Commissioners") for funding and implementation. By letter dated 30 May 1984, the Commis-

sioners notified the DSS Board of the vote denying the reinstatement of respondent.

Upon the Commissioners' refusal to uphold the resolution of settlement, the Board instructed Bordeaux to seek a Declaratory Ruling from the Office of State Personnel. By amended petition signed 29 June 1984, Bordeaux requested a declaratory ruling on the following issues:

> 1. Who constitutes the "*local appointing authority*" as set forth by the facts alleged in the complaint and petition and N.C.G.S. 126-37.
>
> 2. Can the "*local appointing authority*" enter into binding legal agreements relating to settlement or defense of personnel actions pending before the State Courts or any State Agency, including the State Personnel Commission.

Pursuant to this request, Harold H. Webb, the Director of the Office of State Personnel, entered the following ruling:

> This request for a declaratory ruling has been made during the pendency of an active personnel grievance; the Brunswick County Board of Social Services is the respondent in a grievance currently before the State Personnel Commission. The Brunswick County Board of Social Services (hereinafter "Board") has requested an interpretation of the phrase "local appointing authority" found in G.S. § 126-37. § 126-37 does not, in and of itself, define "local appointing authority"; neither is a definition found elsewhere in Chapter 126. The phrase itself is clear and unambiguous; thus, other statutes must be consulted.
>
> N.C.G.S. § 108A-9 sets out the duties of the various boards of social services. § 108A-9(1) empowers a board to appoint a social services director. However, § 108A-9 does not empower a board of social services to appoint personnel other than the director. § 108A-14 sets out the duties of a social services director. § 108A-14(2) empowers the director to appoint necessary personnel for the department of social services. Clearly, in a situation in which there is a permanent, full-time director of social services appointed by the board of social services in conformity with § 108A-9(1) then

the director of social services would be the "local appointing authority."

However, the request not only asks who is the "local appointing authority" under normal and usual circumstances, but also, who constitutes the "local appointing authority" in the following specific factual situation: the Board of Social Services has fired the director of social services, appointed for the interim an "acting" director of social services and has not either appointed a permanent, full-time director or confirmed the "acting["] director as a permanent, full-time director.

There is no law in Chapter 108A which addresses the above situation. Neither is there any case law on point. However, since the board of social services has the statutory responsibility to select the director and to consult with him regarding departmental problems, it appears logical that in the absence of a permanent, full-time director the board of social services should qualify as the "local appointing authority" for the purposes of GS § 126-37.

The second question asked is, "Can the 'local appointing authority' enter into binding legal agreements relating to settlement . . . of personnel actions pending before . . . the State Personnel Commission?" This question is more properly the subject of an Attorney General's opinion; however, this Director, based upon his experience with the State Personnel Commission, states that any party can enter into a settlement agreement of pending personnel cases. Further, the records of the State Personnel Commission reflect that boards of social services have been parties to personnel cases before the State Personnel Commission and have entered into binding agreements with opposing parties.

As a result of this ruling, Bordeaux on behalf of DSS, negotiated a settlement agreement with respondent. The agreement, which awarded respondent reinstatement, back pay and attorney fees was incorporated into a resolution adopted by the full Board on 21 August 1984. This agreement was certified by the full Personnel Commission on 17 October 1984.

On 28 December 1984, Brunswick County filed a Petition for a review of the final agency ruling filed 27 July 1984. Respondent

filed a response to the petition which asserted, among other defenses, that petitioner failed to seek judicial review within thirty days of the issuance of the declaratory ruling, and did not commence "this action within a reasonable period of time and has failed to comply with N.C.G.S. 150A-23(d), 150A-43 and 150A-45."

The matter came on for hearing before Judge Bailey who entered the following Order:

> THIS CAUSE came on for hearing before the undersigned on June 18, 1985. After hearing oral argument from the parties in this action and upon consideration of the matters presented to the Court, it is ordered as follows:
>
> 1. The declaratory ruling issued by Mr. Harold Webb, Director, Office of State Personnel, on July 27, 1984, was in error in the following respects:
>
> a. Mr. Webb erred in ruling that the Board of Social Services is a local appointing authority for the department of social services in the absence of a full-time permanent director. Only a full-time permanent director or acting director of social services can be the appointing authority for the department of social services because G.S. § 108A-14 gives the right to hire and fire personnel of the department of social services to the director only.
>
> b. Mr. Webb erred in ruling that the local appointing authority can enter a binding agreement to settle personnel disputes without the approval of the board of county commissioners. Public money can only be spent pursuant to approval of the appropriate legislative body or pursuant to judgment of a court of competent jurisdiction.
>
> 2. This matter is remanded to the State Personnel Commission for further proceedings not inconsistent with the findings and rulings herein.

From the entry of this Order, respondent appealed.

Womble, Carlyle, Sandridge and Rice by Allan R. Gitter and William A. Blancato, and David L. Clegg, County Attorney, Brunswick County, for petitioner-appellee.

McGougan, Wright and Worley by Dennis T. Worley for respondent-appellant.

PARKER, Judge.

[1] In her first assignment of error, respondent contends the trial court erred in reviewing the final agency decision issued by Director Webb because Brunswick County (i) is not a party to the proceedings, (ii) failed to file a motion to intervene in the proceedings pursuant to G.S. 150A-23(d) and (iii) failed to file a petition for judicial review within thirty days "after a written copy of the decision [was] served upon the person seeking the review by personal service or by registered mail" as required by G.S. 150A-45. We disagree.

Under G.S. 150A-43, any person aggrieved by a final agency decision may seek judicial review of that decision. A county may be an aggrieved person when an agency issues a ruling that could affect the county's revenue. *In re Appeal of Harris*, 273 N.C. 20, 159 S.E. 2d 539 (1968). Pursuant to Director Webb's ruling, the Board resolved to reinstate respondent, and to pay her back wages and attorney fees. This resolution was then sent to the County Commissioners for funding. Because this ruling affected the expenditure of county revenues, Brunswick County was an aggrieved person pursuant to G.S. 150A-43.

[2] Further, Brunswick County's failure to intervene in the administrative proceedings does not bar their right to seek judicial review of any resulting final agency decision. The intervention statute, G.S. 150A-23, is permissive only, and did not require Brunswick County to intervene.

[3] Finally, because Brunswick County was never properly served with a copy of the declaratory ruling, the thirty-day period for seeking review established by G.S. 150A-45 never commenced. Although the affidavit of Betty S. Varnam stated that she "personally hand delivered on October 25, 1984, a copy of the *settlement agreement* to William D. Carter, County Manager for the County of Brunswick" and that certified copies were mailed, return receipt requested, to the individual members of the Board of Commissioners, she did not state that she delivered a copy of the *declaratory ruling* to these individuals as required by G.S.

150A-45. Further, the affidavit of Dennis T. Worley, attorney for respondent, stated that "on November 7, 1984, a copy of the Declaratory Ruling issued by Harold Webb, dated July 27, 1984, and the Settlement Agreement . . . was delivered personally to David Clegg, Brunswick County Attorney . . . ." The county attorney is not the person authorized to accept service for the county. Service upon the county manager or on the chairman, clerk or any member of the board of commissioners is necessary for service upon the county to be effective. G.S. 1A-1, Rule 4(j)(5)(b). Because the declaratory ruling was not served on Brunswick County in accordance with statute, it has not waived its right to seek judicial review by waiting more than thirty days after it received a copy of the decision to file its petition for review. *In re Appeal of Harris*, 273 N.C. at 27, 159 S.E. 2d at 545. The assignment of error is overruled.

[4] In her final assignment of error, respondent contends the Court committed reversible error in concluding that Director Webb was in error in the issuance of the declaratory ruling dated 27 July 1984. Respondent asserts that "the broad managerial authority [in G.S. 108A] should impliedly and implicitly include the authority to resolve legal issues, especially when the Board was without the services of a full-time Director." We disagree.

General Statute 108A-14(2) gives the director of a county department of social services the exclusive power to hire and fire the department's personnel. Director Webb ruled that (i) an acting director does not have the power to appoint personnel and (ii) in the absence of a permanent full-time director, the Board becomes the "local appointing authority" under G.S. 126-37. We find no implied or implicit authority in the statutes that the local Board has any authority to appoint personnel in the absence of a permanent full-time director. The General Assembly has delegated certain responsibilities to the local boards, G.S. 108A-9, and certain responsibilities to the director of the local board. G.S. 108A-14. The statute makes no distinction between "acting" and "permanent" directors. Our reading of the statutes reveals that the Board's sole involvement in personnel matters is "[t]o select the county director of social services . . . ." G.S. 108A-9(1). The director derives his authority to appoint personnel directly from the General Assembly, not from the Board. Judge Bailey was correct when he ruled that Director Webb erred in concluding that

the local board became the "local appointing authority" pursuant to G.S. 126-37 in the absence of a permanent full-time director.

Accordingly, the Order appealed from is

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. JOHN DANIEL FRONEBERGER

No. 8527SC1148

(Filed 17 June 1986)

1. **Criminal Law § 99.3— admission of stolen items into evidence—no expression of opinion by court**

The trial court in a felonious larceny prosecution did not express an opinion regarding the veracity of the victim when the court simply indicated at a certain point in the witness's testimony that her identification of the stolen items was legally sufficient to support their admission into evidence.

2. **Larceny § 7— four charges of larceny of silver—failure to show four different occasions of larceny**

The trial court erred in failing to dismiss three of the four charges of felonious larceny because the State offered no evidence tending to establish that defendant stole silver from his mother's house, in which he also resided, on four separate occasions, the fact that defendant pawned the silver on four different occasions, standing alone, being insufficient to support an inference that he took it on four separate occasions.

3. **Criminal Law § 142.3— larceny of silver—silver pawned—restitution to pawnbrokers as condition of probation—condition proper**

In a prosecution of defendant for felonious larceny of silver, the trial court did not err in requiring as a special condition of probation that defendant repay the loans he obtained from pawnbrokers using the stolen silver as collateral, since the pawnbrokers were aggrieved parties within the meaning of N.C.G.S. § 14-1343(d) and were thus proper subjects for restitution, and since the restitution order was directly related to the criminal offense for which defendant was convicted.

APPEAL by defendant from *Gudger, Judge*. Judgments entered 22 May 1985 in Superior Court, LINCOLN County. Heard in the Court of Appeals 4 March 1986.

Defendant appeals from a judgment entered upon verdicts finding him guilty of four counts of felonious larceny. The court sentenced defendant to three years of imprisonment, six months active and the remainder suspended on special supervised probation upon the condition, *inter alia*, that defendant pay restitution to the pawnbrokers with whom he pawned the stolen goods.

Attorney General Thornburg, by Assistant Attorney General John R. Corne, for the State.

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

WHICHARD, Judge.

Evidence for the State tended to show that during 1984 defendant lived with his mother, Virginia Froneberger Hartman. On 14, 15, 17 and 20 December 1984 defendant pawned numerous items of silver that belonged to Mrs. Hartman. Each lot of silver pawned had a value in excess of four hundred dollars. Mrs. Hartman was out of town and was not aware that her silver was missing until 21 December 1984 when Detective Bergin of the Lincolnton Police Department phoned her at her daughter's house and advised that silverware apparently belonging to her had been pawned under defendant's name.

On 15 January 1985 Bergin arrested defendant at his home. After Bergin informed defendant of the charges against him, defendant inquired, "Well, don't you want to know where the silver is?" Bergin responded, "No." Later defendant told Bergin, "I know this can be used against me, but I'm going to say it, anyway. I took the silver, and I sold it because I needed the money to file suits with."

[1] At trial Mrs. Hartman identified certain items of silver as belonging to her. Before the State could move for admission of the items, the following dialogue, to which defendant objects, occurred:

> THE COURT: That's sufficient Mrs. Hartman. Thank you. The court would, the court would not exact any more sufficient testimony concerning these contents than has been de-

veloped. Are you offering S-1 and the contents at this time, Mrs. Byers?

Assistant Attorney General Byers: They're identified, yes sir. I would like to offer them at this time.

Defendant contends that in this comment the court violated N.C. Gen. Stat. 15A-1222 by expressing the opinion that Mrs. Hartman's identification of the items of silver was accurate. We find no error.

"[A]ny intimation or expression of opinion by the trial judge . . . which prejudices the jury against the accused is ground for a new trial." *State v. Faircloth*, 297 N.C. 388, 392, 255 S.E. 2d 366, 369 (1979). The defendant carries the burden of showing prejudice. *Id.* "[T]he test of prejudice resulting from a judge's remarks is whether a juror might reasonably infer that the judge expressed partiality or intimated an opinion as to a witness' credibility or as to any fact to be determined by the jury." *State v. Staley*, 292 N.C. 160, 165, 232 S.E. 2d 680, 684 (1977).

Rather than expressing an opinion regarding the veracity of Mrs. Hartman's testimony, the court here was simply indicating that her identification of the items was at that point legally sufficient to support their admission into evidence. We do not believe a juror might reasonably infer that the court was expressing partiality or intimating an opinion as to the witness' credibility or as to any other fact to be determined by the jury. *Staley, supra.*

At most the comment constituted harmless error. N.C. Gen. Stat. 15A-1443(a). *Cf. Staley*, 292 N.C. at 169, 232 S.E. 2d at 686 (while "[n]ot intending to abrogate the harmless error doctrine," court nevertheless refused to find expression of opinion nonprejudicial despite substantial evidence pointing to defendant's guilt). Assuming, *arguendo*, that a reasonable juror might infer from the comment that the court was expressing its opinion that Mrs. Hartman's identification of the silver was accurate, there was no evidence from which the jury could have concluded otherwise. Mrs. Hartman's testimony as to her ownership of the silver was clear, competent and credible. Many pieces bore her initials or the initials of deceased members of her family. At no point was her credibility on this or any other matter put at issue. Accordingly, we reject defendant's contention that the court's comment

constituted an expression of opinion which so prejudiced the jury against him as to require a new trial.

[2] Defendant contends the court erred in failing to dismiss three of the four charges of felonious larceny because the State offered no evidence tending to establish that he stole the silver on four separate occasions. We are constrained to agree.

A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place. 50 Am. Jur. 2d *Larceny* Sec. 3 at p. 154. *See State v. Martin*, 82 N.C. 672 (1880); *State v. Simons*, 70 N.C. 336 (1874); Annot., 136 A.L.R. 948. In such instances the constitutional guarantee against double jeopardy prohibits multiple convictions. *See State v. Beaty*, 306 N.C. 491, 293 S.E. 2d 760 (1982); *State v. Martin*, 47 N.C. App. 223, 267 S.E. 2d 35, *disc. rev. denied*, 301 N.C. 238, 283 S.E. 2d 134 (1980); *State v. Fambrough*, 28 N.C. App. 214, 220 S.E. 2d 370 (1975). Thus, absent evidence that the silver was stolen on more than one occasion, defendant could only be convicted of one count of larceny.

In ruling on a motion to dismiss the court must view the evidence in the light most favorable to the State. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E. 2d 649, 652 (1982). Evidence from which jurors may reasonably infer defendant's guilt—whether circumstantial, direct, or both—is sufficient to withstand a motion to dismiss. *Id.* at 67-68, 296 S.E. 2d at 652-53. If the evidence merely raises a suspicion or conjecture as to guilt, however, the court should allow the motion to dismiss. *Id.* at 66, 296 S.E. 2d at 652.

The State maintains that the jury could reasonably infer defendant's guilt as to each count of larceny from the fact that he pawned the silver on separate occasions and had unlimited access to Mrs. Hartman's house. The fact that defendant pawned the silver on different occasions, standing alone, is insufficient to support an inference that he took it on separate occasions. Before guilt can be inferred from the possession of recently stolen property, "the State must show by positive or circumstantial evidence a *prima facie* larceny of the goods." *State v. Boomer*, 33 N.C. App. 324, 328, 235 S.E. 2d 284, 286, *cert. denied*, 293 N.C. 254, 237 S.E. 2d 536 (1977). The State has not shown a *prima facie* larceny of each of the four groups of goods pawned separately. Mrs. Hartman was out of town when her silver was taken and could not

document the time(s) of its disappearance. The fact that defendant resided with her and had unlimited access to the house merely demonstrates that he had the opportunity to commit multiple larcenies. It is equally possible that he took all the silver at one time. Any movement of the silver by defendant which placed it under his control would have sufficed to complete the larceny. *State v. Carswell*, 296 N.C. 101, 249 S.E. 2d 427 (1978) (to constitute larceny there must be an asportation of the goods and the accused must have the goods in his possession, or under his control, even if only for an instant); *State v. Walker*, 6 N.C. App. 740, 743, 171 S.E. 2d 91, 93 (1969) ("While there must be a taking and carrying away of the personal property of another to complete the crime of larceny, it is not necessary that the property be completely removed from the premises of the owner. 'The least removal of an article, from the actual or constructive possession of the owner, so as to be under the control of the felon, will be a sufficient asportation.' "). Thus, if on a single occasion defendant placed all the silver in a box or carried it to another part of the house with the intent to commit larceny, the fact that he subsequently removed it from the house on separate occasions would not support multiple convictions. Since there is no evidence from which the jury reasonably could conclude that defendant committed more than one larceny, such a conclusion could only be based on suspicion or conjecture, which is impermissible. *Earnhardt*, 307 N.C. at 66, 298 S.E. 2d at 652. Thus, as to three of the four larceny counts, the court erred in denying defendant's motion to dismiss.

Accordingly, the judgments on the indictments in Nos. 85 CRS198, 200 and 201, must be vacated. Because the four larceny convictions were consolidated for sentencing and three of the four judgments must be vacated, defendant's sentence in No. 199, along with the above-described condition of probation, must be vacated, and the case must be remanded for sentencing on one count of felonious larceny. *See State v. McCoy*, 79 N.C. App. 273, 278, 339 S.E. 2d 419, 423 (1986); *State v. Anderson*, 76 N.C. App. 434, 439, 333 S.E. 2d 762, 766 (1985).

[3] Defendant finally contends the court erred in requiring as a special condition of probation that he repay the loans he obtained from pawnbrokers using the stolen silver as collateral. Because

this contention will probably arise upon remand for sentencing, we address it even though we are vacating the sentence.

Defendant objects to the condition on the grounds that it is not authorized under N.C. Gen. Stat. 15A-1343(d) and, even if statutorily authorized, it violates Article I, Section 28 of the North Carolina Constitution which prohibits imprisonment for debt. We disagree.

N.C. Gen. Stat. 15A-1343(d), in pertinent part, provides:

> As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court *for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant.* . . . As used herein, "restitution" shall mean compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action. . . . Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders and to provide for compensation to victims of crime, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State. (Emphasis supplied.)

Here, shortly after defendant committed the larceny he presented the stolen items to pawnshops as collateral for loans. The record establishes that the stolen items have been returned to the rightful owner. The pawnbrokers thus have lost the collateral that secured their loans. As a result they are without security and at risk of loss or damage if the loans are not repaid. We believe such loss or damage would directly relate to or "aris[e] out of" the larceny for which defendant was convicted. We thus conclude that, under the particular facts presented, the pawnbrokers are within the meaning and intent of the phrase "aggrieved parties" as used in N.C. Gen. Stat. 15A-1343(d) and thus are proper subjects for restitution as a condition of defendant's probation.

In contending that the order of restitution is unconstitutional, defendant relies on *State v. Caudle*, 276 N.C. 550, 173 S.E. 2d 778 (1970), *State v. Wilburn*, 57 N.C. App. 40, 290 S.E. 2d 782 (1982) and *State v. Bass*, 53 N.C. App. 40, 280 S.E. 2d 7 (1981). In *Caudle*, *Wilburn* and *Bass* the court ordered defendants to pay

restitution for offenses other than those for which they had been convicted. In each case the order of restitution was vacated as unconstitutional. It is well settled that for an order of restitution to be valid it "must be related to the criminal act for which defendant was convicted, else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt." *Bass*, 53 N.C. App. at 42, 280 S.E. 2d at 9. If a restitution order is directly related to the criminal offense for which the defendant was convicted, however, it is valid. *See State v. Dula*, 67 N.C. App. 748, 751, 313 S.E. 2d 899, 901, *affirmed per curiam*, 312 N.C. 80, 320 S.E. 2d 405 (1984). We have concluded that, under the particular facts presented, the order here is directly related to the criminal offense for which defendant was convicted. The order thus does not run afoul of the constitutional provision prohibiting imprisonment for debt.

For the reasons stated, the result is:

(1) As to the felonious larceny indictment in No. 85CRS199, no error; sentence vacated; remanded for resentencing.

(2) As to the felonious larceny indictments in Nos. 85CRS198, 200 and 201, judgments vacated.

Judges WELLS and COZORT concur.

W. STALEY HILLIARD, EDWARD GASKINS, AND DANIEL C. LYNN v. WILLIAM L. THOMPSON AND MAE P. THOMPSON

No. 8510SC1268

(Filed 17 June 1986)

Contracts § 2.4; Vendor and Purchaser § 1— contract to convey realty—no mutuality of obligation

Where a vendor could not have delivered a warranty deed conveying fee simple marketable title as required by the contract to convey realty because his wife refused to sign the deed, the vendor could not have enforced the contract against the purchasers; therefore there was no mutuality of obligation and the purchasers could not enforce the contract against the vendor.

Judge WHICHARD concurs in the result.

Judge JOHNSON concurs in the result and joins in the concurring opinion.

APPEAL by plaintiffs from *Read, Judge.* Judgment entered 10 June 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 6 May 1986.

This is an action for breach of contract. The defendants moved for summary judgment and the pleadings and materials introduced in opposition to and in support of the motion for summary judgment showed that the following matters are not in dispute. On 7 January 1985 an "offer to purchase and contract" was signed by the defendant William L. Thompson and WH & G Realty, Inc. WH & G Realty was not an extant corporation but the plaintiffs intended to organize such a corporation to take the title to a tract of real estate which was the subject of the contract.

Under the terms of the contract the defendant William L. Thompson agreed to convey a tract of real estate in Durham County to the WH & G Realty, Inc. for $70,000.00. William L. Thompson owned the real property and it was agreed by the parties that he would take the contract home to be signed by his wife that night. The plaintiffs at that time delivered to Mr. Thompson a check for $500.00. On the night of 7 January 1985 William L. Thompson called one of the plaintiffs and told him his wife would not sign the contract unless the price was raised to $75,000.00. The plaintiffs agreed to this price. It was agreed that the parties would meet at Mr. Thompson's office the next morning and change the contract to reflect the new price. The next day Mr. Thompson advised the plaintiffs that he had been offered $84,600.00 for the property and returned the check for $500.00. William L. Thompson agreed to give the plaintiffs a chance to meet any offer which was made for the property. The property was sold to a third party before the plaintiffs could meet the third party's offer.

The court granted the motion for summary judgment in favor of both defendants and the plaintiffs appealed.

William A. Bason, for plaintiff appellants.

Howard, Howard, Morelock & From, P.A., by Fred M. Morelock and John N. Hutson, Jr., for defendant appellees.

WEBB, Judge.

The pleadings and the papers filed in support of and in opposition to the motion for summary judgment do not contain any evidence that William L. Thompson was acting as agent for his wife at the time he signed the contract to sell the property. Summary judgment was properly entered on the claim against her. *See Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E. 2d 419 (1979). The plaintiffs argue that there was evidence that William L. Thompson approached Daniel C. Lynn and offered him $5,000.00 if he would sell the property, that the property was not owned by the defendants as tenants by the entirety but was wholly owned by the defendant William L. Thompson, and that he was selling the property because his wife wanted a double wide mobile home. The plaintiffs argue that this is evidence from which a jury could conclude William L. Thompson was acting for his wife. We do not believe this is evidence sufficient to submit to a jury on the question of agency. This is particularly true when all the evidence shows the parties agreed Mr. Thompson would take the contract home to be signed by his wife. The marital relationship does not raise a presumption that the husband is acting as an agent for his wife. *Albertson v. Jones*, 42 N.C. App. 716, 257 S.E. 2d 656 (1979).

Reichler v. Tillman, 21 N.C. App. 38, 203 S.E. 2d 68 (1974) and *Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E. 2d 334, *modified*, 285 N.C. 418, 206 S.E. 2d 162 (1974), relied on by the plaintiffs, are not helpful to them. *Reichler* deals with a question of judgment on the pleadings. The plaintiff had pled that the wife was bound by the contract and this Court held the plaintiff had the right to prove the husband was acting as her agent. In this case we deal with a motion for summary judgment. The parties have forecast what the evidence will be. In *Lawing* this Court held that the superior court had not made findings of fact sufficient to determine whether a husband was acting for his wife. This Court made some statements as to evidence which would prove agency, which statements are not inconsistent with our decision in this case.

One of the terms of the alleged contract provided that William L. Thompson deliver to the plaintiffs a general warranty deed which would contain a fee simple marketable title. Without the signature of his wife Mr. Thompson could not have delivered

such a deed. The plaintiffs would not have been liable on the contract if Mr. Thompson had sued them. There was not a mutuality of obligation. The Restatement (Second) of Contracts § 79 (1981) says that if the requirement of consideration is met, there is no additional requirement of mutuality of obligation. It justifies this rule by saying that the value of a promise is not necessarily affected by the fact that no legal remedy will be available in the event of a breach. We have not been able to find a case in North Carolina dealing with the precise question of whether an agreement which may not be enforceable against one party may nevertheless be enforced against the other. We believe there are cases which assume that such contracts are not enforceable against either party. *See Wellington-Sears & Co. v. Dize Awning & Tent Co.*, 196 N.C. 748, 147 S.E. 13 (1929); *Rankin v. Mitchem*, 141 N.C. 277, 53 S.E. 854 (1906); and *Mezzanotte v. Freeland*, 20 N.C. App. 11, 200 S.E. 2d 410, *cert. denied*, 284 N.C. 616, 201 S.E. 2d 689 (1974). In *Rankin* the Court held that a promise was not enforceable because both sides were not bound by it. The Court said, "[i]n order to make an agreement valid and binding, the promises must be mutual, ..." 141 N.C. at 283, 53 S.E. at 856. In *Wellington* the Court recognized the principle that there must be mutuality of obligation but held that in that case there was sufficient consideration because there were promises enforceable against the plaintiff. In *Mezzanotte* it was held there was a mutuality of obligation. We believe we are bound by these cases to hold that because the defendant William L. Thompson could not have enforced the contract against the plaintiffs, the plaintiffs cannot enforce the contract against William L. Thompson. It was not error to grant the motion for summary judgment in favor of William L. Thompson.

Affirmed.

Judge WHICHARD concurs in the result.

Judge JOHNSON concurs in the result and joins in the concurring opinion.

Judge WHICHARD concurring in the result.

I concur in the result reached, but I believe the opinion unnecessarily premises the decision on the mutuality of obligation

doctrine. It observes that defendant-husband could not have delivered a warranty deed conveying fee simple marketable title without the signature of defendant-wife and that one of the terms of the alleged contract was to provide such a deed. It reasons from these observations that "plaintiffs would not have been liable on the contract if [defendant-husband] had sued them. There was not a mutuality of obligation." Based on this reasoning it holds that because defendant-husband could not have enforced the alleged contract against plaintiffs, plaintiffs accordingly cannot enforce the contract against defendant-husband.

I believe it is unnecessary to consider the performance obligations of plaintiffs to determine whether the alleged contract is binding on defendant-husband. Defendant-husband's uncontroverted affidavit establishes that when he signed the alleged contract all parties agreed that he would have to discuss the matter with his wife before he could enter a binding agreement. It further establishes that he informed plaintiffs that he did not believe his wife would agree to some of the terms in their written offer, and that she in fact refused to sign.

Like the author of the opinion, I find no North Carolina authority directly on point. I believe the following is an accurate statement of the general law, however:

> It has been held in numerous cases that, where an instrument has been executed by only a portion of the parties between whom it purports to be made, it is not binding on those who have executed it. . . .
>
> The question as to whether those who have signed are bound is generally to be determined by the intention and understanding of the parties at the time of the execution of the instrument. The reason for holding the instrument void is that it was intended that all the parties should execute it and that each executes it on the implied condition that it is to be executed by the others, and, therefore, that until executed by all it is inchoate and incomplete and never takes effect as a valid contract, and this is especially true where the agreement expressly provides or its manifest intent is, that it is not to be binding until signed.
>
> Where these reasons do not apply, it is usually held that a party who signs and delivers an instrument is bound by the

> obligations therein assumed, although it is not executed by all the parties named in it, as, for example, where all the parties recognize the validity of the contract and acquiesce in its performance. Usually, however, a party may, on signing, impose an enforceable condition that the agreement is not to be binding until signed by others.

17 C.J.S., Contracts Sec. 62 at 734-36. As stated in *Skinner v. Haugseth*, 426 So. 2d 1127, 1130 (Fla. App. 1983): "In the final analysis, the question almost always seems to turn upon whether the signing party manifested the intent not to be bound by the contract unless all of the other parties joined in its execution." And, as stated in *Bank of United States v. Chemical Bank & Trust Co.*, 140 Misc. 394, 396, 246 N.Y.S. 595, 598 (Sup. Ct. 1930): "When the intent is manifested that the contract is to be executed by others than those who actually signed it, it is inchoate and incomplete and does not take effect as a binding contract unless executed by all parties."

The uncontroverted forecast of evidence here establishes that defendant manifested an intent that the alleged agreement was not to be binding unless his wife became a party by agreeing to it, and that his wife refused to sign and become a party. The alleged agreement thus remained inchoate and incomplete and never took effect as a binding contract. I would hold that the plaintiffs cannot enforce the alleged agreement on this account and would not invoke the mutuality of obligation doctrine on the facts presented. *See* Calamari, *et al.*, *Contracts*, Sec. 4-14 at 157 (2d ed., 1977) (while doctrine may have core of validity, it has been over-generalized and used as a mistaken premise for decisions).

STATE OF NORTH CAROLINA v. SONDRA STEVENSON

No. 8518SC1149

(Filed 17 June 1986)

Homicide § 28.4— self-defense—right to stand ground—right of temporary dweller

Neither permanency of residence nor a leasehold interest in the premises is required before a person is legally justified in standing her ground, rather

than retreating before using deadly force in self-defense; rather, one must show only that she is a member of a household, however temporarily, and that she possesses an intent to reside in that particular place at the time of the attack. Therefore, the trial court erred in denying defendant's request for a special jury instruction on the absence of a duty to retreat in one's own home where the evidence tended to show that she was living in an apartment leased by deceased's girlfriend who had given her permission to stay there for "a week or so"; defendant moved her clothes, her husband's clothes, and the couple's stereo to the apartment; defendant and her husband had been living there for about five days, sharing an extra bedroom, at the time of the shooting; and they had no other residence.

APPEAL by defendant from *Mills, Judge*. Judgment entered 23 May 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 February 1986.

Attorney General Lacy H. Thornburg, by Associate Attorney General Mabel Y. Bullock, for the State.

Assistant Public Defender Ronald P. Butler, for defendant appellant.

BECTON, Judge.

From a judgment imposing a six-year sentence following her voluntary manslaughter conviction, the defendant, Sondra Stevenson, appeals. Defendant argues that the trial court erred by refusing to give defendant's requested instruction that the defendant had no duty to retreat. We agree and grant defendant a new trial.

I

Defendant shot and killed William Curtis Albertson on 19 January 1985. Defendant and her husband, Michael Stevenson, began living in the apartment leased by the deceased man's girlfriend, Kimberly Forehand, about five days before the shooting. They had moved their clothes and stereo to Ms. Forehand's apartment, and she had given them permission to stay there for "a week or so." Prior to the shooting, Albertson stayed at Ms. Forehand's apartment frequently, but also maintained a separate residence.

On the night of the shooting, defendant, Michael Stevenson, Kimberly Forehand, and Albertson went to a local pool room and drank beer. The State's evidence tended to show that Albertson

had been drinking heavily and was intoxicated when the four left the pool room and returned to Ms. Forehand's apartment. Albertson continued drinking, and began arguing with Ms. Forehand about three Polaroid photographs of bruises inflicted by Albertson on Ms. Forehand a few weeks earlier. Albertson had often beaten Ms. Forehand during their four-year relationship, and she had brought and dropped assault charges against him on numerous occasions.

Albertson grabbed Ms. Forehand by the hair and either led or dragged her, holding her in a bent-over position with her face to the floor, to the living room. He sat on the couch, still clutching her by the hair, and she knelt on the floor. Albertson cut the back of Ms. Forehand's head with a pocketknife. Ms. Forehand testified that she then succeeded in convincing Albertson that it was "silly to fight like this." Unfortunately, Allen Holmes, the father of Ms. Forehand's seven-year-old son, Zack, stopped by at that moment to see his son, and Albertson became enraged. Albertson, who had been involved in a fist-fight with Allen Holmes on a prior occasion, attempted to go out after him. Ms. Forehand grabbed his arm to restrain him. Defendant entered at this point and assisted in restraining Albertson, holding him by the other arm. When he did not desist, the defendant took the .32 revolver that Albertson always carried on his belt and backed down the hallway.

Michael Stevenson testified that he came downstairs at this point and saw the defendant pointing a gun at Albertson and Ms. Forehand. He observed that Albertson was clutching Ms. Forehand's hair with his left hand and was holding a knife to her mouth. Michael Stevenson testified that Albertson said, "Tell her to give me my goddamn gun," pushed Ms. Forehand aside, and took a partial step toward the defendant with the knife pointed at her. Defendant shot, hitting Albertson in the abdomen.

Ms. Forehand's version of these facts differed in that she testified that the defendant backed down the hallway saying, "He's not going to hurt you. He's not going to hurt you." She further testified that she stood between Albertson and the defendant and that Albertson handed her the knife, at which point she told the defendant, "Sondra, I've got the knife. For God's sake, put it down." Ms. Forehand testified that she turned sideways and at that moment the defendant fired the fatal shot.

The defendant did not testify.

II

Defendant assigns error to the trial court's denial of her request for a special jury instruction on the absence of a duty to retreat in one's own home. The duty to retreat requires a victim of an assault to retreat to the wall before using deadly force in self-defense. North Carolina, as does a majority of jurisdictions, recognizes the so-called "castle doctrine" as an exception to the retreat rule.

> . . . [A] person is not obliged to retreat when assaulted while in his [or her] dwelling house or within the curtilage thereof, whether the assailant be an intruder or another lawful occupant of the premises.

State v. Browning, 28 N.C. App. 376, 379, 221 S.E. 2d 375, 377 (1976).

The "castle doctrine" is derived from the principle that one's home is one's castle and is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world. As *Browning* made clear, this doctrine applies in North Carolina even when the attacker is, for example, a co-tenant.

Our determination whether defendant had a duty to retreat before using deadly force in self-defense turns on the extent to which "dwelling house" includes a residence other than one in which the defendant had a leasehold or ownership interest or in which defendant was clearly a permanent resident. The State argues that our holding in *State v. Harrison*, 56 N.C. App. 368, 289 S.E. 2d 50, *disc. rev. denied*, 306 N.C. 388, 294 S.E. 2d 214 (1982) is controlling. In *Harrison*, we held, based on the particular facts of that case, that the evidence adduced at trial was insufficient to indicate that defendant was in a place from which he had no duty to retreat when he stabbed the victim. We do not believe, as the State suggests, that *Harrison* stands for the general proposition that a person must have a proprietary or leasehold interest or be a permanent resident of a place before she can avail herself of the "castle doctrine." We believe that a person need only be a member of the household, however temporarily, with the intent to

make that place her residence, in order to invoke the "castle doctrine."

In a case decided by the Maryland Court of Appeals which is strikingly similar to the instant case, the Court looked to the analogous doctrine as it applies in the civil law:

> The phrase "dwelling place" is used . . . to denote any building or habitation, or part of it, in which the actor is at the time temporarily or permanently residing and which is in the exclusive possession of the actor, or of a household of which he is a member. Only that part of the building or other habitation which is actually used for residential purposes is a dwelling place. *Thus, a man's house is the dwelling place of himself, his family, his servants, and for the time being, the dwelling place of one who is residing, however temporarily, in the house as a guest.* It is not the dwelling place of a visitor, social or business, who comes to the house for a particular purpose and not to reside therein. (Emphasis supplied.)

Barton v. State, 46 Md. App. 616, 620, 420 A. 2d 1009, 1011-12 (1980) (quoting Restatement (Second) of Torts, Sec. 65 comment h (1965)).

In *Barton*, the defendant had followed his girlfriend, Wanda, to Baltimore from North Carolina, where he took up residence with Wanda and her two brothers. Defendant intended to stay there temporarily or until he and Wanda had saved enough money to move out on their own. The trial court's failure to give the requested "castle doctrine" instruction, based on the fact that defendant "had [no] proprietary or leasehold interest in the property whatsoever" was held to be reversible error.

We believe that the trial court in the instant case acted under a similar misapprehension of the law in refusing defendant's written, timely request for the "castle doctrine" instruction. In fact, the court stated as part of its basis for denial:

> I might be wrong. You might be completely right and I may be wrong, but that's the way I see it. . . . [T]he only person that I really know that lived there was [Ms. Forehand] . . . and her child and, perhaps, the deceased guy; that actually lived there *permanently.*

(Emphasis added.)

The trial court took too narrow a view of the "castle doctrine," requiring defendant to show that she lived in the apartment permanently before she could avail herself of this defense. The better rule requires courts to look to the intent of the party seeking to invoke the "castle doctrine."

Ms. Forehand admitted that the defendant and her husband asked to live in the apartment "for a week or so" because they had no place to stay, and that defendant's husband came back to the apartment as his home after work. Defendant moved her clothes, her husband's clothes, and the couple's stereo to the apartment. Defendant and her husband had been living there for about five days, sharing an extra bedroom, at the time of the shooting. They had no other residence.

We hold that the evidence adduced fairly permits the inference that Ms. Forehand's apartment was defendant's only place of shelter and that, however temporarily, she considered that apartment her home. The trial court should have instructed the jury that defendant had no duty to retreat because she was a member of the household at the time of the affray.

A person may have no permanent or proprietary status in a particular residence, yet the intent to reside there, however temporarily, fully implicates the policy underlying the "castle doctrine." For example, a battered woman may flee a violent or abusive partner and go to stay temporarily with a friend or relative or in a shelter for battered women. If the abuser tracks her down and attacks her in the temporary shelter, is the temporary shelter not her "residence," since she intended to stay there temporarily? If she be forced to flee her temporary home, "whither shall [s]he flee, and how far, and when may [s]he be permitted to return." *Jones v. State*, 76 Ala. 8, 16 (1884).

We hold, therefore, that neither permanency of residence nor a leasehold interest in the premises is required before a person is legally justified in standing her ground, rather than retreating before using deadly force in self-defense. One must show only that she is a member of a household, however temporarily, and that she possesses an intent to reside in that particular place at the time of the attack.

The instruction which defendant requested was correct in law and supported by the evidence. *See State v. Bradley*, 65 N.C.

App. 359, 309 S.E. 2d 510 (1983). We believe that a different result could well have been reached had the requested instruction been given. *See* N.C. Gen. Stat. Sec. 15A-1443(a) (1983). The failure to instruct on the "castle doctrine," therefore, constituted prejudicial error, and defendant is entitled to a new trial.

The issues raised by defendant in her remaining assignments of error are not likely to recur, and we need not consider them.

New trial.

Judges JOHNSON and MARTIN concur.

RECO TRANSPORTATION, INC. v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 8528SC1259

(Filed 17 June 1986)

Master and Servant § 101— unemployment compensation—truck drivers as independent contractors—no liability of employer for contributions

The evidence did not support the findings made by the ESC and the findings made thereby were insufficient to support the ESC's conclusions that the truck drivers in question were employees of plaintiff for the purposes of N.C.G.S. Chapter 96, and that plaintiff was liable for unemployment insurance contributions, where the evidence tended to show that plaintiff was financially obligated to purchase and maintain the vehicles used to haul freight; drivers could secure their own contracts to have freight on return trips or could secure freight through a broker; destination, date and time of delivery were not controlled by plaintiff; drivers could select their own routes and assistant drivers or could choose not to use assistant drivers; drivers did not have to telephone plaintiff to make their whereabouts known; drivers could refuse requests by plaintiff to haul loads of freight and instead haul loads which the driver arranged; drivers were personally liable for damages to plaintiff owned vehicles or the freight being hauled if the damage was attributable to the driver's negligence; and drivers made investments of up to $3,000 in equipment for the vehicles.

APPEAL by plaintiff from *Allen, Judge.* Judgment entered 9 July 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 15 April 1986.

This is a proceeding in accordance with procedure established by Employment Security Law, G.S. Ch. 96, commenced on

10 December 1983, to determine whether plaintiff Reco Transportation Company (RECO) is liable for unemployment insurance contributions alleged to be due under G.S. Ch. 96 for the fourth quarter of 1978, all of 1979, all of 1980, all of 1981, and the first quarter of 1982. RECO, formed in 1978, hauls freight throughout the United States.

An investigation of RECO by the Employment Security Commission (ESC) began when an individual who had hauled freight in a truck owned by RECO filed a claim for unemployment benefits. This individual's wage transcripts did not report the earnings that he claimed to have earned in his employment by RECO. An audit and investigation of RECO resulted in a determination that RECO was the employer of all truck drivers who operated tractors and trailers owned by RECO. The ESC made an assessment which RECO protested.

On 10 December 1983, because RECO protested its liability for unemployment insurance contributions, an evidentiary hearing was conducted before Special Deputy Commissioner Charles Brown, Jr. Special Deputy Commissioner Brown, in Tax Liability Opinion No. 1672(B) decreed that, "drivers and assistant drivers performing services for RECO Transportation, Inc., are employees of this employing unit." RECO, maintaining that said drivers and assistant drivers are independent contractors, appealed to the Full Commission and on that same date the Full Commission affirmed the opinion by Special Deputy Commissioner Brown.

RECO appealed to Superior Court. On 29 May 1985, this matter was heard in Superior Court. On 8 July 1985, a judgment was rendered that reversed the Full Commission due to insufficient findings of fact to support the conclusions of law made by Special Deputy Commissioner Brown and affirmed by the Full Commission. The Employment Security Commission excepted to said judgment and appealed.

C. Coleman Billingsley, Jr., for the Employment Security Commission of North Carolina appellant.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by William P. Farthing, Jr., and William L. Brown, for appellee.

JOHNSON, Judge.

The only issue that we must decide is whether the findings of fact made by ESC were sufficient to support the conclusion of law that drivers hauling, other than owner-operators, are employees of RECO for purposes of G.S. Ch. 96. G.S. 96-8(6) states the following:

> 'Employment' means service performed including service in interstate commerce . . . performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. . . . [T]he term 'employee' . . . does not include (i) any individual who under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (ii) any individual (except an officer of a corporation) who is not an employee under such common law rules. . . .

G.S. 96-8(6).

ESC, in its brief, concedes the independent contractor status of owner-operators under the common law. *Employment Security Commission v. Hennis Freight Lines*, 248 N.C. 496, 103 S.E. 2d 829 (1958). ESC, in support of its argument, also presents a long established body of common law in North Carolina whereby drivers who own their own trucks and those drivers who operate under leases with motor carriers regulated by the Interstate Commerce Commission are employees of the regulated carriers for purposes of the Workers' Compensation Act. *See Watkins v. Murrow*, 253 N.C. 652, 118 S.E. 2d 5 (1961). However, "the North Carolina Supreme Court . . . made *an exception to the general rule* that one who works according to his own judgment, without being subject to control except as to the result of his work, is an independent contractor, in cases involving trip leases under a lessee's ICC authority." *Smith v. Central Transport*, 51 N.C. App. 316, 320, 276 S.E. 2d 751, 753 (1981). ESC concedes that there are no reported cases in which the aforementioned exception has been extended to unemployment tax liability. ESC argues that it would be inconsistent to allow independent contractor status to drivers for purposes of G.S. Ch. 96 and consider them employees

for purposes of the Workers' Compensation Act. The fallacy with this argument is that our Supreme Court carved out the exception for the Workers' Compensation Act on public policy grounds and dictated that employers must declare drivers to be employees. "The public policy which led to the enactment of the Workmen's Compensation Act likewise required drivers to be classified with the public and entitled to protection from injuries resulting from the interstate operation." *Watkins, supra*, at 658, 118 S.E. 2d at 9.

G.S. 96-15(h)(i) states the judicial standard of review of decisions made by the ESC as follows: "In any judicial proceeding under this section, the findings of fact by the Commission, if there is evidence to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law." G.S. 96-15(h)(i). The scope of our review is "a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law." *In Re Baptist Children's Homes v. Employment Security Comm.*, 56 N.C. App. 781, 783, 290 S.E. 2d 402, 403 (1982).

The common law test for determining the legal relationship of parties to an agreement for the performance of work is as follows:

> The test to be applied in determining whether the relationship of the parties under a contract for the performance of work is that of employer and employee, or that of employer and independent contractor is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract. If the employer has the right of control, it is immaterial whether he actually exercises it.

Scott v. Waccamaw Lumber Co., 232 N.C. 162, 165, 59 S.E. 2d 425, 426-27 (1950). Our Supreme Court has also stated that in analyzing the subject relationship there are eight criteria that may be used along with a consideration of other circumstances. Those indicia are whether the person employed:

> (a) is engaged in an independent business, calling or occupation; (b) is to have the independent use of his special skill, knowledge, or training in the execution of the work; (c) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing the work rather than another; (e) is not in the regular employ of the contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Hayes v. Elon College, 224 N.C. 11, 16, 29 S.E. 2d 137, 140 (1944). None of the listed indicia, by itself, is controlling and the presence of all is not required. *Id.*

The following excerpted portion of the ESC opinion essentially summarizes the ESC's pertinent findings of fact and its basis for concluding that RECO is liable for unemployment insurance contributions.

> In the case at hand, it is clear that Mr. Reece had and has the right to control the activities of his drivers. Mr. Reece may have a good working relationship with his drivers and may allow them wide discretion in both the routes they take and in their efforts to obtain freight. However, Mr. Reece owns one hundred percent of Reco Transportation, Inc., which owns the trucks. The drivers have no investment in the trucks. The drivers have no investment in the cargo. The cargo is carried for third parties. The drivers are expected, if not required, to call the employer each week day. The employer is responsible for approving repairs, etc. The employer is responsible for maintenance of the truck and cost of operating the truck. All drivers and assistants are hired by Dan Reece.

It may be clear to the ESC that "Mr. Reece had and has the right to control the activities of his driver"; however, that is not clear from the ESC's findings of fact nor from the evidence presented to the ESC. The ESC's findings are replete with references to Mr. Reece's financial obligation to purchase and maintain the vehicles used to haul freight, but the findings also state that drivers can secure their own contract to haul freight on return trips or secure freight through a broker. Destination, date and time of delivery is

not controlled by RECO. Drivers may select their own routes and assistant drivers or may choose not to utilize assistant drivers. Drivers do not have to telephone RECO to make their whereabouts known. Upon reviewing the ESC's findings of fact there is only one distinction that can be discerned between owner-operators and non-owners, to wit: the ownership of the vehicles and the financial arrangement with RECO to defray the costs of owning and maintaining the vehicles. "The fact that defendant furnished a truck and two helpers and loaned a saw, shovel, pipe poles does not destroy the independency of the contract." *Hayes, supra*, at 18, 29 S.E. 2d at 142. The findings do not sufficiently reflect RECO's right or lack thereof to "control the worker with respect to the manner or method of doing the work, as distinguished from the right merely to require certain definite results conforming to the contract." *Scott, supra*, at 165, 59 S.E. 2d at 426-27. Moreover, the evidence presented to ESC, which does not support the ESC's conclusion, tended to show the following: There was no contract between those drivers who operated RECO owned vehicles and billed RECO for services rendered. Drivers could refuse requests by RECO to haul loads of freight and instead haul loads of freight that the driver arranged. Drivers could and did haul freight for other transportation companies. Drivers were personally liable for damage to RECO owned trucks or the freight being hauled if said damage was attributable to the driver's negligence; drivers made investments of up to $3,000.00 in equipment for the vehicles. The purchase price and maintenance costs of tractor-trailer rigs has risen so that it is not financially feasible for would-be owner-operators to purchase their own tractor-trailer rigs.

In the absence of any discernible public policy or rule of common law, which motivated our Supreme Court to carve out an exception to the general rule for purposes of the Workers' Compensation Act as set forth in *Hennis, supra*, we decline to further extend the exception stated therein. We hold that the evidence does not support the findings made by the ESC and the findings made thereby are insufficient to support the ESC's conclusions that the drivers in question are employees of RECO for purposes of G.S. Ch. 96. Just as the Court stated in *Hayes, supra:*

> These circumstances fail to disclose that the parties . . . contemplated or intended that the defendant or its representa-

tives should have any right to control or direct the details of the work or what the workman should do as the work progressed. The opposite conclusion is required.

Hayes, supra, at 18, 29 S.E. 2d at 141-42. Accordingly, the trial court's judgment is

Affirmed.

Judges ARNOLD and WHICHARD concur.

SHARON ANN MAPP v. TOYOTA WORLD, INC. AND BARCLAYS AMERICAN FINANCIAL CORPORATION, INC.

No. 8628SC34

(Filed 17 June 1986)

1. **Unfair Competition § 1— sale of vehicle—right to return vehicle promised—deceptive trade practice**

There was no merit to defendant's contention that plaintiff neither alleged nor established any action or conduct on the part of defendant which would amount to an unfair or deceptive trade practice where plaintiff presented evidence from which the jury could reasonably find that defendant induced plaintiff to buy an automobile by promising her that she could return the car if she was not satisfied with it and that defendant had no intention of allowing plaintiff to return the car when this promise was made.

2. **Contracts § 28; Unfair Competition § 1— inducement to buy vehicle—breach of contract alleged—deceptive trade practice—instructions proper**

In an action to recover for breach of contract and unfair and deceptive trade practices where plaintiff alleged that defendant induced her to buy a car by promising that she could return the car if she was not satisfied with it, the trial court's instruction did not leave the jury free to "speculate," as defendant contended, as to whether defendant agreed to rescind the sale if plaintiff was dissatisfied with the car or the purchase agreement, including the price.

3. **Unfair Competition § 1— jury argument with regard to trebling damages—refusal proper**

In plaintiff's action to recover for breach of contract and deceptive trade practices, the trial court did not err in refusing to allow defendant to argue to the jury that any compensable damages awarded by the jury for breach of contract could be trebled by the trial court, since the question of whether conduct constitutes an unfair or deceptive act is one of law for the court, and the jury has no role in the decision as to whether damages should be trebled for such conduct.

4. Unfair Competition § 1— fraudulent inducement in sale of vehicle—punitive damages proper

Defendant's promise to allow rescission of a contract by plaintiff, which promise defendant never intended to keep, was offensive, oppressive and outrageous conduct amounting to a fraudulent scheme which clearly supported an award of punitive damages.

5. Unfair Competition § 1; Election of Remedies § 1.1— punitive or treble damages—election after jury verdict

Plaintiff was not entitled to recover both punitive damages and treble damages for the same conduct, but she should be allowed to elect her remedy *after* the jury's verdict.

APPEAL by defendant from *Snepp, Judge.* Judgment entered 11 December 1985 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 3 June 1986.

Plaintiff brought this action to recover damages for breach of contract, breach of bailment, fraud and unfair and deceptive practices in commerce, all growing out of the sale and purchase of an automobile. Before trial, plaintiff voluntarily dismissed her claim against defendant Barclay's American.

At trial, plaintiff's evidence tended to show the following events and circumstances. On 27 February 1985, plaintiff, the owner of a 1974 Oldsmobile, went to Toyota World, Inc. in Asheville where she met Frank Kiger, a salesman. Plaintiff and Kiger discussed a trade, their discussion resulting in plaintiff's conditional purchase of a 1983 Ford Escort. Plaintiff's car was traded in, plaintiff agreeing to pay an additional $4,945.29: $400.00 in cash, the balance of $4,545.29 to be financed, conditioned on approved credit for plaintiff by Barclay's American. Plaintiff did not have $400.00 in cash, but Kiger persuaded her to give him a $400.00 check on a closed checking account on the promise that Toyota World would hold the check until plaintiff obtained the cash. Kiger promised plaintiff that if she was not satisfied with the Escort, she could bring it back and get her Oldsmobile and $400.00 back. Documents to complete the transaction were signed and plaintiff took the Escort away. The next day, plaintiff returned the Escort to Toyota World, indicating she was not satisfied with it, and asked for her Oldsmobile and her check back. She was informed that her Oldsmobile had been sold and that Toyota World would not accept the return of the Escort. Plaintiff left the Escort at Toyota World. A few days later, Toyota World attempt-

ed to negotiate plaintiff's $400.00 check and when it was returned unpaid, marked "account closed," Toyota World obtained a warrant for plaintiff's arrest. When the check case came on for trial, no one from Toyota World was present and the case was dismissed.

Defendant Toyota World's evidence tended to show Kiger did not tell plaintiff that if she was dissatisfied with the Escort she could return it and cancel the deal and that plaintiff did not disclose that her $400.00 check was on a closed account. Defendant's evidence did not refute plaintiff's evidence that defendant had sold plaintiff's Oldsmobile or that defendant refused to cancel the deal with plaintiff.

Issues were submitted to the jury and were answered as follows:

1. Did the Defendant agree to sell an automobile to the Plaintiff upon condition that she could return the vehicle and cancel the transaction if she was dissatisfied, as alleged in the Complaint?

Answer: YES

2. If so, did the Defendant breach such agreement by failing to cancel the transaction, as alleged in the Complaint?

Answer: YES

3. If so, did the Defendant fraudulently make such a representation as to the conditional nature of the sale, as alleged in the Complaint?

Answer: YES

4. (THIS ISSUE TO BE ANSWERED ONLY IF THE ANSWER TO ISSUE NO. 3 IS "NO".)

What amount of damages, if any, is the Plaintiff entitled to recover from the Defendant for the breach of said agreement?

Answer: $_____

5. Was the making of such representation by the Defendant conduct in commerce or did it affect commerce?

Answer: YES

6. Was the Plaintiff injured as a proximate result of the Defendant's conduct?

Answer: YES

7. If so, by what amount has the Plaintiff been actually damaged?

Answer: $750.00

8. What amount of punitive damages, if any, is the Plaintiff entitled to recover of Defendant?

Answer: $10,000.00

The trial court entered judgment finding that defendant's actions were an unfair practice in commerce and that plaintiff was entitled to have her actual damages trebled and awarding plaintiff $2,250.00 actual and $10,000.00 punitive damages. Defendant Toyota World has appealed from that judgment.

Lentz, Ball & Kelley, P.A., by Phillip G. Kelley, for plaintiff-appellee.

Morris, Golding, Phillips & Cloninger, by James N. Golding, for defendant-appellant.

WELLS, Judge.

[1] In its second argument, defendant presents this question: "Did the trial court err in permitting the plaintiff to recover treble damages?" Defendant asserts that the plaintiff "neither alleged nor established any action or conduct on the part of the Defendant which would permit Chapter 75 treatment" and that "submitting the unfair trade practice issue to the Jury was also improper. . . ." From the evidence presented by the plaintiff, the jury could reasonably find that defendant induced plaintiff to purchase the Ford Escort by promising her that she could return the car if she was not satisfied with it and that defendant had no intention of allowing plaintiff to return the car when this promise was made. Our Supreme Court has held (1) that the statement of an intention to perform an act, when no such intention exists, constitutes misrepresentation of the promisor's state of mind, an existing fact, and as such may furnish the basis for an action for

fraud if the other elements of fraud are present, *Roberson v. Swain*, 235 N.C. 50, 69 S.E. 2d 15 (1952); *see also Wilkins v. Finance Co.*, 237 N.C. 396, 75 S.E. 2d 118 (1953); and (2) that proof of fraud necessarily constitutes a violation of the statutory prohibition against unfair and deceptive acts, *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). All the elements of fraud were present in this case. *See Johnson v. Insurance Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). The unfair commercial practice "issue" was not submitted to the jury, but was appropriately decided by the court after the jury returned its verdict. The only such "issue" answered by the jury was whether defendant's misrepresentations to plaintiff were conduct in commerce or affecting commerce, which was appropriate. The jury's answer to this issue in plaintiff's favor was unquestionably supported by the evidence. These arguments are rejected.

[2] In another argument, defendant asserts that the trial court erred in instructing the jury as to issue number one, as follows:

> Now, the first issue reads as follows: "Did the defendant agree to sell an automobile to the plaintiff upon condition that she could return the vehicle and cancel the transaction if she was dissatisfied as alleged in the Complaint?" Now, as to this issue the burden of proof is on the plaintiff, Miss Mapp, to satisfy you by the greater weight of the evidence that the agent of the defendant, the salesman, agreed that she could take this vehicle which is in question, that if she was not satisfied with it, she could bring it back and the transaction would be cancelled.

Defendant contends that this instruction left the jury free to "speculate" as to whether defendant agreed to rescind the sale if plaintiff was dissatisfied with the Escort *or* the purchase agreement, including the price. We find this instruction not confusing or misleading and reject this argument. Defendant also contends that the trial court erred in submitting two separate issues as to compensatory damages. If there was any error in the manner in which the issues were framed as to compensatory damages, it was cured by the way in which they were answered. This argument is rejected.

[3] In another argument, defendant contends that the trial court erred in not allowing defendant to argue to the jury that any

compensable damages awarded by the jury for breach of contract could be trebled by the trial court. The question of whether conduct constitutes an unfair or deceptive act in violation of the statute is one of law for the Court. *Hardy, supra; Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E. 2d 582, *disc. rev. denied*, 311 N.C. 751, 321 S.E. 2d 126 (1984). The jury has no role in the decision as to whether damages should be trebled for such conduct. The question not being in the jury's province, we hold that the trial court properly instructed counsel not to argue the matter to the jury. This assignment is overruled.

[4] In another argument, defendant contends that the evidence was not sufficient to allow the jury to award punitive damages. Plaintiff's evidence in this case showed not just a breach of promise; it showed a fraudulent scheme, *i.e.*, a contract induced by the defendant's promise to allow rescission of the contract by plaintiff, which promise defendant never intended to keep. To allow defendant to suffer no more than compensatory damages would not be sufficient. We hold such conduct to be offensive, oppressive and outrageous, clearly supporting an award of punitive damages. *See Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976); *compare Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976). This argument is rejected.

[5] Finally, defendant contends that plaintiff was not entitled to recover both punitive damages and treble damages for the same conduct. We agree with this position. The misrepresentation of the contract was the only unfair commercial practice issue submitted to the jury. Defendant's conduct in selling plaintiff's trade-in car almost immediately, despite its promise to allow plaintiff to rescind; defendant's attempted negotiation of plaintiff's check, which it promised to hold; and defendant's procuring a warrant for plaintiff's arrest are all unfair or deceptive acts in violation of G.S. 75-1.1, but they were not placed before the jury as separate unfair or deceptive acts by the wording of the issues. Contrary to defendant's argument, however, we hold that plaintiff should be allowed to elect her remedy *after* the jury's verdict. Our appellate courts have clearly held that actions may assert both G.S. 75-1.1 violations and fraud based on the same conduct or transaction and that plaintiffs in such actions may receive punitive damages or be awarded treble damages, but may not have both. *See Marshall v. Miller*, 47 N.C. App. 530, 268 S.E. 2d 97 (1980), *modified and aff'd*,

302 N.C. 539, 276 S.E. 2d 397 (1981); *see also Bicycle Transit Authority v. Bell*, 314 N.C. 219, 333 S.E. 2d 299 (1985); *Borders v. Newton*, 68 N.C. App. 768, 315 S.E. 2d 731 (1984). These cases do not directly address the question of when the plaintiff in such cases must elect the basis of recovery. We hold that it would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues *and* the trial court has determined whether to treble the compensatory damages found by the jury and that such election should be allowed in the judgment. Hence, we remand this case for such an election, which should be made by plaintiff by a motion in the cause. When plaintiff has made her election, a new judgment should be entered vacating the first judgment and allowing plaintiff recovery based on her election.

No error in the trial. Affirmed in part; reversed in part and remanded for further judgment.

Judges ARNOLD and BECTON concur.

RICHARD D. HELMS, JR. AND MARGARET F. HELMS v. CHURCH'S FRIED CHICKEN, INC.

No. 8526SC1030

(Filed 17 June 1986)

1. Master and Servant § 35.2— employee's statement during robbery—injury to patron—negligence action against employer—summary judgment for employer improper

The trial court erred in entering summary judgment for defendant in plaintiffs' negligence action where there was a genuine issue of material fact as to whether defendant's employee made a statement during a robbery which negligently increased the risk of harm to plaintiffs. Furthermore, it was error for the court to conclude as a matter of law that plaintiffs failed to make out a negligence claim against defendant where the permissible inferences to be drawn from plaintiffs' forecast of evidence were that plaintiffs were business invitees of defendant; plaintiffs were owed a duty by defendant; defendant's employee, acting within the course and scope of his or her employment, breached that duty by negligently increasing the risk of harm to plaintiffs during the armed robbery; and as a proximate result of that breach, plaintiffs were injured.

2. Master and Servant § 35.2— employee's statement during robbery—injury to patron—negligence action against employer—summary judgment for employer improper

In an action to recover for the negligence of one of defendant's employees during an armed robbery which allegedly greatly increased the risk to plaintiffs, evidence on the negligence issue was sufficient to withstand defendant's motion for summary judgment where a question for the jury existed as to whether defendant's employee should have reasonably foreseen the consequences of his behavior in stating to one plaintiff in a loud voice, "when you leave call the police we are being robbed."

3. Master and Servant § 35.2; Negligence § 35.3— employee's statement during robbery—injury to patron—sudden emergency—jury question

Where plaintiffs alleged that they suffered serious injury during an armed robbery because of the negligence of defendant's employee in telling one plaintiff to "call the police we are being robbed," a jury question existed as to whether the employee exercised the kind of judgment expected of a person of ordinary prudence faced with a sudden emergency.

APPEAL by plaintiffs from *Burroughs, Judge.* Order entered 8 May 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 February 1986.

Campbell, Morrison and Bush, by Dale S. Morrison, for plaintiff appellants.

Hedrick, Eatman, Gardner & Kincheloe, by Edward W. Hedrick, for defendant appellee.

BECTON, Judge.

This is a negligence action brought by Richard and Margaret Helms (the Helmses) against Church's Fried Chicken, Inc. (Church's). The Helmses alleged that they were injured as a result of defendant's employee's negligence. The trial court granted summary judgment in favor of Church's, and the Helmses appeal. We reverse and remand for trial.

I

The facts alleged in the complaint and the answers to interrogatories reveal that the Helmses went to Church's on 19 October 1981; that Richard went into the store, bought some food, and turned to leave; that one of Church's employees stated in a loud voice, "when you leave call the police we are being robbed"; that Richard was immediately assaulted by at least three robbers;

that when Margaret Helms saw Richard Helms being attacked, she started out of the truck in the parking lot toward the store to help him; that Richard called out to Margaret to get in the truck and lock the door, but that she was attacked and robbed before she was able to do so; that Richard Helms was stabbed in the back, arm, thumb, both hands and eye, and that Margaret Helms was stabbed in the back, was bruised, suffered a concussion, and had her purse stolen.

The Helmses assign error to the trial court's conclusion that there was no genuine issue of any material fact and that the defendant was entitled to judgment as a matter of law.

II

A. *Summary Judgment*

[1] Summary judgment is only proper when the pleadings and discovery, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Singleton v. Stewart*, 280 N.C. 460, 464-65, 186 S.E. 2d 400, 403 (1972). The burden is on the party moving for summary judgment to establish the lack of a triable issue of fact. *See Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E. 2d 379, 381 (1975). We hold that Church's has failed to meet this burden.

Church's denies that its employee ever made the alleged statement. Since we conclude that whether, and the manner in which, the statement was made are material factual issues on which the Helmses' case could rise or fall, it was error for the trial court to grant summary judgment to Church's.

The trial court also erred in ruling that Church's was entitled to summary judgment as a matter of law. The permissible inferences to be drawn from the non-moving party's forecast of the evidence were that the Helmses were business invitees of Church's; that the Helmses were owed a duty by Church's; that Church's employee, acting within the course and scope of his or her employment, breached that duty by negligently increasing the risk of harm to the Helmses during the armed robbery; and that as a proximate result of that breach, the Helmses were injured. It was error to conclude as a matter of law that the Helmses failed to make out a negligence claim against Church's.

B. *Negligence Principles*

[2] An individual who enters a store as a customer during business hours is a business invitee for purposes of establishing the duty owed to the individual by the owner of the premises. *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E. 2d 36, 38 (1981). The owner is not an insurer of the safety of customers, but must exercise ordinary care to maintain the premises in such a condition that they can be used safely by invitees in the manner for which they were designed and intended. *Id.*

Ordinarily, the store owner is not liable for injuries to invitees resulting from the intentional, criminal acts of third persons, *unless* the owner has reason to know that there is a likelihood of this kind of conduct by third persons *or the owner has reason to know such acts of third persons are occurring, or are about to occur. See Foster*, 303 N.C. at 638-39, 281 S.E. 2d at 38 (quoting the Restatement (Second) of Torts, Sec. 344 comment f (1965) (emphasis added)). Foreseeability is the test to determine the extent of the owner's duty to safeguard business invitees from the criminal acts of third persons. *Foster*, 303 N.C. at 640, 281 S.E. 2d at 39.

Church's argues that foreseeability only relates to the question whether a duty to protect business invitees arises upon evidence of *prior criminal activity* on the premises or in the community. Church's reliance on *Sawyer v. Carter*, 71 N.C. App. 556, 322 S.E. 2d 813 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E. 2d 393 (1985) is misplaced. The issue in *Sawyer* was whether prior criminal activity in the neighborhood was admissible to show foreseeability.

In the instant case, the question is whether Church's employee should have reasonably foreseen the consequences of his or her act, which may have increased the risk of harm to the Helmses. The foreseeability of the holdup is a separate issue.

We said in *Sawyer*:

> [E]vidence of similar prior criminal activity committed on the premises *is the most strongly probative type of evidence* on the question of foreseeability. . . .
>
> . . . .

> . . . The forecast of evidence *in this case* does not support a triable issue of fact on the question of reasonable foreseeability.

71 N.C. App. at 561-62, 322 S.E. 2d at 817 (emphasis added). We do not read *Sawyer* to encompass any issue of foreseeability in the "business invitee-criminal act of third party" context other than the one on which it was decided.

Instead, we rely on the recognized corollary to an owner's duty to safeguard business invitees from criminal acts of third persons: if an owner (or owner's agent) acts, or fails to act, against an armed robber when he or she should reasonably foresee that such action or inaction could proximately result in injury to a customer, the owner may be liable for the customer's injuries. *See* Annot., 72 A.L.R. 3d 1269, 1273 (1976).

The Helmses allege that the armed robbers should have posed an obvious and apparent danger to customers in the eyes of Church's employee, and that the employee's action was negligent because it increased the hazard which in turn caused the injury. A similar situation arose in *Kelly v. Kroger Co.*, 484 F. 2d 1362 (10th Cir. 1973). In *Kelly*, armed robbers held up a grocery store, and ordered an employee to open a safe. Knowing that the safe was equipped with a silent alarm heard only at the police station, the employee complied with the demand. The police arrived while the robbery was still in progress, and the robbers took a customer hostage, eventually killing her.

The Court of Appeals for the Tenth Circuit held that the district court's entry of summary judgment in defendant's favor was error. If plaintiff could present sufficient evidence to convince a jury that the employee, foreseeing the apparent risks and dangers of his action, acted unreasonably under the circumstances, increasing the hazard which ultimately caused the death, plaintiff would be entitled to recover. *See also Orrico v. Beverly Bank*, 109 Ill. App. 3d 102, 440 N.E. 2d 253 (1982) (citing Prosser, *Torts* Sec. 53 (4th ed. 1971) for the general principle that a defendant owes a duty not to increase foreseeable risk of harm to another). We hold that the forecast of evidence on the negligence issue is sufficient to go to the jury.

C. *Sudden Emergency*

[3] Church's argues that even if its employee made the alleged statement, there is no negligence as a matter of law based on the doctrine of sudden emergency. We do not agree.

"Sudden emergency" is not a legal defense which may operate to bar an action; it is only one factor to consider in making the reasonable person determination. The factual issue to be decided is whether Church's employee had the opportunity to exercise the kind of judgment expected of a person of ordinary prudence faced with such an emergency.

> The doctrine of sudden emergency is simply that one confronted with an emergency is not liable for an injury resulting from . . . acting as a reasonable [person] might act in such an emergency. If [one] does so, he [or she] is not liable for failure to follow a course which calm, detached reflection at a later date would recognize to have been a wise choice.
>
> . . . .
>
> That one was faced with an emergency before the injury occurred does not, however, necessarily shield [one] from liability. He [or she] must still act, after being confronted with the emergency, as a reasonable person so confronted would then act. *The emergency is merely a fact* to be taken into account in determining whether he [or she] has acted as a reasonable [person] so situated would have done.

Rodgers v. Carter, 266 N.C. 564, 568, 146 S.E. 2d 806, 810 (1966) (emphasis added); *see also* Restatement (Second) of Torts, Sec. 296 (1965). The question whether an actor used due care in an emergency is ordinarily for the jury. *Rouse v. James*, 254 N.C. 575, 582, 119 S.E. 2d 628, 633 (1961).

We hold that it was for the jury to decide whether Church's employee made the alleged statement. The jury must also be allowed to determine the manner in which the statement was made and whether, under the circumstances, Church's employee acted as a reasonably prudent person would have acted.

Shouting, "Fire!" in a crowded theatre when there is in fact a fire may, in most circumstances, be the reasonably prudent thing to do, while the same act done to warn of a single piece of paper

burning in a trashcan in the theatre vestibule may not be. The jury will decide into which realm this case will fall.

The entry of summary judgment is, therefore, reversed, and the case is remanded for trial.

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

OHNET McMILLAN, WIDOW; MARION D. LAMB AND HUSBAND, HOLLY LAMB; ANGELA D. MOODY, DIVORCED; MARIE D. EVANS, DIVORCED; CALVIN DAVIS AND WIFE, SUSIE B. DAVIS; ULYSSES S. DAVIS, JR. AND WIFE, ALZA DAVIS v. BETTIE A. DAVIS, DIVORCED; DOROTHY FLOWERS, WIDOW; MARION HODGES, UNMARRIED; MARGARET H. JONES AND HUSBAND, ARTHUR S. JONES; RONNIE HODGES, SINGLE; DIANE H. MITCHELL AND HUSBAND, FRANK MITCHELL; AND VIVIAN HODGES, SINGLE

No. 859SC1193

(Filed 17 June 1986)

Wills § 36.1— home left to siblings—death before vesting of interest

Where testatrix left her home to her husband for his natural life, then provided that it should go to her brother and sister in fee simple, and provided that, should one predecease the other, his or her interest would go to the remaining sibling, the devise to the sister lapsed because she predeceased testatrix; the remainder interest of the brother reverted to the estate of testatrix because the brother predeceased testatrix's husband; the home thus passed to the heir at law of testatrix at the time of her death, *i.e.*, her husband; and when the husband died intestate, his heirs at law came into possession of the property.

Judge EAGLES concurring in the result.

Judge PARKER concurs in the result and joins in the concurring opinion.

APPEAL by defendant Bettie A. Davis from *John, Judge.* Judgment entered 13 August 1985 in Superior Court, WARREN County. Heard in the Court of Appeals 8 April 1986.

This is a declaratory judgment action to construe the will of Mary D. Hodges. The pertinent parts of the will are as follows:

I

I give and devise to my husband, Walter Hodges, Jr., for and during the term of his natural life my home place near the Town of Warrenton, North Carolina, and all my personal property.

II

After the death of my said husband, Walter Hodges, Jr., I give, devise and bequeath my said home place and all personal property that may remain to my brother, Simon Peter Davis, and my sister, Luna Davis Newsome, in equal shares, in fee simple forever. If either of my said brother or sister should be dead before the death of my husband, I give the one-half undivided interest which he or she would have taken to the other, in fee simple forever.

Luna Davis Newsome died before the testatrix. The testatrix Mary D. Hodges died on 21 November 1969 survived by her husband Walter Hodges, Jr. and her brother Simon Peter Davis. Mary D. Hodges was not survived by a parent or a lineal descendant. Simon Peter Davis died before Walter Hodges, Jr. and left his entire estate to the appellant Bettie A. Davis. Walter Hodges, Jr., the husband of the testatrix, died intestate on 17 April 1982 and some of his heirs at law brought this action.

The superior court held that the devise to Luna Davis Newsome lapsed because she predeceased the testatrix. It held further that the devise to Simon Peter Davis of a one-half undivided interest in the property constituted a fee simple determinable estate subject to an executory interest. The court held that Simon Peter Davis' estate in the property terminated at his death prior to the death of Walter Hodges, Jr. and the executory interest over to Luna Davis Newsome failed because she predeceased Simon Peter Davis. The court concluded that the remainder interest after the life estate of Walter Hodges, Jr. passed by intestacy to Walter Hodges, Jr. and the heirs at law of Walter Hodges, Jr. now own the property. Bettie A. Davis appealed.

Frank W. Ballance, Jr., P.A., by Ronnie C. Reaves, for defendant appellant Bettie A. Davis.

James H. Limer and Rom B. Parker, Jr., for defendant appellees.

WEBB, Judge.

We believe the superior court correctly interpreted the will of Mary D. Hodges. Under the contested provision Luna Davis Newsome was to receive a one-half undivided interest in the property. She did not survive the testatrix and this legacy lapsed. The lapse was not saved by G.S. 31-42(a) because Luna Davis Newsome's heirs would not have taken under the Intestate Succession Act had there been no will. *Stevenson v. Trust Co.*, 202 N.C. 92, 161 S.E. 728 (1932).

Simon Peter Davis survived the testatrix and he received a remainder interest after the life estate of Walter Hodges, Jr. "An estate in fee simple determinable . . . is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event . . . ." [Citation omitted.] *Charlotte Park and Recreation Commission v. Barringer*, 242 N.C. 311, 317, 88 S.E. 2d 114, 119 (1955). In this case Simon Peter Davis received a fee simple estate to one-half the remainder interest in the property which by the express terms of the will expired when he died before Walter Hodges, Jr. The will provided that this interest would then shift to Luna Davis Newsome. Luna Davis Newsome was not living at the time Simon Peter Davis died and the shift failed.

There is not a residuary clause in the will of Mary Davis Hodges. The lapsed legacy of Luna Davis Newsome and the possibility of reverter of the fee simple determinable estate of Simon Peter Davis passed to the heir at law of Mary Davis Hodges at the time of her death. This was Walter Hodges, Jr. When Walter Hodges, Jr. died his heirs at law came into possession of the property.

The appellant asks us to apply several canons of construction and hold that the will disposes of the entire estate of Mary Davis Hodges so that Bettie A. Davis is the owner of this property. The

canons of construction that appellant says should apply are (1) the intention of the testator must be gathered from the four corners of the will; (2) there is a presumption that one who makes a will did not intend to die intestate as to any portion of her property; and (3) the law favors the early vesting of estates. These canons are to be used when a will is ambiguous. In this case we hold that the will is not ambiguous. The testatrix did not dispose of the lapsed legacy or the possibility of a reverter. These interests passed by intestate succession.

Affirmed.

Judge EAGLES concurs in the result.

Judge PARKER concurs in the result and joins in the concurring opinion.

Judge EAGLES concurring in the result.

While I agree with the result reached here I would reach that result through a different analysis. In my opinion the trial court erred in concluding as a matter of law that the devise and bequest to Simon Peter Davis constituted a fee simple determinable estate subject to an executory interest.

Under the terms of paragraph I of the will, the testatrix's husband, Walter Hodges, Jr., received a conventional life estate in the homeplace and all personal property of Mary Davis Hodges. Under the terms of paragraph II, Simon Peter Davis and Luna Davis Newsome received remainder interests in fee simple absolute in any property remaining after the death of the life tenant. "An estate in remainder is an estate limited to take effect in possession immediately after the expiration of a prior estate created at the same time and by the same instrument." *Power Co. v. Haywood*, 186 N.C. 313, 317, 119 S.E. 500, 502 (1923). Remainders are classified as either vested or contingent. Wiggins, Wills and Administration of Estates in North Carolina Section 280 (2d ed. 1983). The question then becomes how to classify these remainder interests. A contingent remainder is an estate subject to a condition precedent such as the happening of an event which is uncertain and may never happen or when those who are to take in remainder are unascertainable. *Id.* A vested remainder is one

which is limited to a certain person or persons upon the happening of a certain event. *Id.* There are three types of vested remainders, indefeasibly vested remainders, remainders vested subject to partial defeasance (subject to open) and remainders subject to complete defeasance (subject to a condition subsequent). *Id.*

In my opinion the remainders to Simon Peter Davis and Luna Davis Newsome were vested remainders subject to complete defeasance or divestment. The first sentence of paragraph II gives a vested interest to both remaindermen. The second sentence is added divesting the remainder given in the first sentence. By the second sentence, the testatrix required that both remaindermen survive the life tenant and each other. The law favors the early vesting of estates and remainders will be deemed to vest at the death of the testatrix unless the will expressly provides for a later time. *Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E. 2d 341 (1942). Adverbs of time such as "when," "thereafter," "then," "after" and adverbial terms of time such as "at the death of" and "upon the death of" the life tenant relate to the time of enjoyment and not the time of vesting of the estate. *Id.* "The intent to postpone the vesting of the estate must be clear and manifest and not arise by mere inference or construction." *Id.* at 424, 20 S.E. 2d at 343. In my opinion the language of the second sentence in paragraph II of the will serves to create a condition subsequent which, if it occurred, would completely divest the vested remainder. It does not expressly provide that the remainders were to vest at the death of the life tenant. Therefore, the remainders vested, if at all, at the death of the testatrix, subject to being completely divested if the remaindermen did not survive the life tenant and each other.

Luna Davis Newsome predeceased the testatrix, her remainder interest never vested and the trial court properly found that her interest lapsed. Simon Peter Davis survived the testatrix and at her death his remainder interest vested subject to being completely divested if he failed to survive the life tenant, the condition subsequent created by the second sentence in paragraph II of the will. Simon Peter Davis predeceased the life tenant and as a result his vested remainder interest was completely defeated. At the death of the life tenant, the property remaining, both real and personal, reverted to the estate of the testatrix by operation of law. Wiggins, *supra* at Section 279. The will contained no residu-

ary clause; therefore, the property passed by intestacy to the heirs of Mary Davis Hodges living at her death. Mary Davis Hodges was survived by her husband. There were no lineal descendants. As a result and pursuant to G.S. 29-14 the property passed by intestate succession one hundred percent to the husband of the testatrix, Walter Hodges, Jr. When Walter Hodges, Jr. died his heirs came into possession of the property and the trial court properly divided the property among the heirs of Walter Hodges, Jr.

Accordingly I concur in the result which affirms the judgment of the trial court.

STATE OF NORTH CAROLINA v. LUKE SANDERS

No. 8510SC1286

(Filed 17 June 1986)

1. **Assault and Battery § 15.2— utility knife as deadly weapon—instruction proper**

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that defendant swung "something silver" at the victim who shielded himself with his arms, receiving three deep cuts which required 90 stitches, the trial court properly instructed that the utility knife or razor was a deadly weapon as a matter of law.

2. **Criminal Law § 122— jury's rejection of greater offense—necessity for unanimity—confusion—instruction proper**

Where the jury had agreed unanimously on a lesser offense and was simply confused as to whether their rejection of the greater offense had to be unanimous, the trial court's instruction on their duty was proper, and neither the instruction nor the court's colloquy with the foreman in any way coerced a verdict.

APPEAL by defendant from *Barnette, Judge*. Judgment entered 19 July 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 5 May 1986.

Defendant was tried on proper indictment for assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence tended to show the following: The victim noticed

defendant harassing a boy in a bus station and told defendant to stop. A short time later, defendant approached the victim and asked for money. The victim refused and got up to board his bus. He felt someone tap his arm. The victim turned toward defendant, whom he saw swinging "something silver" at him. The victim shielded himself with his arms, receiving three deep cuts requiring 90 stitches. Officers arrived, arrested defendant, and found a "utility razor blade" in his right pocket.

Defendant testified that he cut the victim, but only in self-defense, after the victim and another man attacked him. He testified further that the razor blade he used would not do "that much damage."

The court instructed the jury that the knife or razor was a deadly weapon. The jury returned a verdict of guilty of assault with a deadly weapon inflicting serious injury. Defendant received a sentence in excess of the presumptive. He appeals.

Attorney General Thornburg, by Senior Deputy Attorney General Eugene A. Smith and Associate Attorney General Mabel Y. Bullock, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., for defendant-appellant.

EAGLES, Judge.

[1] Defendant first assigns error to the court's instruction that the knife or razor was a deadly weapon as a matter of law. Defendant failed to object to the instruction at trial, and therefore the only question properly before us is whether the instruction constituted "plain error." App. R. 10(b)(2); *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983). Relying on *State v. Torain*, 316 N.C. 111, 340 S.E. 2d 465 (1986), we hold that it was not "plain error." In *Torain* defendant objected for the first time on appeal that the trial court erred in instructing that "a utility knife is a dangerous or deadly weapon." The court rejected the contention, holding that under the circumstances of the knife's use in the case not only was the instruction legally correct, but also positively required, relying on *State v. Smith*, 187 N.C. 469, 121 S.E. 737 (1924). We reached a similar result in *State v. Wiggins*, 78 N.C. App. 405, 337 S.E. 2d 198 (1985) (box cutter). As we noted in *State*

v. Smallwood, 78 N.C. App. 365, 337 S.E. 2d 143 (1985), in cases like this where the victim has actually suffered serious injury or death the courts have consistently held that a knife is a dangerous or deadly weapon as a matter of law even if it was not produced or described in detail at trial. The first assignment is overruled.

[2] In his second assignment defendant argues that the court improperly coerced a jury verdict. The jury was instructed on four possible verdicts: the indicted charge, two lesser included offenses, and not guilty. Neither side objected. The jury retired, then returned, and the following took place:

(Jury present.)

COURT: Okay. I assume you have not reached a verdict.

FOREMAN: Your Honor, we have a difference of understanding on that matter. It is my interpretation that we have but questions were raised and I need a clarification from you at that point and I had hoped before we came back out.

May I briefly state what the situation is?

COURT: As long as you don't state what your—what your—what your verdict may be.

MR. KNUDSEN [Assistant District Attorney]: May I approach the bench with counsel?

COURT: Uh-huh.

(Discussion off the record.)

COURT: Okay. Go ahead.

FOREMAN: Your Honor, I understood your instructions to indicate that it was our task to take these options and in the light of the evidence presented in this Court and our common sense understanding of that agree on one of these four verdicts. There are several specifications in there and we discussed this in what we all thought was orderly manner and we agree unanimously on one of these options.

Then there was the interpretation advanced that we had to be unanimous in every detail. Obviously we were not unanimous in one of the details.

And so then there was the notion that we were not unanimous in our agreement because we chose—we did not choose the first one, the unanimity was on another option.

COURT: On the option that you ultimately select, any one of the four, you must be unanimous.

FOREMAN: Yes, sir. That was my interpretation but I was not able to convince all members that that was the end of it, that any misgivings about any other point were automatically dropped once you have unanimity on that.

COURT: That's correct.

FOREMAN: My interpretation was correct on that?

COURT: Yes.

FOREMAN: Would you rather that we go back in the room?

COURT: Can you reach a verdict?

FOREMAN: Yes.

COURT: There's no point in making you come back tomorrow if you can do it.

FOREMAN: I think we can in a matter of a few minutes.

COURT: Be my guests. Go back out there and then come back out.

(Jury absent.)

(Jury present.)

COURT: Okay. Has the jury reached a verdict?

FOREMAN: We have, Your Honor.

The court's instruction, contends defendant, erroneously allowed the jury to act on the coercive assumption that once they reached a verdict they could abandon any concern that another verdict might be more appropriate. We note that the jury was not polled by either side.

In deciding whether instructions have had the effect of coercing a verdict we consider the circumstances under which the in-

structions were given and the probable impact of the instructions on the jury. *State v. Peek*, 313 N.C. 266, 328 S.E. 2d 249 (1985). Mere failure to follow the form instructions of G.S. 15A-1235 is not in itself reversible error. *Id.*

It is readily apparent from the colloquy between the court and the jury foreman in the jury's presence that the jury was not unanimous as to the "first option," the indicted offense, and that some members of the jury believed that to reject that "option" required a unanimous vote. The court correctly agreed with the foreman that this was not a proper interpretation, and correctly instructed the jury that its decision on any one of the four options (including not guilty) must be unanimous. The court had earlier instructed the jury in accordance with the provisions of G.S. 15A-1235. The jury foreman indicated that the jury had already reached a verdict: "we agree unanimously on one of these options." Even despite this colloquy, defense counsel did not see fit to poll the jury.

Under the circumstances, it is clear that neither the trial court's instructions nor the colloquy set out *supra* was coercive. The jury had already agreed unanimously on a lesser offense, and simply was confused as to whether their rejection of the greater offense had to be unanimous. The court instructed them correctly as to their duty. Defendant does not suggest, nor do we find, that the trial court comment about there being "no point in making you come back tomorrow" was at all coercive.

State v. Alston, 294 N.C. 577, 243 S.E. 2d 354 (1978) and *State v. Roberts*, 270 N.C. 449, 154 S.E. 2d 536 (1967), cited by defendant, are distinguishable. In *Alston* the trial judge "wander[ed] into uncharted philosophical fields" and risked confusing the jury. 294 N.C. at 595, 243 S.E. 2d at 366. Nevertheless, the Supreme Court held that the charge, considered in context, gave the proper warnings and was not prejudicially erroneous. In *Roberts*, the trial judge told the jury they *must* reach a unanimous verdict and told them to retire *until* they did so. This, held the court, constituted improper coercion. Here, on the other hand, the court kept its comments short and correct, and did not tell the jury that they *must* reach a unanimous verdict and order them to do so, but simply that on any verdict they did reach they would have to be unanimous. *See State v. Fowler*, 312 N.C. 304, 322 S.E. 2d

389 (1984) (numerical inquiry; no error where judge did not express displeasure and stated law correctly). We hold that no prejudicial error occurred.

Defendant has abandoned his remaining assignments of error. App. R. 28(a). We find no reversible error on the face of the record.

No error.

Chief Judge HEDRICK and Judge COZORT concur.

STATE OF NORTH CAROLINA v. SONNY PARKER

No. 8627SC101

(Filed 17 June 1986)

1. **Searches and Seizures § 40— items voluntarily given to officers—no fruits of illegal search**

In a prosecution of defendant for robbery and kidnapping, there was no merit to defendant's contention that a bracelet and diamond ring should have been suppressed as fruits of an illegal search, since the bracelet and ring were voluntarily turned over to the detective serving a search warrant by the woman residing at the apartment, identified as defendant's wife, before any search had been undertaken.

2. **Criminal Law § 73.2— stolen items—detective's testimony—evidence not excludable as hearsay**

There was no merit to defendant's contention that a detective should not have been permitted to testify to the actions of defendant's wife in turning over a ring and bracelet because those actions constituted nonverbal statements, excludable as hearsay, since the detective's testimony was offered to show only that he obtained the jewelry from defendant's wife at his apartment, thus linking the stolen items to defendant, and it was not offered to prove the matter asserted by the wife's nonverbal conduct, *i.e.*, that the items in her possession were the ones identified in the warrant as stolen from the victim.

3. **Kidnapping § 1.2— confinement, restraint or removal—sufficiency of evidence**

There was no merit to defendant's contention that there was insufficient evidence of the essential element of confinement, restraint or removal to support a conviction for kidnapping, since the evidence showed that defendant forced his victim to drive down a highway, turn into a motel parking lot and drive around to the back of the motel, a darker and much more deserted area,

and this conduct was more than a mere technical asportation, was *not* necessary to the accomplishment of the robbery, and did in fact expose the victim to danger greater than that inherent in the robbery itself.

4. Kidnapping § 1— armed robbery as underlying felony—conviction for common law robbery—conviction for kidnapping proper

There was no merit to defendant's contention that he could be convicted of kidnapping only if he was first convicted of armed robbery, as the indictment for kidnapping specified armed robbery as the underlying felony, since the indictment would support a conviction for the lesser-included offense of common law robbery which would in turn support a conviction of kidnapping.

APPEAL by defendant from *Lewis (Robert D.), Judge.* Judgment entered 26 August 1985 in Superior Court, GASTON County. Heard in the Court of Appeals 14 May 1986.

On 15 May 1985, Wendy Kay Branch went to a grocery store near her home in Gastonia at about 10 p.m. to buy some diapers for her baby. When she returned to her car and began to drive out of the parking lot, a black man emerged from the back seat. He held what Ms. Branch thought was a knife to her throat and ordered her to "just drive." He directed her to pull into the parking lot of Honey's Motel and to drive the car all the way around to the back of the motel.

After ordering her to stop the car, the man demanded money. Ms. Branch had only eighty cents with her, but also taken was her bracelet and a small diamond ring. The man demanded that she kiss him, but she refused and he left. Ms. Branch then drove straight home and called the police to report the incident.

A few days later, on 18 May, Ms. Branch saw the man who had robbed her, at the same shopping center where he had gotten in her car. She went home, told her father about seeing the robber, and he called the police. Later that afternoon, a detective called and asked Ms. Branch to meet him. When she arrived, the detective told her that a suspect had been arrested at that shopping center. He showed her a group of eight photographs and asked her if a photo of the man who had robbed her was among them. She picked out the photo of the defendant.

The detective then obtained a search warrant for defendant's apartment. When he arrived to serve the warrant, a woman answered the door. The detective read her the warrant and described to her what he was looking for. Without further

prompting, the woman removed a bracelet from her wrist and got a diamond ring from her jewelry box. Both items matched the description of the items stolen from Ms. Branch. The detective then searched the apartment for the clothes described by Ms. Branch as those worn by the robber. No clothes matching the description were found.

The defendant was charged in indictments, proper in form, with armed robbery and second-degree kidnapping. After a trial by jury, he was found guilty of the kidnapping charge and of common law robbery. Judge Lewis sentenced defendant to prison terms of nine years for kidnapping and ten years for robbery, to be served consecutively. Defendant appeals.

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

Public Defender Rowell C. Cloninger, Jr. for defendant-appellant.

PARKER, Judge.

[1] Appellant first assigns as error the denial of his motion to suppress the bracelet and diamond ring as fruits of an illegal search. He contends that the search warrant was invalid as the affidavit of the requesting officer did not state sufficient facts to justify a conclusion that there was probable cause to search defendant's apartment. This argument ignores the fact that the bracelet and the ring were voluntarily turned over to the detective serving the warrant by the woman residing at the apartment, identified as Phyllis Parker, defendant's wife, before any search had been undertaken. "[W]hen evidence is delivered to a police officer upon request and without compulsion or coercion, there is no search within the constitutional prohibition against unreasonable searches and seizures." *State v. Reams*, 277 N.C. 391, 396, 178 S.E. 2d 65, 68 (1970), *cert. denied*, 404 U.S. 840, 92 S.Ct. 133, 30 L.Ed. 2d 74 (1971). There was no evidence that Mrs. Parker was in any way coerced into turning over the bracelet and ring to the police. The fact that the officer had a search warrant does not, standing alone, constitute sufficient compulsion to make Mrs. Parker's actions involuntary. *Id.* This assignment of error is overruled.

[2] Defendant contends, by his next assignment of error, that the detective should not have been permitted to testify to Mrs. Parker's actions in turning over the ring and bracelet because those actions constituted nonverbal statements, excludable as hearsay. Defendant made a motion *in limine* at trial seeking to prevent the prosecutor from eliciting the testimony. After conducting a *voir dire* of the detective, the trial judge denied the motion.

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." G.S. 8C-1, Rule 801(c). Nonverbal conduct can be a "statement" within the meaning of the rule when the conduct is "intended by [the declarant] as an assertion." *Id.*, Rule 801(a). After the detective had described the bracelet he was seeking, Mrs. Parker removed a bracelet from her wrist, handed it to the detective and said, "Like this?" The detective took the bracelet, then described the diamond ring. Mrs. Parker said, "Just a minute," and went into a bedroom returning with a jewelry box. She opened the box and handed the detective a diamond ring matching the description. These actions were obviously intended as an assertion that "yes, here are the items you just described." *See McCormick on Evidence*, § 250 (3rd ed. 1984). *See also State v. Suits*, 296 N.C. 553, 251 S.E. 2d 607 (1979).

In order for the statements to be excluded as hearsay, they must be offered for the truth of the matter asserted by the statements. G.S. 8C-1, Rule 801(c). The State contends that the statements were offered only to show how and when the police recovered the jewelry, whereas the truth of the matter asserted would be that those items were, in fact, the items stolen. We agree. The victim of the robbery had already identified, during her testimony, the ring and the bracelet as the items stolen from her. All that was required of the detective's testimony was to link the recovery of those items to defendant. Thus, his testimony was only offered to show that he obtained the jewelry from defendant's wife at his apartment. It was not offered to prove the matter asserted by the wife's nonverbal conduct; *i.e.*, that the items in her possession were the ones identified in the warrant as stolen from the victim. The assignment of error is overruled.

[3] By his next assignment of error, defendant argues that the trial court erred in denying his motion to dismiss the charge of second-degree kidnapping. He contends that there was insufficient evidence of the essential element of confinement, restraint or removal to support a conviction for kidnapping. We disagree.

When the charge of kidnapping is based on the allegation that the confinement, restraint or removal of the victim was for the purpose of facilitating the commission of a felony, the defendant is normally also charged with the underlying felony. This procedure can sometimes conflict with the constitutional prohibition on double jeopardy. *See State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). In order to avoid violating a defendant's constitutional guarantee against being subjected to multiple punishments for the same offense, our Supreme Court has held that where the removal of the victim was "an inherent and integral part of [the underlying felony]," it would be "insufficient to support conviction for a separate kidnapping offense." *State v. Irwin*, 304 N.C. 93, 103, 282 S.E. 2d 439, 446 (1981). In *Irwin*, the victim of an attemped armed robbery was forced to move from the front of his store to the back. The Supreme Court set aside the kidnapping conviction, holding that there had been a "mere technical asportation," which was insufficient to support a separate kidnapping offense. *Id.*

In this case, the evidence showed defendant forced his victim to drive down a highway, turn into a motel parking lot and drive around to the back of the motel, a darker and much more deserted area. This conduct was more than a "mere technical asportation," was not necessary to the accomplishment of the robbery and did, in fact, expose the victim to danger greater than that inherent in the robbery itself. *See id.* The assignment of error is overruled.

[4] Defendant's final assignment of error is that the trial judge erred in his instructions to the jury concerning the kidnapping charge. Defendant had been indicted for kidnapping his victim "for the purpose of facilitating the commission of a felony, to wit, armed robbery." The jury was allowed to consider the lesser-included offense of common law robbery in deliberating its verdict on the armed robbery charge. The trial judge then instructed the jurors that if they convicted defendant of robbery, then they could consider the kidnapping charge.

Defendant contends that he could be convicted of kidnapping only if he was first convicted of armed robbery, as the indictment for kidnapping specified armed robbery as the underlying felony. However, under our law related to indictments, an indictment for armed robbery is sufficient to support a conviction for the lesser-included offense of common law robbery. *State v. Owens*, 73 N.C. App. 631, 327 S.E. 2d 42 (1985). There is no reason to impose a stricter requirement on the State where the indictment for kidnapping specifically names armed robbery as the underlying felony. The indictment was sufficient to inform defendant of the charge against him, enable him to prepare a defense, protect him from double jeopardy, and enable the court to proceed to judgment. *See State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980).

Defendant relies on *State v. Brown*, 312 N.C. 237, 321 S.E. 2d 856 (1984). In that case, the indictment charged defendant with kidnapping "for the purpose of facilitating the commission of a felony: to wit, attempted rape. The said [victim] was not released by the defendant in a safe place." *Id.* at 247, 321 S.E. 2d at 862. The trial judge instructed the jury that it could convict defendant of kidnapping if they found that the kidnapping was "for the purpose of terrorizing" the victim. *Id.* The Supreme Court held this instruction to be plain error as it enabled the jury to convict based on some abstract theory not supported by the indictment.

Here, however, defendant was convicted of kidnapping based on the same theory as alleged in the indictment; that is, that the kidnapping was committed for the purpose of facilitating the commission of a felony. The specific underlying felony differed, but only so much as one was a lesser-included offense of the other. This conformed to the rule that a jury can convict defendant if at all, only of the offense laid in the indictment. *See Hunter, supra.* The final assignment of error is overruled.

Having carefully reviewed the record and briefs, we conclude defendant received a fair trial, in which there was

No error.

Judges PHILLIPS and MARTIN concur.

In re Evans

IN THE MATTER OF NATASHA EVANS, JUVENILE

No. 8514DC1020

(Filed 17 June 1986)

1. **Parent and Child §§ 1.5, 2.3— removal of child from parent's care—termination of parental rights—quantum of proof of neglect and dependency**

There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination of parental rights and for purposes of removal of the child from the parent's care.

2. **Parent and Child § 2.3— inability to provide secure living arrangements for child—removal from mother's custody proper**

There was enough clear and convincing evidence that a child was exposed to a substantial risk of physical injury because of her mother's inability to maintain secure living arrangements for her so that the Department of Social Services could properly remove her from her mother's custody until such accommodations could be provided.

3. **Parent and Child § 2.3— conditions for returning child to mother's custody—impropriety**

The district court's order removing a child from her mother's custody was improper in conditioning custody on the mother's ability to provide a separate bed for her seven-year-old daughter, in denying custody on the ground that the one-room living arrangement which the mother had available for herself, her 16-year-old son, and her seven-year-old daughter was not "suitable," and in compelling the mother to submit to psychiatric or psychological evaluation or treatment separate and apart from her participation in her daughter's treatment.

APPEAL by respondent from *Pearson, Judge.* Order entered 10 June 1985 in District Court, DURHAM County. Heard in the Court of Appeals 12 February 1986.

Thomas J. Andrews for respondent-appellant.

No brief filed for petitioner-appellee, Durham County Department of Social Services.

No brief filed for Guardian-ad-Litem.

BECTON, Judge.

Respondent Helen Evans seeks the reversal of a district court order finding her seven-year-old daughter, Natasha Evans, to be dependent and neglected within the meaning of N.C. Gen. Stat. Sec. 7A-517 (1981), removing the child from the mother's

care and placing legal and physical custody of Natasha in the Durham County Department of Social Services (DSS). We vacate and remand.

I

On 12 July 1984, the DSS filed a petition alleging that Natasha was dependent and neglected and obtained a non-secure custody order. On 26 February 1985, a full hearing on the merits was held. The district court made findings of fact which are outlined below.

On 11 July 1984, Helen Evans went to the DSS seeking food and housing assistance for herself and Natasha. DSS personnel observed that Natasha was "dirty, her hair had not been combed for a while and [Helen] Evans was also observed to be in a similar unkempt condition." The DSS found Helen and Natasha Evans a place in a rooming house, but the mother and child returned to the DSS the next day. Helen Evans told the DSS that her AFDC check had been stolen and asked for assistance in finding another place to live. Helen Evans had requested housing assistance from the DSS on other occasions; the last time prior to 11 July 1984 was in February of 1984.

Helen Evans is now living with her sixteen-year-old son in a rooming house. According to the district court,

> [she] sees nothing inappropriate with her and her 16-yr. old son living in a single room. This is also the living arrangement which she has available for her child Natasha if the court grants her request to return her to her custody.

A psychologist, Dr. Shannon Van Wey, testified at this hearing about his evaluation of Helen Evans. The district court found that this evaluation "[did] not reveal any serious pathology although [the psychologist] has grave concerns about [Helen Evans'] lack of impulse control which is reflected in her history of instability and lack of responsibility." Helen Evans had missed and failed to re-schedule appointments with the psychologist in September and October of 1984.

The court found that although Helen Evans loves Natasha, she "is very limited in her ability to be a proper parent for her," and that she does not have a "suitable" place for Natasha to live.

Natasha had missed school from mid-April 1984 to the end of that school year, but now she is "thriving in foster care and doing well both socially and academically in school."

The district court concluded that Natasha is dependent and neglected as defined by G.S. Sec. 7A-517 and that it is in her best interest for her legal and physical custody to be placed with the DSS. The court also concluded that reasonable efforts would be made by the DSS to return Natasha to Helen Evans' custody providing Evans gets a permanent job, secures "suitable housing," including separate beds for herself and each of her two children, and participates in "any recommended treatment plan" prescribed by Dr. Harold T. Harris.

II

[1] Helen Evans contends that the district court erred when it concluded that Natasha was dependent and neglected within the meaning of G.S. Sec. 7A-517 because there was insufficient evidence as a matter of law to support that conclusion. This is an unusual appeal in which this Court is being asked to pass upon the sufficiency of evidence to support findings of dependency and neglect at the removal, rather than at the termination, stage. Respondent makes a very forceful argument, citing the termination cases, that the evidence is so scanty in this case that it does not rise to the level necessary to support the conclusion of neglect and dependency. While we would be inclined to agree with respondent's position if this were a termination case, we believe that a different standard applies at the removal stage and that the *removal* was therefore proper.

N.C. Gen. Stat. Sec. 7A-517(3) authorizes the DSS to take a juvenile into immediate temporary custody if there are reasonable grounds to believe that the juvenile is abused, neglected, or dependent *and* that she would be injured or could not be taken into custody if it were first necessary to obtain a court order. A dependent juvenile is one whose parent, guardian, or custodian is unable to provide for her care or supervision. *See* G.S. Sec. 7A-517(13) (emphasis added). A neglected juvenile is one who, among other things, does not receive proper care, supervision, or discipline from her parent or who lives in an environment injurious to her welfare. *See* G.S. Sec. 7A-517(21).

When a juvenile is alleged to be neglected or dependent and is taken into temporary custody, the DSS must petition a court for secure or non-secure custody. An order for non-secure custody will be made only when there is a reasonable factual basis to believe that the matters alleged by the DSS in its petition for non-secure custody are true *and* that the juvenile is *exposed* to a substantial risk of physical injury because the parent has created the conditions likely to cause injury or has failed to provide, or is unable to provide adequate supervision or protection. *See* N.C. Gen. Stat. Sec. 7A-574(a) and (3) (1985 Cum. Supp.) (emphasis added).

The State then has the burden, at the adjudicatory hearing stage, to prove neglect and dependency by clear and convincing evidence. *See* N.C. Gen. Stat. Sec. 7A-635 (1981). Respondent points out that our courts have not found it difficult to give precise meaning to the statutory definition of a neglected child by analyzing in particular cases the factual circumstances before the court and weighing the compelling interests of the State with those of the parent and child. *In re Biggers*, 50 N.C. App. 332, 341, 274 S.E. 2d 236, 241 (1981).

All but one of the cases respondent cites in support of the contention that in this case the facts are too meager to support the findings of neglect and dependency, are termination cases. There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the DSS may obtain temporary custody of a child when there is a *risk of neglect* in the future. *See In re Phifer*, 67 N.C. App. 16, 26, 312 S.E. 2d 684, 689 (1984) (emphasis added).

[2] Thus, the task at the temporary custody or removal stage is to determine whether the child is *exposed* to a substantial risk of physical injury because the parent is unable to provide adequate protection. We hold that there was enough clear and convincing evidence that Natasha was exposed to a substantial risk of physical injury because of her mother's inability to maintain secure living arrangements for her and that the DSS could properly remove her from her mother's custody until such accommodations could be provided.

[3] However, we disapprove of the district court's order in several respects, and remand for a new determination consistent with this opinion. First, to the extent that the court's order places the state's imprimatur on certain socio-economically based value judgments, it must be overruled. Courts cannot condition custody on a mother's ability to provide a separate bed for her seven-year-old daughter. Nor can a court say, without more, that the one-room living arrangement which Helen Evans had available for Natasha at the time of the hearing was not "suitable," and deny her custody on that ground.

We are also troubled by the district court's conclusion that "[Helen] Evans is in need of being psychiatrically evaluated," and its order that the DSS "shall arrange for Dr. Harold T. Harris to evaluate *both* respondent Helen Evans and Natasha Evans and *they* shall participate in any recommended treatment plan." (Emphasis added.) We have recently held that N.C. Gen. Stat. Sec. 7A-650 (b1) (Cum. Supp. 1985) does not authorize a court to order a parent of a juvenile who has been adjudicated as dependent or neglected to submit to medical, psychiatric, psychological or other assessment or treatment. *In re Badzinski*, 79 N.C. App. 250, 255, 339 S.E. 2d 80, 84 (1986). *Compare*, N.C. Gen. Stat. Sec. 7A-289.30(b)(1981) (In *termination* proceedings, the court may order an "examination" of a parent by a psychiatrist, psychologist, physician, agency or other expert.).

To the extent the order in this case compels Helen Evans to submit to psychiatric or psychological evaluation or treatment *separate and apart* from her "participation" in Natasha's treatment, the district court's order must be vacated, and Helen Evans' failure to submit to such evaluation or treatment cannot be used to deny her custody of Natasha.

The district court concluded that reasonable efforts would be made to return Natasha to her mother's custody, provided Helen Evans complied with the conditions of the court's order. It appears that at the time of the hearing in this matter, Helen Evans had secure housing and was living with her sixteen-year-old son. Since we have vacated the other conditions upon which the district court based its denial of custody to Helen Evans, we remand this cause to that court for a determination of whether custody of Natasha should now be restored to her mother.

Vacated in part and remanded.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. DONALD EDWARD JOHNSON

No. 8512SC1170

(Filed 17 June 1986)

Constitutional Law § 67— disclosure of informant's identity not required—error

The trial court committed reversible error in denying defendant's motion to compel the State to disclose the identity of a confidential informant where the informant, rather than acting as a tipster, actually participated in the drug sale and accepted meprobamate from defendant when the drug sale was consummated; the informant's identity was necessary to defendant's defense since the undercover officer wavered in his identification of defendant during a pretrial photographic lineup, but convincingly identified defendant at trial; prior to defendant's arrest there was no evidence of defendant's commission of a criminal offense, other than the undercover officer's allegations; and the State made no assertion that disclosure of the identity of the confidential informant would jeopardize any pending investigation or the flow of information.

APPEAL by defendant from *Preston, Edwin S., Judge.* Judgment entered 13 June 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 11 March 1985.

On 29 November 1984, a warrant was issued for the arrest of defendant, Donald E. Johnson. The warrant charged, *inter alia,* that on 29 August 1984, defendant had sold and delivered a controlled substance to Agent G. W. Johnson, to wit: Lysergic Acid Diethylamide (LSD). On 4 March 1985, the Cumberland County Grand Jury returned a true bill indicting defendant Donald Edward Johnson for the following: Possession with intent to sell a controlled substance (two counts); possession with intent to deliver a controlled substance (two counts); sale of a controlled substance (two counts); and delivery of a controlled substance (two counts). Prior to trial defendant made a motion for disclosure of the identity of a confidential informant utilized by the Cumberland County Bureau of Narcotics. Defendant's motion was denied. On 10 June 1985, defendant was tried before a jury. The State's evidence tended to show the following: Detective Wayne

Johnson, under the supervision of Agent Ronnie Purdue, made contact with a confidential informant. On 29 August 1984, the State's confidential informant took Detective Wayne Johnson to a white duplex residence in Fayetteville, North Carolina. The confidential informant introduced the detective to a person whom the informant referred to as "Snag." Detective Johnson testified that a discussion ensued between Snag and him about the purchase price of twenty units of Lysergic Acid Diethylamide (LSD). The informant drove Snag and Detective Johnson to a nearby trailer park where Detective Johnson handed Snag eighty dollars ($80.00). Snag went into a trailer and returned with a small plastic bag containing twenty units of LSD. The trio returned to the duplex on Bowden Road, whereupon Snag offered Detective Johnson and the informant methaqualone free of charge, which they accepted. However, laboratory analysis established that what was represented to be methaqualone was actually meprobamate, a controlled substance.

During the trial defendant's evidence tended to show that he did not live in the duplex that the confidential informant took Detective Johnson to; that he was not known by the nickname of Snag; that he did not sell drugs to Detective Johnson or anyone else.

The jury returned guilty verdicts against defendant for possession with intent to sell LSD, G.S. 90-95(a)(1); selling LSD, G.S. 90-95(a)(1); delivery of LSD, G.S. 90-95(a)(1); possession with intent to deliver meprobamate, G.S. 90-95; and delivery of meprobamate, G.S. 90-95. The court consolidated the LSD convictions and imposed a ten-year prison term. The court also consolidated defendant's convictions for felonious possession and delivery of meprobamate and imposed a two-year term, suspended for five years, to begin at the expiration of the ten-year prison term. Defendant appeals.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender David W. Dorey, for defendant.

JOHNSON, Judge.

The only issue that we must decide is whether the trial court committed reversible error in denying defendant's motion to com-

pel the State to disclose the identity of the confidential informant. In support of his motion defendant relies upon *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957). In *Roviaro*, petitioner was charged with violating the Narcotics Drug Import and Export Act by selling heroin to a confidential informant known only as "John Doe." Petitioner was also charged with having knowingly transported heroin to be unlawfully imported. In response to petitioner's motion before and during the trial, the government claimed that John Doe was a confidential informant and his identity was privileged. The United States District Court upheld the privilege asserted by the Government. In *Roviaro*, with six Justices concurring and one Justice dissenting, the Court's synopsis of the fact pattern of the case was stated as follows:

> This is a case where the Government's informer was the sole participant, other than the accused in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe denied knowing petitioner or ever having seen him before.

Roviaro, at 64-65, 1 L.Ed. 2d at 647, 77 S.Ct. at 630. The Court decided that a balancing test, as follows, should be applied in deciding whether disclosure should be granted.

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony, and other relevant factors.

Id. at 62, 1 L.Ed. 2d at 646, 77 S.Ct. at 628. In *State v. Gilchrest*, 71 N.C. App. 180, 321 S.E. 2d 445 (1984), *disc. rev. denied*, 313 N.C. 332, 327 S.E. 2d 894 (1985), this Court, without mention of *Roviaro, supra*, held the following:

> The prosecution is privileged to withhold the identity of an informant unless the informant was a participant in the crime

> or unless the informant's identity is essential to a fair trial or material to defendant's defense. A defendant must make a sufficient showing that the particular circumstances of his case mandate disclosure before the identity of a confidential informant must be revealed. When the defendant fails to make a sufficient showing of need to justify disclosure of the informant's identity he acquires no greater rights to compel disclosure of details about the informant than he initially had. In the present case, the defendant has failed to establish that any additional information about the informant was relevant to his defense or essential to a fair determination of his case. Because the informant was not a participant in the offense and the informant's reliability or credibility was not at issue, we hold the trial court properly sustained objections to questions about the informant.

Gilchrest, at 182-83, 321 S.E. 2d at 447-48 (citations omitted). In *Gilchrest*, defendant did not assert a need to know the confidential informant's identity so that defendant could have a fair trial. The defendant in *Gilchrest* merely sought to attack the reliability and credibility of the confidential informant. In the case *sub judice*, defendant, in support of his motion, stated the following:

> VIII That there is no independent evidence of the events leading up to Defendant's arrest other than the testimony of Agent Johnson.
>
> IX That meaningful disclosure of the alleged C.S.I.'s identity is material and crucial to Defendant's preparation of his defense; it is only through such disclosure that defendant can have access to the sole witness who may both directly corroborate his defense and impeach the witnesses against him.

Defendant contends that the confidential informant in the case *sub judice* was not a tipster, but was an actual participant in the commission of the offense for which defendant was charged. We agree. In *State v. Parks*, 28 N.C. App. 20, 220 S.E. 2d 383 (1975), *disc. rev. denied*, 289 N.C. 301, 222 S.E. 2d 701 (1976), this Court relying on *State v. Ketchie*, 286 N.C. 387, 211 S.E. 2d 207 (1975) and *McLawhorn v. State of North Carolina*, 484 F. 2d 1 (4th Cir. 1973), stated, "If the informant can testify as to the details surrounding the *actual* crime, then the defendant should be given the opportunity to establish his credibility as a witness." *Parks*,

at 25, 220 S.E. 2d at 386 (emphasis in original). In the case *sub judice*, according to Agent Johnson, the State's confidential informant would be able to testify with respect to every aspect of testimony he gave as the State's primary witness. In *Parks*, the drug deal for which defendant was convicted was separate and apart from the drug deal that the State's confidential informant gave the undercover agent an entree for. In sustaining the defendant's conviction the Court in *Parks, supra*, stated "without question, the informants provided Eastman [State Bureau of Investigation Agent] with the necessary entree to defendant's purported drug business, but once the course of dealing was established on 30 August 1974 and defendant felt confident that he was dealing with a safe buyer, the relationship became one uniquely personal between defendant and Eastman." *Id.* at 26, 220 S.E. 2d at 386. The evidence presented in the case *sub judice*, tends to show that the confidential informant played an integral part and would have firsthand knowledge of the criminal offenses defendant was charged with. The State's confidential informant's presence was required during every phase of Agent Johnson's undercover investigation. There is no evidence which would support an assertion that defendant felt confident he was dealing with a safe buyer or that the relationship between Agent Johnson and defendant was uniquely personal. According to evidence presented by the State, the confidential informant participated in this drug sale and accepted meprobamate from defendant when the drug sale was consummated. Moreover, defendant rightfully contends that the confidential informant's identity is necessary to his defense since Agent Johnson wavered in his identification of defendant during a pre-trial photographic lineup, but convincingly identified defendant at trial. The State's confidential informant could, as defendant contends, testify that defendant is not the person Agent Johnson was introduced to as Snag. Prior to defendant's arrest there was no evidence of defendant's commission of a criminal offense, other than Agent Johnson's allegations. The circumstances of this case boil down to a swearing match between defendant and Agent Johnson. We understand that it was within the jury's province to decide the issue based on the evidence before it; however, under the circumstances of this particular case, we deem that defendant has established that the disclosure of the identity of the State's confidential informant is essential to a fair determination of his case. The record herein does not reveal

any assertion by the State that the disclosure of the identity of the confidential informant would jeopardize any pending investigation or the flow of information as was asserted in *Roviaro, supra.* When we balance defendant's right to a fair trial against the free flow of information, we find that the scales tip in defendant's favor.

New trial.

Judges ARNOLD and WHICHARD concur.

STATE OF NORTH CAROLINA v. SHERRY LYNN ALSTON

No. 8618SC4

(Filed 17 June 1986)

1. **Constitutional Law § 30— material statements by witness—pretrial discovery precluded**

There was no merit to defendant's contention that the trial court erred in denying her motion to dismiss for failure of the State to disclose inconsistent statements by the victim of an armed robbery and assault, since the N.C. Supreme Court has interpreted N.C.G.S. §§ 15A-903 and 904 as precluding *pretrial* discovery by a defendant of material statements made by proposed or potential witnesses for the State.

2. **Criminal Law § 119— fingerprint evidence—requested instruction not given—error**

In light of defendant's denial of participation in an armed robbery and assault, her alibi, and her alibi supporting witness, it cannot be said that fingerprint evidence was unlikely to have influenced the jury's verdict; therefore, the trial court erred in failing to give in substance defendant's requested instruction on fingerprint evidence having to do with the time of impression.

APPEAL by defendant from *Washington, Judge.* Judgment entered 18 April 1985 in GUILFORD County Superior Court. Heard in the Court of Appeals 13 May 1986.

Defendant was convicted of robbery with a dangerous weapon and assault with a deadly weapon with intent to kill, inflicting serious injury.

At trial, evidence for the State tended to show the following events and circumstances. On the evening of 3 August 1984, Tate

Alvin Stewart was working at the Spring Valley Curb Market in Greensboro. At about 11:30 p.m., defendant Sherry Lynn Alston, whom Stewart had known for about twelve years and who was a frequent visitor to the store, came into the store and engaged in conversation with Stewart for about ten minutes. Defendant told Stewart where some good "pot" could be obtained, but needed Stewart's help in finding the person's house. The two agreed that when Stewart closed the store, he would meet defendant at a Wendy's restaurant. Defendant stated that she would be driving a 1974 blue Monte Carlo automobile. Stewart closed the store at about midnight, placed the day's receipts of approximately $1,700.00 in the trunk of the car and proceeded to meet defendant at the agreed place. Stewart followed defendant out of Greensboro on Old Randleman Road. Defendant stopped once and told Stewart she was lost; Stewart then told defendant to proceed in the direction they were going. They proceeded to an overpass under U.S. Highway 220 where defendant again stopped her car. When Stewart stopped, defendant told Stewart that her front end was shaking. Stewart got out of his car and while he was examining defendant's front tires, defendant approached him and shot him twice, striking him in the chest and leg. Defendant then took the keys from Stewart's car and took his wallet from the console of the car. Defendant opened the trunk of Stewart's car, removed the bag containing the store receipts and asked Stewart how to open the bag. When Stewart failed to respond, defendant shot him again. Stewart then attempted to escape and defendant shot him again. When Stewart fell, feigning death, defendant approached him, shot him again and then, putting the gun to his head, pulled the trigger three more times, the gun misfiring on those attempts. Defendant then left in the direction of Greensboro. Stewart attempted to make his way to a nearby trailer; defendant returned and attempted to force Stewart into her car, struggling with him. At this point, a passing motorist stopped to render assistance and defendant drove away.

When the robbery was investigated by officers from the Guilford County Sheriff's Department, Stewart informed them that defendant shot and robbed him. A search of defendant's residence disclosed Stewart's wallet and several unspent .32 caliber bullets. No weapon was found. Defendant's fingerprints were found on the trunk of Stewart's car. Upon defendant's arrest, she denied knowledge of the robbery.

Defendant testified, presenting alibi evidence. Other witnesses corroborated defendant's alibi. Defendant also testified that she had taken Stewart's wallet from his car while it was parked at the store early in the evening of 3 August.

From judgments entered on the jury's verdicts, sentencing defendant to presumptive terms of fourteen years and six years respectively, defendant has appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Randy Meares, for the State.

Stephen S. Schmidly, P.A., for defendant-appellant.

WELLS, Judge.

[1] In one of her assignments of error, defendant contends that the trial court erred in denying defendant's motion to dismiss, or in the alternative, for a mistrial, for the failure of the State to disclose evidence in its possession favorable to defendant. Defendant's argument focuses on two separate statements given by Stewart to officers of the Guilford County Sheriff's Department. Both statements clearly implicate and identify defendant as the person who assaulted and robbed him, but Stewart's first statement differs from his second (and from his trial testimony) as to the circumstances under which he encountered defendant on the night of the robbery. In a pre-trial motion, defendant requested that the State disclose to defendant any inconsistent statements made by witnesses for the State. Defendant was furnished or obtained the gist of Stewart's first statement, but was not furnished his second statement which was the one consistent with his trial testimony. Defendant's motion was made pursuant to the provisions of N.C. Gen. Stat. §§ 15A-954(a)(4) and 15A-1061 (1983).

G.S. 15A-954(a)(4) provides:

> (a) The Court on motion of the defendant must dismiss the charges stated in a criminal pleading if it determines that:
>
> . . .
>
> (4) The defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution.

G.S. 15A-1061 provides:

> Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon defendant's motion if there occurs during the trial an error or legal defect in the proceedings . . . resulting in substantial and irreparable prejudice to defendant's case. . . .

Defendant argues that the failure of the State to disclose Stewart's second statement violated her rights to due process, relying on the opinion of the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963) and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976). The opinion of our Supreme Court in *State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977), in which *Brady* and *Agurs* were reviewed and considered, interprets our criminal discovery statutes, N.C. Gen. Stat. §§ 15A-903 and 904 (1983) to preclude *pre-trial* discovery by a defendant of material statements made by proposed or potential witnesses for the State. Defendant here makes no argument that she was denied the use of Stewart's inconsistent statements at trial and we note that in his testimony Stewart freely admitted that his two statements were inconsistent, even explaining that he "lied" in some ways in his initial statement. We hold that defendant was not entitled to *pre-trial* discovery of Stewart's statements and that the trial court correctly denied defendant's motions to dismiss and for mistrial. This assignment is accordingly overruled.

[2] In two other assignments of error defendant contends that the trial court erred in failing to give requested instructions to the jury. First, defendant requested that the trial court give a special instruction on fingerprint evidence, which the trial court denied. The requested instruction was as follows:

> Ladies and Gentlemen of the jury, the State has offerred [sic] evidence that the fingerprints of Sherry Lynn Alston were found on the trunk lid of the vehicle operated by Tate Alvin Stewart the night of the alleged crime. I instruct you that fingerprints corresponding to those of Sherry Lynn Alston are without probative force and cannot be considered by you as my [sic] evidence against the defendant, Sherry Lynn Alston, unless the circumstances are such that the finger-

prints of Sherry Lynn Alston could have been impressed on the trunk lid of the vehicle being operated by Tate Alvin Stewart at the time the alleged crimes were committed. The burden of proof is on the State of North Carolina to establish that the circumstances were such that the fingerprints of Sherry Lynn Alston could have been so impressed only at the time of the commission of the alleged crimes, and if after considering all the evidence, you have a reasonable doubt as to whether the fingerprints of Sherry Lynn Alston could have only been impressed on the trunk lid of the vehicle operated by Tate Alvin Stewart at the time of the commission of the alleged crimes, then it would be your duty to not consider the fingerprint evidence at all in determining whether the State has proven the guilt of Sherry Lynn Alston to the alleged crimes charged beyond a reasonable doubt.

While the requested instruction may not be entirely correct in itself, *State v. Monk*, 291 N.C. 37, 229 S.E. 2d 163 (1976), we find it to be substantially correct in itself. We also find it to be supported by the evidence. Through the testimony of two police witnesses the State showed that fingerprints matching defendant's were lifted from the trunk lid of Stewart's car during investigation of the robbery soon after it occurred. Under these circumstances, it was the duty of the trial court to give the requested instruction in substance, which the trial court did not do. *Monk, supra; State v. Bradley*, 65 N.C. App. 359, 309 S.E. 2d 510 (1983). In fact, in its charge, the trial court never alluded to the fingerprint evidence. In the light of defendant's denial of participation in the assault upon and robbery of Stewart, her alibi and her alibi supporting witness, we cannot say that the fingerprint evidence was not likely to have influenced the jury's verdict and we must therefore conclude that it was prejudicial error for the trial court to refuse to give the requested charge in substance.

Second, defendant contends that the trial court erred in failing to give in substance defendant's requested instruction on identification of defendant as the perpetrator. Defendant requested that the trial court give the identification instruction contained in N.C.P.I.—Crim. Sec. 104.90 (1984). Our review of the instructions given persuades us that the trial court gave such instruction in substance. This assignment is overruled.

Finally, defendant contends that the trial court erred in expressing opinions on defendant's guilt during the jury instruction. We disagree and overrule this assignment.

For the reasons stated, there must be a

New trial.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. CARA F. LIPFORD

No. 8525SC1316

(Filed 17 June 1986)

1. **Conspiracy § 6— conspiracy to traffic in cocaine—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for conspiracy to traffic in cocaine, even though no illegal drugs changed hands, where defendant and two coconspirators went to the scene where a drug deal was to take place; defendant asked an undercover agent how much cocaine he wanted; defendant left, telling the agent she would return shortly and let him know if she could get the cocaine; defendant did return and accepted $2,850 from the agent; and defendant left with the money but never returned with the cocaine.

2. **Conspiracy § 5.1— statements of coconspirator in furtherance of conspiracy—admissibility**

In a prosecution for conspiracy to traffic in cocaine the trial court did not err in admitting testimony by a coconspirator that he had been involved in many drug transactions with defendant in which she had left to get drugs while he waited with the purchaser, that she had always returned with the drugs in the past, and that he thus could not understand what had happened, since evidence establishing the conspiracy had been introduced prior to the conspirator's testimony, and statements made by a coconspirator in furtherance of the conspiracy are admissible.

3. **Conspiracy § 5.1; Constitutional Law § 74— coconspirator's statement—no vicarious assertion of Fifth Amendment rights**

The trial court did not err in admitting a statement made by a coconspirator since the statement did not refer to defendant; moreover, defendant could not argue the inadmissibility of the statement on the ground that the coconspirator's constitutional rights were violated, since Fifth Amendment rights are personal and may not be vicariously asserted.

APPEAL by defendant from *Saunders, Judge.* Judgment entered 26 July 1985 in Superior Court, CATAWBA County. Heard in the Court of Appeals 17 April 1986.

Defendant appeals from a judgment of imprisonment entered upon her conviction of conspiracy to traffic in cocaine.

Attorney General Thornburg, by Assistant Attorney General Victor H. E. Morgan, Jr., for the State.

Purser, Cheshire, Parker & Hughes, by George W. Hughes, for defendant appellant.

WHICHARD, Judge.

[1] Defendant contends the court erred in denying her motion to dismiss for insufficiency of the evidence. She argues that since she did not return to the scene of the agreement to deliver illegal drugs, the evidence shows only that she intended to depart with the money obtained through a pretense that illegal drugs would be delivered to the S.B.I. agent who delivered the payment to her. She further argues that the agent's own testimony that he was "ripped off" supports this view of the evidence. We find the contention without merit.

A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means. *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E. 2d 521, 526 (1975); *State v. Gray*, 56 N.C. App. 667, 672, 289 S.E. 2d 894, 897, *disc. rev. denied*, 306 N.C. 388, 294 S.E. 2d 214 (1982). The selling of twenty-eight grams or more of cocaine is an unlawful act known as "trafficking in cocaine." N.C. Gen. Stat. 90-95(h)(3). A person who conspires to sell twenty-eight grams or more of cocaine is subject to the same penalties as one who in fact does so. N.C. Gen. Stat. 90-95(i).

In ruling on defendant's motion to dismiss the trial court had to consider the evidence in the light most favorable to the State. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E. 2d 649, 652 (1982). The State was entitled to every reasonable inference to be drawn from the evidence, whether the evidence was direct, circumstantial or both. *Id.* at 67, 296 S.E. 2d at 653.

Viewed by this standard as required, the evidence, in pertinent part, showed the following:

On 18 March 1985 defendant accompanied two co-defendants in a pickup truck to an Arby's restaurant. After the truck pulled

into the Arby's parking lot, defendant and the co-defendants engaged in a brief conversation. One of the co-defendants, Grant Bowers, then got out of the vehicle, and defendant and the other co-defendant departed.

Bowers got into a car occupied by S.B.I. Agent John Stubbs and a confidential source. Defendant subsequently returned and also got into the car. The confidential source introduced defendant to Stubbs. Defendant asked how much "caine" Stubbs needed, and Stubbs replied that he and the confidential source wanted to purchase one and one-half ounces of cocaine. Defendant asked if they had cash money for the transaction, and Stubbs told her he had the money. Defendant said she would return shortly and let him know if she could get the cocaine. When she returned she advised that she could get it for a total of $2,850. She further advised that she would need the money before she could get the "caine" and that it would take fifteen or twenty minutes for her to obtain it. She finally said she would leave one of the co-defendants "as collateral" to make sure she returned with either the money or the "caine."

Stubbs thereupon agreed to the arrangement and gave defendant $2,850 in undercover drug money. Defendant left the area with the money at approximately 8:35 p.m. Stubbs and the confidential source waited at the restaurant until approximately midnight, but defendant never returned.

We find the foregoing evidence sufficient "to give rise to a reasonable inference" that defendant and her co-defendants agreed between themselves to commit the unlawful act of trafficking in cocaine. *See Earnhardt*, 307 N.C. at 68, 296 S.E. 2d at 653. It was not necessary to conviction that the unlawful act itself be completed. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is completed." *Bindyke*, 288 N.C. at 616, 220 S.E. 2d at 526. The jury could reasonably infer from the evidence that the union of wills between defendant and her co-defendants was completed, and the court thus properly denied the motion to dismiss.

[2] Defendant contends the court erred in admitting a statement made to Agent Stubbs by co-defendant Bowers. The general import of the statement was that Bowers had been involved in many drug transactions with defendant in which she had left to get

drugs while he waited with the purchaser, that she had always returned with the drugs in the past, and that he thus could not understand what had happened.

"Once a conspiracy has been shown to exist the acts and declarations of each conspirator, done or uttered in furtherance of a common illegal design, are admissible in evidence against all." *Bindyke*, 288 N.C. at 616, 220 S.E. 2d at 526. *See* N.C. Gen. Stat. 8C-1, Rule 801(d)(E). The evidence recited above, at least in material part, was introduced before Bowers' statement was offered. We have held that evidence sufficient to establish a conspiracy. We further hold that Bowers' statement was made in furtherance of the conspiracy. It was made to reassure Agent Stubbs that the drug transaction which was the subject of the conspiracy would indeed occur, despite defendant's prolonged absence after she received the payment. At least in Bowers' mind, the conspiracy still existed when he made the statement. We thus find no error in the admission of the statement.

[3] Defendant argues the court erred in admitting, over objection, testimony regarding a statement made by co-defendant Wallace Collins. Collins' statement did not refer to defendant. Thus, it was not error to admit the hearsay testimony of the statement in the joint trial of defendant and Collins. *See Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968). Defendant contends, however, that the court erred in admitting testimony regarding the statement because at the time it was made Collins was under arrest and had not been informed of his *Miranda* rights. We reject defendant's contention on several grounds.

Defendant has no standing to argue the inadmissibility of the statement on the ground that Collins' constitutional rights were violated. As with Fourth Amendment rights, Fifth Amendment rights are personal and may not be vicariously asserted. *See* N.C. Gen. Stat. 15A-972 ("a *defendant who is aggrieved* may move to suppress evidence . . ."); *State v. Ford*, 71 N.C. App. 748, 751, 323 S.E. 2d 358, 361 (1984), *disc. rev. denied*, 313 N.C. 511, 329 S.E. 2d 397 (1985) (" 'Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.' . . . Only an 'aggrieved' party may move to suppress evidence under G.S. 15A-972 by demonstrating that his personal rights and not those of some third party have been violated."). *See also United States v. Handley*,

763 F. 2d 1401, 1404 (11th Cir.), *cert. denied*, --- U.S. ---, 88 L.Ed. 2d 301, 106 S.Ct. 243 (1985) ("A defendant has standing to object on the ground of the fifth amendment self-incrimination privilege to the admission only of his own statements."); *United States v. Shaffner*, 524 F. 2d 1021, 1022 (7th Cir. 1975), *cert. denied*, 424 U.S. 920, 47 L.Ed. 2d 327, 96 S.Ct. 1125 (1976) (defendant had no standing to object to introduction of co-defendant's confession on the grounds that it was not voluntarily given).

Assuming, *arguendo*, defendant's standing to assert Collins' constitutional rights, we find no violation of Collins' rights. *Miranda* warnings need only be given before an individual is subjected to custodial interrogation. *State v. Holcomb*, 295 N.C. 608, 611-12, 247 S.E. 2d 888, 890-91 (1978). Spontaneous statements made by an individual while in custody are admissible despite the absence of *Miranda* warnings. *Id.*

The evidence regarding Collins' arrest can be summarized as follows:

After Officer Clontz informed Collins that he had a warrant for his arrest on charges of conspiracy to traffic in cocaine, Collins inquired, "What is this [expletive deleted] all about?" In response to Collins' inquiry, Clontz "told him that he was suppose [sic] to be at Arby's on Monday night." Collins replied, "*I was down there* . . . ." (Emphasis supplied.) Defendant's statement was not the result of a custodial interrogation; rather, it was a spontaneous response to Clontz's elaboration on the charges against defendant made at defendant's request. *Holcomb, supra.* Testimony regarding the statement thus was properly admitted.

Further assuming, *arguendo*, both error and defendant's standing to assert it, we do not believe the jury would have reached a different result if Collins' statement had been excluded. At trial and on appeal defendant has maintained that she did not conspire to sell cocaine, but at all times merely intended to abscond with the money given to her by Stubbs. The statement to which defendant objects was an admission by Collins that he was at Arby's on the night in question. Collins' admission in no way detracts from defendant's theory of the case. We thus find the error, if any, harmless beyond a reasonable doubt. N.C. Gen. Stat. 15A-1443(b).

No error.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA v. DONNA ROWE (NOW PORIETIS)

No. 8530SC1205

(Filed 17 June 1986)

1. **Criminal Law § 9.1— defendant not physically present at crime scene—guilt**

In a prosecution for murder, robbery, breaking and entering and larceny, evidence was sufficient to be submitted to the jury, though it showed that defendant was not physically present when the offenses were committed, since it tended to show that defendant served as a lookout for the other felons; that she helped plan and agreed to the break-in and larceny, knowing from the declaration of one of her confederates that if anyone surprised them while the crimes were being committed he would be killed; and that both the robbery and murder were committed in furtherance of the agreed to breaking and larceny.

2. **Burglary and Unlawful Breakings § 1; Larceny § 1— breaking or entering with intention to commit larceny—larceny following break-in—separate offenses**

Breaking or entering with the intention to commit larceny under N.C.G.S. § 14-54 and larceny following a break-in under N.C.G.S. § 14-72 are separate offenses for which punishment can be imposed without violating the constitutional restriction against double jeopardy.

3. **Criminal Law § 9— conviction as both principal and accessory improper**

Defendant could not be convicted as both a principal and an accessory before the fact and after the fact to various crimes.

4. **Homicide § 31.1; Robbery § 6— murder committed during robbery—punishment for robbery improper**

Proof of the underlying felony of armed robbery was an essential and indispensable element of the murder charge against defendant and as such could not be the basis for punishment beyond that imposed for the murder of which it was a part.

APPEAL by defendant from *Burroughs, Judge.* Judgments entered 10 May 1984 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 9 April 1986.

Attorney General Thornburg, by Assistant Attorney General George W. Boylan, for the State.

Acting Appellate Defender Hunter, by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant.

PHILLIPS, Judge.

The defendant was convicted of first degree murder, G.S. 14-17, accessory before the fact of first degree murder, G.S. 14-5, and accessory after the fact of first degree murder, G.S. 14-7; robbery with a dangerous weapon, G.S. 14-87, and accessory after the fact of armed robbery, G.S. 14-5; felonious breaking or entering, G.S. 14-54, felonious larceny, G.S. 14-72, accessory before the fact of felonious breaking or entering and larceny, G.S. 14-5, and accessory after the fact of felonious breaking or entering and larceny, G.S. 14-5; and common law conspiracy to commit breaking or entering and larceny. All the charges concern or arose out of the burglarizing of a doctor's office in Waynesville in 1978 during the course of which one of defendant's three confederates shot, killed and robbed a security guard who entered the office while the larceny was in progress. Though all the convictions cannot stand for the reasons stated below, the insufficiency of evidence is not one of them; for the State's evidence, which includes the testimony of one of her accomplices, tends to establish all of the essential elements of each of the crimes charged.

[1] Nevertheless, defendant maintains that the State's evidence fails to establish her guilt of armed robbery, breaking and entering, larceny and murder largely because it shows that she was not physically present when these offenses were committed, but was waiting outside of the burglarized office in a getaway car, "watching for the law." But to be guilty of these offenses under the circumstances of this case she did not have to be physically present in the office when they were committed; for she was tried on the approved theory that she acted in concert with the direct perpetrators by staying outside the building and rendering aid as their lookout, thereby being constructively present at all times involved. *State v. Oliver*, 309 N.C. 326, 307 S.E. 2d 304 (1983); *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979). This theory is supported by the State's evidence, which shows not only that she served as lookout for the other felons, but that she helped plan

and agreed to the break-in and larceny, knowing from the declaration of one of her confederates that if anyone surprised them while the crimes were being committed he would be killed, and that both the robbery and murder were committed in furtherance of the agreed to breaking and larceny. Thus, the three assignments of error contesting the sufficiency of the evidence are overruled.

[2] While at it we also overrule the assignment contending that her conviction and punishment for both breaking or entering with the intention to commit larceny therein under G.S. 14-54 and larceny under G.S. 14-72 violates the constitutional ban against double jeopardy. This contention flies in the face of several holdings by this Court, and was made, as defendant frankly concedes, in the hope that during the interim our Supreme Court would overrule one of them. But shortly before this case was decided that Court held, as this Court had been holding all along, that breaking or entering with the intention to commit larceny under G.S. 14-54 and larceny following a break-in under G.S. 14-72 are separate offenses for which punishment can be imposed without violating the constitutional restriction against double jeopardy. *State v. Edmondson*, 316 N.C. 187, 340 S.E. 2d 110 (1986).

[3] But the defendant's fall back position—that if the felony convictions as a principal stand the convictions as accessories to those same crimes must fall—is rightly maintained. For in the law of crimes it is fundamental that principals and accessories are two different, mutually exclusive things and that one cannot be both an accessory to and a principal in the same crime. A principal is one who either alone or in concert with others commits or accomplishes a forbidden criminal act or acts, *State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980); while an accessory is one who either before the fact counsels, encourages, instigates or procures *another* to commit a felony—*State v. Sauls*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916, 53 L.Ed. 2d 226, 97 S.Ct. 2178 (1977)—or after a felony is committed knowingly renders assistance to the *felon*. *State v. Potter*, 221 N.C. 153, 19 S.E. 2d 257 (1942). Since one cannot aid, counsel, instigate or encourage oneself and doing so could not be a crime in any event, it inherently follows that one participating as a principal in the commission of a felony cannot also be an accessory to the same felony, either before or after the fact. *State v. McIntosh*, 260 N.C. 749, 133 S.E.

2d 652 (1963), *cert. denied*, 377 U.S. 939, 12 L.Ed. 2d 302, 84 S.Ct. 1345 (1964). Thus, since defendant stands convicted as a principal of all the primary felonies, the accessory convictions are fatally inconsistent and must fall, as defendant maintains by seven different assignments of error. But contrary to her contention a new trial is not required, as the subordinate convictions did defendant no prejudice and under authority of *State v. Perry*, 291 N.C. 586, 231 S.E. 2d 262 (1977) can be discarded as surplusage. We therefore arrest judgment on each of the accessory before the fact and accessory after the fact convictions. Before leaving this subject we note that G.S. 14-5.2, which abolished the distinctions between accessories before the fact and principals and requires that the former be treated now as principals, has no application to this case because it was enacted after these crimes were committed. If the statute did apply, though, it would not change the number of convictions that defendant could be punished for; because if she had been charged and convicted as a principal for encouraging and instigating each of the crimes and also charged and convicted as a principal for actually committing them, the extra conviction in each instance would still be invalid since one cannot be twice guilty of the same, identical crime.

[4] Judgment on the armed robbery conviction is also arrested, but for another reason, as defendant correctly maintains. Her conviction of first degree murder is not based on evidence of design or premeditation, but on evidence that the homicide occurred while the felony of robbery from the person was being committed. G.S. 14-17. Thus, proof of this underlying felony was an essential and indispensable element of the murder charge against defendant and as such cannot be the basis for punishment beyond that imposed for the murder of which it was a part. *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976); *State v. Thompson*, 280 N.C. 202, 185 S.E. 2d 666 (1972).

Having ruled on twelve of the seventeen assignments of error defendant brought forward we overrule her five remaining assignments without discussion. In our opinion the errors assigned—failing to specifically instruct on the prior inconsistent statements made by the accomplice who turned State's evidence; permitting the prosecutor to read the Attorney General's grant of immunity to that witness; allowing the prosecutor to cross-examine defendant as to her sincerity as a Christian, which she

professed to be on direct examination; receiving rebuttal evidence as to the character of certain witnesses for the State, most of which testimony was not objected to; and receiving testimony that defendant did not waive extradition from Ohio where she fled to—were not committed, but even if they were they had no substantial effect on the verdicts rendered, and thus would not warrant a new trial in any event. *State v. Loren*, 302 N.C. 607, 276 S.E. 2d 365 (1981). The State's evidence was to the categorical effect that she participated as a principal in the several crimes; the defendant's evidence, which included her testimony and that of several Ohio friends and relatives, was equally positive and to the effect that she had nothing to do with the crimes, was not even in Waynesville when they were committed, but was in a bar in Toldeo, Ohio celebrating her brother's birthday. Our review of the record including the several volumes of transcript leave us with the impression that this sharp conflict in the evidence was resolved against defendant by the jury after a fair trial free of prejudicial error, and that the judgments for murder, breaking or entering, larceny and conspiracy to commit breaking or entering with the intention to commit larceny should not be disturbed.

We add for possible clarification that since none of the judgments include a sentence of death or life imprisonment the appeal is properly in this Court, G.S. 7A-27(b); and that neither party has questioned the validity of any sentence imposed.

No. 79CRS711, first degree murder—No error.

No. 84CRS1774, robbery with a firearm—Judgment arrested.

No. 84CRS1775, breaking or entering; larceny—No error.

No. 84CRS2022, accessory after the fact of murder—Judgment arrested.

No. 84CRS2023, accessory after the fact of robbery with a firearm—Judgment arrested.

No. 84CRS2024, accessory after the fact of breaking or entering and larceny—Judgment arrested.

No. 84CRS2025, accessory before the fact of murder—Judgment arrested.

No. 84CRS2026, accessory before the fact of breaking or entering and larceny—Judgment arrested.

No. 84CRS2031, conspiracy to commit breaking or entering and larceny—No error.

Judges BECTON and EAGLES concur.

CELLU PRODUCTS COMPANY v. G.T.E. PRODUCTS CORP., ET ALS

No. 8525SC1386

(Filed 17 June 1986)

1. **Limitation of Actions § 4.2— fire caused by exploding lamp—action for damages barred by statute of limitations**

Plaintiff's action to recover damages for a fire allegedly caused by the explosion of a lamp manufactured by defendant was barred by N.C.G.S. § 1-50(6) since 7 July 1978 was the latest possible date of purchase by plaintiff, but plaintiff did not file its complaint until 6 November 1984, more than six years later.

2. **Rules of Civil Procedure §§ 34, 56— discovery not completed—granting of summary judgment—no prejudice**

Plaintiff suffered no prejudice because the court granted summary judgment for defendant prior to the completion of discovery, since the information sought by plaintiff in discovery was not material to the pertinent dates under the statutes which controlled the disposition of the case.

APPEAL by plaintiff from *Saunders, Judge*. Order entered 29 August 1985 in Superior Court, CALDWELL County. Heard in the Court of Appeals 14 May 1986.

This action was instituted on 6 November 1984. The complaint alleged that a fire occurred on 28 March 1983 at the plaintiff's Warrior No. 2 plant in Lenoir and that this fire was caused by the explosion of a Sylvania 1000-watt Metalarc lamp manufactured by the defendant, G.T.E. Products Corporation, distributed by the defendant, Mid-State Electric Distributors, Inc., and installed as part of the plaintiff's Warrior No. 2 plant by the defend-

ant, George Bolick, electrical subcontractor for the general contractor, defendant Wilkie Construction Company, Inc.

The amended complaint alleged five claims for relief, including (i) breach of implied warranties of merchantability, (ii) negligence in the design and inspection of the lamps and in the failure to warn plaintiff about the lamps' purported potential for explosion, (iii) breach of implied warranties of fitness for intended purpose, (iv) breach of express warranties, and (v) defective manufacture.

Defendants answered and later moved for summary judgment on the grounds, *inter alia*, that the action was barred by the statutes of repose, G.S. 1-50(5) and G.S. 1-50(6), and the statutes of limitation, G.S. 25-2-725 and G.S. 1-52(1). On 29 August 1985, the court granted defendants' motion for summary judgment. Plaintiff appealed.

Patrick, Harper and Dixon by Stephen M. Thomas for plaintiff-appellant.

Miller, Johnston, Taylor and Allison by Robert J. Greene, Jr. for defendant Wilkie Construction Company.

Moore, Van Allen, Allen and Thigpen by Daniel G. Clodfelter and Charles E. Johnson for defendant G.T.E. Products Corporation and defendant Mid-State Electric Distributors, Inc.

Tate, Young, Morphis, Bach and Farthing by Edwin C. Farthing for defendant George Wade Bolick, d/b/a Bolick Electric Company.

PARKER, Judge.

The test on a motion for summary judgment is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E. 2d 584 (1980).

[1] Defendants filed supporting affidavits showing that the initial sale of the Metalarc lamps by G.T.E. to Mid-State, and subsequent sale by Mid-State to Bolick occurred no later than 30 August 1977. Wilkie completed all construction at the plant on or

before 30 April 1978. Several replacement lamps were shipped directly from G.T.E. to Bolick during this interval, and Bolick completed installation of the replacement lamps on 7 July 1978.

Based on this evidence, defendants contend that this case is controlled by G.S. 1-50(6) which provides:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

Defendants assert that even using the latest possible date, 7 July 1978, as the final date of purchase by plaintiff or any defendants of Metalarc lamps, the action is barred by G.S. 1-50(6) because plaintiff did not file its complaint until 6 November 1984, more than six years later.

On a motion for summary judgment, the moving party has the burden of establishing that there is no genuine issue as to any material fact. Once the moving party has met its burden, the opposing party may not rest on the mere allegations or denials of his pleading. Instead, the opposing party must set forth specific facts showing that there is a genuine issue for trial, either by affidavits or as otherwise provided in G.S. 1A-1, Rule 56. If the opposing party is unable to present the necessary opposing material, he may seek the protection of section (f) of this rule, which gives the trial court discretion to refuse the motion for judgment or order a continuance. *Gillis v. Whitley's Discount Auto Sales*, 70 N.C. App. 270, 319 S.E. 2d 661 (1984).

The record reveals that plaintiff filed no affidavits, depositions or interrogatory answers to controvert any of defendants' affidavits. Apart from its unverified amended complaint, plaintiff offered only its unverified responses to requests for admissions which had been served by G.T.E., Mid-State and Wilkie Construction. The record does reflect that three sets of requests for admissions were filed by plaintiff, but the parties consented to extensions of time for defendants to respond, and the answers were not yet due at the time of hearing on the motion for summary judgment. The mere failure of the nonmoving party to respond with opposing affidavits or depositions does not automati-

cally mean that summary judgment is appropriate, and the moving party must still succeed on the strength of its evidence. *Perry v. Aycock*, 68 N.C. App. 705, 315 S.E. 2d 791 (1984).

[2] Although ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending, *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 291 S.E. 2d 892, *disc. rev. denied*, 306 N.C. 555, 294 S.E. 2d 369 (1982), we note that the information sought by plaintiff is not material to the pertinent dates under the statutes which control the disposition of this case. Thus, plaintiff suffered no prejudice because the court granted the summary judgment motion prior to the completion of discovery. Moreover, the record does not reflect that plaintiff sought the protection provided in G.S. 1A-1, Rule 56(f).

Finally, plaintiff's assertion that "[i]t did not contract to purchase the lamps in question any more than it contracted to purchase nails, timber, plumbing fixtures or roofing shingles," and rather, that it contracted for the construction of an improvement to real estate, must also be rejected for the reason that G.S. 1-50(5) provides a limit of six years "from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement."

Wilkie's affidavit stated that construction of the plant was completed on or before 30 April 1978. Even if Wilkie submitted its last application for payment on 20 November 1978, and did not accept final payment until after 19 January 1979, as plaintiff wishes to prove, these dates would not control under G.S. 1-50(5).

Whether a statute of repose has expired is strictly a legal issue, *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983), and where, as here, the pleadings and proof show without contradiction that the statute has expired, then summary judgment may be granted. *Colony Hill Condominium I Assoc. v. Colony Co.*, 70 N.C. App. 390, 320 S.E. 2d 273, *disc. rev. denied*, 312 N.C. 796, 325 S.E. 2d 485 (1985).

Plaintiff's remaining arguments are being presented for the first time on this appeal. Appellate courts can only judicially

know what appears of record, *Griffin v. Barnes*, 242 N.C. 306, 87 S.E. 2d 560 (1955), and we will not pass upon questions not presented and ruled upon by the trial court.

The decision of the trial court entering summary judgment in favor of all defendants is

Affirmed.

Judges WELLS and MARTIN concur.

PEOPLES FREEDOM BAPTIST CHURCH AND DAVID G. TAYLOR, PLAINTIFFS v. KENNETH WATSON, GEORGE GRIFFEY, MARKUS K. PHILEMON, JIMMY PHILLIPS AND STEVEN DENNIS MONTGOMERY, ORIGINAL DEFENDANT-APPELLEES v. E. WAYNE SMITH, MINNIE C. SMITH, NORTH CAROLINA NATIONAL BANK OF NORTH CAROLINA AND RUSSELL BATTEN, JR., ADDITIONAL DEFENDANTS-APPELLANTS

No. 8518SC1164

(Filed 17 June 1986)

Lis Pendens § 1— lis pendens not constructive notice of pending litigation

The trial court erred in concluding that the notice of *lis pendens* filed by original plaintiffs on 1 March 1983 constituted constructive notice of pending litigation affecting title to the property so as to defeat the additional defendants' claim to title, since plaintiffs' crossclaim against the additional defendants' predecessor in title was not filed until 20 May 1983, 20 days after the additional defendants purchased the property, and *lis pendens* filed by original plaintiffs therefore could not serve as notice of a dispute in ownership between plaintiff church and defendants' predecessor. Furthermore, the additional defendants met their burden of proof as to the absence of actual notice of pending litigation.

APPEAL by additional defendants from *Washington, Judge.* Judgment entered 17 January 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 13 March 1986.

This appeal concerns an action between the original defendant appellees and the additional defendant appellants to determine the validity of title to real property. Original plaintiffs are not involved in this appeal, their complaint having been dismissed and no appeal was taken on their behalf.

On 1 March 1983, original plaintiffs Peoples Freedom Baptist Church and David G. Taylor, who was then pastor of that church, initiated an action against the original defendants concerning a conflict of ownership and control of the church and its property. Prior to the commencement of that action, a dispute arose among the membership of Peoples Freedom Baptist Church. A certain group of the church, including original defendants Kenneth Watson, George Griffey, Markus Philemon, and Jimmy Phillips, found it necessary to remove themselves from the church premises in order to peacefully conduct worship. On 22 November 1982, the members of the church who had removed themselves met and agreed to continue their worship and the existence of the church. At this meeting, a proper number of the members of Peoples Freedom Baptist Church attended and agreed to change the name of the corporation to Fraley Road Baptist Church. The members also installed the above named original defendants as the deacon board and board of directors of the church. Articles of Amendment to the charter of the corporation were duly executed and filed with the Secretary of State of North Carolina.

On 28 January 1983, after unsuccessfully seeking a loan, the board of directors of the Fraley Road Baptist Church executed a contract with the fifth original defendant Steven Dennis Montgomery, whereby Montgomery was deeded the church property for a period until 15 April 1983 as security for repairs he was to perform for the church. At this point, the original plaintiffs David G. Taylor and Peoples Freedom Baptist Church initiated their action to regain control of the church property from the directors representing the Fraley Road Baptist Church and from Steven Montgomery who held the deed to the property at that time. A notice of *lis pendens* was filed along with the complaint on 1 March 1983.

On or about 14 April 1983, Steven Montgomery conveyed the church property to E. Wayne Smith and wife, Minnie C. Smith, without prior notice to original defendants Watson, Griffey, Philemon, and Phillips, or Fraley Road Baptist Church. The Smiths concurrently mortgaged the property to Russell Batten, Jr., Trustee for NCNB National Bank of North Carolina (NCNB) to finance the purchase. Mr. Batten conducted a title examination in conjunction with the loan, but found no defects in the title. The

instruments conveying title to the Smiths and evidencing the mortgage were recorded on 15 April 1983.

On 5 May 1983, original defendants Watson, Griffey, Philemon, and Phillips filed a crossclaim against original defendant Steven Montgomery attempting to set aside his conveyance to the Smiths. On that same date the four original defendants also filed what was denominated a counterclaim, naming the Smiths, NCNB and the Trustee as additional defendants. This counterclaim sought to set aside Montgomery's conveyance of the property to the Smiths and the deed of trust from the Smiths in favor of NCNB.

On 14 July 1983, an order was entered in superior court resolving the claims among the original parties. On 17 January 1985, the trial court entered judgment declaring both the deed from Steven Montgomery to the Smiths and the Deed of Trust from the Smiths to NCNB "null, void and set aside." The trial court also declared Watson, Griffey, Philemon and Phillips, as trustees for Fraley Road Baptist Church, the lawful owners of the church property. From the judgment of the trial court, the additional defendants appeal.

Roberson, Haworth and Reese, by William P. Miller, for original defendant appellees.

Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Malcolm B. Blankenship, Jr., for additional defendant appellants.

ARNOLD, Judge.

The additional defendants contend that the trial court erred in concluding that the notice of *lis pendens* filed by original plaintiffs on 1 March 1983 constituted constructive notice of pending litigation affecting title to the property so as to defeat the additional defendants' claim to title. We agree.

The doctrine of *lis pendens* is firmly established and provides that:

> When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been.

Rollins v. Henry, 78 N.C. 342, 351 (1878); *see also Hill v. Memorial Park*, 304 N.C. 159, 282 S.E. 2d 779 (1981). In this case the original plaintiffs filed their *lis pendens* on 1 March 1983 providing notice of their action and claim to title as against the directors of Fraley Road Baptist Church and Steven Montgomery. When the Smiths purchased the property and obtained a mortgage in favor of NCNB on 15 April 1983, the action by original plaintiffs was the only pending litigation affecting title to the property. The denominated crossclaim of the original defendants against Steven Montgomery was not filed until 5 May 1983, some 20 days after the Smiths had purchased the property from Montgomery. Since the crossclaim was not pending when the property was purchased by the Smiths, we hold that the *lis pendens* filed by original plaintiffs giving notice of their litigation and claim of ownership of the property cannot serve as notice of a dispute in ownership as between Fraley Road Baptist Church and Steven Montgomery so as to defeat the Smiths' claim to title.

Lis pendens notice under our statutes is not exclusive, however. It serves only to provide constructive notice of pending litigation. *Hill*, 304 N.C. at 164, 282 S.E. 2d at 783. Where, as here, actual notice of pending litigation has been properly pled by one claiming title, the burden is upon the subsequent transferee to establish, by a preponderance of the evidence, the absence of actual notice of pending litigation. *Lawing v. Jaynes and Lawing v. McLean*, 285 N.C. 418, 206 S.E. 2d 162 (1974). The original defendants have recited to this Court testimony which they contend establishes actual notice of pending litigation as to Mr. Smith. However, assuming arguendo that this evidence of conversations occurring prior to the Smiths' purchase does establish actual notice, this notice again is only notice of the original plaintiffs' claim against the directors of Fraley Road Baptist Church and Steven Montgomery. These conversations cannot serve as actual notice of pending litigation involving the directors of Fraley Road Baptist Church and their claim against Steven Montgomery, because this claim was not yet filed and was thus not pending litigation at the time of the conversations. We therefore find that the Smiths, NCNB, and its Trustee have met their burden of proof as to the absence of actual notice of pending litigation. From the record, we determine that the Smiths and NCNB are purchasers

for value without notice and therefore the deed to the Smiths and their Deed of Trust to NCNB are valid.

The additional defendants also contend that the trial court erred in failing to allow the Smiths to recover on their counterclaim for the fair rental value of the property. We agree. We remand this cause for a determination of the fair rental value of the property for the period of loss and for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges WHICHARD and JOHNSON concur.

CHRISTIE HARMON, EMPLOYEE v. PUBLIC SERVICE OF NORTH CAROLINA, INC., EMPLOYER, AND AETNA LIFE & CASUALTY CO., CARRIER

No. 8510IC1272

(Filed 17 June 1986)

Master and Servant § 77.1— workers' compensation—award for permanent partial disability of the back—use of legs impaired—Commission's failure to consider error

Plaintiff, who had been given an award for permanent partial disability of the back, was entitled to have the Deputy Commissioner and the full Industrial Commission consider his referred pain to the extremities of the body in determining whether he had sustained a change of condition under N.C.G.S. § 97-47, and the Deputy Commissioner should have taken into account impairment of the use of plaintiff's legs in determining whether plaintiff had become totally disabled and entitled to compensation under N.C.G.S. § 97-29.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission entered 4 September 1985. Heard in the Court of Appeals 17 April 1986.

Plaintiff appeals from an opinion and award finding that he had not sustained a substantial change in condition from the time of an initial opinion and award filed 8 March 1982. The findings from the 8 March 1982 opinion and award show, in pertinent part, that:

In April 1979, in the course of his employment with defendant-employer, plaintiff injured his back when he twisted it while

handling pipe in a ditch. Plaintiff returned to work on various occasions shortly after the accident, but found that his difficulty with his back prevented him from working. Plaintiff saw two doctors, Dr. Neimeyer and Dr. Joyce, both orthopedic surgeons. Dr. Neimeyer diagnosed plaintiff as suffering from spondylolisthesis with acute lumbosacral strain and later performed surgery wherein he removed part of the vertebrae at the L-5 level, excised the disc and performed a two-level fusion.

Each doctor concluded that plaintiff had a 30% permanent partial disability of his back. Dr. Joyce concluded further that due to plaintiff's back injury there was only a "possibility" that he could return to gainful employment.

From these findings the Commission determined that plaintiff was entitled to temporary total disability from 25 April 1979, the date of injury, to 6 February 1981, the date he reached maximum medical improvement. The Commission concluded further that plaintiff also was entitled to compensation for an additional ninety weeks for a 30% permanent partial disability of the back. Neither party appealed from this opinion and award.

On 3 February 1983 plaintiff sought additional compensation for a substantial change in condition. At the hearing plaintiff presented evidence that he continues to have significant leg and back pain. Dr. Neimeyer testified that plaintiff's condition had substantially changed for the worse between February 1981 and December 1983. Of particular concern to Dr. Neimeyer was "the discomfort [plaintiff reports] persists at times in his leg which would indicate . . . that there has still been some pinching of a nerve in the leg." Dr. Neimeyer related a particular incident when plaintiff bent over to pick up something light and felt such a severe pain in the back and in both the right and left legs that he had to be brought to the doctor's office by ambulance because of his discomfort, spasm and immobility. Dr. Joyce testified that while in 1981 he felt that plaintiff might improve enough to return to work, his opinion at the time of the subsequent hearing was that plaintiff had not improved, was not going to improve and would not be able to return to work.

Based on the foregoing evidence the Deputy Commissioner found that although plaintiff had continued to have severe and persistent leg and back pain and this pain had worsened since his

last rating in that it was more intense, severe, and frequent, he nevertheless had not sustained a substantial change in condition. In her comment the Deputy Commissioner stated:

> It is clear that plaintiff is totally disabled; however, under the Workers' Compensation Act, as long as an injury can be rated to a part of the body, e.g. the back, leg, arm, etc., the claimant is limited to those benefits and cannot receive total disability unless multiple parts or systems of the body are permanently impaired.

A majority of the full Commission adopted the opinion of the Deputy Commissioner. Commissioner Clay dissented. Plaintiff appeals.

Whitesides, Robinson, Blue and Wilson, by Henry M. Whitesides, for plaintiff appellant.

Hedrick, Eatman, Gardner, and Kincheloe, by Mel J. Garofalo and Nancy S. Davenport, for defendant appellee.

WHICHARD, Judge.

Plaintiff contends the Deputy Commissioner and the full Commission should have considered his referred pain to the extremities of the body in determining whether he has sustained a change of condition under N.C. Gen. Stat. 97-47. We agree.

"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 v. K-Mart Corp.*, 312 N.C. 538, 546, 324 S.E. 2d 214, 218-19 (1985). *See also Kendrick v. City of Greensboro*, 80 N.C. App. 183, 341 S.E. 2d 122 (1986). In *Fleming* the Court, upholding an award by the Commission, held that a disabled plaintiff suffering from "chronic back and leg pain" as a 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. *Id.*

It is clear from the Deputy Commissioner's comment that she did not apply the legal standard set forth in *Fleming* to the findings here, and thus, as stressed in the dissent, that she based her determination on a misapprehension of the law. Specifically, the

Deputy Commissioner failed to take into account impairment of the use of plaintiff's legs in determining whether plaintiff is now totally disabled and entitled to compensation under N.C. Gen. Stat. 97-29, as mandated by *Fleming*.

Defendants contend that *Fleming* is inapplicable because the issue there did not concern whether the plaintiff had sustained a substantial change in condition. Defendants are partially correct in that a determination that an injured plaintiff is entitled to compensation under N.C. Gen. Stat. 97-29 under the *Fleming* standard does not, in and of itself, compel a conclusion that such plaintiff has sustained a substantial change of condition under N.C. Gen. Stat. 97-47. There still must be a determination that there has been a substantial change in the injured employee's condition, i.e., a change in his or her capacity to earn wages. *See Edwards v. Smith & Sons*, 49 N.C. App. 191, 192-93, 270 S.E. 2d 569, 570 (1980), *disc. rev. denied*, 301 N.C. 720, 274 S.E. 2d 228 (1981).

In *Hubbard v. Burlington Industries*, 76 N.C. App. 313, 316, 332 S.E. 2d 746, 748 (1985), this Court held that "[w]hen the . . . Commission finds on one occasion that a person is permanently partially disabled and on a later occasion finds[,] based on additional evidence[,] that the person is totally disabled[,] this supports a finding of a change in condition." A situation similar to that in *Hubbard* exists here in that the first opinion and award determined plaintiff to be permanently partially disabled and the Deputy Commissioner subsequently determined, based on competent evidence in the record, that plaintiff is now "totally disabled."

" '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.' " *Wagoner v. Douglas Battery Mfg. Co.*, 80 N.C. App. 163, 164, 341 S.E. 2d 120, 122 (1986), *quoting Cauble v. Macke Co.*, 78 N.C. App. 793, 795, 338 S.E. 2d 320, 322 (1986). Accordingly, the opinion and award are reversed and the cause is remanded to the Industrial Commission to make findings of fact and conclusions of law consistent with this opinion. Specifically, the Commission should take into account impairment of the use of plaintiff's legs as mandated by *Fleming, supra*. We further note that should the Commission, applying *Fleming*, determine that plaintiff is totally

disabled and entitled to compensation under N.C. Gen. Stat. 97-29, plaintiff will have sustained a substantial change of condition. *Hubbard, supra.*

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

JOSEPH SHAW, #20445-26, APPELLANT v. OTTIS F. JONES; D. J. FORD; BOB CONERLEY, SR.; MS. _____ (DIETICIAN, CUMBERLAND COUNTY JAIL) JOHNSON, APPELLEES

No. 8612SC136

(Filed 17 June 1986)

1. **Convicts and Prisoners § 2— special diet not served to prisoner—no violation of constitutional rights**

The trial court properly entered summary judgment for defendants on plaintiff's claim that his Eighth Amendment rights were violated when he was given meals while incarcerated which did not comport with his "medically prescribed diet" and that subsequent refusal of the deputies to comply with this diet constituted "deliberate" indifference to plaintiff's "serious medical needs," since plaintiff's own evidence established that plaintiff was not suffering from any serious medical problem but was simply placed on a diet at his own request for two weeks for the purpose of losing weight.

2. **Costs § 1.2— frivolous suit—plaintiff ordered to pay costs of defense**

The trial court did not err in ordering plaintiff to pay defendants' costs in defending the action, since defendants were the prevailing parties, plaintiff's claim was frivolous, and he continued to litigate it even after being made aware that it was groundless.

3. **Convicts and Prisoners § 2— prisoner's right of access to the courts—no standing to raise issue**

Plaintiff had no standing to raise a claim that his constitutional right of access to the courts was denied while he was confined at the Cumberland County jail, since there was no reasonable likelihood that plaintiff, who was serving a life sentence, would ever be incarcerated in that jail again or subjected to the same alleged constitutional violations.

4. ***Witnesses* § 10— *order enjoining* subpoenaing of witnesses—error**

The trial court's order enjoining plaintiff from subpoenaing witnesses in any action anywhere in the State without first meeting certain conditions and obtaining the trial court's approval exceeded the court's authority.

Shaw v. Jones

APPEAL by plaintiff from *Herring, Judge.* Order entered 10 September 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 16 May 1986.

Plaintiff, a prisoner serving a life sentence, *State v. Shaw,* 293 N.C. 616, 239 S.E. 2d 439 (1977) commenced this civil action on 22 May 1985 under the provision of 42 U.S.C. § 1983. He alleged that while he was in the Cumberland County jail from 7 January 1985 through 9 January 1985 to appear in another lawsuit, he was given meals by the deputies which did not comport with his "medically prescribed diet" and that the subsequent refusal of such deputies to comply with this diet constituted "deliberate indifference to plaintiff's serious medical needs" in violation of his Eighth Amendment rights as established in *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251, *reh. den.,* 429 U.S. 1066, 97 S.Ct. 798, 50 L.Ed. 2d 785 (1976). Plaintiff also alleged that the refusal by defendants to provide writing materials, reading materials, news publications, and writing pens "impose[d] a direct conflict with the right of criminal defendants to possess supplies with which to draft petitions, etc., for submission to the courts, and constitute[d] an infringement of the right to unrestricted access to the courts."

Defendants filed a motion for summary judgment, enclosing with it an affidavit from Joy Daniels, a Department of Corrections nurse, which stated that while plaintiff had been on a restricted 1200-calorie diet, at one time, such diet was for the sole purpose of assisting him in losing weight and that plaintiff suffered from no "serious medical problem."

On 3 September 1985, defendants' motion came on for hearing. Plaintiff was present at the hearing, and live testimony was received on his behalf from Dr. John H. Stanley, a licensed physician on contract with the Department of Corrections who had treated plaintiff, Nurse Daniels and Mr. Arthur Majette, a Correctional Health Assistant at the Odom Prison Unit in Jackson, North Carolina. Following the hearing, Judge Herring granted defendants' motion and entered a separate order enjoining plaintiff from subpoenaing witnesses in any action anywhere in the State without first meeting certain conditions and obtaining the trial court's approval. Plaintiff appealed.

Joseph H. Shaw, pro se.

Larry J. McGlothlin for defendant-appellees.

PARKER, Judge.

When considering a motion for summary judgment, the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. The burden upon the moving party may be carried by proving that an essential element of the opposing party's claim is nonexistent. *Gray v. Hager*, 69 N.C. App. 331, 317 S.E. 2d 59 (1984).

[1] In addition to Nurse Daniels' affidavit, plaintiff's own evidence established the non-existence of an essential element of his claim, to wit: that he had "serious medical needs" to which defendants could be deliberately indifferent. Dr. Stanley stated that both the medical records and his own personal examination of the plaintiff showed that "Shaw was not suffering any serious medical difficulty and was simply overweight." He also stated that plaintiff was placed on a diet at his own request for two weeks for the purpose of losing weight. Nurse Daniels, both in her affidavit and in her live testimony, corroborated this conclusion. Finally, Mr. Majette testified that his recollection was that plaintiff was on a 1200-calorie diet for only two weeks. Because the evidence presented by both parties established that there was no genuine issue of material fact with regard to plaintiff having a serious medical need, the court's granting of defendants' motion for summary judgment on this issue was proper.

[2] In addition to granting defendants' motion for summary judgment, the court ordered plaintiff "to pay in full the costs of the defendants in defending this action, including reasonable attorney's fees" pursuant to 42 U.S.C. § 1988. There is no question that defendants were the "prevailing parties" in this case. The issue is whether, as a matter of discretion, they should be allowed to recover attorney's fees.

"Attorney's fees may be recovered as part of costs in state court proceedings instituted to enforce provisions of 42 U.S.C.

§ 1983." *Lumber Co. v. Brooks, Comr. of Labor*, 50 N.C. App. 294, 296, 273 S.E. 2d 331, 333, *appeal dismissed*, 302 N.C. 398, 279 S.E. 2d 357, *cert. denied*, 454 U.S. 1097, 102 S.Ct. 670, 70 L.Ed. 2d 638 (1981). As stated by this Court in *Miller v. Henderson*, 71 N.C. App. 366, 371-72, 322 S.E. 2d 594, 598 (1984):

> It is clear prevailing defendants as well as plaintiffs are entitled to an award of fees under § 1988. In order to be entitled to attorney's fees, however, a defendant must show that the action brought against him was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." The defendant does not have to show the action was brought in subjective bad faith. (Citations omitted.)

The gist of plaintiff's complaint was that the defendants intentionally and maliciously deprived him of his "medically prescribed diet," thereby expressing a "deliberate indifference to plaintiff's serious medical needs." However, besides the bare allegations in his complaint, plaintiff did not present one shred of evidence that he was in fact on a "medically prescribed diet" between 7 January 1985 through 9 January 1985. The affidavit of Nurse Daniels which was attached to defendants' motion asserted that "the medical record does not indicate that Shaw has a serious medical problem. He was and is merely overweight and needs not to eat as much. The 1200 calorie diet was to help him not eat as much." Assuming *arguendo* that plaintiff did not know of the true medical reasons for his "diet" at the time he commenced this action, he continued to ligitate this matter by subpoenaing four witnesses to the summary judgment hearing after he had been put on notice of the medical reasons for this diet, obesity, which in his case, fell far short of a serious medical need.

Recognizing that trial judges should "resist the understandable temptation to engage in *post-hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation," *Milburn v. Girard*, 455 F. Supp. 283, 285 (E.D. Penn 1978), we are unable to say the trial judge abused his discretion in awarding attorney's fees to the defendants under the facts of this particular situation. We do not reach this conclusion simply because summary judgment was properly entered against plaintiff. Although the Court

in *Miller, supra*, "agree[d] that plaintiff's claims were meritless or groundless as is demonstrated by the fact they were dismissed pursuant to Rule 12(b)(6)," such reasoning does not automatically apply when a claim is terminated pursuant to Rule 56. Each case, of course, must be decided upon its own merits.

[3] As to plaintiff's assertion in his complaint of alleged violations of his constitutional right of access to the courts while confined at the Cumberland County jail, plaintiff has no standing to raise such a claim because there is no reasonable likelihood that plaintiff, who is serving a life sentence, will ever be incarcerated in that jail again or subjected to the same alleged constitutional violations. *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed. 2d 675 (1983); *Buie v. Jones*, 717 F. 2d 925 (4th Cir. 1983).

[4] Finally, with regard to the order enjoining plaintiff from subpoenaing witnesses, the trial judge's action in entering the order, while understandable, exceeded his authority, and the order must be vacated.

We have carefully considered plaintiff's remaining assignments of error regarding alleged abuse of discretion by the trial judge, and find them to be without merit.

The order granting summary judgment in favor of defendants is affirmed. The injunction is vacated.

Judges PHILLIPS and MARTIN concur.

STATE OF NORTH CAROLINA v. LINDA COBLE LINDLEY

No. 8515SC1372

(Filed 17 June 1986)

Burglary and Unlawful Breakings § 1; Husband and Wife § 11.1— separated spouses—wife breaking into husband's home—prosecution proper

Defendant could properly be indicted for and convicted of felonious breaking or entering, though she was married to the occupier of the premises broken into and the owner of the antique guns carried away and the common law ordinarily precludes conviction of a wife for stealing her husband's goods,

since the parties' separation agreement specifically withdrew consent to defendant's entry of the subject premises; defendant and the victim were not "as one person in the law"; and the legal effect of the separation agreement was completely explained to defendant.

APPEAL by defendant from *Brannon, Judge.* Judgment entered 2 May 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 6 May 1986.

Defendant, Linda Coble Lindley, was indicted for and convicted of felonious breaking and entering, G.S. 14-54 and felonious larceny, G.S. 14-72. Defendant was sentenced to two three-year presumptive terms to run concurrently. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Kathryn L. Jones, for the State.

R. Nelson Richardson, for defendant appellant.

JOHNSON, Judge.

Defendant assigns error to the trial court's denial of two motions, (1) a motion to quash the indictment and (2) a motion made at the close of all the evidence to dismiss the charge of felonious breaking and entering. The issue dispositive of both of defendant's assignments of error is whether an unconsented to entry of premises, which is *expressly* prohibited by a marital separation agreement and the taking and carrying away of antique guns valued at over $4,500.00 is sufficient to indict for and submit charges to the jury of felonious breaking and entering and felonious larceny.

The thrust of defendant's argument is that since she was married to the occupier of the premises broken into and the owner of the antique guns carried away, the common law precludes prosecution of her despite the express withdrawal of consent to her entry of the subject premises as stated in the separation agreement. Our decision is rendered accordingly.

A bill of indictment may be quashed if no crime is charged. *See generally, State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384 (1972). The true bill returned by the grand jury against defendant in the case *sub judice*, was in pertinent part as follows:

Date of Offense: Nov. 9, 1982 offense in violation of G.S. 14-54(a); 14-72(b)(2); 14-72(c).

I. The jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, wilfully and feloniously did break and enter a building occupied by William L. Lindley used as a dwelling located at Hwy. 62 S., Alamance, North Carolina with the intent to commit a felony therein: larceny.

II. And the jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully, and feloniously did steal, take and carry away assorted items listed on the attached Exhibit 1, which exhibit is incorporated in this Indictment by reference as if fully set forth on the face thereof.

The personal property of William L. Lindley having a value of $4,551.00 dollars, pursuant to the commission of felonious breaking and entering described in Count I above.

Defendant, in her brief, cites various treatises and *State v. Fulton*, 149 N.C. 485, 63 S.E. 145 (1908), for the proposition "that the wife cannot be convicted for stealing her husband's goods, the reason being that husband and wife were considered but as one person in law." *Fulton, supra*, at 489, 63 S.E. at 146. Defendant argues extensively that it would undermine the unity of the family to abrogate the common law principle of *Fulton, supra*. Defendant, by her entry into the marital separation agreement, has made her case factually distinguishable from the common law principle stated in *Fulton, supra*, and through said agreement relinquished the following aspects of her marital status:

WHEREAS, unhappy differences have arisen between the parties which have caused them to separate from each other on the 5th day of March, 1982, and that such differences are now so pronounced and of such a nature that a reconciliation between the parties is impossible, and *they, after full deliberation, have deemed that they should separate from each other and continue to live separate and apart from each other for the remainder of their natural lives, that they should ter-*

minate the marital relationship, and that a continued and permanent separation each from the other is necessary for the health, happiness, and mental and physical well being of the parties hereto. . . .

1. AGREEMENT TO LIVE SEPARATE AND APART. The HUSBAND and WIFE *shall live separate and apart from each other in the same manner and to the same extent as though they had never been married to each other, and neither shall in any wise molest, disturb, or intrude without invitation upon the presence of the other*, each being free to reside at such place or places and to associate with such person or persons as he or she may desire, all free from any restraint or interference, direct or indirect, on the part of the other.

. . . .

4. REAL PROPERTY. The parties hereto currently own as tenants by the entirety a house and lot located in Alamance, North Carolina. *It is understood and agreed by and between the parties that the HUSBAND shall have the exclusive use and possession of said realty, free from any and all interference by the WIFE. . . . It is further agreed that the WIFE will not, without express invitation* or as is necessary to pick up the children for visitation as outlined below, go upon the premises or in said house.

. . . .

9. PROPERTY RELEASE. . . . The WIFE *does hereby release, convey, and quitclaim to the HUSBAND all right of dower and any and all other common law*, constitutional or statutory rights afforded a wife in lieu thereof or in the nature thereof, together with any and all rights, title, interest, and estate whatsoever which she now has or may hereafter acquire in and to any and all property, whether real or personal, the HUSBAND now owns or has any interest in or which she may hereafter acquire. . . .

. . . .

12. DISCLOSURE. The provisions of this Agreement and their legal effect *have been fully explained* to the parties and each party hereby acknowledges that the Agreement is fair and equitable; that there has been full disclosure of all assets of

both parties and that this Agreement is being entered into voluntarily and that it is not the result of any misrepresentations, fraud, duress, coercion or undue influence.

Defendant's separation agreement clearly shows that there is no family unity left to undermine. The legal effect of said agreement was completely explained to her. Thus, defendant and Mr. Lindley were not "as one person in the law." *Fulton, supra,* at 489, 63 S.E. at 146. Therefore, the indictment of defendant for feloniously breaking and entering of the premises that Mr. Lindley was dwelling in had exclusive possession of and which defendant had no consent to enter therein to commit larceny was proper in form and did charge defendant with a crime. The indictment of defendant for felonious larceny was also proper in form wherein said indictment charged defendant with taking and carrying away Mr. Lindley's personal property valued at $4551.00. We hold that the trial court was correct in denying defendant's motion to quash the indictment, alleging that defendant committed offenses in violation of G.S. 14-54 and 14-72, since defendant had unequivocally relinquished those aspects of marital status which under the common law of this State as it exists now would have barred prosecution of said offenses.

We now turn to the court's denial of defendant's motion to dismiss the felonious breaking and entering charge against defendant. Defendant contends that the State failed to present any evidence that defendant's presence was unlawful. Defendant argues that there is no evidence presented that her entry of the premises in question was not authorized under the separation agreement. We disagree.

When a trial court passes on a defendant's motion to dismiss, the evidence must be considered in the light most favorable to the State and the State is entitled to every reasonable inference therefrom. *See State v. Easterling,* 300 N.C. 594, 268 S.E. 2d 800 (1980). The evidence when viewed in the light most favorable to the State tends to show that on 8 November 1982, William L. Lindley's dwelling place was entered by defendant; that Mr. Lindley did not consent to defendant's entry of his dwelling; and that defendant did not enter Mr. Lindley's dwelling for purposes of exercising her visitation rights under the separation agreement.

No error.

Judges WEBB and WHICHARD concur.

UNITED CHURCH OF GOD, INCORPORATED, A NORTH CAROLINA CORPORATION AND ARTHUR ROBINSON AND ABRAM CATO, DEACONS AND TRUSTEES OF ST. LUKE UNITED CHURCH OF GOD OF AMERICA v. HORACE McLENDON, MARTIN KENDALL, WALTER WASHINGTON AND PRINCE PURCELL

No. 8520SC1358

(Filed 17 June 1986)

1. **Religious Societies § 3.1— church trustee—standing to bring suit for recovery of property**

Plaintiff who sued in his capacity as a duly appointed trustee of St. Luke United Church of God of America, a local church of the plaintiff corporation, could properly maintain an action as a trustee for the recovery of property which was originally deeded to that church, and there was no merit to defendants' contention that plaintiff appeared in this action as a trustee for the United Church of God, Inc., was merely an agent for the corporation, and could not maintain an action in his name for the benefit of the principal.

2. **Religious Societies § 3.1— ownership of church property—summary judgment improper**

In a dispute over the ownership of church property, the trial court erred in granting summary judgment for defendants where genuine issues of material fact existed as to (1) whether a hierarchical relationship existed between the United Church of God, Inc., plaintiff's parent church, and St. Luke United Church of God of America, the church of which defendants were the trustees, (2) whether defendants, alleged trustees, were duly appointed according to the organic forms and rules of St. Luke United Church of God of America, and (3) whether defendants acted within the scope of their authority as recognized by the rules of the church when they renamed the church St. Luke Holiness Church and seized possession of the church property for use as St. Luke Holiness Church.

APPEAL by plaintiff from *Freeman, Judge.* Order entered 19 August 1985 in Superior Court, STANLY County. Heard in the Court of Appeals 7 May 1986.

Michael W. Taylor for plaintiff appellant.

David A. Chambers for defendant appellees.

COZORT, Judge.

This is a civil action to recover church property allegedly wrongfully withheld by the defendants. In January 1960, the trustees of Mount Zion Baptist Church of Badin, North Carolina, conveyed a tract of land located in North Albemarle Township, Stanly County, North Carolina, at 800 Roosevelt Street to plaintiffs Arthur Robinson and Abram Cato and defendant Horace McLendon in their capacity as deacons and trustees of St. Luke United Church of God of America. The deed was recorded on 23 December 1960.

In 1982, because of a controversy within the congregation of St. Luke United Church of God of America, the defendants sought to end their affiliation with the United Church of God, Inc. In 1983, the defendants renamed the church "St. Luke Holiness Church" and took possession of the church property in that name. Plaintiffs sued seeking, *inter alia*, possession of the real property of the church in fee simple. The defendants filed a motion for summary judgment arguing that the United Church of God, Inc., was not a corporate entity at the time of the conveyance of the deed and thus had no interest in the property. The trial court granted defendants' motion. The plaintiffs gave notice of appeal. The United Church of God, Inc., has withdrawn its appeal and plaintiff Abram Cato died on 23 September 1985. Plaintiff Arthur Robinson continues to prosecute his appeal.

Two issues are presented by this appeal: (1) whether Arthur Robinson, in his capacity as trustee of St. Luke United Church of God of America, is a real party in interest having standing to prosecute this appeal even though plaintiff United Church of God, Inc., has withdrawn its appeal, and (2) whether the trial court erred by granting summary judgment for the defendants. We hold (1) that Robinson, in his capacity as Trustee of St. Luke United Church of God of America, is a real party in interest having standing to prosecute this appeal, and (2) that the trial court erred by granting summary judgment for the defendants.

[1] Defendants contend that Arthur Robinson appeared in this action as a trustee for United Church of God, Inc., and was merely an agent for the United Church of God, Inc. Defendants argue that an agent cannot maintain an action in his name for the benefit of his principal. *See Howard v. Boyce*, 266 N.C. 572, 146 S.E.

2d 828 (1966). The verified complaint states: "Plaintiffs Arthur Robinson and Abram Cato are duly chosen and ordained deacons and trustees of St. Luke United Church of God of America, a local church of the plaintiff United Church of God, Incorporated . . . and plaintiffs Arthur Robinson and Abram Cato appear in this action in their fiduciary capacity as trustees." Arthur Robinson appears in his capacity as a trustee of St. Luke United Church of God, not as trustee of plaintiff United Church of God, Inc. A duly appointed trustee of a religious society may maintain an action for the removal of faithless or incompetent trustees and compel them to convey the property to the purposes for which it was designed. *Nash v. Sutton*, 109 N.C. 550, 14 S.E. 77 (1891); *Wheeless v. Barrett*, 229 N.C. 282, 49 S.E. 2d 629 (1948). Likewise, an individual member of a religious society has an equitable interest in the property sufficient to enable him to bring an action to protect the common interests of fellow members. *Nash v. Sutton*, 117 N.C. 231, 23 S.E. 178 (1895). Since Robinson sued in his capacity as a duly appointed trustee of St. Luke United Church of God of America, he can maintain this action as a trustee for the recovery of property which was originally deeded to that church. *See Nash v. Sutton, supra* (suit by individual church member over change of church denomination from Baptist to Methodist); *Western North Carolina Conference v. Tally*, 229 N.C. 1, 47 S.E. 2d 467 (1948).

[2] Next, plaintiff contends that the trial court erred by granting summary judgment for the defendants. We agree. Summary judgment shall be rendered only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). By way of verified complaint the plaintiffs alleged that St. Luke United Church of God of America was a member of the United Church of God, Inc., a hierarchical denomination, and that in 1982 defendant "McLendon held an illegal and unconstitutional meeting of some few members of the congregation . . . in which defendants McLendon, Kendall and Washington were purported to be selected as deacons and trustees of said church, but in fact were arbitrarily appointed by defendant McLendon in an illegal manner . . . ." Plaintiffs submitted several affidavits in support of the allegations in the com-

plaint. Defendants opposed the summary judgment by submitting an affidavit signed by five church members generally denying any affiliation with the United Church of God, Inc.

Genuine issues of fact and law remain to be determined in this matter. The affidavits do not indicate that, as a matter of law, a hierarchical relationship does not exist between the United Church of God, Inc. and St. Luke United Church of God of America. As a general rule, "the parent body of a hierarchical church has the right to control the property of local affiliated churches . . . ." *A.M.E. Zion Church v. Union Chapel*, 64 N.C. App. 391, 414, 308 S.E. 2d 73, 86 (1983), *cert. denied*, 310 N.C. 308, 312 S.E. 2d 649 (1984). Defendants argue that because United Church of God, Inc., had its corporate charter revoked in 1960, that United Church of God, Inc., could hold no interest in property. A church is not required to be incorporated to be able to hold property, G.S. 61-2, *et seq.*; therefore, the revocation of United Church of God's corporate charter is irrelevant to determining whether United Church of God, Inc., has the right to control the property of its alleged local affiliate, St. Luke United Church of God of America. Regardless of whether a hierarchical relationship exists, genuine issues of material facts remain to be determined as to whether the defendants, alleged trustees, were duly appointed according to the organic forms and rules of St. Luke United Church of God of America and whether the defendants acted within the scope of their authority as recognized by the rules of the church when they renamed the church St. Luke Holiness Church and seized possession of the church property for use as St. Luke Holiness Church. *See Atkins v. Walker*, 284 N.C. 306, 200 S.E. 2d 641 (1973). Thus, the order of the trial court granting summary judgment for defendants is

Reversed.

Chief Judge HEDRICK and Judge EAGLES concur.

STATE OF NORTH CAROLINA v. FIRST RESORT PROPERTIES, DOING BUSINESS AS FIRST RESORT PROPERTIES OF N.C., INC.

No. 8620SC109

(Filed 17 June 1986)

Bills and Notes § 22— issuing worthless check—jurisdiction of N. C.

The N. C. court had jurisdiction to try defendant on a worthless check charge since N.C.G.S. § 15A-134 provides that this state has jurisdiction to try a defendant if any part of an offense occurred in N. C.; the check in this case was issued in N. C.; the fact that the person who drew the check added the date and one payee's name in Florida did not affect its apparent negotiability; and, though the check was handed to the payee in Florida, delivery was not completed until defendant's officer's phone call from N. C. authorizing the payee to deposit the check.

APPEAL by defendant from *Pope, Judge.* Judgment entered 4 October 1985 in Superior Court, MOORE County. Heard in the Court of Appeals 7 May 1986.

Defendant corporation was charged with a worthless check offense. The State's evidence tended to show the following: Wicker, an officer of defendant, arranged to have complainant Dickey, a Florida resident, perform consulting work for defendant. Dickey informed Wicker that Kirk, also a Floridian, would assist on the project. Wicker went to defendant's offices in Moore County, North Carolina, where he wrote out a check to Kirk, for $10,000, drawn on defendant's account on a Moore County bank. Wicker then flew to Florida with the check. There he dated it, added Dickey's name as an additional payee and gave the check to Dickey. Before leaving, Wicker asked Dickey to hold the check until Wicker could get back in touch. Four days later Wicker called Dickey from North Carolina and told him to deposit the check. The check was returned for insufficient funds. An officer of the Moore County bank stated that defendant's account contained insufficient funds when the check was presented.

Defendant timely moved to dismiss for lack of jurisdiction and for insufficient evidence. The jury found defendant guilty as charged and answered a special issue that the court had jurisdiction to try defendant. Defendant appeals.

Attorney General Thornburg, by Assistant Attorney General T. Byron Smith, for the State.

Brown, Holshouser, Pate and Burke, by G. Les Burke, for defendant-appellant.

EAGLES, Judge.

The only question before us is whether North Carolina had jurisdiction to try this case. Defendant has abandoned its challenge to the sufficiency of the evidence. App. R. 28(a). We note that Florida law also makes issuing and delivering worthless checks a crime, under language substantially similar to our worthless checks statute. G.S. 14-107; Fla. Stat. Ann. Section 832.05 (West Supp. 1986). *See State v. Bower*, 341 So. 2d 216 (Fla. App. 1976) (general discussion of offense). The commission of a crime is therefore established, and the only question we need decide is jurisdictional.

Jurisdiction in interstate criminal cases is controlled by G.S. 15A-134: "If a charged offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be tried in this State if he has not been placed in jeopardy for the identical offense in another state." This statute reflects the general rule among the states, that any state in which an essential element of a crime occurred may exercise jurisdiction to try the perpetrator. 21 Am. Jur. 2d Criminal Law Section 345 (1981); Annot., 5 A.L.R. 3d 887 (1966). Defendant did not challenge the constitutionality of G.S. 15A-134 below, and we need not consider it here. *State v. Hunter*, 305 N.C. 106, 286 S.E. 2d 535 (1982). At no time has defendant contended that there has been a prosecution in Florida.

North Carolina's worthless check statute, G.S. 14-107, provides in relevant part:

> It shall be unlawful for any person, firm or corporation, to draw, make, utter or issue and deliver to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

Under G.S. 15A-134, if "any part" of this offense occurred in North Carolina, this state had jurisdiction to try defendant. The undisputed evidence was that the check was issued in North Carolina; the fact that Wicker added the date and Dickey's name in Florida did not affect its apparent negotiability. *See* G.S. 25-3-114 (lack of date does not affect negotiability); G.S. 25-3-110 (general payee terms). This fact alone would support jurisdiction under G.S. 15A-134.

Defendant argues that to write a worthless check does not in and of itself constitute a crime, but that the offense cannot occur until delivery. Therefore, since the check was physically transferred in Florida, delivery occurred there. Until then, no crime had been committed, and therefore only Florida can exercise jurisdiction. Defendant relies only on cases antedating the 1975 effective date of G.S. 15A-134, however. *See e.g. State v. Hall*, 114 N.C. 909, 19 S.E. 602 (1894). The statute does not fix jurisdiction where *the crime was completed*, but where *any part of the crime occurred*. As noted above, this jurisdictional requirement was satisfied here.

We note too that delivery was not completed until Wicker's phone call *from North Carolina*. Delivery does not necessarily occur automatically upon physical transfer of an instrument. *See* G.S. 25-1-201(14) (transfer must be voluntary). Delivery of a deed or instrument to the named payee, subject to the control of the person delivering it or subject to an agreed condition, does not constitute delivery in the eyes of the law. *Dunlap v. Willett*, 153 N.C. 317, 69 S.E. 222 (1910) (affirming nonsuit in action on bond, where sureties signed subject to approval of board of directors). *See also Blades v. Wilmington Trust Co.*, 207 N.C. 771, 178 S.E. 565 (1935) (no delivery where deed placed in safe deposit box by grantor and made conditional); *Huddleston v. Hardy*, 164 N.C. 210, 80 S.E. 158 (1913) (Walker, J., concurring). Here Wicker physically transferred the check to Dickey in Florida subject to the condition that Dickey hold it until Wicker got back in touch with him. Wicker's call four days later from North Carolina authorized Dickey to deposit the check. From the evidence then, the jury could find that delivery was not completed until the call. That too would support a conclusion that some part of the delivery occurred in North Carolina.

Defendant has failed to show that North Carolina lacked jurisdiction to try this case. No reversible error appears on the face of the record.

No error.

Chief Judge HEDRICK and Judge COZORT concur.

WALTER R. ALEXANDER v. EUGENE N. ROBERTSON

No. 8626SC80

(Filed 17 June 1986)

1. **Automobiles § 79— intersection accident—failure to keep proper lookout—sufficiency of evidence of contributory negligence**

In an action to recover for injuries sustained in an automobile accident, evidence of contributory negligence was sufficient to be submitted to the jury where it tended to show that visibility was clear; a police vehicle cleared the intersection approximately three car lengths in front of plaintiff; plaintiff testified that he did not see defendant's vehicle until the time of the collision; this was evidence that plaintiff did not keep a proper lookout; and evidence that plaintiff's vehicle struck defendant's truck on the rear portion of the truck was evidence from which a jury could conclude that, if plaintiff had kept a proper lookout, he could have avoided the collision.

2. **Automobiles § 45.2— plaintiff's earlier conviction for speeding—error in admitting evidence not prejudicial**

In an action to recover for injuries sustained in an automobile accident, defendant's error in eliciting from plaintiff testimony on cross-examination that he had been convicted of speeding was not prejudicial.

APPEAL by plaintiff from *Downs, Judge.* Judgment entered 6 May 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 5 June 1986.

The plaintiff brought this action alleging he suffered personal injury and property damage from an automobile accident that occurred on 16 June 1980 at the intersection of Belhaven Boulevard and Rozzell's Ferry Road in Charlotte, North Carolina. The plaintiff was driving his 1977 Triumph automobile in a southeasterly direction on Belhaven Boulevard and approaching the intersection of Rozzell's Ferry Road. Belhaven Boulevard was a four lane

street at that point and the plaintiff was traveling in the inside lane. The defendant was driving his 1975 Chevrolet panel truck on Belhaven Boulevard and approaching the intersection from the opposite direction from the plaintiff. The light was green for both parties.

The defendant attempted to turn left off Belhaven Boulevard onto Rozzell's Ferry Road. The left front corner of the plaintiff's vehicle struck the right rear side of the defendant's truck. The plaintiff testified it was daylight and he could see the stoplight at the intersection from approximately one-half mile. The closest car to him proceeding in the same direction was "[m]aybe five car lengths or more" in front of him as he approached the intersection. He saw a police vehicle turn left in front of him when he was approximately three car lengths from the intersection. The police vehicle turned into Rozzell's Ferry Road. The plaintiff was driving at approximately 20 miles per hour. The defendant then attempted to turn left into Rozzell's Ferry Road and the collision occurred. The plaintiff testified he did not see the defendant's vehicle until the collision occurred.

The jury found negligence on the part of the defendant and contributory negligence by the plaintiff. The court entered a judgment for the defendant and the plaintiff appealed.

William Benjamin Smith for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by John F. Morris and William J. Garrity, for defendant appellee.

WEBB, Judge.

[1] The appellant contends it was error to submit the issue of contributory negligence to the jury. This raises the question of whether there was evidence from which a jury could find that the plaintiff did something immediately before the collision that a reasonably prudent man would not have done or failed to do something which a reasonably prudent man would have done which was a proximate cause of the collision. *See* 9 Strong's N.C. Index 3d Negligence § 1 (1977) for a definition of negligence. If there was contributory negligence on the part of the plaintiff it was his failure to keep a proper lookout and to keep his vehicle under control so as to avoid the collision. The evidence is that the

visibility was clear. A police vehicle cleared the intersection approximately three car lengths in front of the plaintiff. The plaintiff testified that he did not see the defendant's vehicle until the time of the collision. This is evidence that the plaintiff did not keep a proper lookout. We believe the evidence that the plaintiff's vehicle struck the defendant's vehicle on the rear portion of the panel truck is evidence from which a jury could conclude that if the plaintiff had kept a proper lookout he could have avoided the collision. The jury could find that the defendant made the turn a sufficient amount of time before the plaintiff entered the intersection so that his vehicle was more than halfway past the plaintiff's vehicle at the time of the collision. The jury could find from this that with more vigilance the plaintiff could have avoided the collision. This would support a finding that the plaintiff failed to do something a reasonably prudent man would have done which was a proximate cause of the collision. The contributory negligence issue was properly submitted to the jury.

We do not believe our decision in this case is inconsistent with *Hout v. Harvell*, 270 N.C. 274, 154 S.E. 2d 41 (1967); *Dolan v. Simpson*, 269 N.C. 438, 152 S.E. 2d 523 (1967); *Cline v. Atwood*, 267 N.C. 182, 147 S.E. 2d 885 (1966); *Moore v. Hales*, 266 N.C. 482, 146 S.E. 2d 385 (1966); or *Petree v. Johnson*, 2 N.C. App. 336, 163 S.E. 2d 87 (1968) upon which the appellant relies.

In *Hout* our Supreme Court affirmed the sustaining of a demurrer to a complaint because on the allegations of the complaint the defendant could not have avoided the collision. In this case we have held that on the evidence a jury could find the plaintiff could have avoided the collision. In *Dolan* our Supreme Court affirmed a judgment of nonsuit where all the evidence showed the vehicle in which the plaintiff was riding turned in front of the defendant's vehicle at a time when the defendant could not have avoided the collision. The evidence in *Dolan* showed the defendant was keeping a proper lookout. In *Cline* the evidence showed the defendant was the approaching vehicle and was doing all he could to avoid the collision. Our Supreme Court held that a judgment of nonsuit should have been entered. In *Moore* all the evidence showed that as plaintiff entered an intersection on a dominant street the defendant drove her vehicle through a stop sign and into the side of the plaintiff's vehicle. Our Supreme Court held it was error to submit an issue of contributory negligence. The facts in *Moore*

are easily distinguishable from the facts in this case. In *Petree* the evidence showed that when the defendant turned in front of the plaintiff the plaintiff did all she could to avoid the collision. Our Supreme Court held that it was not error to overrule the defendant's motion for nonsuit on the ground the evidence showed contributory negligence as a matter of law. In *Petree*, as in this case, contributory negligence was held to be a question for the jury.

[2] The appellant also assigns error to the defendant's eliciting from the plaintiff testimony on cross examination that he had been convicted of speeding. This was error. G.S. 8C-1, Rule 609(a) prohibits the admission of evidence of crimes which are not punishable by more than 60 days confinement for the purpose of attacking the credibility of a witness. We do not believe this error was prejudicial. The appellant must show not only that there was error but he must also show that if the error had not occurred there is a reasonable probability that the result of the trial would have been different. *See Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967). We cannot hold there is a reasonable probability that a jury would find the plaintiff's testimony incredible because he had been convicted on one occasion of speeding.

No error.

Judges WHICHARD and JOHNSON concur.

DONALD DAVIS, ET ALS v. CITY OF ARCHDALE, ET ALS

No. 8519SC1284

(Filed 17 June 1986)

Municipal Corporations § 31.1— no standing to challenge annexation and rezoning ordinances

Plaintiffs did not have standing to challenge an annexation ordinance since they did not own property in the annexed areas, nor did they have standing to challenge a rezoning ordinance since their allegations that they had sustained and would continue to sustain a diminution in the value of their property due to increased traffic on roads already carrying more than their capacity and due to increased demands upon already overburdened public utilities did not show special damages distinct from the rest of the community which would give plaintiffs standing to challenge the ordinance.

Davis v. City of Archdale

APPEAL by plaintiffs from *Davis, James C., Judge.* Order entered 14 August 1985 in RANDOLPH County Superior Court. Heard in the Court of Appeals 13 May 1986.

On 18 December 1984 the City of Archdale received a petition requesting the voluntary annexation of two tracts of land. On 22 January 1985 the City Council of the City of Archdale adopted an ordinance annexing the two tracts. The City Council also adopted ordinances rezoning the two newly annexed tracts on 24 January 1985 and 26 February 1985.

Plaintiffs, owners of real property "in the area" of the tracts of land newly annexed, instituted this action against the City and the owners of the tracts. Plaintiffs alleged six claims in their complaint: (1) that the annexations were invalid because not all of the property owners of the tracts signed the petition; (2) that the rezonings did not promote the health, safety, morals or general welfare of the community; (3) that the rezonings were unconstitutional; (4) that the 26 February 1985 rezoning was invalidated by the City Council's meeting in executive session; (5) that the rezonings constituted illegal contract zoning; and (6) that the rezonings constituted illegal spot zoning. They sought a declaratory judgment and injunctive relief.

The City filed an answer in which it admitted that not all of the owners of the two tracts had signed the petition for annexation. It denied the other material allegations of the complaint. The owners of the two tracts filed, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the Rules of Civil Procedure, motions to dismiss the complaint for failure to state a claim upon which relief can be granted. Following a hearing, the court allowed the motions. Plaintiffs appealed.

Graham, Miles & Bogan, by James W. Miles, Jr., for plaintiffs-appellants.

No brief for defendant-appellee City of Archdale.

Fisher Fisher Gayle & Craig, by Louis J. Fisher, Jr. and John O. Craig, III, for defendants-appellees William T. Boyd, Shirley C. Boyd, Darrell Leon Frye, Elizabeth Anne Shover Frye, Stephen V. Hill and Sylvia Lee Frye Hill.

Roberson, Haworth & Reese, by J. Brooks Reitzel, Jr., for defendants-appellees R. Dale Britt, C. D. Clodfelter and David L. Maynard.

WELLS, Judge.

Preliminarily, we note that plaintiffs did not file their brief until twenty-five days after the printed record on appeal was mailed, well over the twenty days allowed by Rule 13(a) of the Rules of Appellate Procedure for filing an appellant's brief. Neither did plaintiffs timely seek an extension of time to file their brief. For their failure to file a brief in a timely fashion, their appeal is subject to dismissal. Rule 13(c) of the Rules of Appellate Procedure. Nevertheless, in the exercise of our discretion, we consider the merits of the appeal.

The question before us is whether the court properly dismissed plaintiffs' complaint. Defendants argue that the court correctly dismissed the complaint because plaintiffs lacked standing to challenge the ordinances. We agree.

In passing upon the validity of an annexation or zoning ordinance, one of the court's first concerns is whether the plaintiff has standing to bring the action. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E. 2d 576 (1976). The general rule is that "unless an annexation ordinance be absolutely void (*e.g.*, on the ground of lack of legislative authority for its enactment), in the absence of specific statutory authority to do so, private individuals may not attack, collaterally or directly, the validity of proceedings extending the corporate limits of a municipality." *Id.* Annexation ordinances are authorized by Article 4A of Chapter 160A of the General Statutes. The only persons given the authority by Chapter 160A to challenge an annexation ordinance are those who own property in the annexed area. N.C. Gen. Stat. §§ 160A-38(a) and -50(a) (1982). Plaintiffs admitted in their complaint that they do not own property in the annexed areas. They thus do not have standing to challenge the annexation ordinance.

In order to challenge a rezoning ordinance, one must have a specific personal and legal interest in the subject matter affected by the ordinance and must be directly and adversely affected by the ordinance. *Taylor v. City of Raleigh, supra.* To have standing, an adjacent or nearby landowner must allege and show special damages distinct from the rest of the community. *Heery v. Zoning Board of Adjustment*, 61 N.C. App. 612, 300 S.E. 2d 869 (1983). Plaintiffs alleged in their complaint that they have sustained and will continue to sustain a diminution in the value of their property due to increased traffic on roads which already carry traffic volumes in excess of capacity and due to increased demands upon already overburdened public utilities. We do not think these damages are special damages distinct from those of the rest of the community. Plaintiffs thus do not have standing to challenge the rezoning ordinances. *Compare Taylor v. City of Raleigh, supra* (adjacent landowners had "tenuous" standing to challenge rezoning ordinance when their property was being condemned for water and sewer line easements extending to rezoned property).

Plaintiffs argue that their complaint should not have been dismissed because the City did not move to dismiss and admitted in its answer that proper procedures were not followed in the annexation. This argument has no merit because standing is jurisdictional in nature. *See Taylor v. City of Raleigh, supra.*

For the foregoing reasons, the order dismissing the complaint is

Affirmed.

Judges ARNOLD and BECTON concur.

STATE OF NORTH CAROLINA v. HAROLD DEAN HAMRICK

No. 8627SC59

(Filed 17 June 1986)

1. Criminal Law § 34.1— evidence of defendant's guilt of other offenses—no design or plan shown—evidence inadmissible

In a prosecution of defendant for felonious breaking or entering, felonious larceny of a tractor and other items and conspiracy to commit those crimes,

the trial court erred in admitting testimony by two witnesses that in the two months preceding the offenses charged, they and defendant had been involved in similar transactions involving the larceny of tractors, since the State offered the evidence to prove intent or design and a plan to commit the crime charged; the only relation between the other crimes proved in this case and the crime charged was that they were similar and were committed within a time not too far removed from the crime charged, but this was insufficient to show the existence of a plan to commit the offense charged; and proof of a separate crime by itself does not prove a person planned to commit another crime.

2. **Constitutional Law § 74— breaking and entering and larceny charged—failure to report income to IRS—compelling testimony violative of right to remain silent**

Testimony of defendant who was charged with breaking and entering and larceny offenses as to his failure to report income to the IRS related only to his credibility, and it was therefore error to require him to answer the question when he asserted his constitutional right to remain silent on the ground that the answer might tend to incriminate him.

APPEAL by defendant from *Friday, Judge.* Judgment entered 15 September 1984 in Superior Court, CLEVELAND County. Heard in the Court of Appeals 13 May 1986.

The defendant was tried for felonious breaking or entering, felonious larceny, conspiracy to commit felonious breaking or entering and conspiracy to commit felonious larceny. The State presented evidence tending to show that on 27 February 1984 the defendant and an accomplice, Billy Joe Hill, broke into Parker's Farm Service in Shelby, North Carolina. They loaded onto Parker's company truck a tractor, wheels for the tractor and three log splitters. These items were sold to Bill Wease, who gave the defendant $50 in partial payment. The State also presented testimony from both Hill and Wease that in the two months preceding the 27 February offenses they had been involved with the defendant in similar transactions involving the larceny of tractors.

The defendant presented evidence of an alibi and denied participating in any crimes with Wease and Hill. From judgment entered on a jury verdict of guilty of felonious larceny, felonious breaking or entering and felonious conspiracy, and from sentences imposed, the defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.

Brenda S. McLain for defendant appellant.

WEBB, Judge.

[1] The defendant has brought forward nine assignments of error. We shall discuss two of them. He assigns error to the admission of testimony by Bill Wease and Billy Joe Hill that with the defendant they had broken into other places and stolen tractors. We believe this assignment of error has merit.

The State offered evidence of the defendant's involvement in other crimes to prove the crime for which the defendant was being tried. The State contends that in this case the evidence was properly admitted to prove intent or design and a plan to commit the crime charged. G.S. 8C-1, Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake, entrapment or accident.

Under this rule the evidence was admissible if it proved intent, design, or plan. Prior to the adoption of the rule there were cases which dealt with the question of the proof of intent, design, or plan by the proof of separate crimes. *See State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954) and H. Brandis, *Brandis on North Carolina Evidence* § 91 (1982). We look to these cases for guidance. In *State v. Byrd*, 60 N.C. App. 624, 300 S.E. 2d 49 (1983) we examined several cases dealing with evidence of other crimes to prove the crime charged. We concluded that the rule had been interpreted so broadly that evidence of other crimes was admissible if the other crimes were similar to and were committed at a time not too far removed from the time of the crime charged. We were reversed by our Supreme Court at 309 N.C. 132, 305 S.E. 2d 724 (1983). The Supreme Court did not discuss the reasons we gave for concluding how evidence of other crimes was so admissible. The Court stated, "[w]e find nothing in any of our cases, however, which would authorize the admission of prior crimes purely because they are 'similar' and 'within a time not too far removed from the crime with which the defendant [is] charged.' " *Id.* at 141, 305 S.E. 2d at 730.

The only relation we can find between the other crimes proved in this case and the crime charged is that they were

similar and were committed within a time not too far removed from the crime charged. In light of the Supreme Court's statement in *Byrd* we do not believe we should hold they were admissible. We believe that under several cases cited in our opinion in *Byrd* they would be admissible. Perhaps with the adoption of the Evidence Code it is time to enforce the rule more strictly. *See State v. Weaver*, 79 N.C. App. 244, 339 S.E. 2d 40 (1986). We believe as to plan the rule should be as stated in *Brandis* § 92 that evidence of other crimes to prove a plan must tend "to show the existence of a plan or design to commit the offense charged, ..." We do not believe proof of a separate crime by itself proves a person planned to commit another crime. We cannot see how the evidence in this case was relevant to prove intent or design to commit the crime for which the defendant was tried.

[2] The defendant also assigns error to the court's refusal to allow him to assert his right not to answer a question on the ground his answer might tend to incriminate him. During the cross examination of the defendant he testified he had some income from the sale of firewood. He was asked by the prosecuting attorney whether he had reported this income to the Internal Revenue Service. The defendant through his attorney asserted his constitutional right not to answer on the ground that the answer might tend to incriminate him. He was required to answer and the defendant testified he had not reported this income to the Internal Revenue Service. G.S. 8C-1, Rule 608 provides in part:

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

The testimony of the defendant as to his failure to report income to the Internal Revenue Service related only to his credibility. It was error to require him to answer this question.

As to the defendant's other assignments of error we find they are without merit or the questions they raise should not recur at a new trial.

New trial.

Judges WHICHARD and JOHNSON concur.

JOSEPHINE GILLIS JENKINS v. AVA LINEBERRY WHEELER, ADMINISTRATRIX OF THE ESTATE OF LOUELLA S. WHEELER, AND AVA LINEBERRY WHEELER, INDIVIDUALLY, AVA LINEBERRY WHEELER, EXECUTRIX OF THE ESTATE OF AUSTIN BEDFORD WHEELER, AND JAMES L. WILSON

No. 8619SC97

(Filed 17 June 1986)

1. **Appeal and Error § 68.3; Rules of Civil Procedure § 12— failure to state claim upon which relief could be granted—prior decision controlling**

The trial court erred in dismissing plaintiff's action against one defendant for failure to state a claim upon which relief could be granted, since the Court of Appeals had earlier held that plaintiff's complaint was sufficient to withstand a Rule 12(b)(6) motion, and the trial court was bound by that decision.

2. **Courts § 9.4— motion to dismiss—overruling of one superior court judge by another—error**

The trial court erred in granting a Rule 12(b)(6) motion for one defendant after the moving party's previous Rule 12(b)(6) motion had been denied by another superior court judge, since one superior court judge may not overrule another.

3. **Appeal and Error § 6.6— dismissal of punitive damages claim—interlocutory order appealable**

An interlocutory order dismissing a punitive damages claim affects a substantial right and is immediately appealable. In this action where no evidentiary hearing was held before the order dismissing the claim for punitive damages was entered, there was insufficient evidence to dismiss the claim.

APPEAL by plaintiff from *Beaty, Judge.* Orders entered 28 August 1985 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 4 June 1986.

Ottway Burton for plaintiff, appellant.

Beck, O'Briant, O'Briant and Bunch, by W. Edward Bunch, for defendant, appellee Ava Lineberry Wheeler, Executrix of the Estate of Austin Bedford Wheeler.

William E. Mathers for defendant, appellee Ava Lineberry Wheeler, Individually and as Administratrix of the Estate of Louella S. Wheeler.

Moser, Ogburn & Heafner, by D. Wescott Moser and John N. Ogburn, Jr., for defendant, appellee James L. Wilson.

HEDRICK, Chief Judge.

This is plaintiff's third appeal to the North Carolina Court of Appeals. The three appeals from orders disposing of fewer than all of the claims of all of the parties proves the wisdom of G.S. 1A-1, Rule 54(b). The first appeal from the order allowing the G.S. 1A-1, Rule 12(b)(6) motion of James L. Wilson should have been dismissed pursuant to G.S. 1A-1, Rule 54(b). The second appeal from the order granting the G.S. 1A-1, Rule 12(b)(6) motion of Nationwide Mutual Insurance Company should have been dismissed for the same reason. This present appeal from the orders granting the new G.S. 1A-1, Rule 12(b)(6) motions of James L. Wilson and Ava Lineberry Wheeler, Individually and as Administratrix of the Estate of Louella S. Wheeler, perhaps also should be dismissed because it too is in violation of G.S. 1A-1, Rule 54(b).

We, however, in an effort to remove the case from the procedural morass in which it has fallen, will rule on the matters before us with the fervent hope that counsel will let the case proceed to a final judgment.

We hope that no party will appeal from an order or judgment that disposes of fewer than all of the rights and claims of all of the parties unless the trial judge certifies as provided by G.S. 1A-1, Rule 54(b). This Court will not be inclined to accept an appeal from a judgment or order disposing of less than all of the claims of all of the parties unless the trial court certifies the case for appeal.

The facts of this case are set out in our earlier decisions of *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E. 2d 354, *disc. rev. denied*, 311 N.C. 758, 321 S.E. 2d 136 (1984) and *Jenkins v. Wheeler*, 72 N.C. App. 363, 325 S.E. 2d 4 (1985). We need not repeat them here.

[1] Plaintiff first assigns error to the order granting James L. Wilson's motion to dismiss for failure to state a claim upon which relief can be granted made pursuant to G.S. 1A-1, Rule 12(b)(6). This Court held in *Jenkins v. Wheeler*, 69 N.C. App. 140, 316 S.E. 2d 354, *disc. rev. denied*, 311 N.C. 758, 321 S.E. 2d 136 (1984), that plaintiff's complaint was sufficient to withstand a motion made pursuant to G.S. 1A-1, Rule 12(b)(6). The superior court is bound by this decision, and the order dismissing plaintiff's action against

James L. Wilson for failure to state a claim upon which relief can be granted is reversed.

[2] Plaintiff also assigns error to the order granting the G.S. 1A-1, Rule 12(b)(6) motion of Ava Lineberry Wheeler, Individually and as Administratrix of the Estate of Louella S. Wheeler. On 19 October 1983 Judge Mills denied a 12(b)(6) motion made by Ava Lineberry Wheeler, Individually and as Administratrix of the Estate of Louella S. Wheeler. In denying the motion to dismiss, Judge Mills concluded that the complaint filed by Jenkins stated a claim against Ava Lineberry Wheeler, Individually and as Administratrix of the Estate of Louella S. Wheeler. One superior court judge may not overrule another. *Barbour v. Little*, 37 N.C. App. 686, 247 S.E. 2d 252, disc. rev. denied, 295 N.C. 733, 248 S.E. 2d 862 (1978). The superior court erred in granting a 12(b)(6) motion after the moving party's previous 12(b)(6) motion had been denied by another superior court judge. *Id.* The order dismissing the action against Ava Lineberry Wheeler, Individually and as Administratrix of the Estate of Louella S. Wheeler, is reversed.

[3] Plaintiff also assigns error to the entry of judgment dismissing her punitive damages claim against Ava Lineberry Wheeler as Executrix of the Estate of Austin Bedford Wheeler. Our Supreme Court has held that an interlocutory order dismissing a punitive damage claim affects a substantial right and is immediately appealable. *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976).

Plaintiff asserted two claims for compensatory damages and one claim for punitive damages against Ava Lineberry Wheeler as Executrix of the Estate of Austin Bedford Wheeler. It is unclear from the pleadings whether the punitive damages claim attaches to plaintiff's wrongful death claim or to plaintiff's claim for "conspir[acy] to deprive the plaintiff of the proceeds" of the wrongful death action. No evidentiary hearing was held before the order dismissing the claim for punitive damages was entered. There is insufficient evidence in the record before us to dismiss a claim for punitive damages for wrongful death or "conspiracy." The order dismissing the punitive damages claim is therefore reversed.

The remaining assignments of error are patently non-appealable. The appeal with regard to these assignments is dismissed.

Reversed in part, dismissed in part and remanded.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. CHARLES TIMOTHY DORSETT

No. 8618SC92

(Filed 17 June 1986)

1. **Criminal Law § 91— Interstate Agreement on Detainers—time of trial**

There was no merit to defendant's contention that he was not brought to trial on a particular indictment within 180 days after written notice of his place of imprisonment and his request for final disposition of the charges against him was delivered to the district attorney and clerk of court, as required by the Interstate Agreement on Detainers, since the indictment in question was superseded by another indictment which properly charged defendant with the same offense, and by entering into a stipulation which covered the later indictment, defendant waived any right he may have had pursuant to the Interstate Agreement on Detainers to be tried prior to the end of the agreed upon time period.

2. **Criminal Law § 66.16— photographic lineup—in-court identification of independent origin**

Evidence was sufficient to support the trial court's findings and conclusions that a photographic lineup viewed by witnesses was not impermissibly suggestive and that their in-court identifications of defendant were based on their observations of defendant at the time of the crime and were not influenced or tainted in any way by out-of-court identification procedures.

3. **Criminal Law § 138.7— sentence—conviction on appeal as aggravating factor—impropriety**

The trial court erred in sentencing by finding as the sole aggravating factor that defendant had been convicted of robbery with a dangerous weapon in a case which was on appeal to the Court of Appeals at the time of the sentencing hearing. N.C.G.S. § 15A-1340.2.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 28 August 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 June 1986.

Defendant was charged in a proper bill of indictment with the robbery with a dangerous weapon of Omega Prescription Centers, Inc., d/b/a The Medicine Shoppe pharmacy. At trial, the State presented evidence tending to show that on 28 November 1983 defendant, accompanied by another man, entered The Medicine Shoppe in Greensboro, pointed a gun at the pharmacist and her assistant and took certain controlled substances and money from the cash register. The pharmacist, Omega Dean, and her assistant, Betty New, identified defendant in a photographic line-up and at trial as the armed perpetrator of the robbery. The jury found defendant guilty as charged. From a judgment imposing a prison sentence of thirty years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debbie K. Wright, for the State.

Assistant Public Defender Anne B. Lupton for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to the trial court's denial of his motion to dismiss for failure of the State to comply with the provisions of the Interstate Agreement on Detainers, G.S. 15A-761. Defendant was incarcerated in Missouri when he was notified that a detainer had been filed against him by Guilford County for thirteen charges of robbery with a dangerous weapon. Defendant contends that he was not brought to trial for case No. 85CRS28545 within 180 days after written notice of his place of imprisonment and his request for final disposition of the charges against him were delivered to the Guilford County District Attorney and Clerk of Court, as required by the Interstate Agreement on Detainers. We disagree.

The record discloses that on 1 July 1985, counsel for defense and the State stipulated in a written agreement that the Interstate Agreement on Detainers applied to defendant's indictments for armed robbery, including indictment No. 85CRS20292, and "that these matters must be brought to trial pursuant to that Act on or before August 6, 1985, unless the matter is continued in open court, in the presence of the counsel for the defendant, Charles T. Dorsett for good cause shown." The record further discloses that indictment No. 85CRS20292 was filed attempting to

charge defendant with the armed robbery on 28 November 1983 of Omega Prescription Centers, Inc., d/b/a The Medicine Shoppe, but indictment No. 85CRS28545 was subsequently filed, properly charging defendant with the same offense and thus superseding indictment No. 85CRS20292. G.S. 15A-646. By entering into the stipulation, defendant waived any right he may have had pursuant to the Interstate Agreement on Detainers to be tried prior to the end of the agreed upon time period. The record discloses that defendant's trial was timely under the terms of the stipulation. Therefore, the trial court did not err in denying defendant's motion to dismiss.

[2] Defendant next contends that the trial court erred in denying his motions to suppress the identification testimony of Betty New and Omega Dean. Prior to trial, defendant filed a motion to suppress the photographic identification and in-court identification of defendant by these witnesses for the State. At trial, following voir dire examinations of Omega Dean and Betty New, the trial court made detailed findings and conclusions regarding their identification of defendant as the perpetrator of the robbery. The court found and concluded that the photographic line-up viewed by these witnesses was not impermissibly suggestive and that their in-court identification of defendant was based on their observations of defendant at the time of the crime and were not influenced or tainted in any way by out-of-court identification procedures. We have reviewed the evidence adduced on voir dire and hold that the findings and conclusions made by the trial court are supported by competent evidence in the record.

[3] Defendant's final contention is that the trial court erred in sentencing by finding as the sole aggravating factor that defendant had been convicted of robbery with a dangerous weapon in Guilford County case No. 85CRS28542 because that case was on appeal to this Court at the time of the sentencing hearing. We agree.

G.S. 15A-1340.2 defines "prior conviction" for the purposes of the Fair Sentencing Act as follows:

> A person has received a prior conviction when he has been adjudged guilty of or has entered a plea of guilty or no contest to a criminal charge, and judgment has been entered

thereon, and the time for appeal has expired, or the conviction has been finally upheld on direct appeal.

G.S. 15A-1340.2(4). Defendant's appeal in Guilford County case No. 85CRS28542 had not been finally upheld on direct appeal at the time of the sentencing hearing, but was on appeal to this Court. Therefore, the trial court erred in finding as an aggravating factor that defendant had a prior conviction.

For the foregoing reasons, we hold that defendant had a fair trial free of prejudicial error, but remand for a new sentencing hearing.

No error in trial; remanded for resentencing.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. DUANE DRUMMOND

No. 8514SC1307

(Filed 17 June 1986)

Infants § 18— juvenile delinquent—juvenile guilty of first degree rape—insufficiency of evidence

A juvenile order finding defendant guilty of first degree rape and sentencing him to one year of supervised juvenile probation is reversed since the evidence adduced at trial did not support the crime alleged in the petition, first degree rape under N.C.G.S. § 14-27.2(a)(1), and the petition did not give defendant notice of the crime putatively described in the order, first degree rape under N.C.G.S. § 14-27.2(a)(2)(c).

APPEAL by defendant from *LaBarre, Judge.* Juvenile Court order entered 30 April 1985 in District Court, DURHAM County. Heard in the Court of Appeals 2 June 1986.

Defendant, an eleven-year-old child at the time the crime took place, was found guilty of committing first-degree rape against a six-year-old victim. At trial the State presented evidence tending to show the following: Defendant and one Lonnie Green went into a wooded area with the six-year-old victim. The six-year-old victim pulled down her pants. Defendant and

Lonnie Green kept watch for each other as each boy engaged in vaginal intercourse with the victim. From a juvenile order finding defendant guilty of first-degree rape and sentencing him to one year of supervised juvenile probation, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David Gordon, for the State.

Darryl Smith for defendant, appellant.

HEDRICK, Chief Judge.

Defendant contends that the trial court erred in denying defendant's motion to dismiss because the evidence of defendant's age and of penetration was insufficient to support a judgment of delinquency.

The juvenile petition issued in this case states in pertinent part:

> 3. The following offense(s) or condition(s) is/are alleged:
>
> That the above named child is a delinquent child as defined by G.S. 7A-517(12) in that at and in the county named above on or about the 10th day of May 1984 the above named child did unlawfully, willfully and feloniously carnally know and abuse Natasha Williams a child 6 years old (10/9/77) and thus of the age of 12 years or less in violation of the following law: G.S. 14-27.2.

The juvenile order in pertinent part states that "the Court finds [defendant] guilty beyond a reasonable doubt of having engaged in sexual intercourse with [the victim]; that he committed the offense while aiding and abetting by one or more persons; that disposition be continued." Assuming arguendo that the petition and the order are sufficient to charge a crime, we reverse the order because the evidence adduced at trial does not support the crime alleged in the petition and the petition does not give defendant notice of the crime putatively described in the order.

The evidence presented at trial appears to present two possible theories of first-degree rape under G.S. 14-27.2. First, under G.S. 14-27.2(a)(1), a person is guilty of rape in the first degree if the person engages in vaginal intercourse with a victim who is a child of the age of twelve years or less and the defendant is of the

age of twelve years or more and is four or more years older than the victim. Because defendant in the present case pled not guilty, the burden is on the State to prove every element of the offense charged beyond a reasonable doubt. *See, e.g., State v. Billinger*, 9 N.C. App. 573, 176 S.E. 2d 901 (1970). The uncontradicted evidence shows that defendant was under twelve at the time the offense occurred. No evidence of the age of his accomplice, Lonnie Green, is present in the record before us. Therefore, defendant could not be found guilty of first-degree rape under G.S. 14-27.2 (a)(1).

The second theory of first-degree rape suggested by the evidence is defined in G.S. 14-27.2(a)(2)(c): A person is guilty of rape in the first degree if the person engages in vaginal intercourse with another person by force and against the will of the other person and the person commits the offense aided and abetted by one or more other persons. It appears that this second theory is the theory under which the trial court found defendant guilty. This theory, however, was not alleged in the petition. In fact, implicit in the briefs filed by both the State and defendant is the belief that defendant was found guilty of violating G.S. 14-27.2(a) (1), the first theory.

The petition fails to give defendant adequate notice of the crime of which he was found guilty and therefore violated defendant's constitutional rights. "Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity." *In re Burrus*, 275 N.C. 517, 530, 169 S.E. 2d 879, 887 (1969). *See also In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967). The juvenile petition makes no mention of an accomplice, of aiding or abetting another or of the use of force. Therefore the petition does not describe a violation of G.S. 14-27.2(a)(2)(c) with any particularity.

If the highly ambiguous order entered in this case finds defendant guilty of violating G.S. 14-27.2(a)(1), the order must be reversed because the evidence is insufficient. *State v. Billinger*, 9 N.C. App. 573, 176 S.E. 2d 901 (1970). If the flawed order finds

defendant guilty of violating G.S. 14-27.2(a)(2)(c), the order must be vacated because the petition granting the trial court jurisdiction is insufficient to allege a violation of G.S. 14-27.2(a)(2)(c). *State v. Ingram*, 271 N.C. 538, 157 S.E. 2d 119 (1967). The order of the district court is arrested.

Judges EAGLES and COZORT concur.

JOSEPH M. WARD v. PITT COUNTY MEMORIAL HOSPITAL, INC.

No. 853SC1343

(Filed 17 June 1986)

Abatement § 8— two suits—same subject matter—same defendant—abatement proper

The judgment of the trial court abating plaintiff's action was proper where plaintiff brought two suits, defendant was a defendant in both, and both were based on the same circumstances and subject matter, and it was immaterial that plaintiff's theory in the first suit was libel and in the present suit was breach of contract.

APPEAL by plaintiff from *Watts, Judge*. Order entered 25 September 1985 in Superior Court, PITT County. Heard in the Court of Appeals 18 April 1986.

Voerman & Ward, by William F. Ward, III, for plaintiff appellant.

James T. Cheatham and Ward and Smith, by David A. Stoller, for defendant appellee.

PHILLIPS, Judge.

In a prior action started on 9 August 1983 in the Pitt County Superior Court, plaintiff sued the defendant and various of its employees and professional staff members, alleging that he had been damaged by the circulation among the staff in August 1982 of a memorandum written by a certain nurse, which falsely indicated that plaintiff, a physician on the staff of defendant hospital, had neglected a patient by being unavailable when the nurse tried to call him. The complaint charged that the remarks

were recklessly or negligently made, and asked for the recovery of actual and punitive damages and that the hospital be restrained from interfering with his rights as a member of the hospital staff. That action is still pending. In August 1985 in the same court plaintiff filed this action against defendant alone. In the complaint he alleged that the circulation of the same false memorandum referred to in the prior action was a breach of defendant's contract with plaintiff to provide hospital facilities and services to plaintiff's patients, and asked for the recovery of both compensatory and punitive damages. Pursuant to defendant's plea of abatement this later action was dismissed and plaintiff's appeal is from that dismissal.

The judgment abating plaintiff's action was proper and we affirm it. "The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He can neither *split up his claim nor divide the grounds of recovery. Garner v. Garner*, 268 N.C. 664, 666-67, 151 S.E. 2d 553, 555 (1966). (Emphasis theirs.) That plaintiff's theory of recovery in the first suit was libel and in this one breach of contract is immaterial. Both suits concern the same subject matter and are based upon the same circumstances; and under our law the same subject matter and circumstances can give rise to but one suit for redress against the same defendant, though many claims or theories of recovery may be asserted therein. *Underwood v. Dooley*, 197 N.C. 100, 147 S.E. 686 (1929). Since the claim made against defendant in this suit could and should have been made in the first one it is immaterial that the parties defendant in the two cases are not precisely the same. *Emry v. Chappell*, 148 N.C. 327, 62 S.E. 411 (1908). It is enough to warrant the abatement that plaintiff brought both suits, that defendant is a defendant in both, and that both are based on the same circumstances and subject matter. *Barcliff v. Norfolk Southern Railroad Co.*, 176 N.C. 39, 96 S.E. 644 (1918).

Affirmed.

Judges BECTON and COZORT concur.

COASTAL CONCRETE COMPANY, INC. AND TYRRELL READY MIX v. GARY W. GARNER, D/B/A GARNER CONSTRUCTION COMPANY AND WIMCO INCORPORATED

No. 852SC990

(Filed 17 June 1986)

Rules of Civil Procedure § 56— defendant subject to other suits—propriety of summary judgment

There was no merit to defendant general contractor's contention that an order of summary judgment should not have been entered because it could be sued later by other suppliers or subcontractors of defendant paving subcontractor, since the evidence showed that no material fact was at issue between the parties to this case and plaintiffs were thus entitled to summary judgment to the extent given.

APPEAL by defendant Wimco Incorporated from *Brown, Frank R., Judge.* Judgment entered 9 July 1985 in Superior Court, TYRRELL County. Heard in the Court of Appeals 11 February 1986.

Charles W. Ogletree, and Pritchett, Cooke & Burch, by W. W. Pritchett, Jr., for plaintiff appellees.

Lonnie W. Carraway and F. E. Wallace, Jr., for defendant appellee Gary W. Garner, d/b/a Garner Construction Company.

Carter, Archie & Hassell, by W. B. Carter, Jr., for defendant appellant Wimco Incorporated.

PHILLIPS, Judge.

Plaintiff concrete manufacturers sued to enforce a lien for concrete supplied to defendant Garner, a paving subcontractor, that was used in building a housing project for which the defendant Wimco was the general contractor. After much discovery was done an order of partial summary judgment was entered adjudging that Coastal recover $5,112.76 of Garner; that Tyrrell recover $23,929.91 of Garner; that Wimco immediately pay Coastal $2,615.04 and Tyrrell $12,239.52 "out of the $14,854.56 being held by Wimco and due Garner"; and that Wimco pay to the plaintiffs "any sums coming into its possession up to a maximum of $29,042.67 less credits for payments ordered herein." Only Wimco appealed. The pleadings, the depositions, and other evidence of

record show without controversy that because of the construction referred to Wimco owes Garner Construction Company $36,854.56; Garner owes Coastal Concrete Company $5,112.76 and owes Tyrrell Ready Mix $23,929.91, for a total indebtedness to the two plaintiffs of $29,042.67; and Wimco is holding $14,854.56 of Garner's money. In pleading to the complaint Wimco admitted its debt to Garner and Garner admitted its debts to the plaintiffs. These and other uncontroverted admissions support the judgment entered and we affirm it.

The only grounds suggested by Wimco for upsetting the judgment are that it may be sued later by other suppliers or subcontractors of Garner and if that happens it may have to sue the project owner. The irrelevancy of this contention is obvious. Courts can only rule on justiciable issues that are presented to them, and no issue concerning the rights of anyone but the parties to this case was before the trial court when the judgment appealed from was entered. The evidence presented at that time showed beyond cavil that no material fact was at issue between the parties to *this case* and that plaintiffs were thus entitled to summary judgment to the extent given. Rule 56, N.C. Rules of Civil Procedure. Issues between parties that are ripe for final adjudication do not have to be delayed because other parties, unnecessary to the case, might sue later.

Affirmed.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. LEMANUEL DEVANE

No. 855SC1373

(Filed 17 June 1986)

1. Criminal Law § 99.6— court's questioning of witness—colloquy with counsel—no expression of opinion by court

There was no merit to defendant's contention that, during defendant's cross-examination of the operator of a breathalyzer machine, the trial judge expressed a disparaging opinion about his case and the way it was being handled by questioning the witness and conversing with defense counsel as to the identity of the inventor of the breathalyzer machine.

2. Automobiles § 129.3— driving while impaired—instructions on breathalyzer test evidence not required

In a prosecution of defendant for driving while impaired, the trial court was not required to instruct the jury that the breathalyzer result should not be considered by them unless they found first that the test was performed in accord with regulations promulgated by the Commission of Health Services.

APPEAL by defendant from *Winberry, Judge.* Judgment entered 25 July 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 7 May 1986.

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

Yow, Yow, Culbreth & Fox, by Stephen E. Culbreth and Ralph S. Pennington, for defendant appellant.

PHILLIPS, Judge.

[1] In appealing his conviction of driving while impaired in violation of G.S. 20-138.1, defendant makes but two contentions, neither of which has merit. His first contention is that during his cross-examination of the operator of the breathalyzer machine, a model manufactured by Stevenson Corporation, the trial judge expressed a disparaging opinion about his case and the way it was being handled by questioning the witness and conversing with defense counsel as follows:

Q. THE COURT: Do you know where Mr. Stevenson went to school?

A. No sir.

DEFENSE COUNSEL: Who?

THE COURT: Mr. Stevenson.

DEFENSE COUNSEL: Who is Mr. Stevenson?

THE COURT: You said he said he was the inventor of the machine, didn't you?

DEFENSE COUNSEL: No sir.

THE COURT: Somebody just did.

DEFENSE COUNSEL: I don't recall that.

THE COURT: Yeah, somebody just said that.

DEFENSE COUNSEL: No sir, the inventor of the machine is a Mr. Borkanstein, Professor Robert F. Borkanstein, Department of Forensic Science Studies, Indiana University.

THE COURT: All right.

In our opinion nothing in this interchange cast defendant, his case or his lawyer in an unfavorable light before the jury; it was a harmless effort to identify the *inventor* of the machine used in testing defendant, a matter of no moment to either the case or the jury.

[2] His only other contention is that the court erred in refusing his request to instruct the jury that the breathalyzer result should not be considered by them unless they found first that the test was performed in accord with regulations promulgated by the Commission of Health Services. As was ruled in *State v. Jenkins*, 21 N.C. App. 541, 204 S.E. 2d 919 (1974), the court was not required to give the instruction.

No error.

Judges MARTIN and PARKER concur.

COUNTY OF DARE v. R. O. GIVENS SIGNS, INC.

No. 861SC89

(Filed 17 June 1986)

Appeal and Error § 6.2— order determining fewer than all issues—appeal premature

An order granting judgment on the pleadings in favor of plaintiff, ordering defendant to remove certain signs within sixty days and providing that the issue of whether compensation, and the amount thereof, was due defendant was not ruled on by the order did not dispose of all the claims of the parties; therefore, an appeal from that order was interlocutory and is dismissed.

APPEAL by defendant from *Barefoot, Judge*. Order filed 12 November 1985 in Superior Court, DARE County. Heard in the Court of Appeals 4 June 1986.

Shearin & Archbell by Roy A. Archbell, Jr., for defendant appellant.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker by John N. Fountain and Carolin Bakewell for plaintiff appellee.

COZORT, Judge.

This appeal is interlocutory, and we dismiss it.

Defendant appeals from a 12 November 1985 order granting judgment on the pleadings in favor of plaintiff, ordering defendant to remove certain signs within sixty days. The record does not show that defendant has sought a stay of this order. The order also expressly provides that "the issue of whether compensation is due to Defendant and the amount of any such compensation, raised by the first and second claims of Defendant's counterclaim, is expressly not ruled on by this order."

No G.S. 1A-1, Rule 54(b), certification of "no just reason for delay" is contained in the 12 November 1985 order. The appeal is clearly interlocutory; it does not dispose of all the claims of the parties. Therefore, in this case the order is appealable only if it affects a substantial right. G.S. 1-277; G.S. 7A-27.

The defendant does not contend that the interlocutory order affects a substantial right, and we decline to so hold.

Appeal dismissed.

Chief Judge HEDRICK and Judge EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 JUNE 1986

ARMSTRONG v. CONE MILLS CORP. No. 8610IC85	Ind. Comm. (864679)	Affirmed
BRYANT v. CARSON No. 8521SC1192	Forsyth (85CVS2971)	Affirmed
DURHAM v. NATIONWIDE MUTUAL FIRE INS. CO. No. 8523SC1156	Wilkes (83CVS381)	No Error
ESSA v. MANER No. 8518SC1367	Guilford (84CVS7478) (85CVS4269)	Affirmed
GIBSON v. LAMBETH No. 8626SC103	Mecklenburg (83CVS9098)	Appeal Dismissed
GILBERT v. GILBERT No. 8529DC1026	Henderson (81CVD475) (82CVD426)	Vacated and Remanded
GLENN v. WAGNER No. 8521DC1377	Forsyth (80CVD973)	Affirmed
HAZRA v. SMITH AND FUTRELL No. 8610SC46	Wake (85CVS4589)	Affirmed
IN RE BENDER No. 851SC1190	Currituck (84SP43) (84SP44) (84SP45)	Appeal Dismissed
IN RE HOWELL No. 8519DC1395	Randolph (83-J-102)	Affirmed
PHIL MECHANIC CONSTRUCTION CO., INC. v. HAYWOOD No. 8629DC20	Rutherford (82CVD202)	Affirmed
RAY'S DAIRY BAR, INC. v. RAGLAND AND RANSON No. 8514SC1246	Durham (83CVS785)	Affirmed
ROBINSON-HUMPHREY/ AMERICAN EXPRESS, INC. v. USTUN ATAC No. 8526SC1274	Mecklenburg (83CVS7958)	Affirmed
SIMMONS v. MILLS No. 854DC1070	Sampson (84CVD621)	Affirmed

STATE v. BLUMKE No. 8625SC122	Caldwell (85CRS4792) (85CRS4793)	New Trial
STATE v. CRAWFORD No. 8626SC7	Mecklenburg (85CRS33488)	No Error
STATE v. DALE No. 8611SC48	Johnston (85CRS4750)	No Error
STATE v. DEGREE No. 8527SC1304	Lincoln (85CRS1881)	No Error
STATE v. DORSETT No. 8618SC6	Guilford (85CRS28542)	No Error
STATE v. ELLIOTT No. 8614SC100	Durham (85CRS20480)	No Error
STATE v. HUNT No. 8616SC31	Robeson (85CRS6843)	No Error
STATE v. LYNCH No. 859SC817	Warren (83CRS313) (83CRS314) (83CRS315)	No Error
STATE v. MALLETTE No. 855SC1332	New Hanover (84CRS18890) (84CRS18891)	No Error
STATE v. SCHORLE No. 8625SC130	Catawba (84CRS15307)	No Error
STATE v. SPENCER No. 862SC23	Hyde (85CRS392)	No Error
STATE v. TAPP No. 8614SC58	Durham (85CRS7993) (85CRS9252)	Affirmed
STATE v. TICE No. 854SC1327	Onslow (85CRS1537) (85CRS10869) (85CRS10870) (85CRS10871) (85CRS10872) (85CRS10873) (85CRS10874) (85CRS10875) (85CRS10876)	No Error
STATE v. TOLER No. 852SC1370	Beaufort (84CRS4392)	No Error

STATE v. WILSON No. 8622SC72	Iredell (84CR9506)	No Error
STATE EX REL. ATTORNEY GENERAL v. JOE NEWTON, INC. No. 8510SC1228	Wake (85CVS2157)	As to defendant's appeal from the contempt order, the contempt order is affirmed. As to defendant's appeal from the entry of the preliminary injunction, the appeal is dismissed.
WARD v. WARD No. 867DC60	Wilson (85CVD750)	Affirmed

In re Baby Boy Scearce

IN THE MATTER OF: BABY BOY SCEARCE, DOB: 11/19/83

No. 8514DC755

(Filed 1 July 1986)

1. **Infants § 5— child custody—subject matter jurisdiction**

A petition filed by the DSS was sufficient to give the court subject matter jurisdiction in a child custody case where it was signed and verified by the DSS and alleged that the child had been placed with DSS by its mother, that the putative father was unknown, that North Carolina was the home state of the child and no other state had jurisdiction over the child, and that the best interests of the child would be served if the court assumed jurisdiction over him.

2. **Infants § 9— child custody—appointment of guardian ad litem for child**

The trial court did not err in appointing a guardian ad litem for a baby in a proceeding to determine custody of the baby. N.C.G.S. § 1A-1, Rule 17(b).

3. **Infants § 6.3; Rules of Civil Procedure § 24— child custody—intervention by foster parents**

The trial court did not abuse its discretion in allowing the foster parents to intervene in a child custody action where the court found that it was in the best interest of the child to allow such intervention. N.C.G.S. § 1A-1, Rule 24(b)(2).

4. **Infants § 6.3— child custody—award to foster parents**

The trial court had the authority to award the legal custody of a foster child to the foster parents.

5. **Infants § 6— child custody—order relieving DSS of further responsibility**

Where the trial court found that the best interest of a child who had been placed with the DSS by its mother would be served by awarding legal custody to his foster parents with limited visitation privileges to the child's father, and the court ordered the Durham Community Guidance Clinic for Children and Youth to monitor visitation and report to the court, the court did not err in ordering that the DSS have no further responsibility in the matter.

APPEAL by Petitioner Durham County Department of Social Services and Respondent Jeffrey Harmon from *Read, Judge*. Order entered 11 December 1984 in District Court, DURHAM County. Heard in the Court of Appeals 5 December 1985.

Thomas Russell Odom for Department of Social Services, petitioner appellant; and M. Lynette Hartsell for Jeffrey Harmon, respondent appellant.

Carolyn McAllaster for Kelly and Barbara Whitman, intervenor appellees.

N. Joanne Foil, guardian ad litem, appellee.

COZORT, Judge.

On 11 December 1984, the District Court of Durham County awarded legal custody of a 13-month-old baby boy to foster parents with whom the baby had been placed by the Durham County Division of Social Services (DSS) when the baby was two days old. DSS instituted this action in February of 1984 by filing a petition asking the court to take jurisdiction for the purposes of terminating the parental rights of the biological father, whose identity was then known only to the biological mother. The unwed 16-year-old biological mother had released the baby to DSS for adoptive placement when the baby was born. When the matter came on for hearing before the district court, DSS took the position that custody should be granted to the 18-year-old biological father who had since been identified, and, despite earlier statements and actions to the contrary, had subsequently requested custody of the baby. DSS appealed the district court's award of custody to the foster parents, alleging, *inter alia*, a lack of subject matter jurisdiction in the court, error in the trial court's appointing a guardian ad litem for the baby, and error in its allowing the foster parents to intervene. We affirm.

The facts presented below are taken from the detailed findings of fact entered by the district court in its Order of 31 December 1984, which took over 30 pages to reproduce in the record on appeal. No transcript of the evidence or narrative thereof was filed with this Court. Although the record on appeal contains many exceptions to the findings of fact made by the trial court, none of those have been argued in this Court as not being supported by clear, cogent and convincing evidence. Thus, we deem the facts as summarized below to be properly supported by the evidence and undisputed by the parties.

In early 1983, Dawn Scearce began dating a boy known to her as Jeffrey Brown. Dawn and Jeffrey attended junior high school in Rowan County. In the spring of 1983 Dawn became pregnant with Jeffrey's baby. When Dawn told Jeffrey she was pregnant, Jeffrey suggested she get an abortion which he would pay for. Jeffrey also informed Dawn that he could not marry her because he was planning to marry another woman by whom he had also fathered a child. Dawn attempted to get an abortion; how-

ever, her pregnancy had progressed past the first trimester, and she was unable to get an abortion.

During her pregnancy Dawn lived with her father and stepmother in Durham. Dawn and her parents approached the Durham County DSS in July of 1983 regarding the possibility of releasing the child for adoption. On 19 November 1983, Baby Boy Scearce was born in Durham County. On 21 November 1983, Dawn released Baby Boy Scearce to the Durham County DSS for adoptive placement. Prior to signing the release, Dawn expressed her concern to DSS officials that the biological father of the child or his parents should not be granted custody of Baby Boy Scearce because she did not feel that they were fit and proper individuals to have custody of the child. On 21 November 1983, Baby Boy Scearce was placed by DSS in the home of Barbara and Kelly Whitman, licensed foster parents.

On 17 February 1984, DSS instituted this action by filing a petition asking the district court to take jurisdiction over this matter for the purposes of terminating the parental rights of the then unknown father. On 17 February 1984, a guardian ad litem was appointed for Baby Boy Scearce. On 27 February 1984, Dawn appeared with her father and mother in district court and stated that she did not desire to divulge the identity of the biological father until she received the advice of counsel. On 26 March 1984, Dawn, through counsel, filed an affidavit in which she identified the child's father as "Jeff Brown." DSS officials soon learned that the boy known to Dawn as "Jeff Brown" was Jeffrey Eugene Harmon.

In early March 1984, Dawn returned to Rowan County, North Carolina, and attempted to locate Jeffrey. Dawn located Jeffrey, and he agreed to sign his consent for the release of the child to DSS. Several days later Marlene Gainey, Jeffrey's mother, informed Dawn that Jeffrey would not sign the consent to release the child for adoption because Mrs. Gainey and her husband wished to adopt the baby. Mrs. Gainey then contacted DSS and informed DSS that she was the paternal grandmother of Baby Boy Scearce and that she and her husband desired custody of the child.

On 1 May 1984, a motion in the cause was filed by Jeffrey Harmon asking the trial court to give exclusive care, custody and

control of Baby Boy Scearce to him. On 10 May 1984, the guardian ad litem filed a reply to Harmon's motion in the cause and filed a counterpetition and motion. The counterpetition alleged, among other things, that Baby Boy Scearce was a dependent, neglected, and abandoned child. The guardian ad litem asked the court to deny Harmon's motion in the cause requesting custody of Baby Boy Scearce.

On 28 March 1984, the foster parents of Baby Boy Scearce filed a motion to intervene. The DSS filed an answer to the motion opposing intervention by the foster parents. On 17 April 1984 the trial court allowed the foster parents to intervene; however, on 13 July 1984, the order allowing intervention was vacated because the biological father had not been served with the motion to intervene. On 19 July 1984, after the motion to intervene had been properly served on the father, the trial court allowed the foster parents to intervene pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure.

On 19 July 1984, DSS filed a petition asking the court to award legal and physical custody of Baby Boy Scearce to his biological father, Jeffrey Harmon. On 2 October 1984, the trial of this matter began and continued intermittently for two and one-half months. On 31 December 1984 the district court entered its 30-page order awarding legal custody of Baby Boy Scearce to the foster parents, subject to Jeffrey Harmon's rights of visitation. The court made 41 findings of fact (constituting 28 pages of the record on appeal), many of which were detailed findings concerning Jeffrey Harmon's history of emotional problems and his inability to adequately and consistently provide for the child's care and supervision. The court found that Jeffrey Harmon had a long history of disruptive and inappropriate behavior in school, including suspensions for fighting and using marijuana. Records from the Rowan County Mental Health Office showed he had been referred for counselling at the age of 12 when he tried to persuade two girls to have sex with him. Harmon was once adjudicated delinquent and placed on probation for vandalism. He was belligerent and hostile and had a problem with stealing. He used marijuana and "speed" on a regular basis. Jeffrey Harmon's biological father had "washed his hands" of Jeffrey because of his inappropriate behavior. Jeffrey had left his mother's home, the home of Tim and Marlene Gainey, because his stepfather, Tim

Gainey, had "beaten him to a pulp." He moved back into the Gainey home when his mother learned that Baby Boy Scearce was in the custody of Durham County DSS. Harmon has a sporadic employment history, having on at least two occasions quit full-time employment for no apparent reason. He had been fired from at least one other job and quit several other part-time jobs. Since the birth of Baby Boy Scearce, he has made sporadic support payments. He missed several scheduled visits with Baby Boy Scearce without explanation, testifying that it "caused him no concern that the child might be awakened early from his nap for a visit only to have him not appear."

The trial court further found that, at one point during Dawn's pregnancy, Jeffrey denied being the father of the baby. He offered no financial or other support during the pregnancy. Jeffrey knew the baby had been born by December of 1983, yet he made no effort to make contact with the child until after his mother called the Durham County DSS on 27 March 1984. The court found that Jeffrey was untruthful and that "he would say anything if he thought that particular statement would help convince the Court to grant him custody of Baby Boy Scearce." The court found that Jeffrey Harmon has "serious significant psychiatric problems and would not be able to adequately and consistently provide for the child's care and supervision." Harmon stated to a social worker that he did not feel that he could appropriately care for the child, and he planned to release the baby to Mr. and Mrs. Gainey so that they could adopt him.

The trial court also found that neither Jeffrey Harmon nor his mother Marlene Gainey knew where Baby Boy Scearce would sleep in the Gainey home if they were awarded custody. The Gainey home has three bedrooms, one occupied by Mr. and Mrs. Gainey, one by the two female children, and the third by three of the five male children. The two other boys slept in the small dining area of the home. Mrs. Gainey has been convicted of misdemeanor food stamp fraud and, at the time of the hearing, was under indictment for felony food stamp fraud. Mr. Gainey has been convicted of involuntary manslaughter for which he served a prison sentence.

The trial court found that Baby Boy Scearce has developed normally and is secure and happy in the Whitman home. The

Whitmans expected the baby to be placed out of their home by Christmas of 1983; however, when that did not happen, the Whitmans cared for and loved the baby such that "the bonding necessary for healthy, psychological development occurred." The court found that Baby Boy Scearce is "likely to develop various detrimental consequences of both a short term and long term nature if moved from the Whitmans at this stage of his development." The court found it would be in the child's best interest for custody to be placed with the Whitmans. The court found that Jeffrey Harmon could not provide proper care and supervision for the baby, that he had abandoned Baby Boy Scearce, and that he had "failed and refused to show any interest whatsoever in said child's health and welfare."

In its conclusions of law, the trial court concluded that neither Jeffrey nor Mr. and Mrs. Gainey were fit and proper individuals to have care, custody and control of the child. It concluded that the Whitmans were fit and proper and that it is in the best interest of the baby to award exclusive care, custody, and control of the baby to them. The court awarded legal custody to the Whitmans, with the rights of visitation to Jeffrey Harmon, ordered the Durham Community Guidance Clinic for Children and Youth to monitor visitation and to report to the court if necessary, and relieved the Durham County DSS of any further responsibility in the case. From this order the DSS and the father appealed. Pursuant to Rule 28(f) of the Rules of Appellate Procedure, the father joined in the brief of DSS. Thus, further references in this opinion to arguments by DSS are deemed to include the biological father, Jeffrey Harmon. Likewise, the intervenors and the guardian ad litem, appearing as appellees, have adopted portions of each other's briefs. Further references to the contentions of the guardian ad litem are thus deemed to include the intervenors.

DSS raises five issues on appeal: (1) whether the trial court had subject matter jurisdiction; (2) whether the trial court erred by appointing a guardian ad litem for Baby Boy Scearce; (3) whether the trial court erred by allowing the foster parents to intervene; (4) whether the trial court erred in awarding legal care, custody, and control of Baby Boy Scearce to the foster parents; and (5) whether the trial court erred by relieving DSS of any further responsibility in this case.

[1] DSS contends that the original petition it filed in this case was defective, and that the court, therefore, lacked subject matter jurisdiction over the entire matter. We disagree. The original petition filed in this matter was entitled "Petition for Order Acquiring Jurisdiction and Order Authorizing Service of Process by Publication." The petition set forth in the first paragraph allegations concerning the circumstances surrounding the release of the child to DSS. The third and fourth paragraphs alleged:

> 3. This state is the home state of the minor at the time of the commencement of this proceeding and has been his residence since birth. There is available in this state substantial evidence relative to the minor's present or future care, protection and training and personal relationships.
>
> 4. No other state would have jurisdiction to make a custodial determination as to the minor in accordance with G.S. 50A-3(a)(1)(2), or (3) and it is in the best interest of the minor that this court assumes jurisdiction over him.

The petition went on to request that the court enter an order acquiring jurisdiction over the minor thereby satisfying the jurisdictional requirements of G.S. 7A-289.23 in order that the petitioner could proceed with filing of an action to terminate any and all parental rights of the unknown father. The petition was signed and verified.

DSS contends that the petition was inadequate to confer subject matter jurisdiction on the court because it did not comply with the requirements of G.S. 7A-289.25, the actual petition for termination of parental rights. This argument is spurious. The petition was a preliminary petition asking the court to assume jurisdiction over the child, which the court did. The petition was not a petition to terminate parental rights. No petition to terminate the rights of the father was ever filed in this matter, and the father's parental rights have never been terminated.

DSS also contends under this assignment of error that the trial court lacked jurisdiction because the petition as filed failed to allege that the child was delinquent, undisciplined, abused, neglected, or dependent, in accordance with G.S. 7A-523, the part of the Juvenile Code dealing with "Jurisdiction." The contention of DSS is misplaced. The portion of Chapter 7A to which DSS re-

fers is within the part of the Chapter dealing with "juvenile offenders," "abused and neglected" children, the process by which those types of cases are brought into court, and appropriate dispositions made. The case below is a "custody" proceeding. In *Francis v. Department of Social Services*, 41 N.C. App. 444, 255 S.E. 2d 263 (1979), we discussed what was necessary to confer jurisdiction in custody cases:

> This is a civil action for custody of a minor child. The child was physically present in this State and the court obtained personal jurisdiction over the defendant agency, which had actual control and custody of the child when this action was commenced. Either of these factors would vest jurisdiction in the courts of this State to determine custody of the child. *See* G.S. 50-13.5(c)(2). "The district court division is the proper division . . . for the trial of civil actions and proceedings for . . . child custody." G.S. 7A-244. The procedure in actions for custody or support of minor children is prescribed in G.S. 50-13.5. Subsection (h) of that statute provides that "[w]hen a district court having jurisdiction of the matter shall have been established, actions or proceedings for custody and support of minor children shall be heard without a jury by the judge of such district court and may be heard at any time." We hold that by virtue of these statutes the district court had jurisdiction over the subject matter of this action.

Id. at 448, 255 S.E. 2d at 265-66.

The case below is controlled by our ruling in *Francis*. This petition alleged that the child had been placed with DSS by its mother; that the putative father was unknown; that North Carolina was the home state of the child and no other state had jurisdiction over the child; that the best interest of the child would be served if the court assumed jurisdiction over him. The petition was signed and verified by the DSS.

We also note that after DSS's petition was filed, subsequent petitions filed by the guardian ad litem and the father properly brought the question of the child's placement and custody before the court. The counterpetition of the guardian ad litem alleged that the child was dependent, neglected, and abandoned. The father's motion in the cause raised the issue of custody. Once juris-

diction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined. *In re Shue*, 311 N.C. 586, 319 S.E. 2d 567 (1984); *Latham v. Latham*, 74 N.C. App. 722, 329 S.E. 2d 721 (1985).

[2] Next, DSS contends that the trial court erred in appointing a guardian ad litem for Baby Boy Scearce. The trial court appointed the guardian ad litem after the original petition was filed and prior to the first hearing in this case. In the Order appointing the guardian ad litem the district court relied on G.S. 7A-586, which provides that, "[w]hen in a petition a juvenile is alleged to be abused or neglected, the judge shall appoint a guardian ad litem to represent the juvenile."

DSS argues that the appointment was invalid because (1) the court did not have jurisdiction over the matter, and (2) the original petition contained no allegations of abuse or neglect. As to the first argument, we have held that the court had jurisdiction over the subject matter after the filing of the original petition. While we agree that the original petition contained no allegations of abuse and neglect, we do not read G.S. 7A-586 to prevent the application of other pertinent statutory provisions. *See In re Clark*, 303 N.C. 592, 281 S.E. 2d 47 (1981). Whether the appointment of a guardian ad litem for the minor child is necessary in a proceeding is controlled by G.S. 1A-1, Rule 17(b), N.C. Rules Civ. Proc. "[U]nder the statutory law and traditional practice of this State, the minor parties to a civil action or a special proceeding must be represented by a guardian ad litem . . . ." *Clark, supra*, at 598, 281 S.E. 2d at 52; *Sadler v. Purser*, 12 N.C. App. 206, 209-10, 182 S.E. 2d 850, 852 (1971). " 'The appointment of the guardian *ad litem* is to protect the interest of the infant defendant at every stage of the proceeding.' (Citation omitted.)" *Clark, supra*, at 598, 281 S.E. 2d at 52. Thus, we hold that the trial court did not err by appointing a guardian ad litem for Baby Boy Scearce in this proceeding.

[3] DSS next contends that the trial court erred when it allowed the foster parents to intervene in this action. We disagree. The trial court allowed the foster parents to intervene pursuant to Rule 24(b) of the North Carolina Rules of Civil Procedure. Intervention pursuant to Rule 24(b) is permissive and within the discretion of the trial court. *Ellis v. Ellis*, 38 N.C. App. 81, 247

S.E. 2d 274 (1978). In its order allowing intervention by the foster parents, the trial court made the following finding of fact: "The participation of the movants, who have been Baby Boy Scearce's exclusive caretakers to date, as parties to this action will enhance the Court's knowledge and judgment as to the issues before this Court, including the best interests of Baby Boy Scearce." The trial court concluded: "[I]ntervention by movants will not unduly delay or prejudice the adjudication of the rights of the original parties."

Our research reveals no North Carolina cases directly on point. Under G.S. 7A-667, this Court held that foster parents were custodians as defined by G.S. 7A-278(7) (repealed in 1979), and, therefore, had the right to notice, the right to intervene and to present evidence, and the right to contest orders of the court. *In re Kowalzek*, 32 N.C. App. 718, 721, 233 S.E. 2d 655, 657 (1977). However, G.S. 7A-517(11), the replacement for G.S. 7A-278(7), currently defines Custodian as "[t]he person or agency that has been awarded legal custody of a juvenile by the court." This definition is much narrower than the previous definition, and *In re Kowalzek* is not applicable.

DSS argues that *Oxendine v. Department of Social Services*, 303 N.C. 699, 281 S.E. 2d 370 (1981), controls here and that intervention by foster parents is not permissible. We disagree. In *Oxendine*, the foster parents filed a complaint in district court pursuant to G.S. 50-13.4 and G.S. 50-13.5(b)(1) seeking permanent custody of their foster child. The North Carolina Supreme Court found that, because the natural parents of the foster child had voluntarily released their parental rights and surrendered the child to DSS for adoptive placement pursuant to G.S. 48-9(a)(1), the provisions in G.S. 48-9.1(1) governed the action. *Id.* at 706, 281 S.E. 2d at 375. The court held that nothing in the language of G.S. 48-9.1(1) gave the foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, the foster parents were without standing to *bring an action* seeking custody of the minor child placed in their home by defendant. *Id.* at 707, 281 S.E. 2d at 375.

Oxendine is distinguishable from this case. Because both of Baby Boy Scearce's biological parents have not released him to DSS for adoptive placement, this case is not controlled solely by

G.S. 48-9, *et seq.* In addition, this case involves permissive intervention, not standing to bring an action. Standing is a requirement that the plaintiff have been injured or threatened by injury or have a statutory right to institute an action. *See* G.S. 1-57; *Sanitary District v. Lenoir*, 249 N.C. 96, 99, 105 S.E. 2d 411, 413 (1958). An intervenor by permission need not show a direct personal or pecuniary interest in the subject of the litigation. Shuford, *N.C. Civil Practice and Procedure*, Sec. 24-7, p. 201. It is in the court's discretion whether to allow permissive intervention pursuant to Rule 24(b)(2); and, absent a showing of abuse, the court's decision will not be overturned. *Ellis v. Ellis, supra.*

G.S. 7A-659 recognizes the right of the foster parents to participate in review proceedings concerning the placement and care of the foster child after termination of parental rights. The statute requires that notice of review be given to the foster parents and requires the foster parents to attend the review proceedings. At the very least, foster parents have the right for an opportunity to be heard, a right which derives from the child's right to have his or her best interests protected. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 841-42 n. 44, 53 L.Ed. 2d 14, 33 n. 44, 97 S.Ct. 2094, 2108 n. 44 (1977); *Goldstein v. Lavine*, 100 Misc. 2d 126, 418 N.Y.S. 2d 845 (1979). The right of foster parents to intervene by permission was recognized by the Court of Appeals of Missouri in *In re K.L.G.*, 639 S.W. 2d 619 (1982). The Court reasoned that intervention was necessary to elicit full and accurate information pertaining to the welfare of the child. *Id.* at 622; *see also* 621-22 n. 1. DSS and the father argue that the father was prejudiced by the trial court's allowing the foster parents to intervene. While it may be true that the foster parents did not advocate the position of the father or DSS, the trial court found, and we agree, that intervention by the foster parents would not "prejudice the adjudication of the rights of the original parties." The court further found that the best interests of the child would be served by allowing the foster parents to intervene. DSS has failed to show any abuse of discretion by the court. We hold the trial court did not err by allowing the foster parents to intervene in this action where the trial court found it was in the best interests of the child to allow the intervention.

[4] Next, we consider the argument of DSS that the trial court erred by awarding legal care, custody, and control of the minor

child to the foster parents. DSS argues that *Oxendine, supra,* prohibits the transfer of legal care, custody and control of the foster child to the foster parents. We do not read *Oxendine* to prohibit such a result. *Oxendine* stands for the proposition that foster parents have no standing to bring a custody action pursuant to G.S. 50-13.2, *et seq.* Our case is similar to *Francis v. Department of Social Services, supra,* where this Court stated:

> All that had happened here prior to the institution of the present custody action is that the mother had surrendered the child to the defendant Department and had signed a general consent for his adoption. The effect of this was to give legal custody of the child to the Department "unless otherwise ordered by a court of competent jurisdiction." G.S. 48-9.1(1). Here, a court of competent jurisdiction has otherwise ordered.

41 N.C. App. at 449, 255 S.E. 2d at 266. Having acquired subject matter jurisdiction, the court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of the child to the foster parents. *See* G.S. 7A-647(2)(b), G.S. 50A-1, *et seq.*; and G.S. 50-13.2. This assignment of error is overruled.

[5] In the final assignment of error DSS contends that the trial court erred by ordering that DSS have no further responsibility in this matter. We disagree. The trial court found, after numerous days of testimony, that the best interest of Baby Boy Scearce would be served by awarding legal custody to his foster parents with limited visitation privileges to the child's father. The father's visitations with the child are to be monitored by the Durham Community Guidance Clinic for Children and Youth in Durham and the Guidance Clinic is to report to the trial court concerning the visitations. The trial court has not terminated *its* jurisdiction over the child, nor have the responsibilities of the guardian ad litem been terminated by the court. The participation of DSS in this matter is not statutorily required or as a practical matter necessary. We hold that the trial court did not err in relieving DSS of any further responsibility in this matter.

We recognize that child custody disputes are sensitive and emotion-laden subjects which stir strong conflicts among the litigants. We are not unsympathetic to all those involved in this mat-

ter. However, after reviewing the record, we are convinced that the trial court's rulings and orders are legal, correct, and in the best interest of the child. The record before us is completely devoid of any basis, legal or factual, to support the position advocated by the Department of Social Services, which was to place the child with his biological father. Thus, the orders of the trial court are

Affirmed.

Judge WEBB concurs.

Judge BECTON concurs in the result.

DAVID L. PRITCHARD, VANCE MIDGETT, JAMES STANLEY, TOMMY POWELL, JOHN W. HOLMES, HUGH TARKENTON, VANN RANHORN, CARLTON WHITE AND RICHARD TURNER v. ELIZABETH CITY, NORTH CAROLINA; TOMMY M. COMBS, CITY MANAGER OF ELIZABETH CITY; JOHN F. WEEKS, MAYOR OF ELIZABETH CITY; PARKER MIDGETT, TOMMY GRIFFIN, PETE HOOKER, ANNE CHORY, GARNIE BANKS, W. G. WILLIAMS, JOSEPH ANDERSON, AND ANNIE BERRY, MEMBERS OF THE CITY COUNCIL OF ELIZABETH CITY

No. 851SC780

(Filed 1 July 1986)

1. Municipal Corporations § 9— firefighters—accumulation of vacation leave—ordinance construed

The Elizabeth City city council did not intend an ordinance allowing firefighters to accumulate a maximum of thirty days vacation leave to result in the accumulation of twenty-four hours for each of those thirty days, even though the firefighters worked twenty-four hours on and forty-eight hours off. Other sections of the ordinance defined a firefighter's workday as twelve hours for purposes of accruing and charging vacation leave; the City's clear intent was to treat all employees fairly and equally; defining a firefighter's workday as twelve hours resulted in all employees having enough vacation leave to take approximately the same amount of time off each year; and a 1980 ordinance clearly defining a firefighter's workday as twelve hours simply reorganized sections and subsections and did not suggest that the City intended to change the maximum amount of vacation leave a firefighter could accumulate.

2. Municipal Corporations § 9— municipal employees—accumulation of vacation leave—supplemental contract—summary judgment for City improper

The Elizabeth City city council was estopped to assert the invalidity of supplementary contracts with firemen for accumulated vacation leave and summary judgment was improperly granted on a breach of contract claim by the firefighters against the City where the firefighters worked twenty-four hour shifts; a 1972 ordinance allowed firefighters to accumulate up to thirty days vacation but did not expressly define the length of a firefighter's workday; the correct interpretation of the ordinance limited accumulation of vacation to thirty twelve-hour days; the City Manager and the fire chief had the authority to offer the firefighters an accumulated vacation leave benefit program and to enter into supplementary employment contracts; the City encouraged the continued employment of its firefighters by listing the monetary value of the total accumulated vacation leave in excess of 360 hours and expressly challenged the firefighters to compare the City's compensation package with other employers' programs; the representations that more than 360 hours could be accumulated became supplementary employment contracts because they were inducements to continued employment; it is likely that some firefighters avoided taking vacation leave because its monetary value at termination was increasing; and it would be unfair to charge the firefighters with knowledge of the appellate interpretation of the language in the ordinance when the city officials authorized to administer that ordinance made the same error as the firefighters.

3. Constitutional Law §§ 25.1, 23.1— employer's adjustment of vacation leave—not unconstitutional

An Elizabeth City ordinance limiting the accumulation of vacation leave by firefighters to thirty twelve-hour days per year did not unconstitutionally impair the obligations of the firefighters' contract and the adjustment of the firefighters' accumulated leave did not amount to an unconstitutional taking of property because the ordinance was not applied retroactively. The City applied the correct, albeit belated, interpretation of the previous ordinance in adjusting the firefighters' leave.

APPEAL by plaintiffs from *Griffin (William C.), Judge*. Judgment entered 25 February 1985 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 5 December 1985.

Edelstein and Payne, by Steven R. Edelstein, for plaintiff appellants.

Wilson & Ellis, by M. H. Hood Ellis, for defendant appellees.

BECTON, Judge.

This action for declaratory and other relief was brought by nine firefighters employed by Elizabeth City. They seek relief for the removal of accumulated vacation leave from their employment

records by defendants Elizabeth City, the city manager, the mayor and the members of the city council. We reverse and remand in part and affirm in part.

I

The material facts are not in dispute. Elizabeth City is a municipal corporation. Each of the plaintiff firefighters began working for Elizabeth City between 1972 and 1980 except Mr. Powell, who began in 1963. Each firefighter had an oral contract with the city for an indefinite period of employment. The contracts were made on behalf of the city by the then-current chief of the fire department. Each firefighter was told that he would receive a certain annual salary plus vacation leave, sick leave and other benefits. It was understood by all parties that the benefits were part of the compensation and were earned each pay period. The firefighters were also told that their schedules would comprise a twenty-four-hour workday followed by forty-eight hours off.

A 1972 city ordinance, applicable to firefighters, provided in Division 4:

> Section 5. *Vacation Leave.*
>
> (a) *Vacation Leave Earned.* Each full-time employee shall earn vacation leave at the rate of five-sixths (5/6) workdays per calendar month of service for a total of two (2) calendar weeks per year. For purposes of determining vacation leave earned or taken, the Fireman's workday shall be considered to be each twelve hours absent from duty.
>
> (b) *Previous Vacation Credit.* Vacation credits accumulated by each employee as of the effective date of this Article shall be retained by the employee and used in accordance with the provisions of this Article.
>
> (c) *Granting of Vacation Leave.* Employees shall be granted the use of earned vacation leave upon request at those times designated by department heads which will least obstruct normal operations of the department. . . .
>
> (d) *Vacation Leave Accumulation.* Vacation leave may accumulate to a maximum of thirty (30) workdays of vacation leave, provided that upon the recommendation of a depart-

ment head and with approval of the City Manager, an employee may accumulate up to sixty (60) workdays of vacation leave for a special purpose.

(e) *Terminal Pay.* Upon submission of his resignation, an employee shall be paid for vacation time accumulated to the date of separation provided he has completed one year of continuous service and provided he has submitted notice to his immediate superior at least two weeks in advance of the effective date of resignation. An employee who is involuntarily separated without fault or delinquency on his part shall be paid for vacation leave accumulated to the date of separation. . . . In no case shall terminal pay be for more than thirty (30) work days of accumulated vacation leave.

A "Personnel Handbook" was issued by the city concerning the 1972 ordinance. Under Section IV, describing fringe benefits, the handbook states that each employee is entitled to be paid for "the number of vacation days he has to his credit, not to exceed thirty days or a month and one-half." The handbook did not mention the number of hours in a workday.

As the firefighters worked each pay period, their employment records and the records of both the fire department and the city were updated to reflect the total vacation leave that had accumulated. Until 1981, these records indicated that each of the plaintiff-firefighters had accumulated vacation leave in excess of 360 hours. Personnel forms for the 1978 and 1979 calendar years, approved and signed by the city manager and by the chief of the fire department, were sent to each firefighter. The forms listed, among other items of compensation, each employee's accumulated vacation leave, which, for each plaintiff, was in excess of 360 hours. The monetary value of the total accumulated leave was also listed. In addition, the city stated on each form:

This compensation summary illustrates that your job is worth much more to you and your family than the money you take home. The City's wages and benefits compare very favorably with those of other employer's [sic] in the area.

In May 1978, the city began to consider a new personnel policy. A draft copy of the new policy did not define a firefighter's workday. Nonetheless, an ordinance enacted in May 1980 de-

fines a firefighter's workday as twelve hours for purposes of compensation for accumulated vacation leave. The ordinance provides in relevant part in Article IV:

> 3.0 *Vacation Leave.* Vacation shall accrue to the credit of each full-time permanent employee as follows:
>
> | Length of Service | *Days of Leave Accumulation** | |
> |---|---|---|
> | | Per Month | Per Year |
> | 1 through 5 years | 0.83 1/3 day | 10 days |
> | 6 through 10 years | 1.00 day | 12 days |
> | 11 through 20 years | 1.25 days | 15 days |
> | 21 years or longer | 1.66 2/3 days | 20 days |
>
> * Compensation for a day of Vacation Leave equals pay for twelve hours for an employee assigned to a duty week that averages fifty-six hours; and pay for eight hours for all others.
>
> The maximum vacation leave that may accrue to an employee's credit is limited to thirty days. . . .

Firefighters work a week that averages fifty-six hours.

In September 1982, the city adjusted the employment records of the plaintiff-firefighters, removing hours of accumulated vacation leave that were in excess of 360. Subsequently, the firefighters filed this action. They assert that the 1972 ordinance, which limited accumulated vacation leave to thirty "workdays," did not define "workday" for the purpose of accumulating vacation leave. Therefore, the firefighters contend, they could accumulate up to 720 hours of vacation leave because a firefighter's workday is a twenty-four-hour shift. The firefighters argue that by removing the accrued hours, the defendants (1) breached the firefighters' employment contracts; (2) violated their constitutional rights by enacting a law impairing contracts and by taking their property without due process of law; and (3) violated their civil rights under 42 U.S.C.A. Sec. 1983 (1981). The firefighters sought a

declaratory judgment establishing their right to the allegedly vested accumulated vacation leave in excess of 360 hours that was removed from their records. They also sought compensatory and punitive damages and attorney's fees.

Defendants maintain that the 1972 ordinance legally and unambiguously limited accumulated vacation leave to thirty twelve-hour workdays, or 360 hours. They assert that the listing of hours in excess of 360 was an error, but that those hours did not become the vested property of the firefighters.

The trial court granted summary judgment in favor of the defendants, and the firefighters appeal. They argue that the court erred in granting summary judgment as to each of their claims for relief. They also assert that the court erred to the extent it relied on the statute of limitations, on the doctrine of governmental immunity, on defendant's contention that monetary damages are inappropriate, or on the defense of good faith.

We reverse summary judgment on the breach of contract claim. Although the 1972 ordinance legally limited accumulated vacation leave to 360 hours, the city is estopped to deny the validity of the employment contracts with the firefighters. These contracts were not ultra vires the city. The case is remanded to the trial court on the breach of contract claim for proceedings consistent with this opinion. We affirm summary judgment on all other issues.

II

The defendants in this action concede the facts as alleged by the firefighters. They argue that even on these facts, summary judgment was properly granted because the moving party was entitled to judgment as a matter of law. *See Moore v. Crumpton*, 306 N.C. 618, 295 S.E. 2d 436 (1982). Central to this appeal is the proper interpretation of the 1972 ordinance. This is a question of law.

[1] When interpreting an ordinance, the intention of the municipal corporation must be ascertained and given effect. *Cogdell v. Taylor*, 264 N.C. 424, 142 S.E. 2d 36 (1965); *Minton v. Town*

of Ahoskie, 21 N.C. App. 716, 205 S.E. 2d 626 (1974). "The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Cogdell*, 264 N.C. at 428, 142 S.E. 2d at 39 (citations omitted). If the ordinance is clear and unambiguous, its plain meaning will be enforced. *Minton*. An interpretation that results in illogical or absurd consequences should be avoided. *Helms v. Powell*, 32 N.C. App. 266, 231 S.E. 2d 912 (1977). "Ordinances must be read and construed as a whole or as an entirety in the light of circumstances existing at the time of their adoption, with proper regard for the consequences which would result from giving to them a particular meaning; the courts must keep in mind the object or purpose of the enactments . . . ." 56 Am. Jur. 2d *Municipal Corporations* Sec. 398, at 444 (1971) (footnotes omitted). An ordinance that is ambiguous or susceptible to different reasonable constructions may be interpreted with the aid of the doctrine of contemporaneous construction: "[A] practical construction accorded [to the ordinance] by enforcing officers is given great weight." *Id.* Sec. 405, at 448-49 (footnote omitted). "But such a construction is not binding on the courts." 4 McQuillin, Municipal Corporations, Sec. 12.177e (3d rev. ed. 1985) (footnote omitted).

It is clear from the 1972 ordinance that when a firefighter *earned* a "workday" of vacation leave, twelve hours were to be added to that firefighter's total accumulated vacation leave. It is equally clear that whenever a firefighter was absent from duty for a twelve-hour period, one "workday" (or twelve hours) was to be removed from total accumulated vacation leave. The issue in this case is the proper interpretation of the following provision in subsection (d): "Vacation leave may accumulate to a maximum of thirty (30) workdays of vacation leave. . . ." The firefighters argue that this sentence reasonably could be interpreted to mean that a "workday" for purposes of allowing hours to accumulate was a twenty-four-hour day rather than a twelve-hour day. We agree. Nonetheless, we conclude that this is not what the city council intended.

Reading the ordinance as a whole, we conclude that the definition in Section 5(a) applies as well to Section 5(d). The legislature defined the firefighters' workday as twelve hours for

purposes of determining vacation leave "earned or taken." Having so defined a firefighter's workday in Section 5, if the city council had intended a firefighter's "workday" to mean a twenty-four-hour day for purposes of *accumulating* vacation leave, it would have redefined it for that purpose in subsection (d). We do not believe the city council intended to allow firefighters to accumulate twelve hours for each day of vacation leave "earned" but to accumulate twenty-four hours for each of the thirty days representing the maximum amount of accumulated vacation leave allowed by the city.

The city's clear intention was to treat all employees fairly and equally. The city assured equal treatment in subsection (a) by defining a firefighter's workday as a twelve-hour day for purposes of earning and taking vacation leave, thereby offering to all employees enough vacation leave to take approximately the same amount of time off each year.[1] It is true that firefighters work fifty-six hours each week, forty percent longer than employees working a forty-hour week. But they also may accumulate vacation leave to a maximum of thirty twelve-hour days, or 360 hours. Employees working an eight-hour day may accumulate only thirty eight-hour days, or 240 hours. Thus, firefighters are allowed to accumulate fifty percent more vacation leave than other employees. It would be illogical to interpret the city's intention to be that firefighters could accumulate thirty twenty-four hour days, or 720 hours. This would allow firefighters to accumulate two hundred percent more vacation leave than other employees.

In interpreting the 1972 ordinance and determining the city council's intent, we have considered the circumstances and context in which the city council worked. We recognize that a "workday" was known to be a twenty-four-hour day for firefighters. But

1. For example, consider two city employees, a firefighter and a forty-hour-per-week employee, each of whom earns ten "workdays" of vacation leave per year. The firefighter who earns ten "workdays" (each "workday" being considered a twelve-hour period) would accumulate 120 hours. This firefighter (whose work schedule is twenty-four hours on followed by forty-eight hours off) works approximately 120 hours (or five shifts) during a two-week period. Thus, the 120 hours of vacation time earned for the year would afford the firefighter a two-week vacation. Ten "workdays" of vacation leave earned by the other employee for the year would generate eighty hours of accumulated vacation leave. This, of course, would afford the employee a two-week vacation.

the city clearly accounted for that fact and decided to redefine it as a twelve-hour workday for purposes of determining the vacation leave to which each employee would be entitled. Because the specific language of Section 5(d) of the ordinance is admittedly unclear, we have also considered the "contemporaneous construction" doctrine. Nonetheless, we are not convinced that the previous interpretation of Section 5(d) by the fire chief and by the city manager accurately reflects the city council's intent in enacting the 1972 ordinance. And we are not bound by their interpretation. *See* 4 McQuillin, *supra*, Sec. 12.177e. Although the city records and statements issued to the firefighters indicated that their vacation leave was accumulating beyond 360 hours, these representations cannot alter the substance of the 1972 ordinance. "Custom concerning the payment of compensation by a municipality cannot supersede the law." 4 McQuillin, *supra*, Sec. 12.175b.

The firefighters apparently argue that because the 1980 ordinance clearly defined "workday" as twelve hours for purposes of accumulating vacation leave, the 1972 ordinance must have meant something different. This argument is rejected. The 1980 ordinance simply reorganizes the sections and subsections of the 1972 ordinance, at least those portions concerning vacation leave. Nothing in the 1980 ordinance suggests that the city intended to change the maximum amount of vacation leave that may be accumulated by a firefighter. We conclude that both ordinances were intended to limit firefighters' maximum accumulated vacation leave to thirty twelve-hour days.

III

Because the defendants relied on the 1972 ordinance in adjusting the firefighters' total accumulated vacation leave, our construction of the 1972 ordinance is fatal to all but one of the firefighters' claims for relief. First, we consider the breach of contract claim. In Part IV, *infra*, we discuss the remaining claims.

[2] The breach of contract claim is based on each firefighter's express oral contract of employment with the city. The firefighters contend that they were promised benefits including vacation leave and that by periodically representing that their vacation leave had accumulated beyond 360 hours, the city was bound to credit those extra hours to each firefighter who had earned them.

The defendants respond by arguing that the firefighters had no contractual right to compensation because their compensation is fixed by ordinance. Therefore, according to defendants, any contract to allow accumulated vacation leave in excess of the limit set by the ordinance was ultra vires and void.

The legislature expressly authorized municipal corporations to fix salaries or other compensation or to approve and adopt pay plans to compensate city employees. N.C. Gen. Stat. Sec. 160A-162 (1982). Thus, the city could legally form contracts for the services of firefighters and offer a plan for accumulated vacation leave as a benefit under the contracts. *See* N.C. Gen. Stat. Sec. 160A-4 (1982) (Grants of power to cities should be construed broadly.). Therefore, although they may have been executed improperly, any contracts entered into by the city through its agents to compensate firefighters with accumulated vacation leave were not ultra vires the city. *See Town of West Jefferson v. Edwards*, 74 N.C. App. 377, 385, 329 S.E. 2d 407, 412-13 (1985). *See generally Rockingham Square Shopping Center, Inc. v. Town of Madison*, 45 N.C. App. 249, 253-54, 262 S.E. 2d 705, 708-09 (1980). The cases cited by defendant for the proposition that the city is not estopped to plead ultra vires to a contract that was beyond its power to make are inapplicable. *See, e.g., Moody v. Transylvania County*, 271 N.C. 384, 156 S.E. 2d 716 (1967); *Madry v. Town of Scotland Neck*, 214 N.C. 461, 199 S.E. 618 (1938); *Jenkins v. City of Henderson*, 214 N.C. 244, 199 S.E. 37 (1938).

Although the 1972 ordinance fixed the terms of the vacation leave benefit program, it did not, in itself, form a contract with the employees. *See* 4 McQuillin, *supra*, Sec. 12.177c. Once employment was offered and accepted under the compensation plan set out in the ordinance, however, its provisions become part of the contract. *See id.* The situation in the case at bar is distinguishable from an employee claiming a vested right under a statute which sets a policy regarding a schedule of future payments. *See, e.g., Dodge v. Board of Education of Chicago*, 302 U.S. 74, 82 L.Ed. 57, 58 S.Ct. 98 (1937). In the case at bar, the ordinance clearly contemplates that the vacation leave benefit program would assist in recruiting city employees and would become part of their contracts. *See, e.g., Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 82 L.Ed. 685, 58 S.Ct. 443 (1938). Moreover, the firefighters are not seeking to prevent the city from changing the benefits to be

earned in the future; they seek to recover for benefits allegedly already conferred on them by virtue of the ordinance and their contracts for services previously rendered.

The firefighters argue, and we agree, that the representations that more than 360 hours could be accumulated became supplementary employment contracts because they were inducements to continued employment. *See Chew v. Leonard*, 228 N.C. 181, 44 S.E. 2d 869 (1947); *Roberts v. Mills*, 184 N.C. 406, 114 S.E. 530 (1922); *Buchele v. Pinehurst Surgical Clinic*, 80 N.C. App. 256, 341 S.E. 2d 772 (1986). They each received personalized statements of compensation, signed by the fire chief and city manager, listing accumulated leave in both hours and dollars. Each form stated that it represented a summary of compensation earned and extolled the value of the benefits associated with the job.

The city had broad statutory authority to establish a program for accumulated vacation leave and to set its own limits on the maximum hours that could be accumulated. The 1972 ordinance limited the accumulation of firefighters' vacation leave to thirty twelve-hour days, or 360 hours. Part II, *supra*. The fire chief was given the authority to hire firefighters and offer to them the compensation package created by the city, but not to alter the terms of the ordinance regarding vacation leave. Therefore, the city argues, the firefighters' supplementary contracts for accumulated vacation leave in excess of 360 hours were unauthorized and invalid.

We conclude that this argument by the city is unavailable on the facts of this case. It is true that, generally, a municipality cannot be made liable for breach of an express contract for services when the official making the contract has exceeded his or her authority by entering into such a contract. 56 Am. Jur. 2d *Municipal Corporations* Sec. 504. And the city will not ordinarily be estopped to assert the invalidity of a contract made by an officer of limited authority when that authority has been exceeded. *Id.* Sec. 528.

> *However, such a contract may become binding and enforceable upon the corporation through the doctrine of estoppel* based upon the acts or conduct of officers of the

> corporation having authority to enter into the contract originally, as by receiving the benefits of the contract, or other grounds of equitable estoppel. *A municipality cannot escape liability on a contract within its power to make, on the ground that the officers executing it in its behalf were not technically authorized in that regard, where they were proper officers to enter into such contracts.*

Id. at 585-86 (footnotes omitted and emphasis added).

Applying these principles to the case at bar, the city is estopped to assert the invalidity of the supplementary contracts for accumulated vacation leave in excess of 360 hours. Although neither the fire chief nor the city manager had the authority to extend the limit on accumulated vacation leave, they had the authority to offer an accumulated vacation leave benefit program and to enter into this type of supplementary employment contract. They were clearly the "proper officers to enter into such contracts." Furthermore, the city council, which did have the authority to extend accumulated vacation leave beyond 360 hours, accepted the benefits of the contracts. They city encouraged the continued employment of its firefighters by listing the monetary value of the total accumulated vacation leave (which exceeded 360 hours for the plaintiffs) and expressly challenged the firefighters to compare the city's compensation package with other employers' programs. It is also likely that some firefighters avoided taking vacation leave because, while it was still accumulating, its monetary value at termination was increasing. Had they known they could not accumulate more than 360 hours, they presumably would have either used their vacation time or requested approval under Section 5(d) of the ordinance to accumulate 60 workdays (720 hours) for a special purpose. Furthermore, the ordinance was unclear. It would be unfair to charge them with knowledge of our interpretation of the language in the ordinance, especially when the city officials authorized to administer that ordinance made the same error.

We hold that the plaintiff-firefighters' contracts were not ultra vires the city. And although they were unauthorized, the defendants are estopped to deny the validity of the contracts.

IV

[3] The firefighters' remaining arguments are rejected. First, they claim that the passage of the 1980 ordinance impaired the obligations of contract in violation of Article I, Section 10 of the United States Constitution. This argument might have been valid had the city applied the 1980 ordinance retroactively to reduce the firefighters' rights under contracts binding on the city. Because the 1980 ordinance was not applied retroactively, the trial court properly granted summary judgment in favor of defendants on this claim.

The firefighters' second argument, under the Due Process clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution, also relies on the enactment and application of the 1980 ordinance (the alleged "taking" of the firefighters' property interest in the accumulated vacation leave in excess of 360 hours), without prior notice and an opportunity to be heard. Again, the city applied the 1972 ordinance, not the 1980 ordinance. Summary judgment for defendants was proper. Moreover, we do not believe the facts of this case would support a finding of an unconstitutional taking based on the adjustment of the firefighters' accumulated vacation leave records pursuant to the proper, albeit belated, interpretation of the 1972 ordinance. And none of the firefighters asserts that his employment has been terminated and that the city has wrongfully withheld payment for the contested vacation hours.

Having shown no deprivation of a right secured by the Constitution or laws of the United States, the firefighters' claim based on 42 U.S.C. Sec. 1983 must fail. We need not address their remaining assignments of error.

V

We hold that the 1972 ordinance limited accumulated vacation leave to a maximum of 360 hours. Nonetheless, the actions of the fire chief, the city manager, and the city council in representing that vacation leave might accumulate beyond 360 hours, and in encouraging reliance and accepting the benefits thereof, formed supplementary employment contracts. The contracts were not ultra vires the city, and the city is estopped to assert the invalidity

of the supplementary contracts. Finally, we conclude that because the 1972 ordinance, rather than the 1980 ordinance, was applied to reduce the firefighters' accumulated vacation leave to 360 hours, the city neither impaired the firefighters' employment contracts nor denied the firefighters' rights to due process of law.

For the reasons set forth above, the entry of summary judgment in favor of the defendants on the breach of contract claim is reversed. The case is remanded to the trial court for further proceedings on the breach of contract claim. Summary judgment on all other issues is affirmed.

Reversed and remanded in part, and affirmed in part.

Judges WEBB and COZORT concur.

WILLIE LEE BURNS AND JULIA COLSON BURNS v. FORSYTH COUNTY HOSPITAL AUTHORITY, INC., T/A FORSYTH MEMORIAL HOSPITAL

No. 8521SC1200

(Filed 1 July 1986)

1. **Damages § 14— injury to hospital patient—punitive damages—failure to show gross negligence—summary judgment**

The trial court properly entered summary judgment for defendant on plaintiffs' claim for punitive damages where plaintiffs' evidence that defendant allowed one plaintiff to remain in a hospital ward with a mental patient who exhibited violent behavior indicated that defendant violated the standard of care and good medical practice in Winston-Salem, but nothing in plaintiffs' affidavit supported their allegations that defendant's acts constituted gross negligence or constituted a complete disregard for the life and safety of one plaintiff, a showing of which was required to support an award of punitive damages.

2. **Negligence § 53.2— hospital patient—breach of duty to follow doctor's order—no reasonable foreseeability of injury**

Though the facts indicated a possible breach of defendant's duty to carry out a physician's order to move one plaintiff from a ward to a semi-private room, plaintiffs' evidence failed to establish that such breach, if any, was the proximate cause of one plaintiff's injury, since an essential element of proximate cause is reasonable foreseeability, and there was no evidence that defendant could have foreseen plaintiff's being hit by a chair which was thrown by a mental patient as a result of breaching its duty.

3. Negligence § 56— injury of one hospital patient by another—medical records of patient—exclusion proper

In plaintiffs' negligence action wherein they alleged that one plaintiff was injured when he was not moved to a semi-private room as ordered by his doctor and was struck by a chair thrown by a mental patient who was placed in the same room as plaintiff, the trial court did not err in excluding from evidence as irrelevant certain medical records of the mental patient, since the records from a mental health center to which the patient had been confined prior to his admission to defendant hospital did not pertain to matters within defendant's knowledge; defendant could reasonably rely upon the referring physician's statements regarding the patient's condition; if the patient exhibited a tendency to be dangerous to others, it was incumbent upon the transferring institution to inform defendant accordingly; other excluded medical records pertained to the treatment and condition of the patient after plaintiff was injured by him; and, because foreseeability of injury is an essential element of proximate cause, plaintiffs could not rely upon defendant's knowledge after the injury in support of their negligence claim.

4. Physicians, Surgeons and Allied Professions § 20.2; Negligence § 58.1— injury to hospital patient—standard instruction for health care providers not required

Where plaintiffs alleged that defendant was negligent in allowing one plaintiff to remain in a hospital ward with a mental patient who exhibited violent behavior which resulted in plaintiff's injury, the trial court did not err in failing to charge according to the standard jury charge for health care providers, since the alleged breach of duty in this case did not involve the rendering or failure to render professional nursing or medical services requiring special skills and so it was not necessary to establish the standard of due care prevailing among like hospitals in like situations in order to develop a case of negligence; rather, the applicable standard of care was that of a reasonable, prudent person; the hospital was under a duty to exercise ordinary care to keep the premises in a reasonably safe condition so as not to expose the patients unnecessarily to danger, to warn the patients of hidden unsafe conditions, and to discover hidden unsafe conditions by reasonable inspection and supervision; but such duties were limited to unsafe conditions of which the hospital had notice; the jury, by following the trial court's instruction, necessarily decided that the hospital did not have notice of an unsafe condition; having so decided, the jury would have been precluded from addressing the remaining issue; and plaintiffs therefore could not have been prejudiced by that part of the charge omitted.

APPEAL by plaintiffs from *Ross, Judge*. Judgment signed 4 April 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 March 1986.

On 22 January 1982, plaintiffs instituted an action against defendant (case number 82CVS463). On 15 December 1982, plaintiffs filed a notice of voluntary dismissal without prejudice pursuant to Rule 41(a)(1), N.C. Rules Civ. P. On 17 June 1983, within

one year of dismissing the prior action, plaintiffs filed the complaint in this action, alleging, *inter alia*: On or about 6 June 1980, plaintiff Willie Lee Burns was admitted as a patient to Forsyth Memorial Hospital, at the request of his personal physician, Dr. Jaime Trujillo, for the purposes of having several diagnostic tests performed; that he was assigned to Room 839 with three other patients; that on or about 16 June 1980, Dr. Ernesto De La Torre entered an order into plaintiff Willie Lee Burns' medical record to the effect that plaintiff Willie Lee Burns should be transferred to a semi-private room; that as of 18 June 1980, plaintiff Willie Lee Burns had not been transferred and that on that day "a mental patient" named Daniel Moore was moved into Room 839; that upon learning that Daniel Moore "was violent and dangerous," plaintiff Julia Burns, wife of Willie Lee Burns, went to defendant's administration office and requested that her husband be transferred to a private or semi-private room; that on the evening of 18 June 1980, plaintiff Willie Lee Burns was recuperating in Room 839 after having a myelogram performed; that when plaintiff Willie Lee Burns was being fed his meal that evening, "Daniel Moore manifested his violent behavior by throwing his tray with his food and food continers [sic] across the hospital room"; that after this display of violence, defendant still failed to remove plaintiff Willie Lee Burns; that at approximately 2:00 a.m. on the morning of 19 June 1980, while plaintiff Willie Lee Burns was sleeping under heavy sedation, Daniel Moore threw a chair across the room, striking plaintiff in the left leg and left scrotum, "caus[ing] the plaintiff to fall out of his bed, thereby injuring plaintiff's back." Plaintiffs alleged nine grounds of negligence on the part of defendant. Plaintiffs alleged the negligent acts of defendant proximately caused injury to plaintiff Willie Lee Burns' left leg, left testicle and back. Plaintiff Willie Lee Burns sought damages for physical injuries, lost earnings, and mental anguish. He also sought punitive damages, claiming defendant's negligence constituted gross negligence. Plaintiff Julia Colson Burns sought damages for loss of consortium and mental anguish directly resulting from defendant's negligence. Defendant answered, denying all substantive allegations.

On or about 15 November 1984, defendant moved for summary judgment. On 29 November 1984, defendant's motion for summary judgment was denied, with the exception that the claim

for summary judgment as to punitive damages was granted in favor of defendant. The case went to trial before a jury during the 18 March 1985 session of Superior Court. At the close of plaintiffs' evidence, the court granted defendant's motion for a directed verdict to most of plaintiffs' negligence claims. The jury ruled in favor of defendant. On 4 April 1985, Judge Ross signed a judgment entered in accordance with the verdict. Plaintiffs appeal.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff appellants.

Bell, Davis & Pitt, P.A., by William Kearns Davis and Stephen M. Russell, for defendant appellee.

JOHNSON, Judge.

Plaintiffs assign error to the granting of summary judgment in favor of defendant as to punitive damages, the granting of directed verdicts on the majority of plaintiffs' claims of negligence, and the exclusion of certain medical records; also plaintiffs' challenge the propriety of the jury charge.

Plaintiffs presented as their case in chief the testimony of both plaintiffs; Dr. Amon Funderburk, one of Willie Lee Burns' treating physicians at Forsyth Memorial Hospital; Everett Fox, an expert in the field of hospital administration; Dr. Joseph Oliver, an expert in the general practice of medicine and Willie Lee Burns' present doctor; two of the plaintiffs' daughters; and Mary Newell Waller, an expert in the field of clinical psychology.

Plaintiffs' evidence tended to show the following: On 28 May 1980, while Willie Lee Burns was driving home from a fishing trip, his "left eye was acting up." Upon his return home he went to see his regular doctor, Dr. Trujillo, who had him admitted to defendant hospital for tests, specifically a myelogram, to determine whether plaintiff had a pituitary tumor. Mrs. Burns requested a private or semi-private room, but Mr. Burns was placed in a ward. The subsequent tests revealed no tumor. When Willie Lee Burns was discharged on 1 July 1980, he had to use a wheel chair. After his discharge, he required assistance walking for the next eighteen months, required hospitalization on three more occasions, became impotent, continuously experienced severe lower

back pain, and required the continuous care of a physician and physical therapist up to the time of trial. According to the testimony of plaintiff and several expert witnesses, the deterioration in Willie Lee Burns' physical condition resulted from being hit by a chair thrown by Daniel Moore.

Daniel Moore was transferred to Forsyth Memorial Hospital on 21 May 1980 from Reynolds Health Center, a mental health facility. According to the report submitted by Dr. Bahrani, Daniel Moore's treating physician at Reynolds Health Center, Moore was a voluntary admission seeking treatment of alcoholism. Dr. Bahrani diagnosed the seventy-four year old male as suffering from alcoholism, acute alcohol withdrawal syndrome, and asthma. On 18 June 1980, Daniel Moore was moved into Room 839, a ward room with three other patients, including plaintiff Willie Lee Burns. Plaintiff Julia Colson Burns testified that when she came to visit her husband the evening of 18 June 1980, the "new man in the room [was] acting crazy." Mr. Moore "was hollering and screaming." "He threw his tray and food all over the room." Mrs. Burns observed Mr. Moore playing with his sexual organ. Mr. Moore was restrained by being tied across his stomach with a sheet. "The man was acting so crazy that I was scared to leave Willie in there." Because the nurses who were in the room did nothing to further restrain Mr. Moore, but simply showed amusement at his behavior, Mrs. Burns went to the nurses' station and demanded that Mr. Burns be moved to a private or semi-private room. Mrs. Burns told the nurse at the nurses' station that Daniel Moore was dangerous. The evidence further tended to show that, later that night, during the early morning hours, Daniel Moore got out of his bed, stood at the foot of his bed, and threw a chair. His restraint was still around his waist, with the ends tied to the bed rails. While still recuperating from the myelogram, Willie Lee Burns was struck by a chair in his left leg and left testicle and knocked to the floor.

[1] In the first Assignment of Error addressed, plaintiffs contend the court improperly granted summary judgment in favor of defendant regarding punitive damages. We disagree.

Where a motion for summary judgment is granted, the critical question is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the af-

fidavits, establish a genuine issue as to any material fact. *Oliver v. Roberts*, 49 N.C. App. 311, 271 S.E. 2d 399 (1980), *cert. denied*, --- N.C. ---, 276 S.E. 2d 283 (1981). When the moving party satisfies its burden of proof, the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 291 S.E. 2d 852, *cert. granted*, 306 N.C. 751, 295 S.E. 2d 486 (1982), *appeal dismissed*, 307 N.C. 459, 298 S.E. 2d 385 (1983). In opposition to defendant's motion, plaintiffs offered the affidavit of Willie M. A. Kennedy, registered nurse and attorney licensed to practice law in North Carolina, formerly of plaintiffs' attorneys' law firm. The specific facts set forth in the affidavit supported Ms. Kennedy's opinion that defendant "violated the standard of care and accepted good medical practice in Winston-Salem and in similar communities." Nothing in her affidavit supported plaintiffs' allegations that defendant's acts constituted gross negligence or constituted a complete disregard for the life and safety of Willie Lee Burns. Punitive damages are recoverable in tort actions only where there are aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and wilful wrong, insult, indignity, or a reckless or wanton disregard of plaintiff's rights. *Shugar v. Guill*, 54 N.C. App. 466, 277 S.E. 2d 126, *modified*, 304 N.C. 332, 283 S.E. 2d 507 (1981). The nonmoving party may not rest upon the mere allegations of his pleadings. *Taylor, supra.* There was no evidence of any aggravating factors; the court thus did not err in granting summary judgment on the issue of punitive damages.

In plaintiffs' next Assignment of Error, plaintiffs contend that the court erred in granting directed verdicts on many of plaintiffs' claims of negligence. At the close of plaintiffs' evidence the court stated:

> With respect to the claims in the complaint, I think there is an issue for the jury whether the hospital knew or should have known at the time Mr. Moore was placed in the room with Mr. Burns or thereafter, that the hospital knew or reasonably should have known that Mr. Moore was dangerous to other patients and that if that in spite of that they put him in the room, and that was the proximate cause of the injury and if the injury is proven to the satisfaction of the jury, then a verdict on that basis could reasonably stand. But with re-

spect to the other allegations of negligence, . . . I don't believe there's sufficient evidence to allow any of those allegations of negligence to the jury. To that extent, [I] will allow the motion—

We find no error in the court's ruling. The claims of negligence contained in plaintiffs' complaint which did not go to the jury are:

That the defendant hospital was negligent in that:

A. It failed to place the plaintiff in a private of [sic] semi-private room as ordered by Dr. Ernesto De La Torre.

. . . .

E. It failed to apply effective restraints to Daniel Moore to prevent him from causing injury to the plaintiff.

F. It failed to provide nurses or other hosptital [sic] staff in the plaintiff's room to observe and control Daniel Moore, and to ensure that he not injure the plaintiff.

G. It abandoned the plaintiff by failing to treat his injuries, after he was injured in his hospital room on June 19, 1980.

H. It failed to segregate mental patients, especially Daniel Moore, from other patients in the hospital who were not mental patients.

I. It failed to conform to accepted good medical practice in the Winston-Salem community and in similar communities throughout the nation.

We find that all the above claims of plaintiffs, with the exception of (A) and (G) above, are subsumed in the issue that the court sent to the jury. Accordingly, there is no error. As to plaintiffs' allegations of abandonment, (G) above, we have carefully reviewed plaintiffs' evidence and find a complete lack of evidence to support this claim.

[2] We have also reviewed the record regarding plaintiffs' allegations of negligence for defendant's failure to place Mr. Burns in a private or semi-private room as ordered by Dr. Ernesto De La Torre, (A) above. Plaintiffs' evidence showed that on 16 June 1980, Dr. Ernesto De La Torre entered an order in plaintiff's chart as follows: "Transfer to semi-private room for [the] sake of his nerves." The hospital has a duty to make a reasonable effort

to oversee and monitor the physician's treatment of a patient. *Bost v. Riley*, 44 N.C. App. 638, 647, 262 S.E. 2d 391, 396, *cert. denied*, 300 N.C. 194, 269 S.E. 2d 621 (1980). The hospital has a duty to obey instructions of a doctor, absent the instructions being obviously negligent or dangerous. *See Habuda v. Rex Hospital*, 3 N.C. App. 11, 164 S.E. 2d 17 (1968). These duties flow directly from the hospital to the patient under the doctrine of corporate negligence, expressly adopted in North Carolina in the *Bost* decision, *supra*. The facts here do indicate a possible breach of the duty to carry out the physician's order; however, plaintiffs' case failed to establish that such breach, if any, was the proximate cause of Mr. Burns' injury. An essential element of proximate cause is reasonable foreseeability. *Coltraine v. Pitt County Memorial Hosp.*, 35 N.C. App. 755, 758, 242 S.E. 2d 538, 540 (1978). The evidence shows that Daniel Moore was not placed in Room 839 with Mr. Burns until two days after the physician entered his order to move Mr. Burns. Dr. De La Torre wrote that the purpose of the transfer was "for [the] sake of his nerves." There is no evidence that defendant hospital could have foreseen plaintiff being hit by a chair as a result of breaching this duty. Because there is no evidence to establish the necessary element of proximate cause, a directed verdict on this claim was also proper. Plaintiffs' second Assignment of Error is overruled.

[3] In plaintiffs' next Assignment of Error, plaintiffs contend the court erred in excluding from evidence as irrelevant certain medical records of Daniel Moore, specifically, (1) the medical records of Daniel Moore from the Reynolds Health Center and (2) the medical records of Daniel Moore from defendant Forsyth Memorial Hospital after the time he allegedly injured plaintiff Willie Lee Burns until his discharge. Plaintiffs maintain that these records were critical to show Daniel Moore's dangerousness. We disagree.

The excluded medical records from Reynolds Health Center do not pertain to matters within defendant's knowledge. The medical records of Daniel Moore from defendant Forsyth Memorial Hospital from the time of his admission on 21 May 1980 until 19 June 1980, which were admitted into evidence, contain three pages of notes written by Dr. Bahrani, a physician who treated Daniel Moore at Reynolds Health Center. We find defendant hospital could reasonably rely upon the referring physician's statements regarding Daniel Moore's condition. If Daniel Moore

exhibited a tendency to be dangerous to others, it was incumbent upon the transferring institution to inform defendant accordingly. It is overly burdensome to impose a legal duty upon defendant to read through the entire medical records of all referrals. Accordingly, the medical records from Reynolds Health Center were properly excluded.

The excluded medical records of Daniel Moore from defendant Forsyth Memorial Hospital from 19 June 1980 until he was discharged contain information regarding Daniel Moore's treatment and condition *after* plaintiff Willie Burns was injured. These medical records could bear only upon defendant's knowledge after plaintiff's injury. Foreseeability of injury is an essential element of proximate cause. *Id.* Plaintiffs cannot rely upon defendant's knowledge after the injury in support of their negligence claim.

The complete medical records of Daniel Moore from defendant hospital were reviewed by the trial judge *in camera.* After ruling that records after 19 May 1980 were not relevant, the judge entered an order allowing plaintiffs' counsel to inspect these records after the trial, provided that these records be sealed for review by this Court. In their brief, plaintiffs place special emphasis upon information contained in a Code Sheet as being highly probative of the fact that Daniel Moore was suffering from a "major mental defect." Plaintiffs contend that this evidence alone would be "more than enough for the jury to conclude that he was dangerous. . . ." However, plaintiffs do not provide this Court with any medical definition of the allegedly "major mental defect," do not provide other medical information with which to assess the probable prejudicial effect of the excluded Code Sheet, nor indicate *when* during Daniel Moore's hospitalization this information came within defendant's knowledge, either actually or constructively. The burden is upon plaintiffs as appellants to show error and also to show that the alleged error was prejudicial and amounted to a denial of some substantial right. *Gregory v. Lynch*, 271 N.C. 198, 155 S.E. 2d 488 (1967). Plaintiffs did not meet their burden. Plaintiffs' third Assignment of Error is overruled.

[4] In plaintiffs' last Assignment of Error plaintiffs contend the court erroneously charged the jury. Specifically, plaintiffs contend that the court should have charged according to the standard jury

charge for health care providers, to wit: N.C.P.I.—Civ. 809.00. Plaintiffs further maintain that defendant is a health care provider as defined in G.S. 90-20.21.11 and, therefore, must comply with the standard of care for health care providers as set forth in *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984). We do not agree.

When the alleged breach does not involve the rendering or failure to render professional nursing or medical services requiring special skills, it is not necessary to establish the standard of due care prevailing among hospitals in like situations in order to develop a case of negligence. *Norris v. Rowan Memorial Hospital*, 21 N.C. App. 623, 626, 205 S.E. 2d 345, 348 (1974). In such cases *Wall v. Stout, supra*, is not apposite. The standard of care of a reasonable, prudent person is generally the standard the courts have applied. *Bost v. Riley, supra* (regarding the hospital's duty to use reasonable care in soliciting surgeons to practice at hospital); *Starnes v. Charlotte-Mecklenburg Hospital Authority*, 28 N.C. App. 418, 221 S.E. 2d 733 (1976) (regarding the hospital's duty to provide equipment reasonably suited for the intended use).

In *Payne v. Garvey*, 264 N.C. 593, 142 S.E. 2d 159 (1965), a patient's eye was injured as a result of a thermometer breaking while the nurse was shaking down the thermometer. The Court held that the hospital has a duty to make a reasonable inspection of its equipment and remedy any discoverable defects. *Id.* at 595, 142 S.E. 2d at 161. The case at hand is similar to *Garvey, supra*, in that it concerns the hospital's duty to provide for the patient's safety while he is on the hospital premises. We find the body of tort law regarding negligence in the condition or use of the premises applicable. The patient is an invitee. *See Hitchings v. Albemarle Hospital*, 220 F. 2d 716 (1955). As such, the hospital has a duty to exercise ordinary care to keep the premises in a reasonably safe condition so as not to expose the patient unnecessarily to danger. *See Wrenn v. Hillcrest Convalescent Home Inc.*, 270 N.C. 447, 154 S.E. 2d 483 (1967). The hospital is not an insurer of the safety of its patients. *See Graves v. Charlotte Lodge No. 392*, 268 N.C. 356, 150 S.E. 2d 522 (1966). The hospital is not required to take precautions for its patients' safety such as will make it impractical for it to operate its business. *See Hedrick v. Tigniere*, 267 N.C. 62, 67, 147 S.E. 2d 550, 554 (1966). The duty the hospital

owes its patients is to exercise reasonable or ordinary care to maintain in a reasonably safe condition that part of the hospital designed for the patients' use. *See Samuel v. Simmons*, 50 N.C. App. 406, 408, 273 S.E. 2d 761, 762, *cert. denied*, 302 N.C. 399, 279 S.E. 2d 352-53 (1981). This duty imparts the additional duties owed to an invitee, that is, the duty to warn the patient of hidden unsafe conditions and the duty to discover hidden unsafe conditions by reasonable inspection and supervision. *See Jones v. Pinehurst, Inc.*, 261 N.C. 575, 578, 135 S.E. 2d 580, 582 (1964). These duties are limited to unsafe conditions of which the hospital has notice. *See Revis v. Orr*, 234 N.C. 158, 160, 66 S.E. 2d 652, 654 (1951). It is only when the dangerous condition is known to the hospital or should have been known to the hospital that recovery is permitted. *Id.*

In *Witherspoon v. Owen*, 251 N.C. 169, 110 S.E. 2d 830 (1959), the Court stated that the proprietor of a restaurant owes a duty to protect the invitee against the foreseeable assaults by another invitee. Evidence of the likelihood of committing an assault can be shown by past conduct and previously exhibited bad temper. *Wegner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 65, 153 S.E. 2d 804, 807 (1967). We find the hospital similarly owes a duty to protect the patient against foreseeable assaults by another patient.

In the case *sub judice*, the court instructed the jury regarding the hospital's duty to the patient as follows:

> The plaintiff contends and the defendant denies that the defendant was negligent in that the defendant knew or should have known that the patient Daniel Moore was dangerous or might reasonably be expected to be dangerous to other patients and that the defendant failed to use ordinary and reasonable care by allowing the patient Daniel Moore to be placed in the room with the plaintiff and or by failing to remove the patient Daniel Moore from the room of the plaintiff.

The jury returned a verdict in favor of defendants. By arriving at its verdict pursuant to the foregoing instruction, the jury necessarily decided the threshold issue, that is, that the hospital did not have notice of an unsafe condition. Having so decided, the jury would have been precluded from addressing the remaining

issues. Accordingly, plaintiffs could not have been prejudiced by that part of the charge omitted. This Assignment of Error is overruled. We find

No error.

Judges ARNOLD and WHICHARD concur.

HOWARD K. STANCIL v. BRUCE STANCIL REFRIGERATION, INC., BRUCE STANCIL, SARAH BARNES AND EVA STANCIL

No. 857SC1309

(Filed 1 July 1986)

1. **Corporations § 3.1; Process § 2— corporate directors—disputed election—insufficient service of process—waived**

Respondents in a disputed election of corporate directors waived their right to challenge personal jurisdiction based on insufficient service of process where they each received a copy of the petition and notice of hearing required by N.C.G.S. § 55-71 more than ten days prior to the hearing; they filed a joint response to the petition which did not assert any defense of insufficiency of service of process; and they appeared at the hearing and participated fully. N.C.G.S. § 1A-1, Rule 4(j), Rule 12(h)(1).

2. **Corporations § 3.1; Parties § 8; Rules of Civil Procedure § 19— election of corporate directors—alleged director not named in notice—may not be first raised on appeal**

Respondents in a disputed election of corporate directors could not assert for the first time on appeal that the trial court lacked subject matter jurisdiction because one of the directors alleged to have been elected was not named in the title of the proceeding as required by N.C.G.S. § 55-71(d)(1). The defense of failure to join a necessary party may not be asserted for the first time on appeal. N.C.G.S. § 1A-1, Rule 12(h)(2), Rule 12(h)(3).

3. **Corporations § 3— election of directors—cumulative voting—no error**

The trial court did not err in a non-jury proceeding arising from a disputed corporate directors election by finding and concluding that petitioner was entitled to vote his shares cumulatively and that the two nominees for which he voted were elected. The fact that a recess was not taken after petitioner announced his intention to vote his shares cumulatively was due to the conduct of respondent, who suffered no prejudice from the failure to call a recess.

4. Corporations § 3.1— disputed election of directors—powers of trial court

The trial judge acted well within the powers granted him by N.C.G.S. § 55-71 in a proceeding arising from a disputed corporate directors election by holding that two directors had been elected and ordering that another election be held to elect a third director.

APPEAL by respondents from *Winberry, Judge.* Order entered 16 September 1985 in Superior Court, WILSON County. Heard in the Court of Appeals 16 April 1986.

Bruce Stancil Refrigeration, Inc. is a North Carolina business corporation with its registered office and principal place of business in Wilson County, North Carolina. All of the capital stock of the corporation, consisting of a total of 25,000 shares outstanding, is owned by petitioner, Howard K. Stancil, and his brother, Bruce Stancil, a respondent in this proceeding. Prior to 7 June 1985, Bruce Stancil was president of the corporation, Howard Stancil was its secretary, and the three member board of directors was composed of Bruce Stancil, Howard Stancil, and Eva E. Stancil, who is Bruce Stancil's wife.

On 7 June 1985, the corporation held its annual shareholders' meeting, pursuant to its by-laws and due notice. One of the stated purposes of the meeting was the election of a board of directors for the ensuing year. During the course of the meeting, a dispute arose concerning the manner in which the election was conducted, with Howard Stancil contending that he and his wife Clara Stancil had been elected to the board of directors, and Bruce Stancil contending that no directors had been elected and, therefore, that the previous directors would continue to serve.

On 9 August 1985, Howard Stancil filed a petition, pursuant to G.S. 55-71, seeking a judicial determination of the controversy and an order declaring that he and Clara Stancil had been elected as two of the three directors of respondent corporation. By their response, respondents sought an order declaring that no election had taken place at the 7 June meeting and directing that another meeting be held to elect directors.

A hearing was conducted on 23 August 1985. From the evidence presented at the hearing, Judge Winberry found facts, *inter alia*, as follows:

8. At the time of the annual meeting there were 25,000 shares of stock outstanding in the corporation; owned 12,500 shares of stock (50%) by the Respondent, Bruce Stancil, and 12,500 shares of stock (50%) by the Petitioner, Howard K. Stancil.

9. The proceedings at the annual meeting were tape recorded by consent of all parties and the transcript of the recording attached to the Petitioner's petition herein is a fair and accurate transcription of the proceedings had at the annual meeting, as appears from the testimony at this hearing of both the Petitioner, Howard K. Stancil, and the Respondent, Bruce Stancil.

10. The Respondent, Bruce Stancil, without a majority vote or consent, asserted his "right" to act as chairman of the meeting and in fact conducted the proceedings at the meeting, acting with and upon the advice and consultation of his attorney, Wiley L. Lane, Jr.

11. Bruce Stancil asserted that the first order of business would be the election of three directors, as required by the by-laws, for the ensuing fiscal year.

12. At the first mention of the election of directors, the Petitioner, Howard K. Stancil, announced his intention to vote his shares of stock cumulatively, and requested that the voting be done by written ballot as required by Article III, Section 1 of the by-laws of Respondent corporation.

13. The acting chairman, upon the advice of counsel, refused the Petitioner's request to vote by ballot and then called for nominations for director.

14. The Respondent, Bruce Stancil, nominated Bruce Stancil, Sarah Barnes and Eva Stancil. The Petitioner, Howard K. Stancil, nominated Howard K. Stancil, Clara Stancil and Henry Babb.

15. The Respondent, Bruce Stancil, cast his votes for his nominees for director as follows:

Bruce Stancil	12,500 Votes
Sarah Barnes	12,500 Votes
Eva Stancil	12,500 Votes

The Petitioner, Howard K. Stancil, cast his votes for his nominees for director as follows:

Howard K. Stancil	18,750 Votes
Clara Stancil	18,750 Votes
Henry Babb	0 Votes

16. The Respondent, Bruce Stancil, after casting 12,500 votes for each of his three nominees (totaling 37,500 votes as allowed by law), purported to cast an additional 18,750 votes against Howard K. Stancil and 18,750 votes against Clara Stancil.

17. There is no provision in the North Carolina Business Corporation Act providing for the casting of shareholder votes against a nominee for director, and the purported "votes" cast by the Respondent, Bruce Stancil, subsequent to the casting of his affirmative votes totaling 37,500 for his three nominees, were void and of no lawful effect.

18. Bruce Stancil, Sarah Barnes and Eva Stancil, all being Respondents herein and recipients of 12,500 votes each, failed, as to each of them, to receive a plurality of the votes cast, as required by G.S. 55-67(c), and were not lawfully elected as directors of the Respondent corporation.

19. Bruce Stancil, Sarah Barnes and Eva Stancil, Respondents herein, having failed to be lawfully elected as directors of the Respondent corporation for the fiscal year 1985-1986, were without lawful authority to act, either individually or in concert, as directors for or in behalf of the Respondent corporation subsequent to the meeting on June 7, 1985.

20. The requirements of G.S. 55-67(c) with respect to cumulative voting were fully met, in that:

a. The Petitioner, Howard Stancil, announced his intent to vote his shares cumulatively as required by law;

b. Both the Respondent, Bruce Stancil, who owns 50% of the stock outstanding, and the Petitioner, Howard Stancil, who owns 50% of the stock outstanding, and their respective counsel, stipulated and agreed at the meeting that there were 25,000 shares of stock eligible to vote, owned

12,500 shares by Bruce Stancil and 12,500 shares by Howard Stancil.

c. While the record does not reflect that a recess was taken, there is no prejudice to any party, in that:

1. There were only two stockholders of the Respondent corporation, both of whom owned 50% of the outstanding shares, and both of whom were present at the annual meeting which is the subject of this cause;

2. Both stockholders were represented by counsel at the meeting which is the subject of this cause;

3. The Respondent, Bruce Stancil, owner of 50% of the shares entitled to vote at the annual meeting, had asserted his right to act as chairman of and was in fact acting as chairman of and running the annual meeting according to his own dictates and upon the advice of his counsel;

4. The Respondent, Bruce Stancil, 50% stockholder in the Respondent corporation, acted as chairman of the annual meeting with the advice of competent counsel, and had asserted his dominion and control over its proceedings; and had the opportunity and right to declare a recess, had he deemed such to be necessary, and was not prejudiced by his failure to do so.

21. The nominees of the Petitioner, Howard Stancil, being Howard Stancil and Clara Stancil, having each received 18,750 votes, a plurality of votes cast as required by G.S. 55-67(c), were duly elected as two of the three directors of the Respondent corporation.

22. The bylaws of the Respondent corporation require the election of a third director who should be elected from among the three nominees of the Respondent, Bruce Stancil; i.e., Bruce Stancil, Sarah Barnes or Eva Stancil.

Judge Winberry concluded that Howard Stancil and Clara Stancil had been validly elected to the board of directors of respondent corporation on 7 June 1985, and that neither Bruce Stancil, Eva Stancil or Sarah Barnes had been elected. Based on the findings and conclusions, Judge Winberry declared that Howard Stancil

and Clara Stancil were entitled to act as directors of the corporation. He ordered that the election of the third director be conducted on 23 September 1985 in the office of and under the supervision of the Clerk of Superior Court of Wilson County. He also fixed the voting rights of each stockholder with respect to the election of the third director. Respondents appealed.

Narron, Holdford, Babb, Harrison & Rhodes, by Henry C. Babb, Jr., for petitioner appellee.

Lane and Boyette, by Wiley L. Lane, Jr., and Lee, Reece & Weaver, by Cyrus F. Lee, for respondents appellants.

MARTIN, Judge.

Although respondents argue six assignments of error in their brief, this appeal essentially presents only two issues: whether the trial court had jurisdiction to act in this matter, and, if so, whether its order, declaring that Howard Stancil and Clara Stancil had been validly elected as directors and ordering that a new election be conducted solely for the purpose of electing a third director, is correct. After considering each of the arguments advanced by respondents we affirm the order of the trial court.

[1] Respondents initially contend that the trial court did not obtain jurisdiction over their persons because they were not served with process in the manner provided by G.S. 1A-1, Rule 4(j). They candidly admit, however, that they may have waived this defect by their participation in the proceeding.

G.S. 55-71 provides a summary procedure for the resolution of disputes involving the election of corporate officers and directors. The proceeding is commenced by the filing of a verified petition, G.S. 55-71(c), and the issuance by the petitioner of a notice to the respondents named in the petition, designating a time and place for a hearing before a superior court judge. G.S. 55-71(e). The necessity for a summons is eliminated, but a copy of the petition and notice of hearing must be served on each respondent at least 10 days before the hearing. *Id.* Alternative methods of service are prescribed in the event a respondent cannot be served within the State. *Id.*

Assuming, without deciding, that the service required by G.S. 55-71(c) must be made in the manner required by Rule 4(j),

we hold that respondents have waived their right to challenge personal jurisdiction. Respondents each received a copy of the petition and notice of hearing from petitioner's counsel more than 10 days prior to the hearing. They filed a joint response to the petition requesting that the court declare the entire 7 June 1985 election void but did not assert any defense of insufficiency of service of process. Moreover, they appeared at the hearing and participated fully. They have, therefore, lost their right to assert that the court lacked jurisdiction over their persons. G.S. 1A-1, Rule 12(h)(1); *Simms v. Mason's Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974).

[2] Respondents also contend that the court had no jurisdiction over the subject matter of this dispute. G.S. 55-71(d)(1) requires that the petition include "the title of the proceeding, which shall include as respondents the corporation, the person or persons whose purported election or appointment is questioned, and *any person other than the petitioner, whom the petitioner alleges to have been elected or appointed.*" (Emphasis added.) By the terms of the statute, the corporation and all persons whose election or appointment is at issue in the proceeding are necessary parties thereto.

In his petition, Howard Stancil alleged that he and Clara Stancil had been elected directors of respondent corporation at the disputed meeting; however, Clara Stancil is not named in the title of the proceeding as either a petitioner or as a respondent. Respondents contend that this omission deprived the trial court of jurisdiction over the subject matter of this dispute. We disagree.

Respondents did not assert, at any time during the proceedings below, any defense based upon the fact that Clara Stancil was not named in the title of the proceeding, nor did they seek her joinder as a party. They raise the issue for the first time in this Court. Although a defense of lack of subject matter jurisdiction may not be waived and may be asserted for the first time on appeal; G.S. 1A-1, Rule 12(h)(3); *Dale v. Lattimore*, 12 N.C. App. 348, 183 S.E. 2d 417, *cert. denied*, 279 N.C. 619, 184 S.E. 2d 113 (1971); a failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding. 5 Wright and Miller, Federal Practice and Procedure: Civil § 1359

at 630 (1969) ("failure to join a party under Rule 19 is not a jurisdictional matter"). G.S. 1A-1, Rule 12(h)(2) provides, in pertinent part: "[A] defense of failure to join a necessary party, . . . may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." The rule requires that a defense of failure to join a necessary party be raised in the trial court; it may not be asserted for the first time on appeal. Wright and Miller, *supra*, § 1392. Accordingly, we overrule respondents' assignment of error based upon the failure of the petition to name Clara Stancil as a party to the procedure.

[3] By their second and fourth assignments of error, respondents dispute the trial court's findings of fact with respect to Howard Stancil's exercise of his right to cumulatively vote his shares in the corporation and its conclusion, based on those findings, that Howard Stancil and Clara Stancil were elected as directors. Respondents concede that Bruce Stancil was not entitled to vote his shares "against" the opposing nominees and that the manner in which he sought to conduct the election was irregular. They maintain, however, that as a result of these irregularities, no directors were elected at the meeting.

It is well established that in a non-jury proceeding, the trial court's findings of fact are conclusive on appeal if they are supported by competent evidence. *Williams v. Pilot Life Insurance Company*, 288 N.C. 338, 218 S.E. 2d 368 (1975). The materials before the trial court at the summary hearing included the petition, the response, the corporate charter and by-laws, and a verbatim transcript of the 7 June 1985 meeting. In addition, both Howard Stancil and Bruce Stancil testified at the hearing. We have reviewed the evidence, all of which is included in the record before us, and we are satisfied that the trial court's findings of fact 9 through 16 accurately chronicle the 7 June 1985 meeting and are fully supported by the evidence. Although denominated as findings of fact, findings 18 through 22, all of which are excepted to by respondents, actually contain mixtures of findings of fact and conclusions of law and are therefore reviewable on appeal to determine whether the facts found by the court are sufficient to support its conclusions that Howard Stancil properly exercised his right to vote his shares cumulatively; that his nominees received a plurality of the votes cast; and that Bruce

Stancil's nominees were not elected. *Brown v. Charlotte-Mecklenburg Bd. of Education*, 269 N.C. 667, 153 S.E. 2d 335 (1967).

The right of cumulative voting in an election of corporate directors is granted by G.S. 55-67(c). The statute provides, in part, as follows:

> [D]irectors shall be elected by a plurality of the votes cast and at each election for directors every shareholder entitled to vote at such election shall have the right to vote, in person or by proxy, the number of shares standing of record in his name for as many persons as there are directors to be elected and for whose election he has a right to vote, *or to cumulate his votes by giving one candidate as many votes as the number of such directors multiplied by the number of his shares shall equal, or by distributing such votes on the same principle among any number of such candidates.* (Emphasis added.)

Id. The statute requires, however, that before the right of cumulative voting may be exercised, four things must be done: (1) a shareholder must announce in the open meeting, before the voting starts, that he intends to vote cumulatively; (2) upon such an announcement, the chair must declare that all shares have the right to vote cumulatively; (3) the chair must announce the number of shares present in person or by proxy; and (4) the chair must declare a recess of not less than one hour nor more than four hours, unless a different time period is unanimously agreed upon. *Id.*

The evidence shows, and the trial court found, that before the voting for directors began, Howard Stancil announced, through his attorney, that he intended to vote his shares cumulatively and requested that the vote be by written ballot, as provided by the by-laws. Bruce Stancil, who was acting as chairman, refused the request for vote by ballot and did not acknowledge the announcement of intention to vote cumulatively. He proceeded with the election without declaring a recess. Howard Stancil and Bruce Stancil were the only shareholders of the corporation and had stipulated, at the beginning of the meeting, that each owned 12,500 shares of stock. From these findings, it is apparent that the holders of all outstanding shares of the respondent corporation knew of Howard Stancil's intention to

vote his shares cumulatively, that all shares were therefore entitled to vote cumulatively, and knew the number of shares present at the meeting. The first three requirements of G.S. 55-67(c) were met. The fourth requirement, that of a recess, was not met. However, the trial court found that the requirement was not met due to the conduct of Bruce Stancil, and concluded that he had suffered no prejudice as a result of his failure to call a recess. We agree. The four requirements imposed by G.S. 55-67(c) for the exercise of cumulative voting are designed, among other things, (1) to prevent a shareholder, by a surprise announcement of his intention to vote cumulatively, from taking unfair advantage of other shareholders, and (2) to permit the shareholders an opportunity to determine how their votes may be distributed to their best advantage. Thus, the only person who could possibly have been prejudiced by the fact that no recess was taken after the announcement had been made was Bruce Stancil, whose duty it was, as chairman of the meeting, to declare the recess. He will not be permitted, by his own violation of the statute, to defeat his fellow shareholder's proper exercise of a right to vote cumulatively nor to void an otherwise valid election. We uphold, therefore, the trial court's conclusion that Howard Stancil was entitled to vote, and did vote, his shares cumulatively.

Having concluded that cumulative voting was proper, the outcome of the election may be ascertained by simple mathematics. Each shareholder was entitled to 37,500 votes (12,500 shares x 3 directors to be elected). Howard Stancil distributed 18,750 of his votes for himself and 18,750 for Clara Stancil, while Bruce Stancil distributed his votes equally among his three nominees, 12,500 votes for each. Thus, the trial court correctly concluded that Howard Stancil and Clara Stancil each received a plurality of the votes cast and were elected, while none of Bruce Stancil's nominees received a plurality of votes and were, therefore, not elected.

[4] Finally, by their three remaining assignments of error, respondents contend that the trial court exceeded its authority by declaring that Howard Stancil and Clara Stancil were elected directors of respondent corporation and ordering that another election be held to elect a third director. They argue that G.S. 55-71 is designed only to maintain the *status quo*, and cite us to our previous decisions in *Foreman v. Bell*, 56 N.C. App. 625, 289

S.E. 2d 567, *disc. rev. denied*, 306 N.C. 383, 294 S.E. 2d 207 (1982) and *Swenson v. All American Assur. Co.*, 33 N.C. App. 458, 235 S.E. 2d 793 (1977). Their reliance on these cases is misplaced. The provisions of G.S. 55-71(f) do provide for the entry of interlocutory orders to maintain the *status quo* and prevent "temporary corporate paralysis" pending a determination of the validity of the election. *Thomas v. Baker*, 227 N.C. 226, 229, 41 S.E. 2d 842, 844 (1947); *Foreman, supra; Swenson, supra.* However, G.S. 55-71(h) vests the court with broad powers to provide complete relief in its determination of the controversy.

G.S. 55-71.

(h) Upon completion of the hearing the judge, in determining the matter, may:

(1) *Declare the result of the election* or appointment in controversy;

(2) *Order a new election* or appointment and may include in such order provisions with respect to the directors or officers who shall hold the contested offices until a new election is held or appointment is made;

(3) *Determine the respective voting rights of the shareholders* and of persons claiming to own shares;

(4) Direct such other relief as may be just and proper.

(Emphasis added.) Judge Winberry acted well within these powers in declaring the result of the contested election, ordering that a new election be conducted to complete the board of directors of respondent corporation, and determining the respective voting rights of the shareholders at that election.

The order appealed from is

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. JAMES ALFRED MACK

No. 855SC1075

(Filed 1 July 1986)

1. **Criminal Law § 75.9— volunteered statement—admissibility**

In a prosecution of defendant for driving while impaired, the trial court was not required to exclude testimony by the arresting officer about a statement made by defendant while in custody before he was informed of his *Miranda* rights, since his statement to the effect that he fell asleep at the wheel and ran off the road into a fence was the result of routine booking questions, such as defendant's social security number, and the officer's inquiry was not such that he could have reasonably anticipated a self-incriminatory answer.

2. **Automobiles § 127.1— driving while impaired—sufficiency of evidence**

In a prosecution of defendant for driving while impaired, evidence was sufficient to be submitted to the jury where it tended to show that defendant stated to a police officer that, "All I did was I fall—I fell asleep and ran over there to the fence"; an officer arrived at the scene approximately four minutes after being dispatched there; he observed the headlights of the car on, the key in the ignition, the warm hood, the defendant asleep in the driver's seat, and the nearly empty bottle of Canadian Mist on the floorboard; the officer had trouble rousing defendant and detected a strong odor of alcohol on defendant's person both inside the car and out; defendant was unsteady on his feet and his speech was slightly slurred; and defendant's blood alcohol level was .16 approximately one hour after the officer found him asleep in his car.

3. **Automobiles § 130; Criminal Law § 138.6— driving while impaired—two aggravating factors found—evidence to support only one factor—resentencing required**

Where the only evidence beyond that necessary to prove impaired driving was that defendant fell asleep and ran off the road, such evidence was not sufficient to support both the especially dangerous and the especially reckless aggravating factors, and the trial court erred in finding both. Because it could not be said whether the trial court would have imposed a lesser punishment after weighing the one aggravating factor against the one mitigating factor (defendant's safe driving record) pursuant to N.C.G.S. § 20-179(f)(3), the case must be remanded for resentencing.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 23 May 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 12 February 1986.

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

William Joseph Boney, Jr., for defendant appellant.

BECTON, Judge.

I

Defendant, James Alfred Mack, was convicted of driving while impaired under N.C. Gen. Stat. Sec. 20-138.1 (1983) and given a four-month suspended sentence and a two-day active sentence. We affirm the conviction, but remand for resentencing.

On 19 January 1985, at approximately 8:30 a.m., Police Officer Long found defendant asleep or unconscious in a car off the road near McLumber Lane. Officer Long testified that defendant's car was sitting on top of a chain link fence approximately forty-five feet from the road. He noticed that the car's headlights were on, the key was in the ignition, and the hood was warm. Officer Long attempted to rouse defendant and, after tapping on the window, opened the door and shook the defendant. After several minutes, the defendant woke up. Officer Long asked defendant what had happened, and the defendant replied, "What happened?" Officer Long then asked defendant for his driver's license. He observed a bottle of Canadian Mist on the front passenger side floorboard of the vehicle with its seal broken and much of its contents missing. He also detected a strong odor of alcohol about the defendant, observed that defendant was unsteady on his feet and that defendant's speech was slurred. He formed an opinion that defendant was impaired and placed him under arrest. Defendant was transported to the police station for a breathalyzer test. Officer Long testified that in response to "questions with reference to a social security number and so forth," defendant stated, "All I did was, I fall—I fell asleep and ran over there to the fence." Defendant denied making this statement at trial.

Officer Long testified that he then advised defendant of his *Miranda* rights and asked the defendant what happened. Defendant replied that all he remembered was that he fell asleep. Defendant submitted to a breathalyzer test, which revealed a blood-alcohol level of 0.16.

The defendant's motions to dismiss the DWI charge at the close of the State's evidence and at the close of all the evidence were denied.

II

[1] The defendant assigns error to the trial court's failure, *ex mero motu*, to exclude or suppress the testimony of Officer Long about the statement defendant made while in custody and before he was informed of his *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). The State argues that because the defendant failed to object at trial, he has waived his right to do so now. *State v. Harris*, 290 N.C. 681, 228 S.E. 2d 437 (1976); *State v. Hopper*, 292 N.C. 580, 234 S.E. 2d 580 (1977). This is true unless use of the now-objected to testimony constitutes "plain error" within the meaning of *State v. Odom*, 307 N.C. 655, 300 S.E. 2d 375 (1983) or *State v. Black*, 308 N.C. 736, 303 S.E. 2d 804 (1983). That is, when the error "amounts to a denial of a fundamental right of the accused," it will be noticed by the appellate courts. *Black*, 308 N.C. at 740, 303 S.E. 2d at 806-07 (quoting *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982), *cert. denied*, 459 U.S. 1018, 74 L.Ed. 2d 513, 103 S.Ct. 381 (1982)).

Miranda warnings are required when the defendant is being subjected to a custodial interrogation. *State v. Sykes*, 285 N.C. 202, 205, 203 S.E. 2d 849, 851 (1974). The United States Supreme Court has defined interrogation under *Miranda* to "refer not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed. 2d 297, 308, 100 S.Ct. 1682, 1689-90 (1980), *on remand sub nom., State v. Innis*, 433 A. 2d 646 (R.I. 1981), *cert. denied sub nom., Innis v. Rhode Island*, 456 U.S. 930, 72 L.Ed. 2d 447, 102 S.Ct. 1980 (1982), *amended*, 456 U.S. 942, 72 L.Ed. 2d 464, 102 S.Ct. 2005 (1982).

The North Carolina Supreme Court has adopted the *Innis* analysis and definition of interrogation, holding that interrogation does not include routine informational questions posited to a defendant during the booking process. *See State v. Ladd*, 308 N.C. 272, 286, 302 S.E. 2d 164, 173 (1983). The *Ladd* Court was quick to emphasize, however, that it did not construe this limited exception to include any and all questions asked during the booking process, because, as the Court reasoned:

> . . . Such a rule would totally emasculate the *Miranda* protections and render meaningless the defendant's rights to remain silent and to have the presence of counsel. If all questions asked during booking were free from *Miranda* proscriptions, police officials could quiz the defendant about any subject so long as they timed their queries to coincide with the incidence of booking, regardless of whether the defendant had been given the *Miranda* warnings, whether he had invoked his right to remain silent or whether he had previously asked for an attorney. We therefore limit this exception to *routine informational* questions necessary to complete the booking process that are *not* "reasonably likely to elicit an incriminating response" from the accused.

308 N.C. at 287, 302 S.E. 2d at 173 (quoting *Rhode Island v. Innis*, 446 U.S. at 301, 64 L.Ed. 2d at 308, 100 S.Ct. at 1689-90 (1980)).

Therefore, we must decide under the particular facts of this case, whether a question constitutes interrogation within the *Innis* definition because it was "reasonably likely to elicit an incriminating response." There is no doubt that the defendant in the case *sub judice* was in custody at the time he allegedly made the incriminating statement. And Officer Long testified that defendant made the statement not at the scene of the accident but at the police station in response to routine questions. Only after defendant allegedly made the incriminating statement did Officer Long advise him of his *Miranda* rights.

We are satisfied that defendant's statement was not the product of a custodial interrogation during which he was deprived of his constitutional rights under *Miranda*, and that his statement was therefore admissible. The *Innis* Court was aware of the danger implicit in limiting the ambit of *Miranda* to express questioning, thereby "plac[ing] a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*." *Innis*, 446 U.S. at 299 n.3, 64 L.Ed. 2d at 307 n.3, 100 S.Ct. at 1689 n.3 (quoting *Commonwealth v. Hamilton*, 445 Pa. 292, 297, 285 A. 2d 172, 175 (1971)). Although refusing to so limit their holding, the *Innis* Court recognized that "the police surely cannot be held accountable for the unforeseeable results of their words or actions. . . ." *Innis*, 446 U.S. at 301-02, 64 L.Ed. 2d at 308, 100 S.Ct. at 1690. One

such unforeseeable result is when a defendant simply blurts out an inculpatory statement without encouragement, prodding, or manipulation by the police.

In the instant case, we construe defendant's inopportune response to the officer's routine booking questions as a "spontaneous utterance." *See State v. Sellers*, 58 N.C. App. 43, 48, 293 S.E. 2d 226, 229, *disc. rev. denied and appeal dismissed*, 306 N.C. 749, 295 S.E. 2d 485 (1982). It was not the kind of query to which the officer could have reasonably anticipated a self-incriminatory answer. *See Ladd*, 308 N.C. at 281, 302 S.E. 2d at 170. We find no error in the trial court's failure to suppress this statement.

III

[2] Defendant's next three assignments of error involve the sufficiency of the evidence, and we will consider them together. Defendant asserts that the State's case fails to disclose (1) that the defendant operated the vehicle within the meaning of N.C. Gen. Stat. Sec. 20-4.01(25) (1983), (2) when and if the defendant parked the car where it was found, and (3) that the defendant had consumed the alcohol in his system prior to stopping the car (if he did stop it).

Defendant was charged with a violation of G.S. Sec. 20-138.1, which 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.

When a motion for dismissal questions the sufficiency of circumstantial evidence, the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. *State v. Snead*, 295 N.C. 615, 247 S.E. 2d 893 (1978). Since defendant waived his right to assert the denial of his motion for dismissal at the close of the State's case by presenting evidence at trial, we need only consider now the motion to dis-

miss made at the close of all the evidence. *State v. Dow*, 70 N.C. App. 82, 318 S.E. 2d 883 (1984).

All evidence admitted must be considered by the trial court in the light most favorable to the State, and any discrepancies are to be resolved in favor of the State. *State v. Powell*, 299 N.C. 95, 101, 261 S.E. 2d 114, 117 (1980). All that is required before the court can send the case to the jury is substantial evidence of guilt. *Id.*

We have already held that defendant's inculpatory statement was properly admitted. That statement was the only direct evidence that defendant was driving and ran off the road into the fence. The officer arrived at the scene approximately four minutes after being dispatched there. He observed the headlights of the car on, the key in the ignition, the warm hood, the defendant asleep in the driver's seat, and the near-empty bottle of Canadian Mist on the floorboard. The direct and circumstantial evidence was sufficient to allow a reasonable jury to infer that defendant drove the vehicle on a public street.

The officer further testified that he had difficulty rousing defendant, that he detected a strong odor of alcohol upon defendant's person both inside the car and out, that the defendant was unsteady on his feet and his speech slightly slurred. Defendant's blood-alcohol level was 0.16 approximately an hour after Officer Long found him. This was sufficient, in conjunction with the other evidence outlined above, for a reasonable jury to infer that defendant was under the influence of an impairing substance when he drove the vehicle.

There are numerous possible other scenarios, and the one which defendant advances is plausible, if not supported by much of the evidence. But,

> to hold that the trial court must grant a motion to dismiss unless, in the opinion of the court, the evidence excludes every reasonable hypothesis of innocence would in effect constitute the presiding judge the trier of facts. . . . Proof of guilt beyond a reasonable doubt is required before the jury can convict. . . . What the evidence proves or fails to prove is a question of fact for the jury.

Powell, 299 N.C. at 101, 261 S.E. 2d at 118-19 (quoting *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956)).

Defendant also argues that the trial court should have set aside the verdict as being against the greater weight of the evidence, although defendant made no timely motion to do so. Defendant incorporates his arguments as to the trial court's failure to grant his motion to dismiss, and asserts that it was plain error not to set aside the verdict. We do not agree.

Motions to set aside the verdict are addressed to the discretion of the trial court, and refusal to grant the motion is not reviewable on appeal absent an abuse of discretion. *State v. Boykin*, 298 N.C. 687, 259 S.E. 2d 883 (1979), *cert. denied*, 446 U.S. 911, 64 L.Ed. 2d 264, 100 S.Ct. 1841 (1980). Failure to set aside the verdict *ex mero motu* would be reviewable only in the situation in which the jury's verdict is manifestly unjust and against the greater weight of the evidence. If there is sufficient evidence to support the verdict, the trial judge has acted within his or her discretion in denying the motion, or in failing to act *sua sponte* to set it aside. *See State v. Leigh*, 278 N.C. 243, 179 S.E. 2d 708 (1971).

The State offered substantial evidence of defendant's guilt, and defendant offered no corroboration of his own testimony. The evidence was sufficient to justify the jury's verdict.

IV

[3] Defendant's final assignment of error relates to the trial court's finding, in aggravation of the sentence, that defendant's driving was "especially reckless" and "especially dangerous," and the imposition of a Level Four punishment. Because the trial court found as a mitigating factor that defendant had a safe driving record, defendant could have received a Level Five punishment if the trial court were to find that the mitigating factors substantially outweighed any aggravating factors. *See* N.C. Gen. Stat. Sec. 20-179(f)(2) and (3) (1983).

Because G.S. Sec. 20-179 does not explicitly set out the legislature's intent with respect to the definition of, or evidence necessary to support, these aggravating factors, we have chosen to look for guidance to the Fair Sentencing Act, N.C. Gen. Stat. Sec. 15A-1340.4(a)(1) (1983), and to the plain meanings and defini-

tions of these terms. G.S. Sec. 15A-1340.4(a)(1) states in pertinent part:

> Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation.

"Dangerous" as defined in Black's Law Dictionary 471 (4th ed. 1951) is: "attended with risk; perilous; hazardous; unsafe," and in The American Heritage Dictionary of the English Language 334 (7th ed. 1978) as, "able or apt to do harm." "Reckless" is defined in *Black's* at 1435 as, "careless; heedless; inattentive; indifferent to consequences" and in *American* at 1088 as, "uncontrolled, wild."

We believe that the legislature wrote this aggravating factor in the disjunctive, ("[e]specially reckless or dangerous driving") intending that evidence of either especially reckless or especially dangerous driving was enough to support one aggravating factor. *See* G.S. Sec. 20-179(d)(2). However, in AOC Form CR-311, which the trial court used in the instant case, these factors are listed separately as aggravating factors numbers 3 and 4. In keeping with the reasoning of the Fair Sentencing Act quoted above, there would need to be at least one item of evidence not used to prove either an element of the offense or any other factor in aggravation to support each additional aggravating factor.

Impaired driving is in and of itself "reckless" and "dangerous." Therefore, to determine whether there was enough evidence to prove the defendant's driving was both "especially reckless" and "especially dangerous," we must focus on whether the facts of this case disclose excessive aspects of recklessness and of dangerousness not normally present in the offense of impaired driving to support two separate aggravating factors. This the evidence fails to do.

The only evidence beyond that necessary to prove impaired driving was that defendant fell asleep and ran off the road. Although we do not believe that this was enough evidence to support *both* the especially dangerous and the especially reckless aggravating factors, we do find that falling asleep while driving is at least especially dangerous. However, because we cannot say

whether the trial court would have imposed a Level Five punishment after weighing this one aggravating factor against the one mitigating factor (defendant's safe driving record) per G.S. Sec. 20-179(f)(3), we must remand this case to the trial court for resentencing.

Remanded for resentencing.

Judges JOHNSON and MARTIN concur.

ROXIE M. RAY, PETITIONER-APPELLANT v. BROYHILL FURNITURE INDUSTRIES AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENT-APPELLEES

No. 8524SC1169

(Filed 1 July 1986)

1. **Master and Servant § 108— unemployment compensation—leaving work for health reasons—"Pennsylvania test"—burden of proof**

The Employment Security Commission erred in requiring claimant to meet all four parts of the "Pennsylvania test" in order to obtain unemployment compensation after leaving her employment for health reasons and in placing upon claimant an improper burden of proof for some of those parts. N.C.G.S. § 96-14(1) (1981).

2. **Master and Servant § 108— unemployment compensation—existence of health condition—burden of proof**

Claimant had only to show by competent evidence that a health condition existed at the time she left her employment, and the Employment Security Commission erred in requiring claimant to produce a physician's note on or before the date she left her employment. Plaintiff met her burden of proving her health condition by her own testimony that her doctor had advised her before she left her employment that she should not be working around chemicals and fumes and by a note from her physician dated six weeks after she left her employment.

3. **Master and Servant § 108— unemployment compensation—informing employer of health condition**

The Employment Security Commission erred in finding that claimant failed to inform her employer of her health problem or to request a transfer to a more suitable position where claimant's uncontradicted testimony showed that she informed her immediate supervisor of her health problem and requested a transfer to another department, and that the supervisor took no action on her request and threatened to fire her if she went to the plant manager.

4. Master and Servant § 108— unemployment compensation—minimal steps to preserve employment

Claimant took the necessary minimal steps to preserve her employment where she sought the advice and care of a physician, and she informed her immediate supervisor of her health problems, asked for a protective mask, and requested a transfer to another department.

5. Master and Servant § 108— unemployment compensation—leaving work for health reasons—good cause attributable to employer

Claimant left work with good cause attributable to her employer and thus was entitled to unemployment benefits where claimant's asthma and bronchitis condition was exacerbated by her exposure to chemical sprays, lacquers and fumes in her employment, and claimant's immediate supervisor failed to act on her request for a transfer to another department and threatened to fire her if she went to the plant manager.

APPEAL by petitioner from *Lewis (Robert D.), Judge.* Order entered 10 June 1985 in Superior Court, WATAUGA County. Heard in the Court of Appeals 14 February 1986.

Legal Services of the Blue Ridge, Inc., by Robert W. Lehrer, for petitioner appellant.

Employment Security Commission of North Carolina, by C. Coleman Billingsley, Jr., for respondent appellee.

BECTON, Judge.

The claimant appellant, Roxie M. Ray, was employed by Broyhill Furniture Industries (Broyhill) in Lenoir, North Carolina, for five years and four months before resigning for health reasons on 21 December 1984. Her claim for unemployment benefits was denied because the claims adjudicator found that she had voluntarily quit her employment without good cause attributable to her employer. The decision to deny benefits having been upheld by the appeals referee, the Employment Security Commission, and the Superior Court, Ms. Ray appeals to this Court. We reverse and remand.

I

Ms. Ray worked in the finishing department, and her job was to wipe glaze off the furniture after it had been sprayed. She was constantly exposed to chemical sprays, lacquers and fumes. The company did not provide workers with any kind of protective mask to minimize the harmful effects of exposure to these chemi-

cals and fumes. They did provide fans in the glaze department, which Ms. Ray testified "would just more or less pick that stuff up and just blow it around, and it would, you could just blow it out of your nose, just handful [sic] of it. You would cough it up, you could just take your hand and rub it over your hair and your hands would just be glazed. . . ."

Ms. Ray testified that she was told by her doctor that she would get no relief from her aggravated bronchitis and asthma conditions as long as she was exposed to the chemicals and fumes. He suggested that she request a protective mask and that she seek a transfer to another department. Ms. Ray brought both of these requests to Jimmy Stewart, her immediate supervisor, but no action was ever taken on either of them. In fact, when Ms. Ray got no satisfaction from Mr. Stewart on the transfer request, she expressed an intention to go to the plant manager. According to Ms. Ray, Mr. Stewart threatened to fire her if she went over his head.

Ms. Ray gave one week's notice and left Broyhill on 21 December 1984. Ms. Ray testified that she would have continued to work for Broyhill if she could have been transferred from the finishing room to another department.

II

Introduction

Ms. Ray contends that the superior court erred in upholding the Commission's conclusion that she voluntarily quit her job without good cause attributable to her employer because the Commission improperly applied the law to the facts of her case. We agree.

Under N.C. Gen. Stat. Sec. 96-14(1) (1981), the statute in effect at the time that Ms. Ray applied for benefits, a claimant would be disqualified from receiving benefits if she: (1) left work voluntarily (2) without good cause attributable to the employer. If a claimant *either* left work involuntarily *or* with good cause attributable to the employer, she could collect benefits. *Eason v. Gould, Inc.*, 66 N.C. App. 260, 311 S.E. 2d 372 (1984), *affirmed*, 312 N.C. 618, 324 S.E. 2d 223 (1985). Sections of the Employment Security Act which impose disqualifications from receiving benefits should be strictly construed in favor of claimants. *In re Watson*,

273 N.C. 629, 161 S.E. 2d 1 (1968). However, the burden is on the claimant to prove that she is not disqualified under the Act. *Huggins v. Precision Concrete Forming*, 70 N.C. App. 571, 320 S.E. 2d 416 (1984).

We conclude that Ms. Ray has established *both* that her resignation was involuntary due to compelling health reasons *and* that she had good cause attributable to her employer to leave.

A. *Leaving Work "Involuntarily," and the "Pennsylvania Test"*

First, we address the issue of voluntariness. An employee has not left her job voluntarily when events beyond her control or the wishes of the employer cause the termination. *Eason*, 66 N.C. App. at 262, 311 S.E. 2d at 373. In addition, an employee need not continue employment which is injurious to her health. In many cases, resigning under such circumstances is an involuntary quit, entitling a claimant to benefits. *See generally Milliken & Co. v. Griffin*, 65 N.C. App. 492, 309 S.E. 2d 733 (1983), *disc. rev. denied*, 311 N.C. 402, 319 S.E. 2d 272 (1984) (A claimant who leaves a job for health reasons has left involuntarily with good cause attributable to the employer and is entitled to benefits as long as other statutory requirements are met.).

Ms. Ray had the burden of showing that her resignation was involuntary due to her health condition. However, the Commission required Ms. Ray to satisfy all four parts of the so-called "Pennsylvania test," requiring the claimant to (1) introduce competent testimony that at the time of leaving adequate health reasons existed to justify the leaving, (2) inform the employer of the health problems, (3) specifically request the employer to transfer her to a more suitable position, and (4) take the necessary minimal steps to preserve her employment such as requesting a leave of absence if appropriate and available. *See Deiss v. Unemployment Compensation Board of Review*, 475 Pa. 547, 381 A. 2d 132 (1977).

North Carolina courts have refused to hold that every claimant must prove all four parts of this test in order to survive disqualification. *See Hoke v. Brinlaw Mfg. Co.*, 73 N.C. App. 553, 327 S.E. 2d 254 (1985). In fact, at the time Ms. Ray's case was decided by the Commission, there was no North Carolina case or statute

that set forth what a claimant had to show in order to establish the threshold proposition that leaving employment was involuntary due to health reasons. *See Hoke*, 73 N.C. App. at 559, 327 S.E. 2d at 258 (The new "North Carolina test" is contained in N.C. Gen. Stat. Sec. 96-14(1)(a) and (b) (1985).).

The *Hoke* Court came closest to issuing such a prescription when it held that, *depending on the facts, one or more* of the four requirements should be applied *in most cases* involving a voluntary leaving due to health reasons. *Id.* (Emphasis added.) Applying this standard, we hold that Ms. Ray has met her burden of showing that she should not be disqualified.

B. *The Sufficiency of Claimant's Evidence*

[1, 2] The Commission erred by requiring Ms. Ray to meet all four parts of the "Pennsylvania test" and by increasing her burden of proving some of those parts even beyond that which the Pennsylvania courts require. For example, the Commission found that Ms. Ray "did not present any *competent writing from her physician* to her employer *at the time she quit.*" (Emphasis added.) This implies that a claimant must produce a physician's note on or before the day she leaves. Neither the "Pennsylvania test" nor the new North Carolina statute requires as much. Rather, the claimant must only show by *competent evidence* that the health condition *existed* at the time of the leaving. Competent evidence may include the physician's statement or testimony, but does not exclude any other evidence tending to prove the existence of claimant's health condition. *See Milliken*, 65 N.C. App. at 495, 309 S.E. 2d at 735. Ms. Ray's testimony about her condition, which was corroborated by the physician's note, was competent evidence. The employer offered no contradictory evidence. Ms. Ray has met her burden on part one.

Defendant makes much of the fact that Ms. Ray's doctor's note was dated 7 February 1985, some six weeks after she left Broyhill. This, they say, did not prove that she had left work due to a health condition which existed at the time of her leaving. Since the Commission erroneously believed that a contemporaneous, written physician's note was the *only* competent evidence which would establish a health condition at the time of the leaving, it disregarded Ms. Ray's testimony and looked instead to the technical, probative value of the 7 February 1985 note.

Ms. Ray testified that Dr. Cline had advised her before she left Broyhill in December of 1984 that she should not be working around the chemicals and fumes. This was competent evidence. The note corroborated her testimony. The fact that the note was written in the present rather than in the past tense ("needs to be away from dust, fumes, and smoke due to medical problems") does not render it incompetent, even though the note might have been better evidence had it contained a more time-specific prohibition.

C. *Notifying the Employer of the Health Problem*

[3] The Commission also erred in finding that Ms. Ray failed to inform the employer of the health problem. Since no witnesses testified on behalf of the employer, there is no evidence of the personnel policy, standard procedure, or decision-making structure at Broyhill. Yet, the Commission chose to speculate as to what Ms. Ray *could have done* to preserve her claim. The Commission stated: "Except for her supervisor, she did not inform anyone in authority. She could have gone to the personnel department or the plant manager and did not do so."

Again, neither the "Pennsylvania test" nor the new North Carolina statute requires as much. All that was required of Ms. Ray under the "Pennsylvania test" was that she inform the employer of the health problem or specifically request a transfer to a more suitable position, both of which she did. Under the new North Carolina statute, Ms. Ray would need only to have given the employer notice of the health condition at a reasonable time prior to leaving, and *be available* for other alternative work offered by the employer, requirements which she also satisfied. *See* G.S. Sec. 96-14(1)(b); *Milliken*, 65 N.C. App. at 497, 309 S.E. 2d at 737.

The Commission took the position that Ms. Ray's supervisor was not the "employer" within the meaning of the "Pennsylvania test." We disagree. Ms. Ray testified that not only did her supervisor, Mr. Stewart, refuse to take action on her requests for transfer, and in fact told her that he doubted she could get one, he also threatened to fire her if she went to the plant manager. Certainly, if Mr. Stewart had the power to fire Ms. Ray, he was at least in a position to stand in the shoes of the employer for purposes of taking notice of the employee's health condition and transfer request. That he chose to ignore and threaten Ms. Ray

should not operate to increase *her* burden of preserving her claim.

Speculation as to what Ms. Ray *could have done* is irrelevant. The issue is not whether she presented an ironclad case to the Commission, but rather whether she met the burden of showing that she constructively informed the employer or requested a transfer. Again, because Broyhill offered no evidence and the only evidence on this issue was Ms. Ray's testimony, the Commission erred in finding that she did not inform anyone in authority.

D. *Taking the "Necessary Minimal Steps"*

[4] Finally, the Commission found that Ms. Ray's "failure to take the necessary minimal steps in order to seek a transfer or otherwise protect her employment requires a disqualification period [sic]." The Commission did not specify what those "necessary minimal steps" would have been, but it is apparent that the Commission felt Ms. Ray should have gone to the plant and/or personnel manager and perhaps even that she should have asked for a leave of absence, even though she testified that a leave of absence would have given her only temporary relief, such as her vacation the previous July had done. We have already found that by going to her immediate supervisor, Ms. Ray gave at least constructive notice to her employer of her condition and desire for a transfer. This, together with asking for a protective mask and seeking the care and advice of a physician, is enough to meet the burden of showing that she took the "necessary minimal steps" to preserve her employment.

E. *Leaving Work with "Good Cause"*

[5] Even assuming, *arguendo*, that Ms. Ray did not establish that she left work involuntarily, we believe that she should have been allowed benefits on the ground that she left with good cause attributable to her employer. "Good cause" is that which "would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." *Watson*, 273 N.C. at 635, 161 S.E. 2d at 7. Cause "attributable to the employer" is one which is "produced, caused, created or as a result of actions by the employer." *In re Vinson*, 42 N.C. App. 28, 31, 255 S.E. 2d 644, 646 (1979).

We believe that this also includes *inaction* by the employer. Broyhill's inaction placed Ms. Ray in the untenable position of

having to choose between leaving her job and becoming unemployed or remaining in a job which exposed her, without even minimal protection, to harmful chemicals and fumes that exacerbated her asthma and bronchitis conditions. Thus, Ms. Ray's cause was attributable both to the employer's action (Mr. Stewart's threat to fire her if she went over his head) and inaction (Mr. Stewart's failure to put in her transfer request).

The Employment Security Act was passed for "[t]he public good and the general welfare of the citizens of this State . . . for the benefit of persons unemployed through no fault of their own." N.C. Gen. Stat. Sec. 96-2 (1985). The Act does not contemplate penalizing workers who choose in favor of their own health, safety or ethical standards and against an affirmative or *de facto* policy of the employer to the contrary. *See, e.g., In re Clark*, 47 N.C. App. 163, 266 S.E. 2d 854 (1980) (claimant left because actions employer required her to take violated ethical standards of her profession.).

Conclusion

We hold that the Commission erred in disqualifying Ms. Ray from receiving benefits by applying an improper legal standard *and* by disregarding or misapplying the only competent evidence offered to meet that stringent and inflated burden. The Commission's findings of fact disregarded much of the competent evidence and its conclusions of law were based on an erroneous interpretation of relevant precedent. *See Eason*, 66 N.C. App. at 261, 311 S.E. 2d at 373 (Commission's conclusions of law may be fully reviewed on appeal).

The judgment of the Superior Court is reversed, and the cause is remanded to the Commission for entry of an award of benefits.

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

ROSEWITHA A. SINK, EXECUTRIX FOR THE ESTATE OF HENRY COOLIDGE SINK, DECEASED v. BILLY RAY ANDREWS AND GRACE ALTMAN ANDREWS AND W. B. MEDLIN AND G. F. DEAL AND J. K. GARDNER AND HANNIS THOMPSON AND CITY OF HIGH POINT

No. 8518SC1245

(Filed 1 July 1986)

1. **Limitation of Actions § 4.1— defective electrical wiring—installation more than six years before action commenced—wrongful death action barred**

Summary judgment was properly entered for defendants on plaintiff's wrongful death claim where she alleged that defendants negligently installed or permitted to be installed electrical wiring in the residence which plaintiff purchased from them, the wiring was defective and unsafe, and the fire in which plaintiff's husband died was caused by the defective condition of the wiring, since defendants showed that any electrical work performed or permitted by them was completed more than six years before the action was commenced; plaintiff forecast no evidence to show that any part of the allegedly defective electrical work was performed within six years before the suit was filed; and the action was therefore barred by N.C.G.S. § 1-50(5)a.

2. **Vendor and Purchaser § 6— seller's responsibility for defective electrical work—failure to disclose facts—summary judgment for seller proper**

In a wrongful death action where plaintiff claimed that defendants sold her a house knowing that the electrical wiring was defective and unsafe and that they negligently failed to disclose the condition of the wiring to her, the trial court properly entered summary judgment for defendants, since defendants produced evidence that all of their wiring had been done by a licensed electrician and had passed inspection by city inspectors; defendants and others who had resided in the house up until the time it was sold to plaintiff stated that they had noticed no indication of electrical problems; had defendants known or had reason to know that the condition of the wiring was hazardous, it is unlikely that they would have exposed themselves to a risk of injury or death; defendants thus showed that they had no knowledge or reason to know of the existence of the allegedly defective and dangerous wiring; the burden then shifted to plaintiff to counter defendants' forecast of evidence; and her evidence fell short of that required to present a genuine issue of fact as to defendant's knowledge or reason to know of the alleged hazardous condition.

APPEAL by plaintiff from *Davis, James C., Judge.* Judgments entered 25 February 1985 and 24 July 1985 in GUILFORD County Superior Court. Heard in the Court of Appeals 14 April 1986.

Plaintiff brought this civil action on 23 January 1984 seeking recovery for the alleged wrongful death of her husband, Henry Coolidge Sink, who died in a fire at plaintiff's residence on 25 January 1982. Plaintiff alleged that the fire had resulted from

defective electrical wiring in the house, which she had purchased from defendants Andrews shortly before her marriage. By her First Claim, plaintiff alleges that the Andrews were negligent in installing, or permitting the installation of, defective and dangerous wiring in the house; by her Second Claim, she alleges that they negligently failed to disclose to her the existence of the unsafe wiring when they sold the house to her. Additional claims for negligence were asserted against the City of High Point and individual members of the City's fire department. Settlements have been reached as to those claims and plaintiff has submitted to voluntary dismissals, with prejudice, as to all defendants except the Andrews.

Defendants Andrews moved for summary judgment as to both of the claims against them. By order dated 25 February 1985, the trial court granted partial summary judgment to defendants, dismissing plaintiff's First Claim. On 24 July 1985, an order was entered granting defendants' motion as to plaintiff's Second Claim. Plaintiff appeals from each order.

Edwards and Stamey, by Billy G. Edwards, for plaintiff-appellant.

Petree, Stockton & Robinson, by James H. Kelly, Jr., for defendants-appellees Billy Ray Andrews and Grace Altman Andrews.

MARTIN, Judge.

Plaintiff assigns error to the entry of each of the orders granting defendants' motions for summary judgment and dismissing her claims against them. She contends that genuine issues of fact exist with respect to each claim and that defendants are not entitled to judgment as a matter of law. We affirm both orders.

Summary judgment, pursuant to G.S. 1A-1, Rule 56, is appropriate where no genuine issues exist as to any material fact and the moving party is entitled to judgment as a matter of law. The rule permits penetration of an unfounded claim or defense in advance of trial and summary disposition of the case when a fatal weakness in a claim or defense is made apparent. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). The moving party has the burden of showing the lack of any triable issue of fact and his entitlement to judgment as a matter of law. *Id.*

> The device used is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law.

Id. at 378-79, 218 S.E. 2d at 381-82, *quoting* 2 McIntosh, North Carolina Practice and Procedure § 1660.5 at 72 (Phillips Supp. 1970).

Both of plaintiff's claims are grounded upon allegations of negligence. As a general rule, summary judgment is not appropriate where issues of negligence are involved. *Vassey v. Burch*, 301 N.C. 68, 269 S.E. 2d 137 (1980). However, if the evidentiary forecasts establish either a lack of any conduct on the part of the movant which could constitute negligence, or the existence, as a matter of law, of a complete defense to the claim, summary judgment may be properly allowed. *Id.*

[1] By her First Claim, plaintiff alleges that defendants Andrews negligently installed, or permitted to be installed, electrical wiring in the residence which was defective and unsafe and that the fire in which Henry Sink died was caused by the defective condition of the wiring. Evidence submitted by defendants in support of their motion for summary judgment disclosed that Jim Walters Homes constructed the house in question for them in 1967. Although the exterior was completed by Jim Walters Homes, the Andrews were required to finish the interior. They employed Carolina Electric Service of Greensboro to install the electrical wiring, employed a plumber, and Mr. Andrews installed the sheetrock and panelling. In 1974, the Andrews added an addition to the house, including a utility room. The wiring for the addition was also installed by Carolina Electric Service and was completed in December 1974, after which Mr. Andrews installed panelling. By answers to interrogatories, their affidavits and the affidavits of others who had resided in the house from 1974 until it was sold to plaintiff in 1981, defendants asserted that no other electrical work had been performed by them or at their request since 1974.

In opposition to the motion, plaintiff offered the affidavit of Phil Barham, a principal in Carolina Electric Service of Greensboro, to the effect that all of the work which his company performed at the house met applicable code requirements. Fred Rapp, an electrical engineer and fire investigator, stated in his affidavit that he had inspected the wiring in various parts of the house after the fire and that much of the wiring was defective and did not meet the requirements of the North Carolina Building Code. Hannis Thompson, Chief of the High Point Fire Department, testified at his deposition that the fire originated in the utility room and was electrical in origin. In her own affidavit, plaintiff asserted that no electrical work had been performed at the house between the date she purchased it and the date of the fire.

Defendants contend, and we agree, that upon this evidence, the trial court correctly concluded that plaintiff's First Claim is barred, as a matter of law, by the provisions of G.S. 1-50(5)a. The statute provides:

> § 1-50
>
> (5)a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

The statute is substantive in nature and imposes, as a condition precedent to a cause of action, that plaintiff establish that the action is brought within six years of the completion of the improvement or last negligent act of the defendant, whichever occurs later, even though the injury or damage may not have occurred before the expiration of the time limitation. *See Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E. 2d 415 (1982).

Defendants, by their forecast of evidence, have shown that any electrical work performed or permitted by them was completed more than six years before this action was commenced. Such a showing, considered alone, establishes their right to a judgment in their favor as to plaintiff's First Claim and shifts the burden to plaintiff to forecast evidence sufficient to show that a triable is-

sue of fact exists as to applicability of G.S. 1-50(5)a. *See Caldwell v. Deese, supra.* Plaintiff has failed to meet this burden. While the evidence may be conflicting as to whether the wiring, as installed in the residence, was defective or whether it met applicable code requirements, plaintiff has forecast no evidence which would be available to her at the trial of this action to show that any part of the allegedly defective electrical work was performed within six years before the suit was filed.

> It is clear and well established that the party opposing summary judgment is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must, at the hearing upon motion for summary judgment, be able to evince the existence of a triable issue of material fact.

Wachovia Bank & Trust Co., N.A. v. Grose, 64 N.C. App. 289, 292, 307 S.E. 2d 216, 217 (1983), *disc. rev. denied*, 311 N.C. 309, 317 S.E. 2d 908 (1984).

[2] In her Second Claim, plaintiff alleges that when the Andrews sold the house to her in February 1981, they knew or should have known that the wiring was defective and unsafe, of the risks occasioned thereby, that plaintiff would neither discover the faulty wiring nor realize the danger, and that they negligently failed to disclose the condition of the wiring to her. She does not contend that defendants wrongfully concealed information from her or that they misrepresented any fact.

As a general rule, in the absence of an express or implied warranty, *Hartley v. Ballou*, 286 N.C. 51, 209 S.E. 2d 776 (1974) or a fraudulent concealment or misrepresentation, *Griffin v. Wheeler-Leonard & Co., Inc.*, 290 N.C. 185, 225 S.E. 2d 557 (1976), a vendor of real property is not liable for damage or harm to a purchaser or others from defects existing at the time of the sale. Prosser and Keeton, The Law of Torts § 64 (5th ed. 1984). However, a developing exception to this rule provides that where the seller knows or has reason to know of a hidden defect which poses an unreasonable risk of harm to persons on the premises and of which the purchaser has no knowledge and is not reasonably likely to discover, the seller has a duty to warn the purchaser of the existence of such defect and, upon his failure to do so, will be held liable for any harm which results therefrom to the

purchaser or others upon the premises. *Id. See also* Restatement (Second) of Torts §§ 352 & 353 (1965). Plaintiff cites us no North Carolina cases which have adopted this exception to the general rule, nor has our research disclosed any cases in this State which have extended liability, based on negligence principles, for hidden defects beyond that imposed upon a builder-vendor. *See Oates v. JAG, Inc.*, 314 N.C. 276, 333 S.E. 2d 222 (1985). Nevertheless, we view the exception as reasonable and, given an appropriate factual setting, would be inclined to embrace it in this State. The evidence before us on defendants' summary judgment motion does not, however, permit us to do so in this case.

In order for plaintiff to obtain the benefit of the exception, she must prove at trial not only that the condition of the wiring constituted a hidden defect, which posed an unreasonable risk of harm and resulted in actual harm to decedent, but also that the defendants knew or had reason to know of the existence of the defective condition. In support of their motion, defendants produced evidence that all of their wiring had been done by a licensed electrician and had passed inspection by city inspectors. In addition, defendants and others who had resided in the house up until the time it was sold to plaintiff stated that they had noticed no indications of electrical problems, such as flickering lights, blown fuses or circuit breaker problems. Moreover, all of these witnesses had continued to live in the house for a number of years after the electrical work was completed. Had they known or had reason to know that the condition of the wiring was hazardous, it is unlikely that they would have exposed themselves to a risk of injury or death. By their forecast of evidence, defendants showed that they had no knowledge or reason to know of the existence of the allegedly defective and dangerous wiring. The burden then shifted to plaintiff to counter the defendants' forecast of evidence by producing some evidence of her own. The only evidence which she produced was the affidavit of Mr. Rapp, to the effect that the wiring in much of the house did not meet code requirements, and the acknowledgment of defendant Bill Andrews that he had observed the wiring when he installed the panelling in the house and addition. However, he also testified that he knew nothing about electrical wiring and that he assumed the wiring to have been installed properly because it had been done by a licensed electrician and had been inspected. Her evidence falls

short of that required to present a genuine issue of fact as to defendants' knowledge or reason to know of the alleged hazardous condition. In the absence of such, defendants had no duty to warn and their failure to do so cannot be said to be negligence.

The orders granting defendants' motion for summary judgment are

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

JERRY W. DANIELS v. MONTGOMERY MUTUAL INSURANCE COMPANY

No. 8522SC1011

(Filed 1 July 1986)

Rules of Civil Procedure § 41.2; Costs § 3— failure to obey court order—sanctions less than dismissal—taxing of costs and attorney fees

The trial court has the authority under N.C.G.S. § 1A-1, Rule 41(b) to impose sanctions less than dismissal, including costs and attorney fees, for failure to comply with a court order; but the court must make findings concerning the effectiveness of alternate sanctions and the party's ability to perform the alternative.

APPEAL by plaintiff from *Davis, Judge,* and *Smith, Judge.* Orders entered 5 November 1984 and 29 April 1985 in DAVIDSON County Superior Court. Heard in the Court of Appeals 11 February 1986.

Wilson, Biesecker, Tripp & Sink by Joe E. Biesecker; and Brinkley, Walser, McGirt, Miller, Smith & Coles by Charles H. McGirt and Stephen W. Coles for plaintiff appellant.

Yates, Fleishman, McLamb & Weyher by Joseph W. Yates, III, and Gary R. Poole for defendant appellee.

COZORT, Judge.

Plaintiff brought this action seeking to recover on a fire insurance policy. At the third trial of this matter plaintiff's counsel, in his opening argument, violated the trial court's order granting

a motion in limine by referring to the fact that plaintiff had not been criminally prosecuted for burning his house. The trial court declared a mistrial and pursuant to Rule 41(b) ordered the plaintiff to pay the defendant's costs and attorney's fees connected with the third trial. Plaintiff did not pay. The trial court, pursuant to Rule 41(b), dismissed plaintiff's claim and awarded defendant approximately $50,000 on its counterclaim. Plaintiff appealed. A novel issue presented by this appeal is whether the trial court, pursuant to G.S. 1A-1, Rule 41(b), has the authority to impose a lesser sanction of costs, which include attorney's fees, against a party or his counsel. We hold that it does.

On 17 August 1982 plaintiff instituted this action by filing a complaint seeking to recover on a fire insurance policy he had purchased from the defendant. On 14 October 1981, the property insured by the defendant burned down. Plaintiff sought to recover $102,140.14 from the defendant. Defendant answered denying coverage and alleging that "plaintiff intentionally caused, procured, or acquiesced in the fire for the fraudulent purpose of collecting insurance benefits." Defendant counterclaimed seeking $48,792.76 for the amount of mortgage payments the defendant had paid on the first and second mortgages on plaintiff's property.

Prior to the first trial of this action defendant filed a motion in limine requesting that the plaintiff be prohibited from introducing evidence or referring to any evidence that no criminal charges had been filed against the plaintiff on account of the fire. Judge Hamilton H. Hobgood granted defendant's motion in limine. On 14 November 1983 a mistrial was declared in the first trial when plaintiff's counsel, Joe E. Biesecker, informed the court that he might be a witness on behalf of his client and therefore would need to withdraw.

On 7 May 1984, this action was called for trial for the second time. Joe E. Biesecker again appeared as counsel for plaintiff. Prior to the commencement of the second trial, Judge Robert A. Collier, Jr., reiterated the order of Judge Hobgood allowing defendant's motion in limine. The second trial ended in a mistrial by virtue of a deadlocked jury.

On 17 September 1984, this action was called to trial for the third time. Prior to the trial Judge James Davis reiterated the

prior court order prohibiting the introduction of evidence or reference to any matter before the jury that no criminal charges had been filed against the plaintiff as a result of the fire. During opening statements to the jury, plaintiff's attorney, Joe E. Biesecker, made the following statement: "If Jerry Daniels had burned his house, then he ought to have been prosecuted." On 18 September 1984 a mistrial was declared by Judge Davis. On 26 September 1984, the defendant made a motion to dismiss pursuant to Rule 41(b) for failure of the plaintiff to comply with the order of court prohibiting him from introducing evidence or referring to the fact that no criminal charges had been filed against the plaintiff. As a lesser sanction, the defendant requested the trial court to tax plaintiff with the reasonable out-of-pocket expenses incurred by the defendant in defending the action. On 18 December 1984, Judge Davis denied the defendant's motion to dismiss but imposed a lesser sanction by ordering that the plaintiff be taxed with the reasonable out-of-pocket expenses, including attorney's fees, incurred by the defendant in connection with the third trial. The total amount assessed was $6,021.02 in costs, including legal fees of $3,372.75. The plaintiff was given 30 days to pay the costs.

The plaintiff failed to comply with the 17 December 1984 order. On 21 February 1985 defendant filed a motion to dismiss based upon plaintiff's failure to comply with the 17 December 1984 order. The motion was heard by Judge Donald L. Smith. Judge Smith concluded that he had no authority to alter, modify or vacate Judge Davis's order and that dismissal would be a proper means of enforcing the order. Accordingly, Judge Smith, pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, dismissed the plaintiff's action and ordered that defendant recover $48,792.76 on its counterclaim. Plaintiff appealed from this order.

Three issues are presented in this appeal: (1) whether the trial court may, as an alternative to granting a motion to dismiss, tax plaintiff with the defendant's costs, including attorney's fees, incurred pursuant to the third trial; (2) whether the trial court erred in dismissing the plaintiff's complaint, pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, for plaintiff's failure to comply with the order to pay costs; and, (3) whether the

trial court erred by entering judgment on defendant's counterclaim subsequent to dismissing the plaintiff's action.

The threshold question is whether the order assessing attorney's fees and costs with which plaintiff did not comply was properly entered. The propriety of the order depends on whether the trial court, pursuant to Rule 41(b), has the authority to impose a lesser sanction of costs, which include attorney's fees.

Rule 41(b) provides in pertinent part:

> *Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him.

Our research has revealed no North Carolina cases discussing the power of the court to impose lesser sanctions pursuant to Rule 41(b) for failure to comply with an order of the court. Section (b) of Rule 41 is identical to the federal rule. *Whedon v. Whedon*, 313 N.C. 200, 328 S.E. 2d 437 (1985); *Joyner v. Thomas*, 40 N.C. App. 63, 251 S.E. 2d 906 (1979). Therefore, we will look to federal case law as a guide to a determination of this issue.

As a general rule, each party to a lawsuit bears his own attorney's fees and costs, absent express statutory or contractual authority. *Hall v. Cole*, 412 U.S. 1, 36 L.Ed. 2d 702, 93 S.Ct. 1943 (1973); *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E. 2d 179 (1972). However, in the exercise of their equitable powers, courts may award attorney's fees absent such authority when interests of justice so require. *Hall, supra*, 412 U.S. at 4-5, 36 L.Ed. 2d at 707, 93 S.Ct. at 1945-46. *See* Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System*, 61 N.C. L. Rev. 612 (1983). Recently, North Carolina has enacted a statutory provision which allows the assessment of attorney's fees against a party in cases where the court finds "that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. . . . A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees." G.S. 6-21.5. This provision appears to be based on deterring frivolous and bad faith lawsuits by the use of attorney's fees.

The power of the court to dismiss pursuant to Rule 41(b) derives from the inherent power of the court to manage and control its proceedings. 5 *Moore's Federal Practice* Para. 41.11-.12 (2d ed. 1985); *see* G.S. 1A-1, Rule 41(b), Comment, Section (b); *Minor v. Minor*, 62 N.C. App. 750, 303 S.E. 2d 397 (1983). But dismissal with prejudice for failure to comply with a court order is a harsh sanction, particularly where the fault lies with plaintiff's counsel. *Moore's, supra.* We note that plaintiff's counsel strenuously argued in oral argument that plaintiff was blameless and that the violation of the motion in limine was due solely to the actions of his counsel at trial. The most extreme penalty, dismissal with prejudice, should be imposed only after full consideration of the effectiveness of less stringent measures. *Rogers v. Kroger Co.*, 669 F. 2d 317 (5th Cir. 1982). "[T]he courts have frequently imposed lesser sanctions, such as fining plaintiff's attorney, denying the motion to dismiss on the condition plaintiff pay defendant for attorney's fees, or dismissing without prejudice." *Moore's, supra.* The imposition of costs due to an attorney's inappropriate conduct may often be preferable to dismissal. *Poulis v. State Farm Fire & Cas. Co.*, 747 F. 2d 863, 869 (3d Cir. 1984).

North Carolina courts have the inherent power to impose fines and sanctions against an attorney for disobeying a court order. *In re Robinson*, 37 N.C. App. 671, 247 S.E. 2d 241 (1978). In *Robinson* this court stated:

> [A] Superior Court, as part of its inherent power to manage its affairs, to see that justice is done, and to see that the administration of justice is accomplished as expeditiously as possible, has the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. Sanctions available include citations for contempt, censure, informing the North Carolina State Bar of the misconduct, *imposition of costs*, suspension for a limited time of the right to practice before the court, suspension for a limited time of the right to practice law in the State, and disbarment.

Id. at 676, 247 S.E. 2d at 244 (emphasis added). Thus, this Court has recognized the power of the trial court to tax costs against an errant attorney.

In *Hornbuckle v. Arco Oil & Gas Co.*, 732 F. 2d 1233 (1984), *cert. denied*, --- U.S. ---, 89 L.Ed. 2d 312, 106 S.Ct. 1198 (1986),

the Fifth Circuit Court of Appeals was presented with a case similar to the case *sub judice*. There the plaintiff's lawyer refused to start the trial because of a conflict in his case schedule. The court ordered the plaintiff to reimburse the defendant for attorney's fees and costs incurred in preparation for the scheduled trial that had been, in effect, wasted as a result of the necessity of rescheduling the trial. Plaintiff Hornbuckle failed to pay, and the court dismissed the suit. The plaintiff argued that she was not financially able to pay the costs and attorney's fees. The Fifth Circuit affirmed, finding that the trial court, pursuant to Rule 41(b), had the power to impose sanctions, including costs and attorney fees, on either counsel or client, as may be appropriate; however, the court remanded the case for express findings concerning whether plaintiff Hornbuckle had the ability to pay the sum assessed as an alternative to dismissal, and, if not, whether any sanction less severe than dismissal, including those that might be assessed against counsel, would be appropriate and sufficient. *Id.* at 1237. *See also Mallor, supra*, at 646-52; *Cauley v. Wilson*, 754 F. 2d 769 (7th Cir. 1985); *Scarborough v. Eubanks*, 747 F. 2d 871 (3d Cir. 1984).

With the foregoing, persuasive legal principles in mind, we hold that the trial court has the authority, pursuant to Rule 41(b), to impose lesser sanctions against a party or counsel for failure to comply with a court order. The lesser sanctions imposed may include costs plus attorney's fees. In considering what sanctions to impose, the trial court must make findings concerning the effectiveness of alternative sanctions and must make findings that the plaintiff is capable of performing the alternative. Accordingly, we remand the case for express findings concerning whether plaintiff had the ability to pay the sum assessed as an alternative to dismissal, and, if not, whether any sanction less severe than dismissal, including those which might be assessed against counsel, would be appropriate and sufficient.

Having determined that the original order is not supported by sufficient findings and is thus erroneous, we vacate the second order dismissing the plaintiff's claim and granting defendant's counterclaim. *Thornburg v. Lancaster*, 303 N.C. 89, 277 S.E. 2d 423 (1981).

The order taxing cost and attorney's fees against plaintiff is vacated. The order dismissing the plaintiff's action and awarding

defendant $48,792.76 on its counterclaim is vacated. The cause is remanded for findings as set forth above.

Vacated and remanded.

Judges WELLS and WHICHARD concur.

INTERNATIONAL PAPER COMPANY, PLAINTIFF v. JAMES W. HUFHAM, SR. AND WIFE, PATRICIA C. HUFHAM AND JAMES W. HUFHAM, JR., DEFENDANTS AND THIRD PARTY PLAINTIFFS v. SEABOARD SYSTEMS RAILROAD, THIRD PARTY DEFENDANT

No. 8513SC630

(Filed 1 July 1986)

1. **Quieting Title § 2 — standing — possibility of cloud on title**

Plaintiff had standing to challenge defendants' claim of ownership of former railroad property where defendants' answer admitted some possibility that a portion of the disputed land might lie within the boundaries of plaintiff's deed.

2. **Quieting Title § 2.2 — former railroad bed — 1849 deed — easement rather than fee simple — summary judgment for plaintiff proper**

The trial court properly granted summary judgment for plaintiff in an action to quiet title to a tract of land which was formerly a portion of the Seaboard Coastline Railroad where plaintiff's predecessors in title included a landowner who conveyed the "right and privilege" to build a railroad over the land in 1849; defendants had acquired a quitclaim deed from Seaboard, a successor to the 1849 railroad, after Seaboard pulled up its tracks; the controlling issue was whether the 1849 deed conveyed fee simple title or an easement which Seaboard had abandoned; the granting clause conveyed only the right and privilege to enter the land and build a railroad; there were no covenants of seizin and warranty; and the deed predated N.C.G.S. § 39-1, which contains a presumption that a conveyance is in fee.

APPEAL by defendants from *Clark, Judge*. Judgment entered 10 January 1985 in Superior Court, BRUNSWICK County. Heard in the Court of Appeals 21 November 1985.

Michael W. Willis for defendant appellants.

Prevatte, Prevatte & Peterson by James R. Prevatte, Jr., and Kenneth R. Campbell for plaintiff appellee.

COZORT, Judge.

On 27 June 1983 plaintiff International Paper Company filed this action to quiet title to a tract of land located in Brunswick and Columbus Counties, North Carolina. The trial court granted summary judgment for plaintiff ordering that the cloud of defendants' adverse claim be removed from plaintiff's title. We affirm.

On 12 June 1981, defendants acquired from Seaboard Coast Line Rail Road Company (formerly Wilmington and Manchester Rail Road) (hereinafter "Seaboard") by quitclaim deed a strip of land 130 feet wide by 6,606 feet long lying in Brunswick County, between Lake Waccamaw and Wilmington. This land was a portion of the Seaboard line which ran between Whiteville and Wilmington, North Carolina. Seaboard removed its tracks from this land when service on the line was discontinued in 1977.

On 27 June 1983 plaintiff filed this action alleging that it was fee simple owner of a certain tract of land which it acquired from Acme Fertilizer Company on 26 June 1967, and that defendants claim an estate or interest in part of this land based upon the quitclaim deed defendants had acquired from Seaboard on 12 June 1981, which is recorded in the Brunswick County Registry in Deed Book 480 at page 151. Plaintiff further alleged that Seaboard had held only an easement in said land which had been granted to it by plaintiff's predecessors in title during the 1840s. Plaintiff alleged that Seaboard had abandoned its easement and that the lands have reverted to the original owners and their successors in interest, from which plaintiffs claim their title.

Defendants answered, and while asserting they are the fee simple owners of the land described in Deed Book 480 at Page 151 of the Brunswick County Registry, they admitted that "there is some possibility that a portion of those lands described in Deed Book 480 at Page 151 of the Brunswick County Registry may lie within the boundaries of those lands [plaintiff acquired from Acme Fertilizer Company on 26 June 1967]."

Defendants filed a third-party complaint against Seaboard, alleging fraud in the conveyance of the 130-foot wide, 6,606-foot long tract of land; defendants subsequently voluntarily dismissed that complaint.

Thereafter, plaintiff moved for summary judgment and on 10 January 1985 the trial court granted plaintiff's motion for summary judgment ordering "that the cloud of the adverse claim of the defendants be and is hereby removed from the title to the [plaintiff's] property described in the complaint . . . ." Defendants appeal.

[1] First, we address whether we must consider defendants' contention on appeal that the calls in plaintiff's deed do not encompass any of the railroad property acquired by defendants in their 12 June 1981 quitclaim deed from Seaboard. The transcript of the summary judgment hearing in this case shows that part of the controversy at the hearing centered on whether a call in plaintiff's deed was to the center of the railroad line or only to the edge of the railroad "right-of-way." Defendants urge this Court to hold that the call in plaintiff's deed is only to the southern edge of the railroad right-of-way, which would mean that plaintiff's land would not encompass any of the land in which defendants claim an interest. Thus, according to defendants, plaintiff would have no standing to bring this action.

While the determination of what the boundary lines are is a question of law for the court, *Carson v. Reid*, 76 N.C. App. 321, 332 S.E. 2d 497 (1985), *affirmed*, 316 N.C. 189, 340 S.E. 2d 109 (1986), we need not judicially determine what the boundary lines are in plaintiff's deed. As noted earlier, in their answer, "Defendants admit that there is some possibility that a portion of those lands described in Deed Book 480 at Page 151 of the Brunswick County Registry may lie within the boundaries of those lands described in [plaintiff's deed]." This admission gave plaintiff standing in court to challenge the defendants' claim as a cloud upon its title. *Resort Development Co., Inc. v. Phillips*, 278 N.C. 69, 76, 178 S.E. 2d 813, 818 (1971). As our Supreme Court stated in *Resort Development Co., Inc.*:

> "In order to remove a cloud from a title, it is not necessary to allege and prove that . . . the plaintiff . . . had an estate in or title to the lands in controversy. It is only required . . . that the plaintiff or plaintiffs have such an interest in the lands as to make the claim of the . . . defendants adverse to him or them." *Etheridge v. Wescott*, 244 N.C. 637, 94 S.E. 2d 846; *Williams v. Board of Education*, 266 N.C. 761, 147 S.E. 2d

> 381. "An action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim." *Plotkin v. Bank*, 188 N.C. 711, 125 S.E. 541. By suit to remove a cloud from title, a plaintiff does not necessarily put his title in issue. "He is not demanding possession of land nor are his rights put in issue. He demands judgment that the defendant has no right, title or interest . . . adverse . . . to him." *Plotkin v. Bank, supra.*

Id. at 76-77, 178 S.E. 2d at 818. Thus, we need not consider defendants' contention concerning the boundary lines described in plaintiff's deed.

[2] The controlling issue is whether a deed made by William Brinkley to the Wilmington and Manchester Rail Road Company in 1849 conveyed fee simple title or only an easement in the strip of land in controversy. It is this land which Seaboard conveyed by quitclaim deed to defendants. It is undisputed that Seaboard ceased rail traffic on the line in question on 28 February 1977, and removed its rails from the property in question in the summer of 1977. If the deed conveyed only an easement, the estate of the railroad company ceased and terminated when its tracks were removed and the railroad was abandoned; the defendants took nothing by the quitclaim deed; and plaintiff would be entitled to summary judgment. *McCotter v. Barnes*, 247 N.C. 480, 484, 101 S.E. 2d 330, 333 (1958).

The construction of a deed is a question of law for the court. *Brown v. Hodges*, 232 N.C. 537, 61 S.E. 2d 603 (1950). Upon reviewing the deed, we hold that the deed conveyed only an easement for railroad purposes and not a fee simple title. The deed, in pertinent part, reads as follows:

> Whereas it is contemplated to construct a Rail Road from the Town of Wilmington in the State of North Carolina or from some point near that place, to the village of Manchester in the State of South Carolina or to some point near said last mentioned place; and it being supposed that said Rail Road will pass through the Counties of Brunswick and Columbus in the State of North Carolina and through the Districts of Horry, Marion, Darlington and Sumter in the State of South Carolina; and whereas the benefits and advan-

tages of the establishment of said Rail Road to the several and respective owners and proprietors of the lands through which the same will pass will greatly exceed the loss and damages which will be severally sustained by them by the construction of said Rail Road through their respective lands; and being desirous to promote the building and establishment of said Road: Now, therefore, know all men by these presents that I, Wm. Brinkley of the County of Brunswick in the State of North Carolina for and in consideration of the premises and in further consideration of the sum of having the Depot on my land near the dwelling in hand paid by the Wilmington and Manchester Rail Road Company at and before the sealing and delivery of these presents, the receipt of which is hereby acknowledged, have given, granted and surrendered and by these presents do give, grant and surrender to the said Wilmington and Manchester Rail Road Company *the right and privilege by their agents and servants to enter upon each and every tract or parcel of land belonging to or held by me*, wheresoever the same may be situate through which they may desire to construct their Rail Road; to lay out and construct their said Road on such lands according to their pleasure; and to lay out, use, occupy and possess such portions of said lands contiguous to said Rail Road as they may desire as sites for Depots, Toll Houses, Warehouses, Water Stations, Engine Sheds, Wood Sheds, Work Shops or other buildings for the necessary accommodation of said company, or for the protection of their property or the property of others entrusted to their care; Provided, However, the said company shall not enter upon any portion of said lands which may be occupied by any Dwelling House, Yard, Garden or Grave Yard; and that the land laid out on the line of said Rail Road shall not exceed, except at the deep cuts and fillings, one hundred thirty feet in width, and at such deep cuts and fillings shall not exceed a width sufficient for the construction of the enbankments and deposits of waste earth; and that land contiguous to said Rail Road which may be used for the sites of buildings shall not exceed a sufficiency for the purposes of the Road. To have and to hold the before granted lands with the rights and privileges aforesaid unto the said Wilmington and Manchester Rail Road Company and their as-

signs for the uses and purposes aforesaid forever. [Emphasis added.]

No land is conveyed by this language, only the "right and privilege" to the railroad company to enter upon the lands of Mr. Brinkley and lay out its railroad line, not to exceed 130 feet in width, and "to lay out, use, occupy and possess such portions of said lands contiguous to said Rail Road" for the construction of buildings necessary for the accommodation of the railroad company. Title to the land, subject to such right-of-way or easement, remained in Mr. Brinkley. *See Beasley v. Aberdeen and Rockfish Railroad Co.*, 145 N.C. 272, 59 S.E. 60 (1907); *Railroad v. Olive*, 142 N.C. 257, 55 S.E. 263 (1906); Annot. 6 A.L.R. 3d 973 (1966).

McCotter v. Barnes, supra, relied upon by the defendants, is distinguishable from the case at bar. In that case the deed in question was held to have conveyed to the railroad the land in fee simple. The granting clause of the deed in the *McCotter* case recited that "'said parties of the first part . . . have given, granted, bargained and sold and by these presents do hereby give, grant, bargain and sell unto the party of the second part, its successors and assigns, a tract or parcel of land 100 feet in width . . . .'" *Id.* at 482, 101 S.E. 2d at 332. Here the granting clause conveyed only the right and privilege to enter upon the lands and construct a railroad. The deed in *McCotter* contained covenants of seizin and warranty reciting that the grantors were seized of the property conveyed in fee and would defend such title. Here there are no covenants of seizin and warranty. Finally, the court in *McCotter* applied to the *Barnes* deed the presumption contained in G.S. 39-1, that a conveyance shall be construed to be a conveyance in fee unless "such conveyance in plain and express words shows, or it is plainly intended by the conveyance or some part thereof, that the grantor meant to convey an estate of less dignity." The deed in question predates the enactment of G.S. 39-1.

In sum, we hold that the Brinkley deed conveyed only an easement and the estate of Seaboard ceased and terminated when it ceased rail traffic and removed its tracks. As such, defendants acquired nothing through their quitclaim deed, and the trial court properly granted summary judgment for the plaintiff.

Affirmed.

Judges WEBB and BECTON concur.

JAMES M. COX, DALLAS MULLINS, AND WALTER ROBERTS v. STATE OF NORTH CAROLINA, EX REL., JAMES A SUMMERS, SECRETARY, NORTH CAROLINA DEPARTMENT OF NATURAL RESOURCES AND COMMUNITY DEVELOPMENT

No. 8517SC959

(Filed 1 July 1986)

1. **Waters and Watercourses § 3.2— Sedimentation Pollution Control Act— land-disturbing activities before date of regulation**

15 N.C. Ad. Code 4B.0013 requires the installation of erosion and sedimentation control measures irrespective of whether the land-disturbing activity occurred before or after the effective date of the regulation, 1 February 1976.

2. **Waters and Watercourses § 3.2— Sedimentation Pollution Control Act—owners of roads as "landowners"**

The developers of a subdivision who still own the roadways over which lot owners have an easement are "landowners" within the meaning of 15 N.C. Ad. Code 4B.0013 who may be held responsible under the Sedimentation Pollution Control Act for permanent erosion and sediment control measures in the roadways.

APPEAL by the State from *Morgan, Judge.* Order entered 5 June 1985 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 4 February 1986.

Attorney General Lacy H. Thornburg by Assistant Attorney General Walter M. Smith for the North Carolina Department of Natural Resources and Community Development, appellant.

McLeod, Campbell, Wilkins & McLeod, by F. B. Wilkins, Jr., for appellees.

COZORT, Judge.

The issue presented by this appeal is whether state statutes and regulations provide that the developers of land, who still own the roadway over which lot owners have an easement, are responsible for permanent erosion and sediment control measures in that roadway. The land-disturbing activity of the developers in developing the land occurred before the effective date of the

regulations in question under which the State is attempting to hold the developers responsible. We hold that the State can hold responsible the developers who still own the roadway, and the trial court erred in ruling otherwise.

The facts are largely undisputed. In 1973, the plaintiffs developed a subdivision in Rockingham County. The roads were graded and lots were sold. The boundary lines of the lots extend to the edge of the road and ditch lines and do not extend to the center of the roads. By 15 September 1974, all lots in the subdivision had been sold. The streets and roads shown on the recorded plats of the subdivision were constructed and opened by the plaintiffs on 26 September 1973, and have been used continuously since that date by owners of the lots located in the subdivision and the public. The plaintiffs offered to dedicate the roads to public use but the offer of dedication has never been accepted by any governmental agency. There has not been an out conveyance of any portion of the roads.

On 6 January 1984, personnel of the North Carolina Department of Natural Resources and Community Development (hereinafter "NRCD") inspected the subdivision and determined that the roads and ditches were experiencing accelerated erosion and offsite damage from sedimentation in violation of the Sedimentation Pollution Control Act of 1973 (G.S. 113A-50, *et seq.*) (hereinafter "the Act"), and regulations promulgated pursuant to the Act by the Sedimentation Pollution Control Commission, the NRCD agency responsible for enforcement of the Act. On 19 January 1984, NRCD issued to plaintiffs written notice to comply with the Act.

On 1 February 1984, plaintiffs filed this action to enjoin NRCD from enforcing the Act against them and for a ruling that they are not "landowners" of the roads and ditch lines within the meaning of the Commission's regulations. On 28 March 1984, the Honorable Edward K. Washington entered partial summary judgment in favor of the defendant, finding that plaintiffs are landowners of the subject property within the meaning of the Commission's regulations. Judge Washington continued further proceedings until the plaintiffs were afforded a hearing before the Commission on the issue of whether the subject property was existing in violation of the terms of the Act and regulations promulgated thereunder. On 3 May 1984, a hearing was held before a

departmental hearing officer. On 5 December 1984, the Full Commission adopted the hearing officer's revised proposed findings of fact, conclusions of law, and recommendation, finding that the subject property exists in violation of the terms of the Act and that plaintiffs are "landowners" responsible for maintaining erosion control measures on the property.

Plaintiffs appealed to superior court for judicial review of the Commission's decision. On 5 June 1985, the Honorable Melzer Morgan, Jr., reversed the Commission's decision. The superior court concluded that "[t]he developers [plaintiffs] here now have so little interest and control of the streets in this subdivision that they may not be held to be the landowners for the purposes of the pertinent section of the administrative regulations on sediment control." The superior court also concluded that "even if the petitioners, as owners of the underlying fee in the subdivision roads, be determined to be 'landowners' under 15 NCAC 4B .0013, that section refers, not to acreas [*sic*] which were uncovered on the effective date of that regulation, but rather 15 NCAC 4B .0013 refers to land disturbing activities occurring after February 1, 1976." Defendant's exceptions to these two conclusions form the basis of its appeal and present for our determination whether plaintiffs as owners in fee simple of the subdivision roads, the lands in question, come within the purview of 15 N.C. Ad. Code 4B.0013.

[1] This appeal presents two questions: (1) Does 15 N.C. Ad. Code 4B.0013 require the installation and maintenance of certain erosion and sedimentation control measures irrespective of whether the land-disturbing activity occurred before or after 1 February 1976, the effective date of the regulation?; (2) If so, are plaintiffs "landowners" within the meaning of 15 N.C. Ad. Code 4B.0013?

The regulation in question, 15 N.C. Ad. Code 4B.0013, reads as follows:

> .0013 RESPONSIBILITY FOR MAINTENANCE
>
> During the development of a site, the person conducting the land-disturbing activity shall install and maintain all temporary and permanent erosion and sedimentation control measures as required by the approved plan or any provision

of the Act, these Regulations, or any order or local ordinance adopted pursuant to the Act. After site development, the landowner or person in possession or control of the land shall install and/or maintain all necessary permanent erosion and sediment control measures, except those measures installed within a road or street right of way or easement accepted for maintenance by a governmental agency. (Emphasis added.)

NRCD maintains that the underlined portion of this regulation applies to land-disturbing activities irrespective of when they occurred and makes plaintiffs "landowners" responsible for installation and maintenance of all erosion and sediment control measures along the roads. On the other hand, plaintiffs contend that regulation .0013 is not applicable to this case, and that, nevertheless, they are not "landowners" within the regulation's meaning. We agree with NRCD.

The purpose of the Act, G.S. 113A-50, *et seq.*, is to control erosion and sedimentation, rather than only land-disturbing activities. *Lee v. Penland-Bailey Co., Inc.*, 50 N.C. App. 498, 274 S.E. 2d 348 (1981). Under the terms of the Act the Commission is empowered and has a duty to promulgate regulations "for the control of erosion and sedimentation resulting from land-disturbing activities." G.S. 113A-54(b). To accomplish the purpose of the Act, the Act and the regulations enacted pursuant to it may be applied to land-disturbing activities which occurred before the Act and regulations became effective. *Lee v. Penland-Bailey Co., Inc., supra.*

The superior court concluded that "15 NCAC 4B .0013 . . . refers, not to acreas [*sic*] which were uncovered on the effective date of that regulation, but rather 15 NCAC 4B .0013 refers to land disturbing activities occurring after February 1, 1976." This interpretation focuses on land-disturbing activities rather than erosion control. As such, this interpretation misconstrues the language of the regulation and the avowed purpose of the Act and its regulations: to control erosion and sedimentation, rather than only land-disturbing activities. The second sentence of 15 N.C. Ad. Code 4B.0013 requires permanent erosion and sediment control measures to be installed or maintained, or both, after site development, irrespective of whether the land-disturbing activity oc-

curred before or after the adoption of the regulation: "After site development, the land owner or person in possession or control of the land shall install and/or maintain all necessary permanent erosion and sediment control measures, [with one exception not applicable here]."

To adopt the superior court's interpretation of the second sentence of 15 N.C. Ad. Code 4B.0013 would effectively eliminate from regulation all erosion in progress prior to the effective date of the regulation and continuing thereafter. Such an interpretation would fly directly in the face of the declared policy of the legislation. We find nothing in the express language of 15 N.C. Ad. Code 4B.0013 which limits its application *only* to erosion occurring after the regulation's enactment.

[2] Having determined that the second sentence of 15 N.C. Ad. Code 4B.0013 requires the installation and maintenance of certain erosion and sedimentation control measures irrespective of when the land-disturbing activity occurred, we now turn to whether plaintiffs are landowners within the meaning of 15 N.C. Ad. Code 4B.0013.

Under 15 N.C. Ad. Code 4B.0013, after site development, the responsibility for installation and/or maintenance of erosion and sedimentation control measures, is placed upon the "land owner or person in possession or control of the land." Here we are only concerned with the meaning of "landowner." "Landowner" is not defined by the Act or the Commission's regulations. Giving "landowner" its common, ordinary, everyday meaning (*see Abernethy v. Board of Comm'rs*, 169 N.C. 631, 86 S.E. 577 (1915)), "landowner" means "an owner of land." Webster's Third New World International Dictionary (1968). Plaintiffs, as owners in fee simple of the subject roads, are certainly landowners within the meaning of 15 N.C. Ad. Code 4B.0013. As landowners they may be held responsible for the erosion control of their land. Plaintiffs' dedication of the roads to the purchasers of the lots does not relieve them from complying with the Commission's regulations. Plaintiffs are still the landowners within the meaning of 15 N.C. Ad. Code 4B.0013. This interpretation is not an unduly harsh result because plaintiffs conducted the land-disturbing activities, the building of the subdivision roads, for their economic benefit.

In sum, the Commission correctly held the plaintiffs, as landowners, responsible for the sedimentation and erosion control, and the superior court erred in reversing the decision of the Commission.

Reversed.

Judges WELLS and WHICHARD concur.

JACK E. STEGALL AND WIFE, ILSE F. STEGALL, AND ROBERT T. HORNE AND WIFE, LINDA S. HORNE v. NORMAN KENT ROBINSON, AND LISA ROBINSON HABISCH AND HUSBAND, MICHAEL BERNARD HABISCH

No. 8520SC1127

(Filed 1 July 1986)

Deeds § 20.5 — restrictions in subdivisions — requirements of title examiners — sufficiency of notice to purchasers

In title examination when checking the grantor's out conveyances it is not enough merely to insure that the subject property was not conveyed out previously; rather, the title examiner must read the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property. Defendants in this action had record notice of restrictive covenants governing a subdivision where the covenants were not recorded as part of the subdivision plat but were recorded with the first conveyance out of lots in the subdivision, and the restrictions were sufficiently unambiguous to be enforceable as a matter of law.

APPEAL by defendants from *Helms, Judge.* Judgment entered 22 August 1985 in Superior Court, UNION County. Heard in the Court of Appeals 6 March 1986.

Defendants appeal from summary judgment enforcing a restrictive covenant and ordering them to remove their mobile home from their lot in a residential subdivision.

Smith & Cox, by Ronald H. Cox, for plaintiff-appellees.

Griffin, Caldwell, Helder & Steelman, by Sanford L. Steelman, Jr. and Jake C. Helder, for defendant-appellants.

EAGLES, Judge.

The dispositive question presented here is whether defendants had record notice of restrictive covenants governing a subdivision, where the covenants were not recorded as part of the subdivision plat but were recorded with the first conveyance out of lots in the subdivision. Relying on *Reed v. Elmore*, 246 N.C. 221, 98 S.E. 2d 360 (1957), we hold that they did have record notice and therefore that the trial court properly entered summary judgment against them.

I

The parties own lots in Blocks B and C of the Boulevard Heights Subdivision, which was laid out in a plat filed by their mutual predecessor in title. No general restrictions were filed with the plat. Instead, the predecessors included in their first recorded conveyance out of lots in the subdivision a page entitled "Restrictions Applicable to Blocks B and C of Boulevard Heights, as Shown on [the recorded plat.]" The restrictions repeatedly referred to "this lot," but also referred to the "blocks restricted hereby," and provided for the waiver of certain restrictions, called "these restrictive covenants," by the owners of lots in the subdivision. Defendants installed a house trailer on their lot in violation of the terms of the restrictions. Plaintiffs sued for removal of the trailer. On stipulated facts, the court granted plaintiffs' motion for summary judgment and denied a similar motion by defendants. Defendants appeal.

II

Summary judgment is appropriate when the record before the court presents no genuine issue of material fact, but only questions of law. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Even if the questions of law are difficult, summary judgment may be proper. *Thomas v. Ray*, 69 N.C. App. 412, 317 S.E. 2d 53 (1984). The facts are not disputed here, only the legal effect of recorded instruments. The case was therefore ripe for summary judgment. Since the trial court decided only questions of law, its ruling is fully reviewable here. *N.C. Reins. Facility v. N.C. Ins. Guaranty Ass'n*, 67 N.C. App. 359, 313 S.E. 2d 253 (1984).

III

It is fundamental that our recording statutes are intended to provide a single reliable means for purchasers to determine the state of the title to real estate. G.S. 47-18; *Hill v. Pinelawn Mem. Park, Inc.*, 304 N.C. 159, 282 S.E. 2d 779 (1981). A purchaser accordingly has constructive notice of all duly recorded documents that a proper examination of the title should reveal. *Id.*

IV

In *Reed v. Elmore, supra*, the Supreme Court defined the parameters of a proper title examination. In *Reed* plaintiff and defendant owned adjoining parcels acquired from the same grantor. Plaintiff had purchased and recorded first. Plaintiff's deed contained a restriction against use of a portion of his property for building purposes, and recited that this restriction "shall likewise apply" to the land later acquired from grantor by defendant. The trial court found for plaintiff when plaintiff sued to enjoin building by defendant on the adjoining lot, and the Supreme Court affirmed. The Court held that there existed a uniform and enforceable plan of development, even though defendant's deed made no reference to plaintiff's deed. The covenant was not personal to the parties to plaintiff's deed, but ran with the land. The court quoted at length and with approval from *Finley v. Glenn*, 303 Pa. 131, 154 A. 299 (1931). There the parties also shared common grantors, who had covenanted to impose restrictions generally on their other properties adjoining that first conveyed to plaintiff. The Supreme Court of Pennsylvania upheld the restriction, and plaintiff's right to enforce it:

> The controlling factor in the decision of the case is that the immediate grantors of both plaintiff and defendants were the same. When the latter came to examine the title which was tendered to them, it was of primary consequence that they should know whether their grantors held title to the land which they were to convey. They could determine that question only by searching the records for grants from them. . . . So doing, defendants would find the deed from [grantors] to plaintiff which had been recorded. Coming upon this conveyance, it was their duty to read it, not, as argued by appellant and decided by the chancellor who heard the case, to read only the description of the property to see what was

> conveyed, but to read the deed in its entirety, to note anything else which might be set forth in it. The deed was notice to them of all it contained; otherwise the purpose of the recording acts would be frustrated. If they had read all of it, they would have discovered that the lots which their vendors were about to convey to them had been subjected to the building restriction which the deed disclosed. It boots nothing, so far as notice is concerned, that they did not acquaint themselves with the entire contents of the deed.

303 Pa. at 135-36, 154 A. at 301, *quoted* 246 N.C. at 231, 98 S.E. 2d at 367-68. Simply stated *Reed* stands for the rule that in title examination when checking the grantor's out conveyances it is not enough to merely insure that the subject property was not conveyed out previously. The title examiner must *read* the prior conveyances to determine that they do not contain restrictions applicable to the use of the subject property.

V

This rule was vigorously criticized in the dissent in *Reed* itself. *Reed v. Elmore, supra* (Denny, J., dissenting). Focusing on the later purchaser's direct chain of title, Justice Denny contended that since the restriction asserted by plaintiff did not appear in that direct chain of title, the restriction was unenforceable as to defendant. *See also Maddox v. Arp*, 114 N.C. 585, 19 S.E. 665 (1894) (purchaser need only follow "up the stream of title"). The dissent quoted with approval from *Hege v. Sellers*, 241 N.C. 240, 84 S.E. 2d 892 (1954). There a general plan of restrictions was prepared, but not filed with the subdivision map. Instead it was included as part of each conveyance out by the common grantor to the lot owners, except for the conveyance out of the contested lot. The court, focusing on the chain of title to the particular lot at issue, held that the restrictions were not in the line of title and hence not enforceable. *Reed* was decided after *Hege*, however, and therefore controls.

Professor Webster spoke unkindly of the *Reed* rule:

> In view of the holding of *Reed v. Elmore* a purchaser of real property in North Carolina must examine all recorded "out" conveyances made by prior record titleholders during the periods when they respectively held title to the property

> to determine if any such owner has expressly imposed a restriction upon the use of the property. The difficulty in discovering all existent restrictive covenants that grow out of *Reed v. Elmore* is easily demonstrable. The case charges purchasers with constructive notice of all that "could be discovered by a search of the deeds and records, whether within the direct chain of conveyances or outside the direct chain of conveyances. Therefore, for safety's sake, the title examiner must look at each deed of any tract of land of both immediate and prior grantors that was executed during each one's ownership of the land in question. Furthermore, beyond requiring the title searcher to go beyond the index books into the actual deed books to look at deeds conveying lands other than the lands being searched, the title examiner must read *each* of these collateral deeds in *detail*, not merely their descriptions to find potential latent restrictions, servitudes, or easements imposed in such collateral deeds. When this requirement is considered with the rule existent that deeds are construed as a whole and meaning is given to every part without reference to formal divisions of the deed, it becomes obvious that the title searcher is given an entirely impracticable and unreasonable task. [Emphasis in original.] [Footnotes omitted.]

J. Webster, Webster's Real Property Law in N.C. Section 503 at 623-24 (Hetrick rev. ed. 1981).

While there is substantial well-reasoned criticism of the decision in *Reed v. Elmore, supra*, our research indicates *Reed* has not been overruled, expressly or implicitly, and therefore controls our decision here. We note that legislation has been proposed which would change the *Reed* rule. *See* J. Webster, Doubt Reduction through Conveyancing Reform—More Suggestions in the Quest for Clear Land Titles, 46 N.C. L. Rev. 284, 301-5 (1968). This proposed legislation has not been enacted by the General Assembly and ought not be the subject of judicial legislation by this Court. Notwithstanding its critics, *Reed* remains in effect and controls here.

VI

Accordingly, defendants had record notice of the restrictions included with the first conveyance of lots in the Boulevard

Heights Subdivision. The only question remaining is whether the restrictions are sufficiently unambiguous to be enforceable as a matter of law. We conclude that they are. The restrictions are prominently titled "RESTRICTIONS APPLICABLE TO BLOCKS B AND C OF BOULEVARD HEIGHTS." They referred to "the blocks restricted hereby," not "lots," and provided for approval of other lot owners in the subdivision for exceptions. The restrictions are obviously of the type commonly used to restrict development in subdivisions. The references to "lot" or "lots" in the singular and plural, on which defendants peg their claim of ambiguity, are minor technical errors of drafting which cast no real doubt on the true purpose of the restrictions to provide a general standard for development in the subdivision. We hold that the restrictions unambiguously established the general plan and justified judgment as a matter of law for plaintiffs. *Reed v. Elmore, supra.*

VII

We are aware of the policy reasons favoring a less stringent duty to read "out" conveyances. Nevertheless, we are bound to apply the law as established by our Supreme Court. Accordingly, judgment for plaintiffs must be affirmed.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. LAWRENCE BROWN, JR.

No. 853SC1265

(Filed 1 July 1986)

1. Criminal Law § 34.5— evidence of defendant's guilt of other offense—admissibility to show identity

In a prosecution of defendant for burglary, felonious larceny, and felonious possession of stolen property where the evidence tended to show that defendant stole a safe, opened it, and removed the contents, the trial court did not err in allowing into evidence testimony regarding another burglary and safecracking incident, since the circumstances of the two safecracking incidents were so similar as to tend to show that the crime charged and the other offense were committed by the same person.

2. Larceny § 7.4— possession of stolen property—sufficiency of evidence

Evidence of felonious possession of stolen goods was sufficient to be submitted to the jury where it tended to show that a van fitting the description of defendant's van was seen within 325 feet of the victim's home on the night his safe was stolen; a man generally fitting the description of defendant was seen driving the van; paint sample evidence indicated that the safe had been in defendant's van; the safe was found in a wooded area near the home of defendant's girlfriend; the underside of defendant's van contained tree fragments; testimony indicated that defendant stole a second safe from a home at night, took it to a wooded area, and opened it by peeling away the faceplate in the same manner in which the safe in this case had been opened; another person testified that defendant had admitted to the crimes with which defendant was charged in this case; and in the week following the larceny of the safe and its contents, primarily $100 bills, defendant spent cash totalling in excess of $4,500, most of it in denominations of $100 bills.

APPEAL by defendant from *Phillips (Herbert O., III), Judge.* Judgment entered 22 July 1985 in Superior Court, PITT County. Heard in the Court of Appeals 15 April 1986.

Defendant was charged in a proper bill of indictment with second degree burglary, felonious larceny, and felonious possession of stolen property. At trial, the State presented evidence which tended to show the following facts. Lyman Harris and his wife, Mary Edna Harris, resided on Route 1, Winterville, North Carolina. The utility room of the house contained a cabinet with closing doors which enclosed a safe. The safe contained among other things approximately $27,000 in cash—$26,000 in one hundred dollar bills and the rest in smaller denominations.

On 20 November 1984, defendant's father, a Terminix employee, came to the Harris home to spray for roaches and bugs. During this call, defendant's father opened the cabinet containing the safe, and sprayed inside the cabinet and around the safe. On 10 December 1984, defendant accompanied his father on a return call to do more spraying. The cabinet containing the safe was in plain view of defendant, though the safe could be seen only if the cabinet doors were open.

On 2 January 1985, Lyman Harris left his home at approximately 5:00 p.m. to visit his wife in the hospital and returned at approximately 9:30 p.m. Upon returning home, he found that someone had broken into the house and removed the safe and its contents. On this same night, Sidney Harris and his wife, Frances Harris, observed a light blue Ford van parked on the side of the

road approximately 325 feet from the Lyman Harris home between 7:20 p.m. and 8:10 p.m. The van had chrome wheels, no side panel windows on the driver's side, and two windows in the back doors of the van. A van matching this description is registered to Larry Brown Carpet Installation, defendant's self-owned business. Furthermore, Frances Harris observed the driver of this van at an intersection about a mile from the Lyman Harris home. This driver appeared to be a white male, in his twenties, with a pointed nose, dark hair, and what looked like a beard. This description generally matches that of defendant.

On 5 January 1985, the safe was found in a wooded area in Greenville, approximately 2,300 feet from Cemetery Road on which defendant's girlfriend lives and where defendant often stayed.

Investigators took paint and rust samples from the safe, the inside of the van, the bumper of the van, and the van's bolt hitch. Investigators also took various paint and rust samples and samples of chipped pieces of brick from the Harris residence. Wood samples were also collected from the wooded area in which the safe was found, and from underneath defendant's van.

Patricia Harrell, a forensic chemist with the State Bureau of Investigation (SBI), performed a chemical analysis of the paint and rust chips from the Harris residence, from the van, and from the safe. She concluded that the paint and rust samples from all three places were the same. William E. Pierce, another forensic chemist with the SBI, could not show a relationship between the pieces of chipped brick found on the van's bolt hitch with chipped brick from the Harrises' front porch due to an insufficient amount of material found on the bolt hitch. Furthermore, Elizabeth Wheeler, an expert in wood anatomy, concluded that the wood samples found under the van were from oak, sweet gum, and other hardwood trees similar to those trees in the area where the safe was found. However, due to the nature of the science, she could not conclusively state that these samples were from the very trees in that wooded area.

Finally, defendant engaged in several financial transactions between 3 January 1985 and 9 January 1985 in which he spent cash totalling in excess of $4,500, primarily in denominations of one hundred dollar bills.

Defendant presented evidence which tended to show that he and his parents were at a shopping mall from approximately 6:00 p.m. to 8:30 p.m. on 2 January 1985. After arriving home, defendant then drove to his girlfriend's house in his black Dodge Daytona, and there watched television until he left around 10:30 p.m.

Following the close of the State's evidence and again at the close of all evidence, defendant moved to have all charges dismissed. The trial court denied the motions. Defendant was found guilty of felonious possession of stolen goods. From a judgment imposing a ten-year term of imprisonment, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Abraham Penn Jones, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends the trial court erred in allowing into evidence testimony regarding another burglary and safecracking incident in Craven County because this testimony constituted evidence of a distinct and unrelated crime, violated due process, and denied defendant a fair trial. We do not agree.

The general rule in North Carolina is that evidence of other crimes is inadmissible on the issue of guilt if its only relevance is to show defendant's bad character or disposition to commit an offense similar to the one charged. *State v. Weldon*, 314 N.C. 401, 333 S.E. 2d 701 (1985). This general rule prohibiting the admission of evidence of "other crimes" does have exceptions, however. Rule 404(b) of the North Carolina Rules of Evidence provides:

> *Other Crimes, Wrongs, or Acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Johnny Evans testified that about one month before the trial, he and defendant entered a house in Craven County, removed a

safe, and took it to a wooded area. Defendant took a sledgehammer and hit the combination dial and handle until they were removed. Defendant then used a tapered iron stake to open the face of the safe. Using a crowbar, defendant next peeled back the faceplate to reveal the concrete underneath. Defendant broke away the concrete allowing the removal of an underlying plate and entrance into the safe. Evans also testified that while engaged in opening this safe, defendant confessed to the charges pending against defendant in this case.

Evans's statement concerning defendant's confession is admissible as a hearsay exception under Rule 801(d) of the North Carolina Rules of Evidence, as an admission by a party-opponent. Evans's testimony as to defendant's method and manner used in opening this safe in Craven County is admissible under Rule 404(b) to show identity.

> If . . . evidence tends to identify the accused as the perpetrator of the crime charged it is admissible notwithstanding that it also shows defendant guilty of another criminal offense. "Where the accused is not definitely identified as the perpetrator of the crime charged and the circumstances tend to show that the crime charged and another offense were committed by the same person, evidence that the accused committed the other offense is admissible to identify him as the perpetrator of the crime charged."

State v. Freeman, 303 N.C. 299, 301-02, 278 S.E. 2d 207, 208 (1981), *quoting State v. McClain*, 240 N.C. 171, 175, 81 S.E. 2d 364, 367 (1954). In the instant case, defendant relied upon a defense of alibi, thus putting his identity in issue. *State v. Thomas*, 310 N.C. 369, 312 S.E. 2d 458 (1984). The remaining question is thus whether the circumstances of the two safecracking incidents were so similar as to tend to show that the crime charged and the second offense were committed by the same person. *Id.*

Experts testified at trial that the method of peeling back the faceplate to gain entry into the safe as described in the testimony of Johnny Evans was also the method used to gain entry into Lyman Harris's safe. We find that the two instances of safecracking are sufficiently similar as to provide a reasonable inference that the same person committed both offenses. *See id.* We conclude, therefore, that there was no error in the admission of

Johnny Evans's testimony as substantive evidence of defendant's guilt.

[2] Defendant also contends that the trial court erred in failing to dismiss the charge of felonious possession of stolen goods because the evidence was insufficient as a matter of law to establish defendant's guilt beyond a reasonable doubt. We do not agree.

In order to sustain the conviction of felonious possession of stolen goods as per the indictment, the State must establish the following elements:

(1) Possession of personal property;

(2) Which has been stolen pursuant to a burglary;

(3) The possessor knowing or having reasonable grounds to believe the property to have been stolen pursuant to a burglary; and

(4) The possessor acting with a dishonest purpose.

G.S. 14-72(c); *see also State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). Upon a motion to dismiss in a criminal action, the evidence must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984). Any contradictions or discrepancies in the evidence are for resolution by the jury. *Id.* The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.*

The evidence in the instant case indicates that a van fitting the description of defendant's van was seen within 325 feet of the Harris residence on the night the safe was stolen. A man generally fitting the description of defendant was seen driving this van. Paint sample evidence indicates that Lyman Harris's safe had been in defendant's van. The van bolt hitch contained brick dust, and the Harrises' brick porch had been recently chipped. The safe was found in a wooded area near the home of defendant's girlfriend. The underside of defendant's van contained tree fragments. Testimony indicated defendant stole a second safe from a

home at night, took it to a wooded area, and opened it by peeling away the faceplate in the same manner in which Lyman Harris's safe had been opened. Johnny Evans testified that defendant had admitted to the crimes with which defendant was charged in this case. Furthermore, in the week following the burglary of the Harris safe and its contents, defendant spent cash totalling in excess of $4,500, primarily in denominations of one hundred dollar bills. We believe this evidence is sufficient to establish substantial evidence of each element of the charge of felonious possession of stolen property.

For the reasons set forth above, we find

No error.

Judges WHICHARD and JOHNSON concur.

IN THE MATTER OF: HUMANA HOSPITAL CORPORATION, INC., PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF FACILITY SERVICES, CERTIFICATE OF NEED SECTION, RESPONDENT-APPELLEE, AND WAKE COUNTY HOSPITAL SYSTEM, INC.; HOSPITAL BUILDING COMPANY, D/B/A RALEIGH COMMUNITY HOSPITAL; AND CORNELIA ALLEN, MARY DUNN, HUBERT A. EVANS, ET AL., INTERVENORS

No. 8510DHR1028

(Filed 1 July 1986)

1. **Hospitals § 2.1— certificate of need—State exceeded its authority—no prejudice**

Respondent exceeded its authority in ruling on competing applications for a certificate of need for a new hospital by permitting the Wake County Hospital to determine how many of up to 20 beds at its existing medical center would be transferred to the new facility; however, the error did not prejudice petitioner's application and could be corrected on remand. N.C.G.S. Chapt. 150A, N.C.G.S. § 131-177(4).

2. **Hospitals § 2.1— certificate of need—construction not covered by application**

The decision of the Department of Human Resources to permit competing applicants for a certificate of need for a new hospital to construct facilities not covered by their applications was not unauthorized; the law does not require that applications be approved precisely as submitted or not at all. N.C.G.S. § 131-182(b).

3. Hospitals § 2.1— certificate of need—consideration of current information—revision of costs estimates

The Department of Human Resources did not act in an illegal, unfair, or unconstitutional manner when considering competing applications for a certificate of need for a new hospital by adding to its file up-to-date information on an applicant's change in policy regarding uninsured non-emergency indigents or by revising another applicant's estimates of the costs of operating the proposed facility. 10 N.C. Admin. Code 3R .0306(b).

4. Hospitals § 2.1— certificate of need—agency decision supported by whole record

The findings of the Department of Human Resources in granting a certificate of need for a new hospital to petitioner's competitors were supported by evidence upon review of the whole record and were affirmed, with the exception of a determination not affecting petitioner, despite a hearing officer's findings in petitioner's favor.

APPEAL by petitioner from the decision of the North Carolina Department of Human Resources, Division of Facility Services, entered 26 April 1985. Heard in the Court of Appeals 4 March 1986.

In 1981, pursuant to G.S. 131-177, the North Carolina Department of Human Resources (DHR) announced the need for the construction of 160 acute care hospital beds through 1987 in Wake County. In response thereto, petitioner Humana Hospital Corporation (Humana), Wake County Hospital System, Inc. (WCHS), and Hospital Building Company (HBC) applied to the DHR for certificates of need (CON). In doing so Humana proposed to construct a 160 bed full service, acute care hospital near Cary, in southwestern Wake County; WCHS, which operates Wake Medical Center and several other hospitals in the County, proposed to relocate Western Wake Hospital, a 20 bed satellite hospital in Apex, and make it a 110 bed hospital by adding 90 beds; and HBC, which operates Raleigh Community Hospital in north Raleigh, proposed to remodel that 140 bed facility and add a 110 bed wing to it.

DHR treated the applications as competing and following a review by the CON Section it denied Humana's application, approved HBC's application on condition that it add only 90 beds rather than 110 to its 140 bed facility, and approved WCHS's application on condition that it close its 20 bed satellite facilities in Apex and Fuquay-Varina and not provide obstetrical and neonatal services in the new Western Wake Hospital. At Humana's

request the decision was reconsidered, after which the hearing officer recommended that it be changed in only one respect—that instead of WCHS closing the hospital at Fuquay-Varina it should close 1 to 20 beds at Wake Medical Center and transfer them to the new Western Wake facility. At Humana's request a contested case hearing was then ordered pursuant to G.S. 131-185 (Supp. 1981). HBC, WCHS and certain individuals representing the low income residents of Wake County were permitted to intervene; and an evidentiary hearing was conducted by hearing officer, attorney Leonard Jernigan. In his proposal for decision, filed in accord with G.S. 150A-34, Jernigan found and concluded that the CON Section had abused its discretion in conducting the competitive review and recommended that Humana's application be unconditionally approved and that the applications of WCHS and HBC be denied. The proposal was reviewed by I. O. Wilkerson, the Director of the Division of Facility Services, who had been designated by DHR to render the final agency decision; he rejected the hearing officer's recommended findings and conclusions, and affirmed the decision of the CON Section to approve, with the conditions previously stated, the applications of WCHS and HBC and to deny Humana's application. The decision, after review by the Wake County Superior Court, was remanded to Wilkerson, who filed a revised decision somewhat to the same effect as before. As permitted by G.S. 131E-188, Humana appealed therefrom directly to this Court.

Sanford, Adams, McCullough & Beard, by Charles H. Montgomery and Renee J. Montgomery, for petitioner appellant.

Attorney General Thornburg, by Assistant Attorney General Barbara P. Riley and Assistant Attorney General John R. Corne, for respondent appellee.

Manning, Fulton & Skinner, by Howard E. Manning, and Hollowell & Silverstein, by Edward E. Hollowell and Robert L. Wilson, Jr., for intervenor appellee Wake County Hospital System, Inc.

Jordan, Price, Wall, Gray & Jones, by John R. Jordan, Jr., Stephen R. Dolan, and Steven M. Shaber, for intervenor appellee Hospital Building Company, d/b/a Raleigh Community Hospital.

East Central Community Legal Services, by Gregory C. Malhoit; N. C. Legal Services Resource Center, by Pam Silberman; and Legal Services of The Lower Cape Fear, by Richard Klein, for intervenor appellees Cornelia Allen, Mary Dunn, Hubert A. Evans, et al.

PHILLIPS, Judge.

[1] Since this matter was initiated before the effective date of the rewritten Administrative Procedure Act, N.C. Sess. Laws (1st Sess. 1985) c. 746, s. 19, *codified at* G.S. Chapter 150B, the Administrative Procedure Act of 1973 (APA), G.S. Chapter 150A, governs our review of this case. Section 51 of the APA provides 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.

In a brief upwards of 100 pages long Humana argues that the respondent agency, both in processing the competing applications and in ruling on them, exceeded its authority, abused its discretion, and acted arbitrarily and capriciously in several respects. The only action by the respondent that fits any of these characterizations in our opinion was its decision to permit the Wake County Hospital to determine how many of its 20 beds at Wake Medical Center should be transferred to the new Western Wake facility. G.S. 131-177(4) places the responsibility

for determining the need for new hospital beds in this state upon the respondent agency, and G.S. 131-182(b) authorizes it to approve the construction of such facilities with or without conditions; but no statute authorizes it to delegate any of its authority to others and the attempted delegation is void. Even so, this unauthorized act, which affected only 19 hospital beds at the most and could not have prejudiced Humana's application to construct a 160 bed hospital, does not require any further action on Humana's application, which is the subject of this appeal. The error can be corrected on remand by the respondent determining the number of beds to be closed at Wake Medical Center and transferred to the new facility.

[2] Another agency decision that Humana earnestly argues was unauthorized was permitting the competing applicants to construct facilities that were not covered by their applications. The argument seems to be that the agency must either approve or disapprove of applications for certificates of need but has no authority to either require more or grant less than is applied for. In our opinion the law does not require that applications for certificates of need be approved precisely as submitted or not at all, and it would be folly if it did so. G.S. 131-182(b) provides, "The Department shall issue as provided in this Article a certificate of need *with or without conditions* or reject the application within the review period." (Emphasis supplied.) The fundamental purpose of the certificate of need law is to limit the construction of health care facilities in this state to those that the public needs and that can be operated efficiently and economically for their benefit. G.S. 131-175; Schonbrun, *Making Certificate of Need Work*, 57 N.C. L. Rev. 1259 (1979). In serving that purpose adjustments are often needed and under the foregoing statute the agency has discretion to make them by granting only some of the things applied for and by imposing conditions not applied for. The record in this case indicates that additional hospital beds are needed in more than one part of Wake County, while some hospital beds are located where they are not needed. The agency's decision to put some of the additional beds in one place and some in another and to transfer beds to those places from unneeded facilities was both authorized and justified, in our opinion.

[3] The several other agency acts that Humana contends were illegal, unfair or unconstitutional are of somewhat the same sub-

stance, and we will discuss only two of them. One is that HBC was permitted to amend its application, whereas DHR regulation, 10 N.C. Admin. Code 3R .0306(b) prohibits the amending of certificate of need applications after they have been declared complete for review. But HBC did not amend its application. What happened, as the record shows, was that: In its original application HBC indicated that in admitting uninsured, non-emergency indigents to the proposed new facility its policy was to require a deposit commensurate with the treatment anticipated; that policy was later changed by HBC's board of directors and when the CON Section received a hearsay report to that effect, it wrote HBC's attorney for verification, and added his reply to the file. Adding this up-to-date information to the file was not unauthorized and, in any event, did not cause the agency to determine that a new 160 bed hospital is not needed in Cary, as Humana proposed. Another unauthorized act complained of is that the agency revised Humana's estimates as to the cost of operating the proposed facility. But according to the record an adjustment of these estimates was necessary because of discrepancies in Humana's application and in making the adjustment the agency used Humana's costs at its similar facility in Greensboro, which was neither unfair nor prejudicial.

[4] The main question before us, of course, is whether the agency decision has adequate evidentiary support. Agency findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence. G.S. 150A-51(5); *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). In arguing that the agency findings are not so supported, however, Humana dwells mostly on the perceived soundness of the hearing officer's recommended findings in its favor. While the hearing officer's recommendations were entitled to consideration and apparently received it, the responsibility for making the decision is that of the DHR. G.S. 131-177. And it is neither decisive nor persuasive that the hearing officer's findings may be supported by evidence, as Humana argues, because the agency's findings are similarly supported. Making deductions from the evidence before it was the prerogative as well as the responsibility of the DHR, and the deductions made, so our review of the whole record indicates, were both lawful and proper. Thus the decision is affirmed except for that part

which would permit WCHS to determine how many of its 20 beds at Wake Medical Center will be transferred to the new Western Wake facility, and that determination is reversed. Upon remand the respondent agency will determine the number of beds to be transferred from Wake Medical Center to the new Western Wake facility as it should have done to start with.

Affirmed in part; reversed in part, and remanded.

Judges ARNOLD and EAGLES concur.

IN THE MATTER OF: THE ESTATE OF KERMIT STEWART WARREN, DECEASED

No. 858SC1369

(Filed 1 July 1986)

Wills § 67— bequest of livestock—sale by incompetent testator's trustees—no ademption

Where testator specifically bequeathed his interest in livestock to his daughter, testator subsequently became incompetent and did not regain his competency at any time before his death, testator owned an interest in certain livestock at the time he became incompetent, this interest in livestock was sold by testator's trustees, the funds from the sale were included in the assets coming into the hands of testator's executor, and there were sufficient assets in the estate to satisfy all of its obligations as well as all general, specific and demonstrative devises without any abatement of those devises, the testator's specific testamentary gift of his interest in livestock to his daughter was not adeemed by the trustees' sale thereof during testator's incompetency before his death, and the trial court properly directed the executor to distribute to testator's daughter an amount equal to the proceeds of the sale of the livestock.

APPEAL by respondent, Earl Warren, from *Llewellyn, Judge.* Orders filed 7 May 1985 and 8 May 1985 in WAYNE County Superior Court. Heard in the Court of Appeals 14 May 1986.

Kermit Stewart Warren executed his Last Will and Testament on 10 June 1977. Less than a year later, he was adjudged to be mentally incompetent and co-trustees were appointed to manage his affairs. Mr. Warren never regained his competency and died on 17 April 1981, survived by a daughter, Tennys Warren

Biederman, and a son, Earl Warren. C. Branson Vickory qualified as Executor of the Estate of Kermit Stewart Warren, deceased, and was issued letters testamentary on 24 April 1981.

In a petition filed 17 May 1982, Tennys Warren Biederman alleged that Kermit Stewart Warren had, by his will, made a bequest to her of his interest in livestock and that all of his livestock had been sold by his co-trustees before his death. She alleged that the proceeds of the sale had remained in the hands of the co-trustees until Mr. Warren's death and had then been turned over to his executor. She sought an order requiring the executor to distribute those funds to her under the terms of the will. The executor responded, contending that the testator had provided no direction as to the payment of the obligations of the estate, including taxes, and that it was likely that the costs of administration and payment of debts and taxes would consume the personal property of the estate and that any interest which petitioner had in the proceeds of the sale would therefore abate. Earl Warren responded, contending that the bequest to his sister, the petitioner, was for livestock owned at the time of their father's death and that since the testator had owned no livestock at the time of his death, petitioner had no rights by reason of the bequest.

After a hearing before the Clerk of Superior Court of Wayne County, orders were entered directing that all estate and inheritance taxes be paid from the residuary estate of Kermit Stewart Warren and requiring that the executor distribute to petitioner an amount equal to the proceeds of the sale of the livestock. Respondent Earl Warren appealed to the Superior Court. Upon appeal, Judge Llewellyn made findings of fact, conclusions of law and entered orders affirming the Clerk. Respondent Earl Warren appeals.

Hall, Hill, O'Donnell, Taylor & Manning, by Raymond M. Taylor for petitioner appellee, Tennys Warren Biederman.

Duke and Brown, by J. Thomas Brown, Jr., for respondent appellant Earl Warren.

MARTIN, Judge.

Appellant's single assignment of error is directed to the entry of Judge Llewellyn's orders "as being contrary to the law and facts in such cases made and provided." The assignment of error is based upon two identical exceptions in the record, one following each of the trial court's orders. Each exception states: "The Respondent Appellant excepts to the findings of fact and entry of this order." Insofar as these statements purport to be exceptions to the trial court's findings of fact, they are ineffective because they are "broadside." Therefore, appellant having taken no valid exception to the trial court's findings of fact, they are presumed to be supported by competent evidence and are binding on appeal. *Dealers Specialties, Inc. v. Neighborhood Housing Services, Inc.*, 305 N.C. 633, 291 S.E. 2d 137 (1982). Appellant's exceptions are effective only as exceptions to the entry of the orders. They present for review only the question of whether any error of law appears on the face of the record, which includes whether the facts found support the judgments and whether the judgments are regular in form. *State v. Kirby*, 276 N.C. 123, 171 S.E. 2d 416 (1970); *Green v. Maness*, 69 N.C. App. 403, 316 S.E. 2d 911, *disc. rev. denied*, 312 N.C. 621, 323 S.E. 2d 922 (1984).

By his first argument, appellant contends that Judge Llewellyn erred by ordering the executor to pay all of the estate and inheritance taxes from the assets of the testator's residuary estate. In the 8 May 1985 order, the trial judge found that the intent of Kermit Warren, as expressed by the terms of his will, was that "all North Carolina Inheritance Tax and Federal Estate Tax payable by reason of his death and the transfer of his property upon his death" be paid from the assets comprising his residuary estate. A testator has a legal right to direct the assets of his estate from which estate and inheritance taxes are to be paid by his executor. *Wachovia Bank & Trust Co. v. Waddell*, 234 N.C. 454, 67 S.E. 2d 651 (1951). Having ascertained that such was the intent of the testator in this case, the trial judge was correct in ordering that estate and inheritance taxes be paid from the residuary estate. Appellant's exception to the entry of the 8 May 1985 order is overruled.

Appellant next contends that the trial judge erred in his 7 May 1985 order by requiring the executor to pay Tennys Warren

Biederman an amount equal to the proceeds of the sale of Kermit Warren's interest in livestock. The facts found by Judge Llewellyn with respect to this issue may be summarized as follows: Kermit Stewart Warren executed his last will and testament on 10 June 1977. In his will, he bequeathed his interest in livestock to his daughter, Tennys Warren Biederman, and devised to her two specific tracts of real property. There were no other general, specific, or demonstrative bequests or devises, and the residuary of the testator's estate was left to his son, Earl Warren.

In February 1978, Kermit Stewart Warren was adjudged incompetent and co-trustees were appointed for him. He remained incompetent until the time of his death. At the time he was adjudged incompetent, he owned an interest in certain cattle. Thereafter, the co-trustees sold Kermit Warren's interest in the cattle for $22,543.48; the proceeds of the sale became assets of the Estate of Kermit Stewart Warren, Incompetent. Upon his death in 1981, the co-trustees distributed to the Executor of the Estate of Kermit Stewart Warren, Deceased, personal property having a value of at least $67,909.99, which amount included the proceeds of the sale of Kermit Warren's interest in the cattle. The proceeds of the sale are traceable through the accounts filed with the court by the co-trustees. The total assets of the estate were valued at $428,235.75, including personal property valued at $158,915.75 and real property valued at $269,320.00. These assets are sufficient to satisfy all remaining obligations of the estate, to satisfy the specific devise of realty to Tennys Warren Biederman, and to pay to Tennys Warren Biederman the proceeds of the sale of Kermit Warren's interest in the cattle.

Appellant argues that the bequest of livestock to Tennys Warren Biederman was adeemed when the livestock were sold by the co-trustees prior to Kermit Warren's death. The principle of ademption is a rule of law which applies to extinguish a specific testamentary gift where the property which is the subject matter of the gift is not found *in specie* in the testator's estate at the time of his death. *Tighe v. Michal*, 41 N.C. App. 15, 254 S.E. 2d 538 (1979).

> [A]n application of the principle of ademption can be rationalized on the theory that the testator would have changed his will upon the sale, loss, or destruction of any of the subject

> matter of his specific testamentary gift if it had been his intention that the beneficiary should receive any substitute or contingent gift. Such view would be entirely proper, as a will generally reflects the testator's testamentary intent as of the date of his death. G.S. 31-41. When a person becomes mentally incompetent, however, that person ceases to be able to form testamentary intent. In such cases, it would defy reason to hold that a testator's will reflected his testamentary intent as of the date of his death, even though it had been legally determined that the testator was incapable of forming a testamentary intent for many years prior to that date.

Id. at 22, 254 S.E. 2d at 543-44. North Carolina, therefore, follows the majority rule that the principle of ademption does not apply when the testator becomes incompetent and the subject matter of a specific bequest or devise is sold by a guardian. *Id.*

When the principle of ademption does not apply, and the subject matter of the specific testamentary gift is not found in the testator's estate upon his death, the beneficiary is entitled to the proceeds of the sale of the property which was the subject of the gift, whether or not those proceeds have been commingled with other assets of the estate, unless it is necessary to abate the testamentary gifts of the testator. G.S. 28A-15-5(a) provides for abatement of shares of devisees and heirs "without any preference or priority as between real and personal property, in the following order:

(1) Property not disposed of by will;

(2) Residuary devises;

(3) General devises;

(4) Specific devises."

In the present case, the trial court found that testator specifically bequeathed his interest in livestock to his daughter, that he subsequently became incompetent and did not regain his competency at any time before his death, that at the time he became incompetent he owned an interest in certain livestock, that his interest in livestock was sold by his trustees for $22,543.48, that those funds were included in the assets coming into the hands of the executor, and that there were sufficient assets in the estate

to satisfy all of its obligations as well as all general, specific and demonstrative devises without any abatement of those devises. These findings are sufficient to support the court's conclusion that testator's specific testamentary gift of his interest in livestock to Tennys Warren Biederman was not adeemed by the trustees' sale thereof during testator's incompetency before his death, and to support the order directing the executor to distribute to her an amount equal to the proceeds of the sale. Appellant's exception to the 7 May 1985 order is overruled.

The orders appealed from are affirmed.

Affirmed.

Judges PHILLIPS and PARKER concur.

JUANITA J. GATLIN, PLAINTIFF v. SAMUEL LEE BRAY, MICHAEL HARRINGTON AND WAYNE GRIMES, D/B/A CAROLINA BONDING COMPANY, A PARTNERSHIP; SAMUEL LEE BRAY, INDIVIDUALLY; MICHAEL HARRINGTON, INDIVIDUALLY; WAYNE GRIMES, INDIVIDUALLY; JOHN DOE NUMBER ONE, INDIVIDUALLY; JOHN DOE NUMBER TWO, INDIVIDUALLY, DEFENDANTS

No. 863SC8

(Filed 1 July 1986)

Master and Servant § 33; Rules of Civil Procedure § 12— bail bondsmen—allegations of false imprisonment and other torts—complaint sufficient

The trial court erred by granting defendants' motion to dismiss for failure to state a claim upon which relief could be granted where plaintiff alleged that defendants Harrington and Grimes were liable individually and as a partnership for a false imprisonment and other torts committed by defendant Bray and two unidentified men acting in the course of their employment; the facts alleged were adequate to give defendants sufficient notice of the nature and basis of plaintiff's claim and no insurmountable bar to recovery was presented on the face of the complaint.

APPEAL by plaintiff from *Reid, Judge*. Order entered 24 September 1985 in Superior Court, PITT County. Heard in the Court of Appeals 8 May 1986.

Plaintiff brought suit to recover compensatory and punitive damages for an assault upon her by defendant Samuel Lee Bray and two unidentified white males. Plaintiff also sought damages for false imprisonment, trespass, invasion of privacy, and intentional infliction of emotional distress. She named as defendants Samuel Lee Bray, Michael Harrington, and Wayne Grimes, individually and doing business as Carolina Bonding Company, a partnership, and two unidentified white males, John Doe number one and John Doe number two, individually.

Pursuant to N.C. Gen. Stat. 1A-1, Rule 12(b)(6), defendants Bray, Harrington and Grimes moved to dismiss for failure to state a claim upon which relief can be granted. The court denied the motion of Bray, individually and doing business as Carolina Bonding Company, but allowed the motions of Harrington and Grimes, individually and doing business as Carolina Bonding Company. Plaintiff appeals.

Steven E. Lacy for plaintiff appellant.

Gaylord, Singleton, McNally, Strickland & Snyder, by L. W. Gaylord, Jr. and Vernon G. Snyder III, for defendant appellee Michael Harrington.

Howard, Browning, Sams & Poole, by Myron T. Hill, Jr., for defendant appellee Wayne Grimes.

WHICHARD, Judge.

Plaintiff alleges that in the late evening hours of 2 November 1983 Bray and two unidentified males, forcibly and without consent, entered her private residence. Pointing guns, they forced plaintiff out of her bed. They "yelled and cursed and threatened" plaintiff, demanding to know the whereabouts of a fugitive they referred to as "Chris Jones." They searched plaintiff's apartment, overturning furniture and rummaging through her personal effects.

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the allegations of the complaint must be viewed as admitted, and the motion should not be allowed unless the complaint affirmatively shows that plaintiff has no cause of action. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E. 2d 611, 615 (1979); *Grant v. Insurance Co.*, 295 N.C. 39, 42,

243 S.E. 2d 894, 897 (1978). Plaintiff's complaint clearly states several causes of action—*inter alia*, assault, trespass and intentional infliction of emotional distress—against Bray and the two unidentified males. The sole question is whether it states any cause of action against defendants Harrington and Grimes [hereinafter defendants] who are not alleged to have been present in plaintiff's residence at the time of the events which are the subject of the complaint.

Plaintiff alleges that at the time of these events Bray and defendants were general partners in Carolina Bonding Company and that the two unidentified males were employees of the company. She further alleges that when Bray and the two unidentified males entered her residence and assaulted her they were acting within the scope of their employment and in furtherance of "whatever duties they were expected to perform." It is well-settled that partners are jointly and severally liable for the intentional torts of their employees when the acts complained of are committed in the course of the employment. *See Wegner v. Delicatessen*, 270 N.C. 62, 66, 153 S.E. 2d 804, 807 (1967) ("[A]n employer is liable to a third person injured by the wrongful act . . . of his employee if, but only if, such act or omission occurred in the course of the employment . . . ."); *Hardy & Newsome, Inc. v. Whedbee*, 244 N.C. 682, 684, 94 S.E. 2d 837, 838-39 (1956) ("The liability of partners for the torts of the partnership is joint and several."). *See also Edwards v. Akion*, 52 N.C. App. 688, 693, 279 S.E. 2d 894, 897, *affirmed per curiam*, 304 N.C. 585, 234 S.E. 2d 518 (1981) ("The employer is liable if its employee, in performing his duties, adopts a method which constitutes a tort and inflicts an injury upon a third party."). Similarly, partners are jointly and severally liable for intentional torts committed by a partner in the course and scope of partnership business. *Johnson v. Gill*, 235 N.C. 40, 68 S.E. 2d 788 (1952); *Dwiggins v. Bus Co.*, 230 N.C. 234, 52 S.E. 2d 892 (1949); N.C. Gen. Stat. 59-43, -45.

Defendants maintain, however, that plaintiff's allegations that the actions of Bray and the two unidentified males were for the benefit of Carolina Bonding Company and in furtherance of "whatever duties they were expected to perform . . . as bondsmen and runners for Carolina Bonding Company" are not sufficient to withstand their motions to dismiss. They rely on

Clemmons v. Insurance Co., 274 N.C. 416, 419-20, 163 S.E. 2d 761, 763-64 (1968), which states:

> Upon a demurrer to a complaint on the ground that it does not state a cause of action, the allegations of fact, together with all relevant inferences of fact reasonably deducible therefrom, are taken to be true. . . . The question is whether, such being the facts, the plaintiff is entitled to recover from the defendant. The allegations of the complaint are to be liberally construed so as to give the plaintiff the benefit of every reasonable intendment in his favor. . . . *Liberal construction, however, does not mean that the court is to read into the complaint allegations which it does not contain. . . . Furthermore, the demurrer does not admit inferences or conclusions of law drawn from the facts alleged in the complaint. . . . The allegation of such a conclusion adds nothing to the allegations of facts upon which it is based, and, therefore, is to be disregarded in determining whether the facts alleged, and admitted by the demurrer, entitle the plaintiff to recover from the defendant. . . .*
>
> Obviously, the complaint in this action alleges an assault by Weeks upon the plaintiff. The question is whether it alleges facts giving rise to a cause of action in favor of the plaintiff against the defendant, Weeks' employer, by reason of this assault.
>
> In *Terrance, Inc. v. Indemnity Co.* . . . an allegation in a complaint that the person executing a contract "was acting in behalf of and as agent of the plaintiff" was held to be "a mere conclusion unsupported by any allegation of fact." . . . In *Shives v. Sample* . . . a complaint was held subject to demurrer for the reason that it alleged negligence without alleging the facts establishing such negligence . . . .
>
> *Like negligence, the extent of the course or scope of the employment of an agent or servant is not a fact in itself, but is the legal result of certain facts. Therefore, the plaintiff's allegation . . . that at all times mentioned in the complaint, Weeks was acting "within the course and scope of his employment" as agent of the defendant, is an allegation of a conclusion of the pleader and adds nothing to the facts alleged in the complaint.* (Citations omitted.) (Emphasis supplied.)

Defendants' reliance on *Clemmons* is misplaced. In *Shugar v. Gill*, 51 N.C. App. 466, 470-72, 277 S.E. 2d 126, 130-31, *modified and affirmed*, 304 N.C. 332, 283 S.E. 2d 507 (1981), this Court applied pleading standards articulated in *Clemmons* and found the allegations of punitive damages in plaintiff's complaint insufficient to withstand defendant's motion to dismiss. The Supreme Court rejected this Court's reliance on *Clemmons* and found plaintiff's complaint sufficient to state a cause of action. It reasoned as follows:

> Unquestionably, under our decisions prior to the adoption of the 1970 Rules of Civil Procedure, plaintiff's pleadings in this case could not have withstood defendant's motions to dismiss.
>
> "By enactment of G.S. 1A-1, the legislature adopted the 'notice theory of pleading.'" *Roberts v. Memorial Park*, 281 N.C. 48, 56, 187 S.E. 2d 721, 725 (1972).
>
> In our first case which considered the "notice pleading" theory of the new Rules of Civil Procedure, Justice Sharp (later Chief Justice) wrote:
>
> > A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.
>
> *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E. 2d 161, 167 (1970). *Accord: Presnell v. Pell*, 297 N.C. 715, 260 S.E. 2d 611 (1979); *Brewer v. Harris*, 279 N.C. 288, 182 S.E. 2d 345 (1971).
>
> In instant case, the Court of Appeals held that the complaint did not state a claim for punitive damages. . . . [T]he Court of Appeals . . . concluded that this Court intended to follow the general rules laid down in cases involving punitive damages which predated the 1970 Rules of Civil Procedure. We do not agree.

* * *

> Here under the "notice pleading" theory there was sufficient information in the complaint from which defendant could take notice and be apprised of "the events and transactions which produce the claim to enable [him] to understand the nature of it and the basis for it."

Shugar, 304 N.C. at 336-38, 283 S.E. 2d at 509-10.

Thus, the standards articulated in *Clemmons* regarding the pleading of a claim based on *respondeat superior* are no longer applicable. With the adoption of "notice pleading," mere vagueness or lack of detail is no longer ground for allowing a motion to dismiss. *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E. 2d 161, 165 (1970). "Pleadings comply with our present concept of notice pleading if the allegations in the complaint give defendant sufficient notice of the nature and basis of plaintiffs' claim to file an answer, and the face of the complaint shows no insurmountable bar to recovery." *Rose v. Guilford Co.*, 60 N.C. App. 170, 173, 298 S.E. 2d 200, 202 (1982).

We find plaintiff's complaint, judged by the notice pleading standard, sufficient to withstand defendants' motions to dismiss. The facts alleged are adequate to give defendants sufficient notice of the nature and basis of plaintiff's claim, and no insurmountable bar to recovery is presented on the face of the complaint. Thus, the order dismissing plaintiff's action for failure to state a claim upon which relief can be granted as to defendants, individually and doing business as Carolina Bonding Company, is

Reversed.

Judges WEBB and JOHNSON concur.

IN RE THOMPSON ARTHUR PAVING COMPANY, A DIVISION OF APAC-CAROLINA, INC.'S CONTRACT CLAIM WITH THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

No. 8510BSCA1306

(Filed 1 July 1986)

State § 4.4— construction of highway—action to recover extra costs—appeal from Highway Administrator—theory on appeal

Where petitioner paving contractor filed a claim with the State Highway Administrator on the ground of "changed conditions," and the Administrator denied the claim in its entirety, the contractor could not thereafter appeal to the Board of State Contract Appeals on different theories of equitable adjustment of the contract, extra work, alteration of plans, and breach of contract, since a party who appeals from the State Highway Administrator to the superior court is bound by the theory of the claim brought before the Administrator; N.C.G.S. § 136-29(b) requires this conclusion by its language that the contractor may sue the Administrator "[a]s to such portion of the claim as is denied"; this strict reading is in accordance with the principle of retaining to the State all sovereign immunity that is not expressly waived; in 1983 the Legislature amended the statute to allow appeal of the Administrator's decision to the Board of State Contract Appeals in lieu of instituting a civil action in superior court; and the same standards should apply to the contractor's appeal to the Board as would have applied had the contractor filed suit in superior court. N.C.G.S. § 143-135.16(c) (Cum. Supp. 1985).

APPEAL by respondent from judgment of the North Carolina Board of State Contract Appeals entered 18 July 1985. Heard in the Court of Appeals 16 April 1986.

Thompson-Arthur Paving Company and the North Carolina Department of Transportation (DOT) entered into a contract on 8 January 1982 for the construction of State Highway Project No. 8.1528907 in Davidson County. The contract contained the following statement on subsurface information: "There is no subsurface information available on this project. The contractor shall make his own investigation of subsurface conditions." Also, Article 104-6 of the Standard Specifications for Roads and Structures (SSRS), 1 July 1978, entitled "Changed Conditions," was deleted in its entirety from the contract. The contract provided for a lump-sum payment to Thompson-Arthur for contract Item #108, portable temporary traffic control devices that would be needed as the work interfered with normal traffic on the road.

Construction began on 25 February 1982, after which a high moisture content and unstable subgrade were discovered. These conditions resulted in several supplemental agreements entered into by the parties and an extension of 277 days in the contract completion date. None of these supplemental agreements provided extra compensation for portable temporary traffic control.

Pursuant to N.C. Gen. Stat. § 136-29(a) (1981), on 7 September 1984, Thompson-Arthur sent a verified claim to the State Highway Administrator seeking $6,230.00 in additional compensation for Item #108. A hearing on the claim was held on 18 December 1984 at which Thompson-Arthur argued for the additional sum in light of the changed conditions occurring at the site. By letter of 7 January 1985, the Administrator denied the claim in its entirety, noting as one of his reasons that a "changed conditions" basis for additional compensation was not available to Thompson-Arthur, as that provision had been deleted from the contract.

Thompson-Arthur then appealed this decision to the Board of State Contract Appeals, an alternative to civil action in superior court established by N.C. Gen. Stat. § 136-29(c1) (Cum. Supp. 1985) and N.C. Gen. Stat. § 143-135.10 *et seq.* (Cum. Supp. 1985). In its notice of appeal, Thompson-Arthur revised its claim to $16,403.33.

At the hearing before the Board, Thompson-Arthur acknowledged that the "changed conditions" argument was not available and instead contended that the claim should be awarded based on theories of "equitable adjustment" of the contract, "extra work" pursuant to Article 104-7 of the SSRS, "alteration of plans" pursuant to Article 104-3 of the SSRS and breach of contract.

The Board found for Thompson-Arthur in the amount of $14,835.48 plus interest. The judgment contained the following conclusions of law, in pertinent part:

. . .

> (2) The parties hereto may present and the Board may hear and consider all admissible evidence, all relevant legal theories applicable to the instant case, this hearing being *de novo*.

. . .

(6) Appellant is entitled to additional compensation under the express terms of the contract and documents incorporated by reference therein.

(7) The Board makes no conclusion relative to Appellant's issue of equitable adjustment.

The judgment's findings of fact imply that the "express terms of the contract" which the Board found entitled Thompson-Arthur to compensation were those of Article 104-3 of the SSRS, entitled "Alteration of Plans or Details of Construction."

From this judgment, the Department of Transportation appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorneys General Thomas H. Davis, Jr. and Evelyn M. Coman, for the Department of Transportation.

C. Thomas Ross for petitioner-appellee.

WELLS, Judge.

In its first argument, the DOT contends that the Board erred by failing to dismiss Thompson-Arthur's claim for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. DOT argues that Thompson-Arthur changed both the theory and the substance of the claim after the claim was denied by the Administrator and that these changes divested the Board of jurisdiction to hear the appeal.

It is an established principle of jurisprudence, resting on grounds of sound public policy, that a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from suit. *Smith v. Hefner*, 235 N.C. 1, 68 S.E. 2d 783 (1952); *Mattox v. State*, 21 N.C. App. 677, 205 S.E. 2d 364 (1974). By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute. *Smith v. Hefner, supra.* Waiver of sovereign immunity may not be lightly inferred and statutes waiving this immunity, being in derogation of the sovereign right to immunity,

must be strictly construed. *Guthrie v. State Ports Authority*, 307 N.C. 522, 299 S.E. 2d 618 (1983).

The sole statutory grounds that allow suit against the State Highway Administrator are provided in N.C. Gen. Stat. § 136-29 (1981). *See In re Huyck Corp. v. Mangum, Inc.*, 309 N.C. 788, 309 S.E. 2d 183 (1983). That statute reads, in pertinent part, as follows:

> (a) Upon the completion of any contract for the construction of any State highway awarded by the Department of Transportation to any contractor, if the contractor fails to receive such settlement as he claims to be entitled to under his contract, he may . . . submit to the State Highway Administrator a written and verified claim for such amount as he deems himself entitled to under the said contract setting forth the facts upon which said claim is based. In addition, the claimant, either in person or through counsel, may appear before the State Highway Administrator and present any additional facts and argument in support of his claim. . . .
>
> (b) As to such portion of the claim as is denied by the State Highway Administrator, the contractor may, within six (6) months from receipt of said decision, institute a civil action for such sum as he claims to be entitled to under said contract by the filing of a verified complaint and issuance of summons in the Superior Court of Wake County or in the superior court of any county wherein the work under said contract was performed. The procedure shall be the same as in all civil actions except as herein and as hereinafter set out.
>
> (c) All issues of law and fact and every other issue shall be tried by the judge, without a jury. . . .

A case similar to the one *sub judice* is *Bridge Co. v. Highway Comm.*, 30 N.C. App. 535, 227 S.E. 2d 648 (1976). In that case, the contractor had presented its claim to the Administrator on the theory that the Department of Transportation had misrepresented the moisture content of the soil below the site and the claim was denied on the basis that there was no misrepresentation. At trial, the court agreed with this decision on the same basis. The contractor argued on appeal that the statute provided for a trial *de novo* and therefore the trial court should have considered the

contractor's claim on the additional theories of changed conditions, extra work or reclassification of materials. This Court held that the contractor could sue the Commission only in the manner provided by the statute and was therefore bound by the theory of the claim brought before the Commission. *Bridge Co. v. Highway Comm., supra.* The words of the statute that call for this conclusion are that the contractor may sue the Administrator "[a]s to such portion of the claim as is denied." G.S. 136-29(b). This strict reading is in accordance with the principle of retaining to the State all sovereign immunity that is not expressly waived.

In 1983 the Legislature amended the statute to allow appeal of the Administrator's decision to the Board of State Contract Appeals in lieu of instituting a civil action in superior court. N.C. Gen. Stat. § 136-29(c1) (Cum. Supp. 1985). DOT argues that the same standards should apply to Thompson-Arthur's appeal to the Board as would have applied had Thompson-Arthur filed suit in superior court. We agree. Though the statute terms the Board an alternative to civil suit, the claim allowed to the Board is nevertheless a waiver of sovereign immunity, the terms of which are to be strictly construed. By this logic we apply the same restrictions on maintaining a claim to the Board as those for a claim to superior court, for there is no language, express or implied, that the creation of this alternative was to expand the substantive rights of the contractor against the sovereign immunity of the State.

To the same effect, the language of N.C. Gen. Stat. § 143-135.16(c) (Cum. Supp. 1985) is very strict: "The appellant shall not be permitted to rely upon any grounds for relief on appeal which were not set forth specifically in his notice of appeal filed with the Board." Though the Administrator based his denial of Thompson-Arthur's claim on the lack of a "changed conditions" provision in the contract, Thompson-Arthur did not set forth in its appeal notice any intent to pursue theories of equitable adjustment, extra work, breach of contract or alteration of plans; this last provision the one upon which the Board apparently based its award.

As we reverse the Board's decision on the grounds set forth above, we do not find it necessary to address DOT's remaining contentions.

Reversed.

Chief Judge HEDRICK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. EDWARD HALL, JR. AND HORACE STEPHENS

No. 8516SC1339

(Filed 1 July 1986)

1. **Burglary and Unlawful Breakings § 8; Larceny § 1— breaking or entering with felonious intent to commit larceny—punishment for both crimes—no double jeopardy**

Defendant could properly be punished upon convictions for breaking or entering with the felonious intent to commit larceny therein in violation of N.C.G.S. § 14-54 and for larceny committed pursuant to such breaking or entering as provided in N.C.G.S. § 14-72(b)(2), and punishment for both crimes did not subject defendants to double jeopardy.

2. **Criminal Law § 61.2— shoe prints—nonexpert opinion testimony proper**

Though police officers were not experts in identifying shoe prints, they were nevertheless qualified to compare shoes and shoe prints and could properly conclude that shoes which defendants were wearing and shoe prints leading from the scene of the crime to the place where defendants were apprehended matched.

3. **Criminal Law §§ 138.6; 138.41— separate listing of mitigating and aggravating factors—ministerial oversight**

There was no merit to defendant's contention that the trial court erred in failing to find in mitigation that he had been honorably discharged from the armed services, since there was no proof that defendant was so discharged; nor was there merit to his contention that the court did not list separately for each offense the aggravating and mitigating factors found, since the transcript of the sentencing hearing showed that the trial judge made and listed findings supporting the validity of both judgments, and it was a ministerial oversight rather than judicial error which resulted in only one aggravating and mitigating factors form sheet being signed and put in the file.

APPEAL by defendants from *Johnson, E. Lynn, Judge*. Judgments entered 18 July 1985 in Superior Court, ROBESON County. Heard in the Court of Appeals 18 April 1986.

Under a two count indictment applicable only to him each of the defendants was convicted of felonious breaking or entering in

violation of G.S. 14-54 and felonious larceny in violation of G.S. 14-72. Each defendant was sentenced to a prison term for each offense in excess of the presumptive term.

The evidence of the parties was to a different effect. The State's evidence was that: An F.C.X. store in Fairmont was forcibly entered during the night of 29 January 1985 and several articles of merchandise taken away, including an air compressor with wheels. Early that morning the investigating police found two sets of shoe prints and a set of wheel tracks which led from the store to the house of defendant Hall's father, where they found the stolen merchandise and both defendants asleep in bed. The wheel tracks the police followed appeared to match the wheels of the stolen air compressor and the shoe prints appeared to match the shoes that the defendants put on their feet after the police awakened them. The defendants' evidence, through their own testimony, in effect was that they knew nothing about the theft; that defendant Hall spent the night before the break-in drunk and asleep in his father's house, and defendant Stephens spent the night elsewhere and did not arrive there until about twenty-five minutes before the police arrived.

Attorney General Thornburg, by Assistant Attorney General William F. Briley, for the State.

Appellate Defender Hunter, by Assistant Appellate Defender Leland Q. Towns, for defendant appellant Edward Hall, Jr.

Kenneth E. Ransom for defendant appellant Horace Stephens.

PHILLIPS, Judge.

[1] The first of three questions raised by the defendants, either jointly or severally, is whether punishing each of them for both convictions—breaking or entering with the felonious intent to commit larceny therein in violation of G.S. 14-54, and larceny committed pursuant to such breaking or entering as provided in G.S. 14-72(b)(2)—violates the ban against double jeopardy contained in the constitutions of this state and the United States. *State v. Edmondson*, 316 N.C. 187, 340 S.E. 2d 110 (1986), which upheld earlier holdings to the same effect by this Court, requires that this question be answered in the negative.

[2] The second question is whether defendant Stephens' objections to the police officers' testimony that his shoe soles *appeared* to match one set of the shoe prints that led from the store where the theft occurred to the house where defendants and the stolen merchandise were found should have been sustained. This question also requires a negative answer. Defendant's contention is that the testimony had no proper foundation. But, as was held in *State v. Atkinson*, 298 N.C. 673, 259 S.E. 2d 858 (1979), the officers though not experts in identifying shoe prints were qualified to compare shoes and shoe prints and testify with respect thereto, and, under the circumstances recorded, that they saw and compared both the shoe prints and shoes involved was foundation enough for their conclusion that the shoes and prints matched. *State v. Jackson*, 302 N.C. 101, 273 S.E. 2d 666 (1981).

[3] The final question is whether defendant Hall must be resentenced because Article 81A, Chapter 15A of the North Carolina General Statutes, otherwise known as the Fair Sentencing Act, was not complied with in sentencing him. This question is raised by two assignments of error—one that the court erred in failing to find in mitigation that he had been honorably discharged from the armed services, and the other that the court erred in "failing to list separately for each offense the aggravating and mitigating factors found"—neither of which has merit, in our opinion, and we overrule them. The first assignment has no evidentiary basis because no proof was presented that defendant was honorably discharged from the armed services; all that the record contains with respect to him even being in the armed forces is a statement by his attorney that "he served in the armed services." While the facts stated in the second assignment, that the court did not "list separately for each offense the aggravating and mitigating factors found," are true, which is to say only one form sheet listing the court's findings of factors in aggravation and mitigation was signed and is in the record though two judgments imposing prison terms were entered, under the circumstances recorded that does not require that defendant be resentenced, as he contends. For the transcript of the sentencing hearing shows that after the court had heard from the defendants and counsel for both parties the following occurred:

THE COURT:

Madam Clerk, if you will go to your aggravating-mitigating factors forms, please.

As to the defendant, Edward Hall, Jr., in respect to both counts, felonious breaking, entering and felonious larceny, the Court finds the following aggravating factors: Number 26, the defendant has a prior conviction or convictions for criminal offenses punishable by more than sixty-days confinement.

Find no mitigating factors, and find that the aggravating factors were proven by a preponderance of the evidence, and that the factors in aggravation outweigh the factors in mitigation.

The transcript further shows that later, upon entering judgment against defendant Hall for breaking or entering, the court stated: "The Court makes the written findings set forth on the attached findings of factors in aggravation and mitigation of punishment"; and that upon entering judgment against the defendant for larceny, the court again stated: "The Court makes the written findings set forth on the attached findings of factors in aggravation and mitigation of punishment."

So, it is quite plain, it seems to us, that in sentencing the defendant to a term of imprisonment for each offense which exceeded the presumptive term that the trial judge made and listed findings which support the validity of both judgments under G.S. 15A-1340.4(b). It is also plain, we think, that in passing judgment on the defendant the court gave separate consideration to each offense and the aggravating and mitigating factors found in each instance. The only deficiency is that another aggravating and mitigating factors form sheet was not signed and put in the file, as the judge obviously intended, though that form refers to the case as a whole rather than to just one charge, the usual practice. But this was not a judicial error; it was but a ministerial oversight that did no prejudice to defendant. His contention that *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983) nevertheless requires that he be resentenced is at variance with our understanding of that case. As we read *Ahearn* it requires defendants sentenced for multiple convictions to be resentenced when the

record does not indicate that each of the sentences imposed was separately considered and based upon findings required by the Fair Sentencing Act. We do not understand *Ahearn* to require resentencing when all that is missing is a duplicate aggravating and mitigating factors form sheet. To so construe *Ahearn* would neither promote judicial economy, one of the main objects of that decision as it applies to this one, nor benefit the defendant.

No error.

Judges BECTON and COZORT concur.

BARCLAYS AMERICAN CORPORATION, D/B/A BARCLAYS AMERICAN/FINANCIAL v. CHARLES J. HOWELL, AND WIFE MARY HOWELL

No. 8619DC79

(Filed 1 July 1986)

Rules of Civil Procedure § 60.2— relief from judgment—failure to appear—excusable neglect

The trial court erred in denying plaintiff's Rule 60(b)(1) motion for relief from an order of dismissal and judgment on defendants' counterclaim on the ground of excusable neglect where plaintiff's counsel of record received notice that the case was scheduled for trial on 11 February; on 4 February plaintiff's counsel mailed a motion to withdraw to the court and sent a copy to plaintiff; plaintiff received no notice that the case was set for trial on 11 February, and neither plaintiff's counsel nor any other representative for plaintiff appeared for trial on 11 February; and an order allowing plaintiff's counsel to withdraw was not entered until 18 February.

APPEAL by plaintiff from *Horton, Judge.* Order entered 30 September 1985 in District Court, CABARRUS County. Heard in the Court of Appeals 16 May 1986.

Williams, Boger, Grady, Davis & Tuttle, by M. Slate Tuttle, Jr., for plaintiff appellant.

Casey, Bishop, Alexander & Murphy, by Jeffrey L. Bishop, for defendant appellees.

PHILLIPS, Judge.

This appeal is from an order denying plaintiff relief from an order dismissing plaintiff's complaint and a judgment for the defendants on their counterclaim in the amount of $3,513.11; the order and judgment were entered at or following a trial which was not attended by plaintiff's counsel of record or any other representative of plaintiff. The pertinent facts that control our decision are largely of record and are not in dispute. In February 1983 plaintiff, the assignee of a contract under which defendants agreed to buy an organ and bench from a Denver, North Carolina concern, engaged attorney Roger Lee Edwards to sue for possession of the organ and the balance of the purchase price, and this action was duly filed before the month was over. By their answer the defendants denied that they had ever received possession of the organ, counterclaimed for the amount they had paid toward its purchase and requested a jury trial on all issues. The other developments in the case before January 1985 are irrelevant to the appeal and need not be stated.

During the first week of January 1985 Mr. Edwards received a copy of a trial calendar showing that the case was scheduled to be tried on 11 February 1985. On 4 February 1985 he mailed a motion to withdraw from the case to the court and sent a copy to the plaintiff, who received it either the next day or the day after. The motion was not accompanied by a notice as to when it would be heard and the record does not show that it was ever calendared for hearing. Later, in testifying for the defendants on plaintiff's motion Mr. Edwards could not say whether he notified plaintiff that the case was scheduled to be tried on February 11 and had no letter or other writing indicating that he did; but he did say that "[s]ubsequent to July, 1983, he had no communications with Barclays concerning the case" and that after his motion to withdraw was mailed the next contact he had with the plaintiff was several months later when its representative obtained the file from him. On the other hand affidavits by plaintiff's manager and cashier were to the positive effect that no notice or information about the case being tried was received. On 11 February 1985 when the case was called for trial neither Mr. Edwards nor any other representative of plaintiff appeared in court and an order dismissing plaintiff's case without prejudice was entered; and after defendants waived a jury trial and presented their

evidence the court entered judgment for them on their counterclaim. On 18 February 1985 the court heard Mr. Edwards' motion to withdraw and entered an order that day permitting him to withdraw from the case. The next information plaintiff received about the case was three months later when the Cabarrus County Sheriff, with an order of execution in hand, demanded payment of defendants' judgment. Plaintiff then obtained its file from Mr. Edwards and engaged its present counsel, who learned of the developments that had occurred and filed a motion for relief from the order of dismissal and the judgment on defendants' counterclaim on the grounds of excusable neglect, as authorized by Rule 60(b)(1), N.C. Rules of Civil Procedure.

Following a hearing on plaintiff's motion, in addition to finding facts somewhat as above stated though it was not found whether or not plaintiff was notified of the trial date, the court found that whether plaintiff knew about the trial or not was immaterial because ordinary prudence required that it promptly contact Mr. Edwards after receiving his motion to withdraw and ascertain the status of the case, and that if it had done so it would have learned that the trial was scheduled. The court also found that one of plaintiff's employees would testify that the defendant Mary Howell personally acknowledged to her that the defendants had received possession of the organ and that they were well pleased with it. From the facts as found the court made the following conclusions of law and denied the motion:

> 1. Plaintiff has not shown that its failure to attend the February 11, 1985 trial was the result of excusable neglect. . . . [I]ts failure to make such inquiry upon receipt of its counsel's motion to withdraw on February 5 or 6, 1985, demonstrates that plaintiff failed to give its pending action that attention which a man of ordinary prudence usually gives to his important business.
>
> 2. Because plaintiff failed to attend to its pending action with the requisite decree [sic] of care, the neglect of its attorney, if any, is imputable to plaintiff.
>
> 3. In addition to its failure to demonstrate that the judgment was entered as the result of excusable neglect, plaintiff has also failed to make a sufficient showing of a meritorious defense to warrant relief under Rule 60.

In our opinion the foregoing conclusions of law, as well as the mixed finding and conclusion that plaintiff through the exercise of ordinary prudence should have learned about the pending trial, are clearly erroneous. Furthermore, even if plaintiff had contacted Mr. Edwards after receiving his motion to withdraw and had learned that the trial was imminent it does not follow, as the court apparently assumed, that it could have gone forward with the trial in an effective manner. It is common knowledge among litigants and lawyers alike that a litigant who has a lawyer usually cannot get another one, and is not expected to do so, until the first lawyer is out of the case; and plaintiff's counsel of record, who was unwilling to try the case and had so advised the court, was not out of it until a week after the trial was over. Also it is fundamental that a lawyer has the duty to timely inform his client about trial schedules and other developments important to the litigation and that his duty to protect his client in a pending case does not terminate upon filing a motion to withdraw, but continues until he is relieved either by agreement or the court. Under the circumstances recorded Edwards had a clear duty to protect plaintiff and the status quo by appearing at the scheduled trial which he knew about and obtaining a continuance, which plaintiff was obviously entitled to since Edwards, though still in it, was unwilling to try the case and plaintiff had had no opportunity whatever to engage substitute counsel. The failures of counsel referred to are not attributable to plaintiff for nothing in the record suggests that it had any reason to suppose that a trial was scheduled, or that Mr. Edwards had waited until its eve before filing his motion to withdraw, or that its case would be disposed of without notice to it while Edwards, who had recorded his inability to go forward with it, was still in the case. When counsel engaged for a case declines to go forward with it the litigant is entitled both to reasonable notice of that fact and a reasonable opportunity to obtain substitute counsel. *Gosnell v. Hilliard*, 205 N.C. 297, 171 S.E. 52 (1933). In this case the record plainly shows that this plaintiff had neither and that its failure to attend the trial of the case was excusable as a matter of law.

And contrary to the court's conclusion the plaintiff did make a sufficient showing that it also has a meritorious case. The contract of purchase, in which defendants admitted that the merchandise involved had been received, was before the court; as was

defendants' account with plaintiff, which showed that monthly payments were made on the contract for a long period. These documents along with the affidavit of plaintiff's employee that defendant Mary Howell acknowledged receiving and being satisfied with the merchandise is evidence enough to warrant a jury finding that the defendants are indebted to the plaintiff, as alleged.

The order denying plaintiff relief from the order of dismissal and judgment is reversed; the order of dismissal, the judgment and the order incident to it taxing plaintiff with defendants' attorney fees are all vacated; and the matter is returned to the District Court for a trial *de novo* both on plaintiff's complaint and defendants' counterclaim.

Reversed; vacated and remanded.

Judges MARTIN and PARKER concur.

J.I.C. ELECTRIC, INC., A MICHIGAN CORPORATION v. ROMALLUS MURPHY

No. 8518SC1126

(Filed 1 July 1986)

Constitutional Law § 26.2— Michigan judgment—full faith and credit—no extrinsic fraud shown

Defendant's contention that a Michigan judgment against him was not entitled to full faith and credit but was subject to collateral attack because it was obtained fraudulently and was against public policy was without merit where defendant contended that the Michigan court was misled into believing that attorneys representing defendant's employer were also representing him and he contended that he did not agree to the consent judgment and was not informed of it by attorneys purporting to represent him, but both questions raised issues of intrinsic fraud which should properly be addressed to the Michigan rather than N.C. courts.

APPEAL by defendant from *Long (James M.), Judge*. Judgment entered 24 July 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 February 1986.

Romallus O. Murphy, pro se.

McNairy, Clifford & Clendenin, by Michael R. Nash, for plaintiff appellee.

BECTON, Judge.

Defendant Romallus Murphy was President of Shaw College at Detroit, Michigan in June 1981 when he was sued in that capacity by J.I.C. Electric, Inc. for specific performance of a lease-purchase agreement and for damages, costs, interest and attorney's fees in Wayne County, Michigan. Murphy resigned his position at Shaw College in March 1983 and moved to Greensboro, North Carolina in April 1983. He left his forwarding address with Shaw College officials and the attorneys who were representing the college in the lawsuit.

On 21 July 1983, judgment was entered pursuant to a "mediation evaluation" in the Wayne County, Michigan Circuit Court against Shaw College and Romallus Murphy in the amount of $13,000. According to Murphy, he was first notified of this judgment in August 1984, when local attorneys in Greensboro informed him that they had been retained to collect it.

On 6 September 1984, J.I.C. Electric filed the action which is the subject of this appeal in the Guilford County Superior Court, seeking that the Michigan judgment be given full faith and credit in North Carolina and that judgment be entered against Murphy in this State. Murphy answered and alleged that the mediation judgment was made without his knowledge and consent and was therefore void as to him; that the attorneys representing Shaw College in the Michigan court had misled the court about (1) their authority to represent Murphy; (2) their failure to give notice to Murphy; and (3) an alleged conflict of interest between their representation of both the college and Murphy; and that the Michigan judgment should therefore not be given full faith and credit in North Carolina.

On 17 May 1985, Murphy filed a motion to vacate the mediation judgment in the Wayne County, Michigan Court on grounds similar to his answer in this case, which was denied after oral argument on 25 June 1985. Murphy then gave notice of appeal to the Michigan Court of Appeals. The status of that appeal is not clear, but it appears that it is still pending.

From an entry of summary judgment by the Guilford County Superior Court in this action against Murphy for $13,000 plus interest at the rate of thirteen percent per annum (pursuant to Michigan law), Murphy appeals, and we affirm.

Murphy contends that the superior court erred in granting J.I.C. Electric's motion for summary judgment because triable issues of fact concerning fraud and public policy exist. Defendant is essentially contending that the Michigan judgment is subject to collateral attack because it was obtained fraudulently and/or is against public policy. It is true that the final judgment of another jurisdiction may be collaterally attacked on three grounds: (1) lack of jurisdiction, (2) fraud in the procurement; or (3) that it is against public policy. *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 278, 280 S.E. 2d 787, 792 (1981); *see also Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E. 2d 2 (1979).

However, to make a successful attack upon a foreign judgment on the basis of fraud, it is necessary that *extrinsic* fraud be alleged. *Id.* Extrinsic fraud is that which is collateral to the foreign proceeding, and not that which arises within the proceeding itself and concerns some matter necessarily under the consideration of the foreign court upon the merits. *See Horne v. Edwards*, 215 N.C. 622, 624, 3 S.E. 2d 1, 3 (1939).

The fraud Murphy alleges here is clearly intrinsic in nature. He contends that the Michigan court was misled to believe that the attorneys representing Shaw College were also representing him, and that absent such a misrepresentation, the judgment would not have been entered against him. Even assuming this allegation to be true, Murphy's remedy is in the Michigan courts.

There is a presumption, in North Carolina as well as in Michigan, in favor of an attorney's authority to act for the client he or she professes to represent. *See In re Certain Tobacco*, 52 N.C. App. 299, 278 S.E. 2d 575 (1981); *Jackson v. Wayne Circuit Judge*, 341 Mich. 55, 67 N.W. 2d 471 (1954). One who challenges the actions of an attorney as being unauthorized has the burden of rebutting this presumption. *Id.*

In any event, when a party to an action denies that he gave his consent to the judgment as entered, the proper procedure is by motion in *that* cause. *Howard v. Boyce*, 254 N.C. 255, 118 S.E.

2d 897 (1961) (emphasis added). Thus, even if the Michigan judgment is void on grounds of attorney fraud or misrepresentation, that question is to be decided by the Michigan courts, and the Wayne County, Michigan Circuit Court has already denied Murphy's motion to vacate on those grounds. The attempt to collaterally attack the Michigan judgment in the North Carolina courts on the basis of intrinsic fraud is therefore improper.

Because a consent judgment is valid only if all parties give their unqualified consent at the time the court sanctions the agreement and promulgates it as a judgment, *Overton v. Overton*, 259 N.C. 31, 129 S.E. 2d 593 (1963), Murphy argues that the Michigan judgment is void since, according to him, he did not consent to the judgment, nor was he informed of it by the attorneys purporting to represent him. Therefore, he contends, it would be against the public policy of North Carolina to give full faith and credit to the judgment of another jurisdiction which was both void and obtained in violation of a party's due process rights. We are not persuaded.

Again, the question whether the Michigan judgment is void because Murphy did not consent is properly addressed to the Michigan courts. In addition, there is no question that Murphy had proper notice of the Michigan court proceedings and that he had an opportunity to be heard there. He was personally served with process and he filed pleadings and affidavits in the Michigan court before moving to North Carolina. His motion for summary judgment in that case, on grounds that he should not be held personally liable for the acts of the college, was denied.

We hold that Murphy has not raised a material factual issue which goes to extrinsic fraud or contravention of public policy, and that J.I.C. Electric's motion for summary judgment was properly granted. Even though the status of Murphy's appeal to the Michigan Court of Appeals is unclear, the full faith and credit clause of the United States Constitution applies as soon as the foreign judgment becomes enforceable, and does not depend upon the exhaustion of all appeals or the expiration of the time allowed for appeal. *See* Annot., 2 A.L.R. 3d 1384 (1965).

We therefore

Affirm.

Judges JOHNSON and MARTIN concur.

IN THE MATTER OF: BABY BOY SCEARCE DOB: 11/19/83

No. 8514DC756

(Filed 1 July 1986)

1. **Courts § 7.4— motion for attorney's fees four months after appeal—no jurisdiction in trial court**

The trial court was without jurisdiction to consider intervenors' motion requesting attorney's fees where the motion was made approximately four months after the trial court had entered the order awarding child custody to the intervenors and approximately four months after the Department of Social Services had filed its notice of appeal of that order, and the appeal took the case out of the jurisdiction of the trial court.

2. **Courts § 7.4— motion for costs four months after appeal—jurisdiction of trial court**

Though a child custody order had been appealed four months prior to the guardian ad litem's Rule 60 motion for an award of costs, the trial court nevertheless had jurisdiction to consider the motion and indicate how it was inclined to rule on the motion.

APPEAL by petitioner from *Labarre, Judge*. Orders entered 3 and 5 June 1985 in District Court, DURHAM County. Heard in the Court of Appeals 5 December 1985.

Thomas Russell Odom for Department of Social Services, appellant.

Carolyn McAllaster for Kelly and Barbara Whitman, intervenor appellees; and N. Joanne Foil, guardian ad litem, appellee.

COZORT, Judge.

In an opinion filed simultaneously with this opinion, we affirmed an Order of Durham County District Court awarding temporary legal custody of the minor child Baby Boy Scearce to his foster parents, with limited visitation privileges to the biological father. (See No. 8514DC755.) This appeal arises from a determina-

tion of the Durham County District Court indicating that it would award attorney's fees to the intervenors (foster parents) and costs to the guardian ad litem. The Durham County Department of Social Services (hereinafter referred to as DSS) appealed from the Orders alleging that the district court lacked jurisdiction to enter the Orders and that the Orders were erroneous because the findings of fact and conclusions of law were not supported by the evidence. We hold that the trial court did not have jurisdiction to enter the Order as to the intervenors' request for attorney's fees. We hold that the court did have jurisdiction to enter the Order as to the guardian ad litem's request for costs.

I.

[1] First, we will address the intervenors' Motion in the Cause requesting attorney's fees pursuant to G.S. 50-13.6. A request for attorney's fees may be properly raised by a motion in the cause subsequent to the determination of the main custody action. *See Upchurch v. Upchurch*, 34 N.C. App. 658, 664-65, 239 S.E. 2d 701, 705 (1977). In this case, however, the intervenors' motion was made 22 April 1985, approximately four months after the trial court had entered the Order awarding custody to the intervenors, and approximately four months after DSS had filed its Notice of Appeal to that Order. It is well established that as a general rule an appeal takes the case out of the jurisdiction of the trial court. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). Thus, the trial court lacked jurisdiction to consider the intervenors' motion. With the appeal of the custody order having been resolved in the opinion filed simultaneously with this opinion (see No. 8514DC755), the trial court can now properly consider intervenors' motion, pursuant to G.S. 50-13.6, for attorney's fees. Before awarding attorney's fees, the trial court must make specific findings of fact concerning:

> (1) the ability of the intervenors to defray the cost of the suit, *i.e.*, that the intervenors are unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit;
>
> (2) the good faith of the intervenors in proceeding in this suit;
>
> (3) the lawyer's skill;

(4) the lawyer's hourly rate;

(5) the nature and scope of the legal services rendered.

See Warner v. Latimer, 68 N.C. App. 170, 314 S.E. 2d 789 (1984); *Allen v. Allen*, 65 N.C. App. 86, 308 S.E. 2d 656 (1983); *Rickenbaker v. Rickenbaker*, 21 N.C. App. 276, 204 S.E. 2d 198 (1974). The lawyer's skill, hourly rate, and the nature and scope of the legal services rendered all relate to a conclusion of the reasonableness of the attorney's fees. *See Upchurch v. Upchurch, supra; Ward v. Taylor*, 68 N.C. App. 74, 314 S.E. 2d 814, *cert. denied*, 311 N.C. 769, 321 S.E. 2d 157 (1984).

II.

[2] The guardian ad litem filed a motion pursuant to Rule 60 requesting a supplemental order wherein she alleged that through oversight and inadvertence the district court failed to order assessment of costs incurred in the action, including witness fees for out-of-county witnesses as well as for expert witnesses. In *Ward v. Taylor, supra*, this Court recognized the right of the trial court pursuant to Rule 60(a) to correct inadvertent omissions of costs from an order. The controlling question here is whether the trial court had jurisdiction to consider the guardian ad litem's motion after DSS had entered its Notice of Appeal. The guardian ad litem's Motion for a Supplemental Order was made 25 April 1985, approximately four months after the Order awarding custody was entered.

In *Bell v. Martin*, 43 N.C. App. 134, 140-42, 258 S.E. 2d 403, 408-09 (1979), *reversed on other grounds*, 299 N.C. 715, 264 S.E. 2d 101 (1980), this Court stated:

> There is authority, however, for the proposition that the trial court retains limited jurisdiction, after an appeal has been taken, to hear and consider a Rule 60(b) motion . . . .
>
> * * * *
>
> It appears to us that the better practice is to allow the trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending. . . . This procedure allows the trial court to rule in the first instance on

the Rule 60(b) motion and permits the appellate court to review the trial court's decision on such motion at the same time it considers other assignments of error.

We hold the trial court had jurisdiction to consider the motion made pursuant to Rule 60 and indicated how it was inclined to rule on the motion, consistent with our holding in *Bell v. Martin, supra.* After reviewing the trial court's Order awarding costs, we find the facts support the conclusions of law, and the conclusions of law support the Order. We remand for entry of the Order awarding costs.

The result of the appeal is: (1) as to the Order awarding attorney's fees to the intervenors, vacated and remanded for further proceedings; and, (2) as to the Order awarding costs to the guardian ad litem, remanded for entry of order.

Judges WEBB and BECTON concur.

MICHAEL K. GRIFFIN v. MARIE S. GRIFFIN

No. 8615DC118

(Filed 1 July 1986)

1. **Divorce and Alimony § 25.3— child custody with father—contrary to children's wishes—no abuse of discretion**

The trial court did not abuse its discretion in a child custody action by granting primary custody to the father contrary to the expressed wishes of the children where the trial court clearly considered the wishes of the children and expressed its opinion that, with attempts by both parties to manipulate the children, the validity of the children's feelings as expressed to the court was questionable.

2. **Divorce and Alimony §§ 25.3, 25.7— child custody—failure to determine when children would choose custodial parent—no error**

The trial court did not err in a child custody action by failing to make a positive determination of when and how the children could make a choice as to their custodial parent where the court expressed its hope for a more stable and peaceful future for the children. A change of custody would have to be made pursuant to a new motion in the cause and in consideration of changed circumstances. N.C.G.S. § 50-13.7 (1984).

3. Divorce and Alimony § 25.3— custody—temporary ex parte order—dissolved at hearing—moot

Assignments of error concerning the validity of an *ex parte* order for temporary child custody which lasted one week and which was dissolved at the hearing were moot.

4. Appeal and Error § 45.1— child custody—findings alleged not supported by evidence—request for de novo review

An assignment of error in a child custody action contending that there was insufficient evidence to support thirty-two findings of fact but which only asked for a *de novo* review without arguing the exceptions violated Rule 28(b)(5) of the Rules of Appellate Procedure.

5. Divorce and Alimony § 25.3; Evidence § 34.5— child custody—statements of children—admissible as state of mind

There was no prejudice in a child custody action from the trial court's exclusion of testimony dealing with statements the children had made concerning intimidation by their father and their desire to live with their mother. The state of mind of the children was a relevant issue; however, the children voiced these fears and concerns in an interview with the court. N.C.G.S. § 8C-1, Rule 803(3).

APPEAL by defendant from *Peele, Judge*. Judgment entered 18 October 1985 in ORANGE County District Court. Heard in the Court of Appeals 5 June 1986.

Plaintiff husband filed a complaint on 7 February 1985 requesting absolute divorce from defendant and custody of the two minor children. Defendant answered and counterclaimed for custody of the children, child support and equitable distribution. Judgment of absolute divorce was entered on 20 June 1985.

The matter of custody was set for hearing on 14 August 1985. On 5 August 1985 plaintiff obtained an *ex parte* temporary custody order awarding him custody of the children for a week pending the hearing. Defendant filed a motion to quash the order, but no ruling was entered. After the trial court heard evidence on the matter of custody, it granted joint legal custody to the parties with primary custody granted to plaintiff husband. Defendant appealed.

Lewis & Associates, by Susan H. Lewis, for plaintiff-appellee.

James T. Bryan, III for defendant-appellant.

WELLS, Judge.

[1] In her first assignment of error, defendant contends that the trial court abused its discretion in entering an order which failed to give sufficient weight to the testimony of the children in light of their ages. It is a well-recognized principle of the law in this State that the trial court has broad discretion in matters of child custody. *In re Peal*, 305 N.C. 640, 290 S.E. 2d 664 (1982). *Falls v. Falls*, 52 N.C. App. 203, 278 S.E. 2d 546, *disc. rev. denied*, 304 N.C. 390, 285 S.E. 2d 831 (1981). Another accepted principle is that the wishes of a child of sufficient age to exercise discretion in choosing a custodian are entitled to considerable weight when the contest is between the parents, but these wishes are not controlling. *Peal, supra; Hinkle v. Hinkle*, 266 N.C. 189, 146 S.E. 2d 73 (1966). Some ten pages in the transcript are devoted to the trial court's interview with the children to determine their wishes. The trial court found as fact that:

> The Children have expressed a desire to live with the mother to Dr. White, Jim Huegerich (the police social worker), and to another friend. There is no question about this. The question is whether the Court should honor this request and whether the Children are in a position to make this decision.

The court expressed its opinion that, with attempts by both parties to manipulate the children, the validity of the children's feelings as expressed to the court was questionable. The trial court clearly considered the wishes of the children and we find no abuse of discretion in its decision to grant primary custody to the father.

[2] Defendant next contends that the court erred in failing to make a positive determination of when and how the children can make a choice as to their custodial parents. This is a reference to a finding of fact which reads:

> [the children] need a period without prodding and without stress, so they can relax, and at a later time, make their choice as to the parents.

The trial court here is merely expressing its hope for a more stable and peaceful future for the children and clearly is not promising that, at some definite future date before majority, the

children will be allowed to choose their custodians. Such a change of custody would have to be made pursuant to a new motion in the cause and in consideration of changed circumstances. N.C. Gen. Stat. § 50-13.7 (1984). When there is no objective measurement of how circumstances will change, a finding of changed circumstances can only be made by examining the evidence contemporaneously with the new motion in the cause. *See, e.g., Falls v. Falls, supra.* This assignment is overruled.

[3] Defendant's next two assignments concern the validity of granting plaintiff's *ex parte* order for temporary custody and the trial court's refusal to rule on defendant's motion to quash. The temporary order lasted one week and was dissolved at the opening of the hearing on 14 August 1985. This issue is moot; therefore, these assignments are overruled.

[4] Defendant next contends that there was insufficient evidence to support thirty-two of the trial court's findings of fact. This assignment of error does not argue the exceptions but only asks for a *de novo* review of each one. This is a violation of Rule 28(b)(5) of the Rules of Appellate Procedure. Moreover, we have carefully reviewed the record and found each of the questioned findings to be supported by evidence in the transcript. This assignment is overruled.

[5] In her final assignment of error, defendant contends that the trial court erred in excluding the testimony of two witnesses as to the states of mind of the two children. The excluded testimony dealt with statements made by the children to the witnesses concerning the children's intimidation by the father and desire to live with the mother. Defendant argues that these statements were admissible as a hearsay exception under N.C. Gen. Stat. § 8C-1, Rule 803 of the Rules of Evidence because the statements showed the children's state of mind. Rule 803 provides in pertinent part:

> Hearsay exceptions; availability of declarant immaterial.
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . .
>
> (3) Then Existing Mental, Emotional, or Physical Condition.—A statement of the declarant's then existing state of mind [or] emotion. . . .

This rule is virtually identical to the federal rule. *See* Commentary, Rule 803. Evidence tending to show state of mind is admissible as long as the declarant's state of mind is a relevant issue and the possible prejudicial effect of the evidence does not outweigh its probative value. Weinstein's *Evidence* § 803(3)[03] (1984); Graham, *Handbook of Federal Evidence* § 803.3 (2d ed. 1986). As previously discussed, the state of mind of the children is a relevant issue. *Hinkle v. Hinkle, supra.* This evidence was admissible and its exclusion constituted error on the part of the trial court. However, in a transcribed interview with the children, they voiced these fears and desires to the court, which took them into account in its decision. The excluded evidence was thus cumulative and its exclusion is held to be without prejudicial effect.

The decision of the trial court is

Affirmed.

Judges ARNOLD and BECTON concur.

MARY D. MACE, EMPLOYEE, PLAINTIFF v. N. C. SPINNING MILLS AND/OR RHYNE MILLS, EMPLOYERS, AND HOME INDEMNITY INSURANCE COMPANY AND/OR LIBERTY MUTUAL INSURANCE COMPANY, CARRIERS, DEFENDANTS

No. 8610IC27

(Filed 1 July 1986)

1. Master and Servant § 69— workers' compensation—computation of average weekly wage—ability to work full time

The Industrial Commission's finding that plaintiff had a weekly earning capacity of $146 was supported by plaintiff's own testimony that, since she had left defendant's employment, she had worked as a school bus driver and security guard and that her wages on the security guard job were $3.65 per hour; that the job was only part time and was lost because of a reduction in force did not nullify the evidence; no evidence was presented that plaintiff's respiratory disease limited her to part-time work, and the Commission's finding that she was able to work full time at the earning capacity found therefore was not error; and the Commission properly based plaintiff's compensation on capacity to earn rather than actual earnings.

2. Master and Servant § 68— workers' compensation—occupational disease—sufficiency of evidence

Evidence was sufficient to support a finding that plaintiff worked in the textile industry for more than thirteen years, and it was inferable from plaintiff's evidence that about ten of those years were spent processing cotton so that the Commission's finding that she was exposed to cotton dust and an expert's opinion had evidentiary support, and the Commission's conclusion based thereon that plaintiff had an occupational disease was not erroneous.

APPEAL by plaintiff and defendant employer from the Opinion and Award of the North Carolina Industrial Commission filed 7 August 1985. Heard in the Court of Appeals 9 May 1986.

Plaintiff claims benefits under the Workers' Compensation Act for disability resulting from chronic obstructive pulmonary disease allegedly caused by exposure to cotton dust in her employment. She began working in textile mills in 1955 and worked off and on in different mills in the Lincolnton area until June of 1980 when her last employer was defendant N. C. Spinning Mills. Her work in the mills exposed her to respirable cotton dust and she began having breathing problems in 1971; they included chest tightness, a feeling of being smothered, congestion, productive cough, and shortness of breath. Her symptoms usually got worse as the work week progressed and diminished on days that she did not work. At different times she underwent respiratory therapy; and in 1973 and 1974 she was hospitalized twice for a collapsed lung. In her last employment with defendant her respiratory problems worsened until she had to quit textile work altogether. After leaving defendant's mill plaintiff had a full time job for awhile as manager of a motel owned by some relatives and had part time jobs as a security guard and school bus driver. She has also been trained as a nursing assistant and technician and has some experience in that work. Her physical activities are limited by her breathing difficulties: she cannot walk more than three-quarters of a mile, mow her lawn for more than 15 minutes, or ascend stairs without experiencing shortness of breath. When working in the mills she never wore a mask because it hindered her breathing. She has smoked 15 to 20 cigarettes a day since she was 16.

After hearing her claim and finding facts substantially as set forth above the deputy commissioner also found that plaintiff had chronic obstructive pulmonary disease with elements of em-

physema and chronic bronchitis, as well as hyperreactive airways disease; that her exposure to cotton and flax dust had significantly contributed to the development of her pulmonary disease; and that she was permanently partially disabled as a result of the disease. The deputy commissioner concluded that plaintiff was entitled to compensation for 300 weeks at a rate equal to two-thirds of the difference between $143.50, her average weekly earnings when she left defendant's employ, and her average weekly earnings since then.

The Full Commission, on appeal by defendant, made findings as to plaintiff's occupational disease not materially different from those made by the deputy commissioner. But on the disability question the Commission found that plaintiff had a demonstrated weekly earning capacity of $146.00 after becoming disabled, while her average weekly wage before was $154.00, and reduced her compensation to $5.33 per week for 300 weeks. Plaintiff appealed and we allowed defendant's petition for certiorari after it failed to file its appeal notice within the time allowed.

Charles R. Hassell, Jr. for plaintiff appellant-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Hatcher Kincheloe, for defendant appellee-appellant N. C. Spinning Mills.

PHILLIPS, Judge.

By her appeal plaintiff contends that the Commission's findings that she has a weekly earning capacity of $146.00 are unsupported by evidence and that she is therefore entitled to more compensation than the Commission allowed. By its appeal defendant contends that the Commission's findings that plaintiff's chronic obstructive lung disease was contributed to by her textile employment and that she is permanently disabled because of it are not supported by competent evidence, and thus no compensation at all is due her. Neither contention has merit and we affirm the Commission's decision in all respects.

[1] The finding that plaintiff has had an earning capacity of $146.00 per week since leaving defendant's employment is supported by plaintiff's own testimony that since that time she has worked as a school bus driver and security guard and that her wages on the security guard job were $3.65 per hour, which com-

putes to $146.00 per week. That this job was only part time and was lost because of a reduction in force does not nullify the evidence. For aught that the record shows she was capable of working full time at that job and any other of the jobs that she is qualified for which require little physical exertion, such as bus driver, nurse technician or cashier. Since no evidence was presented that her respiratory disease limits her to part time work, the Commission's finding that she was able to work full time at the earning capacity found was not error and must be upheld. The argument that the Commission should have based her compensation on actual earnings since she became disabled is unavailing. An injured worker's disability rate is based on *capacity* to earn rather than actual earnings, which are only evidence of earning capacity. *Ashley v. Rent-A-Car Co.*, 271 N.C. 76, 155 S.E. 2d 755 (1967). An award to be valid must be based on *capacity* to earn. *Hill v. DuBose*, 234 N.C. 446, 67 S.E. 2d 371 (1951).

[2] Defendant's attack upon the award made to plaintiff rests upon the false premise that no competent evidence was presented that the plaintiff was exposed to cotton dust in her employment for "about ten years," as the Commission found and as was stated in the hypothetical questions asked Dr. Owens, whose occupational disease and disability opinions are crucial to plaintiff's case. Though the record shows that during the period from 1955 to 1980 she did not always work in textiles and often changed jobs it also clearly shows that plaintiff worked altogether more than 156 months or 13 years in the textile industry. And while she did not testify as to exactly how much of that time was spent processing cotton it is fairly inferable from her evidence that it was a period of "about ten years." Thus both the Commission's finding and Dr. Owens' expert opinion have evidentiary support and the conclusion based thereon that she has an occupational disease is not erroneous. *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E. 2d 189 (1979). Defendant's further arguments, likewise without merit, require no discussion.

As to plaintiff's appeal—affirmed.

As to defendant's appeal—affirmed.

Judges MARTIN and PARKER concur.

CITY OF WINSTON-SALEM v. DONALD R. ROBERTSON AND WIFE, ALICE F. ROBERTSON

No. 8621SC169

(Filed 1 July 1986)

Municipal Corporations § 33.4— closing of driveway by city—no taking requiring compensation

Plaintiff's mere approval of defendants' driveway location in 1969 was not an agreement between the parties but a regulatory action taken by plaintiff for safety purposes which could not be compared with a right-of-way agreement in which the property owner reserved access at a particular point; thus, the trial court erred in finding that plaintiff's closing of defendants' driveway amounted to a taking which required compensation by plaintiff.

APPEAL by plaintiff from *Wood, Judge*. Order entered 18 November 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 June 1986.

In 1969 defendants purchased a lot on the corner of Akron Drive and Ogburn Avenue in the City of Winston-Salem and constructed thereon a convenience store with gasoline pumps. Prior to constructing the store, defendant-husband presented a map of the proposed improvements to an official from the City of Winston-Salem, Department of Public Works, Streets Division. Defendant-husband sought plaintiff-City's approval of driveway locations on the lot. Plaintiff-City approved the map which provided for four driveways from city streets to defendants' property, one driveway each on Mentor Street and Akron Drive, and two driveways on Ogburn Avenue.

On 17 January 1984 plaintiff-City brought this condemnation action against defendants to acquire a permanent right-of-way and a construction easement for widening Akron Drive and improving the Akron Drive/Ogburn Avenue intersection. A hearing was held on 1 July 1985 to determine whether plaintiff-City's plan to close one of the two entrances to defendants' property on Ogburn Avenue pursuant to the modification and improvement of the Akron Drive/Ogburn Avenue intersection was a taking which required compensation or a legitimate exercise of plaintiff-City's police power which did not require compensation. The court concluded that there was a taking and ordered plaintiff-City to pay defendants just compensation for the closing of the driveway. From the order entered, plaintiff-City appeals.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr., and Gusti W. Frankel, for plaintiff appellant.

Allman, Spry, Humphreys and Armentrout, by C. Edwin Allman and James W. Armentrout, for defendant appellees.

WHICHARD, Judge.

Plaintiff-City contends the court erred in failing to find that closing one of defendants' two driveways on Ogburn Avenue represents a legitimate exercise of plaintiff-City's police power which does not require compensation. Defendants concede that ordinarily such action by the City "in eliminating one of the two ingress and egress ways from [Ogburn Avenue] would be a legitimate use of the City's police power." However, citing *Petroleum Marketers v. Highway Commission*, 269 N.C. 411, 152 S.E. 2d 508 (1967), defendants contend, in essence, that the court did not err in finding a taking because plaintiff-City's approval for these driveway locations in 1969 constituted a binding agreement between the parties fixing access to Ogburn Avenue at those points.

We hold that the question is controlled by *Haymore v. Highway Comm.*, 14 N.C. App. 691, 189 S.E. 2d 611, *cert. denied*, 281 N.C. 757, 191 S.E. 2d 355 (1972). In *Haymore* this Court held that the granting of a driveway permit by the State Highway Commission did not vest an irrevocable property right in plaintiff-landowners which could not thereafter be taken without compensation. 14 N.C. App. at 695-96, 189 S.E. 2d at 614-15. The Court reasoned:

> It is true that compensation must be paid where under a right-of-way agreement the owner retains the right of access at a particular point and is subsequently refused access at that point. *Petroleum Marketers v. Highway Commission*, 269 N.C. 411, 152 S.E. 2d 508; *Kirkman v. Highway Commission*, 257 N.C. 428, 126 S.E. 2d 107; *Williams v. Highway Commission*, 252 N.C. 722, 114 S.E. 2d 782; *Realty Co. v. Highway Comm.*, 1 N.C. App. 82, 160 S.E. 2d 83. In such instances, the right of continuing access at a particular point is a property right acknowledged by the State as a part of the consideration for the right-of-way agreement. The granting of an application for a driveway permit is not a contract. It is a regulatory action taken by the State for safety purposes and

> cannot be compared with a right-of-way agreement in which the property owner reserves access at a particular point.

Id. at 696, 189 S.E. 2d at 615. The Court also stated:

> [T]he Commission requires driveway permits for the purpose of assuring that a proposed driveway will be constructed in a safe manner and so as not to endanger travel upon the highway. This is an exercise of the general police power, and the granting of the permit does not vest an irrevocable property right in the property owner.

Id. at 695, 189 S.E. 2d at 614-15.

Following *Haymore*, we hold that plaintiff-City's mere approval of defendants' Ogburn Avenue driveway location in 1969 was not an "agreement" between the parties but "a regulatory action taken by [plaintiff-City] for safety purposes [which] cannot be compared with a right-of-way agreement in which the property owner reserves access at a particular point." *Id.* The trial court thus erred in finding a taking which required compensation by plaintiff-City. Accordingly, the order is reversed, and the cause is remanded for entry of an order in favor of plaintiff-City.

Reversed and remanded.

Judges PHILLIPS and MARTIN concur.

THOMAS CALVIN DUNLAP, SR. v. SYLVIA SHERRILL DUNLAP

No. 8519DC1227

(Filed 1 July 1986)

Appeal and Error § 6.2— interlocutory orders—no right of appeal

Orders providing for temporary child custody and requiring plaintiff to produce tax returns and other business records were not immediately appealable since they were interlocutory and did not affect a substantial right which would be lost if the orders were not reviewed before the final judgment.

APPEAL by plaintiff from *Warren, Judge*. Orders entered 22 May 1985 in District Court, ROWAN County. Heard in the Court of Appeals 6 May 1986.

Plaintiff instituted this action seeking an absolute divorce from defendant. He later amended the complaint to also seek custody of the minor children. Defendant filed an answer and counterclaim seeking to set aside a separation agreement executed on 3 June 1983 by the parties. On 22 May 1985, the court entered an order directing the primary custody of the minor children to remain with the defendant pursuant to the separation agreement pending further hearing of the matter in August 1985. On the same day the court also entered an order directing plaintiff to produce tax returns, business records, and other requested documents. From these orders of the trial court, plaintiff appeals.

Sullivan & Pearson, by Mark E. Sullivan, for plaintiff appellant.

Grant & Hastings, by Randell F. Hastings, for defendant appellee.

ARNOLD, Judge.

The orders from which defendant appeals are interlocutory. An interlocutory order is one that does not determine the issues, but directs some further proceeding preliminary to a final decree. *Smart v. Smart*, 59 N.C. App. 533, 297 S.E. 2d 135 (1982). No appeal lies from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose if the order is not reviewed before the final judgment. *Heavner v. Heavner*, 73 N.C. App. 331, 326 S.E. 2d 78, *disc. rev. denied*, 313 N.C. 601, 330 S.E. 2d 610 (1985).

The trial court's order as to child custody does not finally determine the issue involved, but only provides for temporary custody until an August hearing date for further proceedings preliminary to a final decree. We hold that the order is interlocutory and the temporary custody granted by the order does not affect any substantial right of plaintiff which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits. *See Smart*, 59 N.C. App. 533, 297 S.E. 2d 135. As to the order to produce the business records and other documents, it has been held that orders allowing discovery are not appealable since they are interlocutory and do not affect a substantial right which would be lost if the ruling were not reviewed before the final judgment. *Dworsky v. Insurance Co.*, 49

N.C. App. 446, 271 S.E. 2d 522 (1980). Plaintiff's appeal from these two orders by the trial court are therefore premature and must be dismissed.

Appeal dismissed.

Judges WELLS and BECTON concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 JULY 1986

BELL v. BELL No. 8514DC1256	Durham (84CVD02489)	Affirmed
BENSON v. GREEMAN CORPORATE CONSULTANTS, INC. No. 865SC239	New Hanover (85CVS1647)	Dismissed
BOWDEN v. BOWDEN No. 8620DC162	Moore (85CVD214)	Affirmed
COATS v. COATS No. 8611DC84	Johnston (85CVD155)	Affirmed
FOARD v. FOARD No. 8626SC164	Mecklenburg (84CVD127)	New Trial
GRACE BAPTIST CHURCH v. CITY OF OXFORD No. 859SC1364	Granville (82CVS331)	Affirmed
GRUBB v. GASSADA No. 8518DC1325	Guilford (85CVD1312)	Affirmed
HAGER v. HARRIS No. 8623SC108	Yadkin (85CVS260) (85CVS261)	Dismissed
IN RE CRABTREE No. 8514SC1221	Durham (85SP709)	Affirmed
IN RE GIBBIE No. 8627DC73	Gaston (350-85-321) (85J221)	Reversed
IN RE LEONARD v. HIATT No. 8622SC149	Davidson (85CVS547)	Affirmed
INT. AND DOMESTIC DEV. CORP., INC. v. FULLER OIL CO., INC. No. 8512SC1397	Cumberland (82CVS5272)	The trial court's denial of recovery to the plaintiff is affirmed. The trial court's judgment awarding the defendant $1.00 in damages is vacated. The appeal of the defendant is dismissed as moot. The plaintiff shall pay the costs. Affirmed in part; vacated in part.

JONES v. CANNON No. 863DC127	Pitt (84CVD535)	Vacated and Remanded
LINDLER v. JIM SIMMONS PONTIAC-BUICK, INC. No. 8610SC248	Wake (85CVS1220)	Affirmed
McCULLOUGH v. ROANOKE CHOWAN TECHNICAL COLLEGE No. 866SC179	Hertford (85CVD020)	Affirmed in part; dismissed in part.
McKELLAR v. E. J. COX COMPANY No. 8610IC106	Ind. Comm. (922635)	Affirmed
McMASTERS v. EDGCOMB METALS COMPANY AND BLACKWELL No. 8618SC193	Guilford (84CVS8022)	No Error
MUNDAY v. MUNDAY No. 8621DC90	Forsyth (83CVD4331) (84CVD3559)	Affirmed
PARKS v. PARKS No. 8626DC87	Mecklenburg (81CVD9050)	Vacated and Remanded
SAMUEL v. SAMUEL No. 8614DC75	Durham (84CVD1624)	Affirmed in part, vacated in part.
SHERRILL v. N.C. DEPT. OF CORRECTION No. 8610IC208	Ind. Comm. (TA-8786)	Affirmed
SNOW v. NATIONWIDE MUTUAL FIRE INS. CO. No. 8617SC30	Surry (84CVS758)	Affirmed
STATE v. BELL No. 8618SC250	Guilford (85CRS069052)	Affirmed
STATE v. BETHEA No. 8613SC126	Columbus (85CRS01477)	Affirmed
STATE v. BLACK No. 8619SC42	Cabarrus (85CRS6346)* (85CRS6347)**	*Assault with a deadly weapon on a law enforcement officer. New Trial. **Larceny of a firearm. No Error.
STATE v. BOZEMAN No. 865SC135	New Hanover (85CRS16666)	Affirmed

STATE v. CARTER No. 8618SC209	Guilford (85CRS66104)	Remanded for Resentencing
STATE v. CRUMP No. 8613SC16	Bladen (84CRS5323) (84CRS5324) (84CRS5325) (84CRS5326) (84CRS5327)	Affirmed
STATE v. HAMBY AND SHOUN No. 8625SC38	Caldwell (85CRS1372) (85CRS1397)	No Error
STATE v. HAMM No. 864SC201	Onslow (84CRS22046)	No Error
STATE v. HASKINS No. 865SC96	New Hanover (85CRS621) (85CRS624)	Appeal Dismissed
STATE v. HERRON No. 8620SC198	Union (85CRS3783)	No Error
STATE v. HOLLEY No. 866SC91	Bertie (83CRS3625)	Appeal Dismissed
STATE v. McEACHERN No. 8612SC187	Cumberland (84CRS21430)	We hold that defendant received a fair trial free from prejudicial error.
STATE v. MASON No. 8627SC57	Gaston (85CRS3778)	No Error
STATE v. POHLENZ No. 864SC219	Onslow (85CRS11984)	Appeal Dismissed
STATE v. RILEY No. 8614SC207	Durham (85CRS16667) (85CRS16668) (85CRS17687) (85CRS25705)	Affirmed
STATE v. RODDEY No. 8626DC120	Mecklenburg (85CRS14641)	No Error
STATE v. SINGLETON No. 863SC139	Pamlico (81CRS854)	Vacated and Remanded
STATE v. WHITEHURST No. 8611SC163	Johnston (85CRS4541)	No Error

STOCKS OIL COMPANY v. TYSON No. 868SC128	Greene (84CVS50)	Affirmed
STOKES v. ESTATE OF PAUL H. DUNNAGAN No. 8621SC185	Forsyth (85CVS610)	Affirmed

APPENDIXES

REVISED RULES FOR
COURT-ORDERED ARBITRATION

PRESENTATION OF
VAUGHN PORTRAIT

SUPREME COURT OF NORTH CAROLINA

****

IN THE MATTER OF	)	
PILOT PROGRAM OF	)	ORDER
MANDATORY, NONBINDING	)	
ARBITRATION	)	

****

WHEREAS, the Supreme Court of North Carolina adopted an order in this matter on 28 August 1986; and

WHEREAS, the Court now desires to revise the rules therein adopted;

Now, therefore, the Court orders:

(1) Effective immediately, the program shall operate pursuant to the attached revised "Rules for Court-Ordered Arbitration."

(2) These revised rules shall be promulgated by their publication, together with this order, in the Advance Sheets of the Supreme Court and the Court of Appeals of North Carolina.

Done by the Court in conference this 4th day of March 1987.

WHICHARD, J.
For the Court

THE RULES AND COMMENTARY AS ORIGINALLY PROMULGATED ARE REVISED AS FOLLOWS:

Rule 2

Delete from Rule 2(a) the following: "60 days after the date the action was filed" and substitute in lieu thereof "the first 20 days after the 60-day period fixed in Rule 8(b) begins to run."

Rule 3(i)

Rewrite to read as follows:

No ex parte communications between parties or their counsel and arbitrators are permitted.

Rule 3(l)

Rewrite the final phrase to read "as provided in N.C.R. Civ. P. 11, 37(b)(2)(A)-37(b)(2)(C) and N.C. Gen. Stat. § 6-21.5."

Rule 3, Comment

Final paragraph, last sentence, should end with a comma after "papers" and this phrase should be added: "except in cases in which a N.C. R. Civ. P. 12 motion is filed in lieu of a responsive pleading."

Rule 5

In Rule 5(d), delete the words "or in any other proceedings" and insert in lieu thereof the words "or in any subsequent proceeding involving any of the issues in or parties to the arbitration."

In Rule 5(e), add these words after "proceeding":

in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration.

Rule 8

Amend Rules 8(a) and 8(b) by substituting:

(a) *Actions Designated for Arbitration.*

The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from a magistrate's judgment and give notice of such designation to the par-

ties in all cases not exempted for comparison purposes pursuant to Rule 1(d)(2).

(b) *Hearings Rescheduled; 60 Day Limit; Continuances.*

(1) The court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled or continued to a date after the time allowed by this rule only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

Amend the *Comment* to read as follows:

One goal of these rules is to expedite disposition of claims involving $15,000 or less. See Rule 8(a). The 60 days in Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal.

RULES FOR COURT-ORDERED ARBITRATION IN NORTH CAROLINA

Revised March 4, 1987

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COURT-ORDERED ARBITRATION

Rule 1

ACTIONS SUBJECT TO ARBITRATION

(a) *Types of Actions; Exceptions.* All civil actions filed in the trial divisions of the General Court of Justice which are not assigned to a magistrate and all appeals from judgments of magistrates in which there is a claim or there are claims for monetary relief not exceeding $15,000 total, exclusive of interest, costs and attorneys' fees, are subject to court-ordered arbitration under these rules except actions:

(1) Involving a class;

(2) In which there is a substantial claim for injunctive or declaratory relief;

(3) Involving:

(i) family law issues,

(ii) title to real estate,

(iii) wills and decedents' estates, or

(iv) summary ejectment;

(4) Which are special proceedings;

(5) In which a claim is asserted for an unspecified amount exceeding $10,000 in compliance with N.C.R. Civ. P. 8(a)(2);

(6) Involving a claim for monetary recovery in an unspecified amount later to be determined by an accounting or otherwise, if the claimant certifies in the pleading asserting the claim that the amount of the claim will actually exceed $15,000; or

(7) Which are certified by a party to be companion or related to similar actions pending in other courts with which the action might be consolidated but for lack of jurisdiction or venue.

(b) *Arbitration by Agreement.* The court may submit any other civil action to arbitration under these rules or any modification thereof, pursuant to agreement by the parties approved by the court.

(c) *Court-Ordered Arbitration in Cases Having Excessive Claims.* The court may order any case submitted to arbitration under these rules at any time before trial if it finds that the amount actually in issue is $15,000 or less, even though a greater amount is claimed.

(d) *Exemption and Withdrawal from Arbitration.*

(1) The court may exempt or withdraw any action from arbitration on its own motion or on motion of a party made not less than 10 days before the arbitration hearing and a showing that: (i) the amount of the claim(s) exceed(s) $15,000; (ii) the action is excepted from arbitration under Rule 1(a); or (iii) there is a strong and compelling reason to do so.

(2) During the pilot arbitration program, the court shall exempt from arbitration a random sample of cases so as to create a control group of cases to be used for comparison with arbitrated cases in evaluating the pilot arbitration program.

COMMENT

The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000. The $15,000 jurisdictional limit by statute and Rule 1(a) applies only to the claim(s) actually asserted, even though the claim(s) is or are based on a statute providing for multiple damages, *e.g.* N.C. Gen. Stat. §§ 1-538, 75-16. An arbitrator may award damages in any amount which a party is entitled to recover. These rules do not affect the jurisdiction or functions of the magistrates where they have been assigned such jurisdiction. Counsel are expected to value their cases reasonably without court involvement. The court has ultimate authority to order overvalued cases to arbitration. The court's authority and responsibility for conducting all proceedings and for the final judgment in a case are not affected by these rules, which merely give the court a new civil procedure. A false certification under Rule 1(a)(6) might trigger N.C.R. Civ. P. 11(a) and N.C. Gen. Stat. § 6-21.5 sanctions or State Bar disciplinary action.

"Family law issues" in Rule 1(a)(3)(i) includes all family law cases such as divorce, guardianship, adoptions, juvenile matters, child support, custody and visitation. Actions which are "special proceedings" or involve summary ejectment, referred to in Rule 1(a), are actions so designated by the General Statutes.

Rule 1(b) allows binding or non-binding arbitration of *any* case by agreement and permits the parties to modify these rules

for a particular case. Court approval of any modification will give a variant proceeding the court's imprimatur and ensure adherence to their primary purpose. For example, arbitrators under these rules are not expected to decide protracted cases without fair compensation by the parties. This rule was not intended to provide compensation from the limited funds available to the pilot courts for protracted or exceptional cases. Therefore, the court should review and approve any such extraordinary stipulations.

Rule 1(c) is a safeguard against overvaluation of a claim to evade arbitration. It would become operative on motion of a party. This rule *does not* require (nor forbid) the court to examine any case on its own motion to determine its true value. The court may establish an administrative procedure for reviewing pleadings in cases appropriate for consideration by a judge for referral under Rule 1(c). *See also* the Comment to Rule 1(a).

Exemption or withdrawal may be appropriate under Rule 1(d)(1)(iii) in a challenge to established precedent in an action in which a trial de novo and subsequent appeal are probable or a case in which there has been prior mediation through the North Carolina Attorney General's office.

Rule 2

ARBITRATORS

(a) *Selection.* The court shall select and maintain a list of qualified arbitrators, which shall be a public record. Unless the parties file a stipulation identifying their choice of an arbitrator on the court's list within the first 20 days after the 60-day period fixed in Rule 8(b) begins to run, the court will appoint an arbitrator, chosen at random from the list.

(b) *Eligibility.* An arbitrator shall have been a member of the North Carolina State Bar for at least five years and must be approved by the Senior Resident Superior Court Judge and the Chief District Court Judge for such service.

(c) *Fees and Expenses.* Arbitrators shall be paid a $75 fee by the court for each arbitration hearing when they file their awards with the court. An arbitrator may be reimbursed for expenses actually and necessarily incurred in connection with an arbitration hearing and paid a reasonable fee not exceeding $75 for work on a case not resulting in a hearing upon the arbitrator's written application to, and approval by, the Senior Resident Superior Court

Judge, or the Chief Judge of the District Court, of the court in which the case was pending.

(d) *Oath of Office.* Arbitrators shall take an oath or affirmation similar to that prescribed in N.C. Gen. Stat. § 11-11, in a form approved by the Administrative Office of the Courts, before conducting any hearings.

(e) *Disqualification.* Arbitrators shall be disqualified and must recuse themselves if as a judge in the same action they would be disqualified or obliged to recuse themselves. Disqualification and recusal may be waived by the parties upon full disclosure of any basis for disqualification or recusal.

(f) *Replacement of Arbitrator.* If an arbitrator is disqualified, recused, unable, or unwilling to serve, a replacement shall be appointed in a random manner by the court.

COMMENT

Under Rule 2(a) the parties have a right to choose one arbitrator from the list if they wish to do so, but they have *the burden of taking the initiative if they want to make the selection,* and they must do it promptly.

Under Rule 2(c) filing of the award is the final act at which payment should be made, closing the matter for the arbitrator. The arbitrator should make the award when the hearing is concluded. Hearings must be brief and expedited so that an arbitrator can hear at least three per day. *See* Rule 3(n).

Payments and expense reimbursements authorized by Rule 2(c) are made subject to court approval to ensure conservation and judicial monitoring of the funds available during the pilot program from the "private sources" specified in the enabling Act.

Rule 3

ARBITRATION HEARINGS

(a) *Hearing Scheduled by the Court.* Arbitration hearings shall be scheduled by the court and held in a courtroom, if available, or in any other public room suitable for conducting judicial proceedings and shall be open to the public.

(b) *Pre-hearing Exchange of Information.* At least 10 days before the date set for the hearing, the parties shall exchange:

(1) Lists of witnesses they expect to testify;

(2) Copies of documents or exhibits they expect to offer in evidence; and

(3) A brief statement of the issues and their contentions.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing.

(c) *Exchanged Documents Considered Authenticated.* Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(d) *Copies of Exhibits Admissible.* Copies of exchanged documents or exhibits are admissible in arbitration hearings.

(e) *Witnesses.* Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(f) *Subpoenas.* N.C.R. Civ. P. 45 shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(g) *Authority of Arbitrator to Govern Hearings.* Arbitrators shall have the authority of a trial judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all contempt matters to the court.

(h) *Law of Evidence Used as Guide.* The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect he determines appropriate.

(i) *No Ex Parte Communications with Arbitrator.* No ex parte communications between parties or their counsel and arbitrators are permitted.

(j) *Failure to Appear; Defaults; Rehearing.* If a party who has been notified of the date, time and place of the hearing fails

to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear. If a party is in default for any other reason but no judgment has been entered upon the default pursuant to N.C.R. Civ. P. 55(b) before the hearing, the arbitrator may hear evidence and may issue an award against the party in default. The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond his control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Rule 5(a).

(k) *No Record of Hearing Made.* No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(l) *Sanctions.* Any party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions by the court on motion of a party, or report of the arbitrator, as provided in N.C.R. Civ. P. 11, 37(b)(2)(A)-37(b)(2)(C) and N.C. Gen. Stat. § 6-21.5.

(m) *Proceedings in Forma Pauperis.* The right to proceed in forma pauperis is not affected by these rules.

(n) *Limits of Hearings.* Arbitration hearings shall be limited to one hour unless the arbitrator determines at the hearing that more time is necessary to ensure fairness and justice to the parties.

(1) A written application for a substantial enlargement of time for a hearing must be filed with the court and the arbitrator, if appointed, and must be served on opposing parties at the earliest practicable time, and no later than the date for pre-hearing exchange of information under Rule 3(b). The court will rule on these applications after consulting the arbitrator if appointed.

(2) An arbitrator is not required to receive repetitive or cumulative evidence.

(o) *Hearing Concluded.* The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments he permits have been completed. In exceptional cases, he may in his discretion receive post-hearing briefs, but not evidence, if submitted within 3 days after the hearing has been concluded.

(p) *Parties Must be Present at Hearings; Representation.* All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear pro se.

(q) *Motions.* Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(1) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in his award. Parties shall state their contentions regarding pending motions deferred to the arbitrator in the exchange of information required by Rule 3(b).

(2) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

COMMENT

Rule 3(d) contemplates that the arbitrator shall return all evidence submitted when the hearing is concluded and the award has been made. Original documents and exhibits should not be marked in any way to identify them with the arbitration, to avoid possible prejudice in any future trial.

An arbitrator may at any time encourage settlement negotiations and may participate in such negotiations if all parties are present in person or by counsel. *See* Rule 3(p).

The purpose of Rule 3(n) is to ensure that hearings are limited and expedited. Failure to limit and expedite the hearings defeats the purpose of these rules. In this connection, note the option in Rule 3(b) for use of prehearing stipulations and/or sworn or unsworn statements to meet time limits.

Under Rule 3(o) the declaration that the hearing is concluded by the arbitrator formally marks the end of the hearing. Note Rule 4(a), which requires the arbitrator to file his award within three days after the hearing is concluded or post-hearing briefs are received. The usual practice should be a statement of the award at the close of the hearing, without submission of briefs. In the unusual case where an arbitrator is willing to receive post-hearing briefs, he should specify the points he wants addressed promptly and succinctly. Time limits in these rules are governed by N.C.R. Civ. P. 6 and N.C. Gen. Stat. §§ 103-4, 103-5.

Under Rule 3(q) the court will rule on prehearing motions which dispose of the case on the pleadings or relate to the pro-

cedural management of the case. The court will normally defer to the arbitrator for his consideration motions addressed to the merits of a claim requiring a hearing, the taking of evidence, or examination of records and documents other than the pleadings and motion papers, except in cases in which a N.C.R. Civ. P. 12(b) motion is filed in lieu of a responsive pleading.

Rule 4

THE AWARD

(a) *Filing the Award.* The award shall be in writing, signed by the arbitrator and filed with the court within 3 days after the hearing is concluded or the receipt of post-hearing briefs, whichever is later.

(b) *Findings; Conclusions; Opinions.* No findings of fact and conclusions of law or opinions supporting an award are required.

(c) *Scope of Award.* The award must resolve all issues raised by the pleadings and may exceed $15,000.

(d) *Copies of Award to Parties.* The court shall forward copies of the award to the parties or their counsel.

COMMENT

Under Rule 4(a) the arbitrator should issue the award when the hearing is over and should not take the case under advisement. If the arbitrator wants post-hearing briefs, he must receive them within three days, consider them, and file his award within three days thereafter. *See* Rule 3(o) and its *Comment.*

See Rule 1(a) and its *Comment* in connection with Rule 4(c).

Rule 5

TRIAL DE NOVO

(a) *Trial De Novo As of Right.* Any party not in default for a reason subjecting him to judgment by default who is dissatisfied with an arbitrator's award may have a trial de novo as of right upon filing a written demand for trial de novo with the court, and service of the demand on all parties, on an approved form within 30 days after the arbitrator's award has been filed, or within 10 days after an adverse determination of a Rule 3(j) motion to rehear.

(b) *Filing Fee.* A party filing a demand for trial de novo shall pay a filing fee equivalent to the arbitrator's compensation, which shall be held by the court until the case is terminated and returned to the demanding party only if there has been a trial in which, in the trial judge's opinion, the demanding party improved his position over the arbitrator's award. Otherwise, the filing fee shall be forfeited to the fund from which arbitrators are paid.

(c) *No Reference to Arbitration in Presence of Jury.* A trial de novo shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without the consent of all parties to the arbitration and the court's approval.

(d) *No Evidence of Arbitration Admissible.* No evidence that there have been arbitration proceedings or any fact concerning them may be admitted in a trial de novo, or in any subsequent proceeding involving any of the issues in or parties to the arbitration, without the consent of all parties to the arbitration and the court's approval.

(e) *Arbitrator Not to be Called as Witness.* An arbitrator may not be deposed or called as a witness to testify concerning anything said or done in an arbitration proceeding in a trial de novo or any subsequent civil or administrative proceeding involving any of the issues in or parties to the arbitration. His notes are privileged and not subject to discovery.

(f) *Judicial Immunity.* The arbitrator shall have judicial immunity to the same extent as a trial judge with respect to his actions in the arbitration proceeding.

COMMENT

Rule 5(c) does not preclude cross-examination of a witness in a later proceeding concerning prior inconsistent statements during arbitration proceedings, if done in such a manner as not to violate the intent of Rules 5(c) and 5(d).

See also the *Comment* to Rule 6 regarding demand for trial de novo.

Rule 6

THE COURT'S JUDGMENT

(a) *Termination of Action by Agreement Before Judgment.* The parties may file a stipulation of dismissal or consent judgment at any time before entry of judgment on an award.

(b) *Judgment Entered on Award.* If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award is filed, the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be mailed to all parties or their counsel.

COMMENT

A judgment entered on the arbitrator's award is not appealable because there is no record for review by an appellate court. By failing to demand a trial de novo the right is waived. Demand for jury trial pursuant to N.C.R. Civ. P. 38(b) does not preserve the right to a trial de novo. There must be a separate, specific, timely demand for trial de novo after the award has been filed.

Rule 7

COSTS

(a) *Arbitration Costs.* The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(b) *Costs Following Trial De Novo.* If there is trial de novo, court costs may, in the discretion of the trial judge, include costs taxable under Rule 7(a) incurred in the arbitration proceedings.

(c) *Costs Denied if Party Does Not Improve His Position in Trial De Novo.* A party demanding trial de novo who does not improve his position may be denied his costs in connection with the arbitration proceeding by the trial judge, even though prevailing at trial.

Rule 8

ADMINISTRATION

(a) *Actions Designated for Arbitration.* The court shall designate actions eligible for arbitration upon the filing of the complaint or docketing of an appeal from the magistrate's judgment and give notice of such designation to the parties in all cases not exempted for comparison purposes pursuant to Rule 1(d)(2).

(b) *Hearings Rescheduled; 60 Day Limit; Continuances.*

(1) The court shall schedule hearings with notice to the parties to begin within 60 days after: (i) the docketing of an appeal from a magistrate's judgment, (ii) the filing of the last responsive pleading, or (iii) the expiration of the time allowed for the filing of such pleading.

(2) A hearing may be scheduled, rescheduled or continued to a date after the time allowed by this rule only by the court before whom the case is pending upon a written motion and a showing of a strong and compelling reason to do so.

(c) *Date of Hearing Advanced by Agreement.* A hearing may be held earlier than the date set by the court, by agreement of the parties with court approval.

(d) *Forms.* Forms for use in these arbitration proceedings must be approved by the Administrative Office of the Courts.

(e) *Delegation of Nonjudicial Functions.* To conserve judicial resources and facilitate the effectiveness of these rules, the court may delegate nonjudicial, administrative duties and functions to supporting court personnel and authorize them to require compliance with approved procedures.

(f) *Definitions.* "Court" as used in these rules means, depending upon the context in which it is used:

(1) The Senior Resident Superior Court Judge, if the action is pending in the Superior Court Division, or his delegate;

(2) The Chief District Court Judge, if the action is pending in the District Court Division, or his delegate; or

(3) Any assigned judge exercising the court's jurisdiction and authority in an action.

COMMENT

One goal of these rules is to expedite disposition of claims involving $15,000 or less. *See* Rule 8(a). The 60 days in Rule 8(b)(1) will allow for discovery, trial preparation, pretrial motions disposition and calendaring. A motion to continue a hearing will be heard by a judge mindful of this goal.

Rule 9

APPLICATION OF RULES

These Rules shall apply to cases filed on or after their effective date and to pending cases submitted by agreement of the parties under Rule 1(b) or referred to arbitration by order of the court.

COMMENT

A common set of rules has been adopted for the three pilot districts. These rules may be amended, to permit experiments with variant procedures or to take into account local conditions, with the prior approval of the Supreme Court of North Carolina. The enabling legislation, 1985 N.C. Sess. Laws, ch. 698 § 23, vests rulemaking authority in the Supreme Court, and this includes amendments.

Ceremonies

For the Presentation of a Portrait

of

The Late Chief Judge and Justice

Earl Wray Vaughn

To

The North Carolina Court of Appeals

1 June 1987

Courtroom of the Court of Appeals

Court of Appeals Building

Raleigh

PRESENTATION ADDRESS

BY

THE HONORABLE DAVID M. BRITT

MAY IT PLEASE THE COURT:

I consider it a great privilege and a distinct honor to be asked to make these remarks today as the family of my longtime friend and colleague, Justice Earl W. Vaughn, presents his portrait to this Court.

My friendship with Justice Vaughn began in February of 1961 when he began serving in the North Carolina House of Representatives. We were colleagues in that body for four terms. He became a member of this Court two years after I did and we served together here for nine years. For some 15 years we were close neighbors on the same street in the City of Raleigh.

Earl Wray Vaughn was born on 17 June 1928 in the farm home of his parents, John H. and Lelia F. Vaughn, in Rockingham County, North Carolina. He was their eleventh and their last child.

His early years were typical of the average North Carolina farm boy, as he attended public school and contributed as best he could to the operation of the family farm. He attended Ruffin High School from 1941 to 1945 and drove a school bus part of that time.

In the fall of 1945 Earl entered Pfeiffer Junior College as a self-help student. During his second year at Pfeiffer he dropped out in order to enter military service. He served in the Army for two years, seeing service in Korea and being discharged as a sergeant.

Following his discharge and with benefits he had earned under the G.I. Bill, he was able to resume his higher education. He entered the University of North Carolina at Chapel Hill and was awarded a B.A. degree in 1950. He then entered the U.N.C. Law School and was awarded a J.D. degree in 1952. He passed the North Carolina bar examination in August of 1952.

Soon after his admission to the bar, Earl became general counsel for a motor carrier in the City of Greensboro. On 20 December 1952 he did the best day's work of his life when he married Eloise Freeland Maddry of Chapel Hill.

Earl and Eloise began their married life in Greensboro but Earl's desire to enter the private practice of law in his home county grew stronger as each week and month passed. After considerable soul-searching, they decided to take a bold step and in the summer of 1953 they moved to Draper where Earl opened his office as a sole practitioner. Eloise became a teacher in the Rockingham County Schools and pursued that profession for a number of years.

After maintaining his office in Draper for several years, Earl moved his main office to the adjoining, larger town of Leaksville. He served as attorney for Draper from 1955 until 1967 when the towns of Draper, Spray and Leaksville merged to form the new town of Eden. He served as Eden town attorney until 1969. During 1959 and 1960 he served as prosecuting attorney for the Leaksville Recorder's Court.

In 1964 Earl formed a partnership for the practice of law with Thomas S. Harrington, a partnership that was dissolved when Earl became a member of the judiciary. The firm enjoyed a substantial general practice which covered several Piedmont counties.

In November of 1960 Earl was elected to represent Rockingham County in the state House of Representatives. This was the beginning of an illustrious legislative career and from the outset he was regarded by his colleagues as a man of integrity and great ability. He made friends easily as is indicated by an incident that occurred during his first term.

The senator from his county had introduced a bill that was of considerable benefit to one man from Rockingham County but had statewide ramifications. The senator had very strong feelings about the bill and succeeded in getting it through the Senate. When the bill came up for consideration in the House, the senator was in the back of the House chamber watching the proceedings. Earl was recognized to explain the bill and his remarks were substantially as follows:

> Fellow members of the House, please do not ask me to explain this bill in detail. Although the bill has statewide implications, its enactment will be of no real harm to anybody but it will help a deserving citizen of my county. But more importantly to me, if you want to see me as a member of this body two years from now, please vote for the bill; otherwise, I'm dead.

It suffices to say, there was little or no further discussion, the bill passed overwhelmingly, and Earl's legislative career continued for four terms thereafter.

During the 1961 and 1963 sessions of the General Assembly, great progress was made in the furtherance of public education in North Carolina. At the 1961 session additional revenue had to be raised to pay for that progress and Earl never hesitated to cast the hard votes to raise that revenue.

In the 1963 session, legislation was enacted to extend the community college and technical institute programs in our state. Earl was very active in getting that legislation enacted and thereafter was one of the primary movers in starting the Rockingham County Community College. He served that institution as a trustee from 1963 until 1970 and took great pride in its progress.

Many difficult issues faced the 1965 General Assembly. One of these related to electric public utilities and there was a three-way fight between the private-investor companies, the Rural Electric Membership Corporations and the cities and towns retailing electricity. Vaughn was given the unwanted task of chairing the House Committee on Public Utilities. Numerous public hearings were held, intensive lobbying was exerted, and feelings ran high. With great patience and due courtesy to all concerned, Vaughn led the committee and the House in arriving at a fair conclusion.

Another controversial matter that faced the 1965 session was whether North Carolina should adopt the Uniform Commercial Code. This bill was sent to the Committee on Corporations, of which Vaughn was a vice chairman. For several months the committee listened to minute explanations of the various complicated sections of the bill. Several subcommittees were formed to study in detail the different sections and Vaughn chaired one of the subcommittees. Toward the end of the session many differences were reconciled and the code was passed with few modifications.

Also considered at the 1965 session was legislation proposed by the Courts Commission to establish a uniform system of courts below the Superior Courts. Vaughn was on the committee that handled this legislation and was very helpful in getting through the House what we now know as our district court system.

A special session of the General Assembly was called by Governor Dan K. Moore in the fall of 1965 to consider amendments to the highly controversial law enacted by the 1963 General Assembly known as the Speaker Ban Law. The many supporters of this

law, including several members and former members of the Legislature, were adamantly opposed to any change in the law. On the other side were administrators, faculties and trustees of the state supported colleges and universities who were able to show that these institutions probably would lose their accreditation unless the law was amended or repealed. Vaughn was under tremendous pressure from some of his most ardent supporters to vote against any change in the law. Nevertheless, due to his feeling that the law would result in irreparable damage to the state's institutions of higher learning, he voted for and supported the changes proposed.

In 1966 Vaughn was appointed to the North Carolina Courts Commission. The Commission had been created by the 1963 General Assembly to make recommendations to improve our courts. In the fall of 1965 a constitutional amendment had been approved authorizing the Legislature to create an intermediate Court of Appeals. The amendment provided that the structure, organization, and composition of the Court of Appeals would be determined by the Legislature. About the only limitation was that the Court would have not less than five members and would not be required to sit *en banc*.

During most of 1966 the Courts Commission spent many hours, days and weeks working on proposed legislation relating to the Court of Appeals, Several members of the commission visited other states to observe their intermediate appellate courts, and knowledgeable people from other states were brought to Raleigh to tell about their courts. Vaughn was in the thick of the work of the commission and contributed considerably to its final report and recommendations to the General Assembly.

When the 1967 session of the Legislature convened, the Speaker of the House prevailed on Vaughn to chair the committee on courts. The Speaker knew that this committee would handle the proposed Court of Appeals legislation. While Vaughn preferred another assignment, he acceded to the Speaker's request.

Vaughn's hand in all legislative matters was greatly strengthened during the early days of the session when he received commitments from every Democrat member of the House to support him for speaker of the 1969 house. Soon thereafter he was designated to serve as Speaker *pro tem* for the 1967 session and he was unanimously selected by his Democrat colleagues to be majority leader during the 1967 session.

With the credentials just enumerated, Vaughn had very little trouble in steering the proposed Court of Appeals legislation through the House. His committee held several public hearings in order to inform interested people throughout the state about the proposals. It also held numerous meetings for all lawyers serving in the House so that they might be fully informed about the proposals. In due time the proposed legislation received the overwhelming approval of the Committee on Courts and then passed the House with few if any dissenting votes. The Senate also gave the legislation its near-unanimous approval.

The law creating the Court of Appeals provided that the court would originally have six members, to be appointed by the Governor in 1967. It also provided that as of 1 July 1969 the membership of the Court would be increased to nine and authorized the Governor serving at that time to appoint the additional three members. On 5 July 1967, the day before the 1967 session of the Legislature adjourned, David M. Britt resigned as Speaker of the House in order to accept an appointment by Governor Dan Moore as one of the six original members of the newly created Court of Appeals.

Vaughn was then chosen to complete Britt's term as Speaker. During the interim between the 1967 and 1969 sessions there was no special session of the Legislature. However, there were numerous duties the speaker had to discharge and Vaughn did that in his usual efficient fashion.

In 1968 the voters of Rockingham County displayed the same wisdom they had shown in 1960, 1962, 1964 and 1966 by overwhelmingly electing Earl W. Vaughn to the state House of Representatives. When the Democrats caucused prior to the convening of the 1969 session, they unanimously chose Vaughn to be their nominee for Speaker. On the opening day of the session his election as Speaker was a mere formality.

Vaughn's service as speaker during the 1969 session was sure and steady. Probably his greatest headache came about when it was determined that new sources of revenue would have to be found if the level of services then provided by the state was to continue. The Governor and legislative leaders wrestled with the problem for several weeks before they decided "where the axe would fall." After the decision was made, Speaker Vaughn gave it his full support and in due time the assembly approved the decision.

As the 1969 session drew to a close, history repeated itself when Vaughn resigned as Speaker to accept appointment by Governor Robert W. Scott to the Court of Appeals. The other two judges appointed at the same time were R. A. Hedrick of Iredell County and W. E. Graham of Mecklenburg County. The three new members were administered their oaths on 23 July 1969.

Taking the oath as judge terminated two phases of Vaughn's illustrious career—that of practicing attorney and that of legislator. While he rendered valuable service to the state as a legislator, he was ever mindful of his love for and his obligations to the people of his native Rockingham County. From that day in the summer of 1953 when he opened his modest law office in Draper, until the day he assumed his duties as a judge of the Court of Appeals, he served the people of his county. He was active in the Methodist Church. He served as president of the Draper Rotary Club, as a member of the Tri-City Rescue Squad, as president of his county Bar Association, and as secretary-treasurer of his county Democratic Executive Committee. He contributed much to the merging of the three small adjoining towns of Leaksville, Spray and Draper into the new municipality of Eden. This politically sensitive undertaking was consummated in 1967.

Vaughn approached his service with the Court of Appeals with the same enthusiasm and determination that marked his previous achievements. With his dedication to duty, his quick mind and his delightful wit, he immediately became a favorite of his colleagues. The late Chief Judge Raymond Mallard thoroughly enjoyed "trading barbs" with him and Judge Walter Brock soon learned that in Vaughn he had met his match as a practical joker.

Earl served on this Court for 15½ years. Joining the Court just two years after its creation, he played a vital part in getting the Court firmly established and accepted as an important part of the state's judicial system. About the time he came on the Court, it began considering cases involving substantial changes in many areas of the law made by the General Assembly while Earl served in that body. These areas included public utilities, the Uniform Commercial Code, Rules of Civil Procedure and jurisdiction of the courts. Since he had been an active participant in the enactment of these changes, he was able to provide valuable input in deciding cases involving them.

For many years there has been a tendency on the part of many people to categorize judges as liberal, conservative or something in between. Vaughn did not fit into any mold. He approached each case determined to apply the law as he saw it to

the facts of the case under consideration. He labored long and hard in drafting the opinions in cases assigned to him to write. With him every opinion that he wrote was a "carefully considered" opinion.

Vaughn took his work on the Court very seriously. He was one of the first members of the Court to get to his office in the mornings and one of the last to leave in the evenings. He remarked to me on several occasions that he could not expect those working under him—particularly his research assistants—to work hard unless he set the example.

On 3 January 1983 Vaughn was sworn in as Chief Judge of the Court of Appeals, having been appointed to that position by Chief Justice Joseph Branch. He served as Chief Judge for two years. During that time he devoted his best efforts to devising means of improving operating procedures of the Court.

Following the retirement of Justice J. William Copeland from the state Supreme Court in December of 1984, Governor Hunt appointed Judge Vaughn to fill the vacancy on that Court. He was administered the oath as Associate Justice on 2 January 1985. Some three months later, Vaughn was advised that he had a terminal illness and on 31 July 1985 he retired from the Court. Although he waged a valiant fight in his battle against the illness, he died in Rex Hospital in the City of Raleigh on 1 April 1986. His funeral was held in Edenton Street United Methodist Church, of which he was a faithful member, and he was buried in the Orange United Methodist Church Cemetery in Chapel Hill.

Although Judge Vaughn became Justice Vaughn prior to his death, his very brief tenure on the Supreme Court denied the state the contribution he was capable of making to the work of that court. His greatest contribution to the judiciary of our state was related to the Court of Appeals. Thus, it is entirely fitting that his portrait be presented to this Court and I commend his family for that decision. As a member of the Courts Commission, he assisted in the planning for this Court. As a member of the General Assembly, he played a major part in the creation of this Court. And as one of its judges for 15 of its first 17 years, he made a lasting contribution to the establishment of the Court and the administration of justice in North Carolina.

If Horatio Alger were living today, he could find in Earl Vaughn inspiration for another book. If Harry Golden were living today, he could find in Earl Vaughn another example for his *Only In America*. From the tobacco patches and cornfields of Rock-

ingham County Earl worked his way to the highest position in our state's legislative branch and to one of the seven highest places in our state's judicial branch. He truly earned and deserves the recognition that is being extended to his memory today.

In addition to his lovely wife, Eloise, Judge Vaughn is survived by his daughter, Mary Rose, and his three sons, Mark Foster, John Maddry and Stuart Earl. We are privileged to have all of them present today, and it is on their behalf that I present Judge Vaughn's portrait to the Court at this time.

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

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ABATEMENT

§ 8. Identity of Actions

A second action brought by plaintiff against defendant was properly abated where both actions were based on the same circumstances and subject matter although plaintiff's theory in the first action was libel and in the second action was breach of contract. *Ward v. Pitt Co. Memorial Hospital*, 521.

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

A county's petition for review of a final agency ruling seven months after the ruling was filed was not barred by the statutory thirty-day period for seeking review where the county was never properly served with a copy of the ruling. *In re Appeal of Brunswick Co.*, 391.

Brunswick County was an aggrieved person where the board of the department of social services resolved to reinstate a dismissed employee and to pay her back wages and attorney fees. *Ibid.*

APPEAL AND ERROR

§ 3. Review of Constitutional Questions

The Court of Appeals would not rule upon the issue of a statute's constitutionality where defendant did not seek such relief in its motion for judgment on the pleadings and the trial court did not reach or rule upon the question. *Ratcliff v. Co. of Buncombe*, 153.

§ 6.2. Finality as Bearing on Appealability; Premature Appeals

An order granting judgment on the pleadings in favor of plaintiff, ordering defendant to remove certain signs, and providing that the issue of whether compensation was due defendant was not ruled on was not immediately appealable. *County of Dare v. R. O. Givens Signs, Inc.*, 526.

Orders providing for temporary child custody and requiring plaintiff to produce business records were not immediately appealable. *Dunlap v. Dunlap*, 675.

§ 6.6. Appeals Based on Motions to Dismiss

An interlocutory order dismissing a punitive damages claim was immediately appealable. *Jenkins v. Wheeler*, 512.

§ 16.1. Limitations on Powers of Trial Court After Appeal

The trial court did not err in allowing defendant's addition of an assignment of error after the settlement conference. *Lawing v. Lawing*, 159.

§ 24. Necessity for Objections, Exceptions, and Assignments of Error

An appellee's assignments of error were not properly before the Court of Appeals where appellee attempted to raise as cross-assignments of error questions he was required to file as a cross-appeal. *Cherry, Bekaert & Holland v. Worsham*, 116.

§ 45.1. Effect of Failure to Discuss Exceptions and Assignments of Error in Brief

An assignment of error contending that there was insufficient evidence to support findings of fact but which only asked for a de novo review without arguing exceptions violated App. Rule 28(b)(5). *Griffin v. Griffin*, 665.

APPEAL AND ERROR — Continued

§ 68.3. Law of the Case; Decisions Relating to Pleading Motions

The trial court was bound by an earlier decision of the Court of Appeals that plaintiff's complaint was sufficient to withstand a motion to dismiss for failure to state a claim for relief. *Jenkins v. Wheeler*, 512.

ASSAULT AND BATTERY

§ 15.2. Instructions; Assault With a Deadly Weapon With Intent to Kill or Inflicting Serious Bodily Injury

The trial court properly instructed that a utility knife was a deadly weapon as a matter of law. *S. v. Sanders*, 438.

ATTORNEYS AT LAW

§ 7.1. Validity and Construction of Fee Agreements

A contingent fee contract for the payment of legal fees as a percentage of a child support recovery was void as against public policy. *Davis v. Taylor*, 42.

A contingent fee contract covering services rendered in an equitable distribution action is not void as against public policy and is fully enforceable as long as it does not provide compensation to the attorney for securing the divorce. *In re Foreclosure of Cooper*, 27.

§ 7.5. Allowance of Fees as Part of Costs

In an action to recover on a fire insurance policy when there had been a foreclosure sale, the trial court properly awarded attorney fees to the trustee under a deed of trust on the subject property where there was a complete absence of a justiciable issue in defendant's counterclaim against the trustee for failure to enforce the foreclosure sale. *Sprouse v. North River Ins. Co.*, 311.

AUTOMOBILES AND OTHER VEHICLES

§ 45.1. Relevancy and Competency of Evidence of Criminal Conviction Arising from Same Accident as Civil Action

Error in permitting defendant to elicit from plaintiff testimony on cross-examination that he had been convicted of speeding was not prejudicial. *Alexander v. Robertson*, 502.

§ 79. Contributory Negligence; Intersection Accidents

The evidence was sufficient to be submitted to the jury on the issue of contributory negligence in striking defendant's automobile as it attempted to make a left turn in front of plaintiff at an intersection. *Alexander v. Robertson*, 502.

§ 113.1. Assault and Homicide; Evidence Held Sufficient

The evidence was sufficient to support defendant's conviction of voluntary manslaughter arising out of an automobile accident. *S. v. Hillard*, 104.

§ 126.3. Blood and Breathalyzer Tests; Manner and Time of Administration of Test

There was no merit to defendant's contention that his 30 minutes to contact an attorney began to run when the formal request to submit to the breathalyzer test was made rather than when he was advised of his rights. *In re Vallender*, 291.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 127.1. Driving While Impaired; Evidence Held Sufficient

The evidence was sufficient to be submitted to the jury in a prosecution for driving while impaired. *S. v. Mack*, 578.

§ 129.3. Instructions as to Blood and Breathalyzer Tests

The trial court was not required to instruct the jury that a breathalyzer result should not be considered by them unless they found first that the test was performed in accord with regulations promulgated by the Commission of Health Services. *S. v. DeVane*, 524.

§ 130. Driving While Impaired; Verdict and Punishment

The trial court erred by finding the especially dangerous and especially reckless aggravating factors for impaired driving where the only evidence beyond that necessary to prove impaired driving was that defendant fell asleep and ran off the road. *S. v. Mack*, 578.

BILLS AND NOTES

§ 4. Consideration

The assignment of potential commissions was sufficient consideration to support a note. *Smith v. Jones*, 129.

§ 20. Presumptions and Burden of Proof; Sufficiency of Evidence

It was not reversible error to submit to the jury an issue as to the intention of the parties on a note. *Smith v. Jones*, 129.

§ 22. Criminal Prosecutions

The N. C. court had jurisdiction to try defendant on a worthless check charge where the check was issued in N. C. and the person who drew the check added the date and one payee's name in Florida. *S. v. First Resort Properties*, 499.

BURGLARY AND UNLAWFUL BREAKINGS

§ 1. Definition

Where a separation agreement expressly prohibited the wife from going upon the husband's premises without his consent, the wife could properly be convicted of breaking or entering of the husband's dwelling even though she was still married to the husband. *S. v. Lindley*, 490.

§ 8. Sentence and Punishment

Defendants could properly be punished upon convictions for breaking or entering with the felonious intent to commit larceny and for larceny pursuant to the breaking or entering without violation of double jeopardy. *S. v. Hall*, 650.

Punishment for breaking or entering with intent to commit larceny and larceny following a break-in does not violate double jeopardy provisions. *S. v. Rowe*, 469.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 4. Cancellation and Rescission for Mutual Mistake

The trial court erred in rescinding a completed contract for the sale of land on the basis of mutual mistake of fact where the mistake pertained to a future contingency. *Opsahl v. Pinehurst Inc.*, 56.

CANCELLATION AND RESCISSION OF INSTRUMENTS — Continued

§ 12. Damages, Verdict, and Judgment

Plaintiffs would not be entitled to damages for voluntary moving and rental expenses made after they were aware of defendant's breach even if the trial court should find a material breach of contract justifying rescission. *Opsahl v. Pinehurst Inc.*, 56.

CONSPIRACY

§ 5.1. Admissibility of Acts and Statements of Coconspirators

Evidence that defendant brought two people to a restaurant pursuant to a previously agreed upon plan to sell cocaine was sufficient to establish a conspiracy involving defendant so that extrajudicial statements by one coconspirator were admissible in a joint trial of the three conspirators. *S. v. Collins*, 346.

The trial court did not err in admitting a statement made by a coconspirator since the statement did not refer to defendant. *S. v. Lipford*, 464.

The trial court did not err in admitting testimony by a coconspirator that he had been involved in drug transactions with defendant in which she had left to get drugs while he waited with a purchaser, that she had always returned with the drugs, and that he thus could not understand what had happened. *Ibid.*

§ 6. Sufficiency of Evidence

Evidence was sufficient to be submitted to the jury in a prosecution for conspiracy to traffic in cocaine even though no illegal drugs changed hands. *S. v. Lipford*, 464.

§ 8. Verdict and Judgment

There was no merit to defendant's contention that a sentence of seven years and a fine of $50,000 for conspiracy to traffic in cocaine were unduly harsh because no drugs were actually delivered. *S. v. Collins*, 346.

CONSTITUTIONAL LAW

§ 4.2. Standing; Waiver and Estoppel

The trial court properly dismissed plaintiff's complaint challenging the constitutionality of a statute prohibiting the chairman of the Buncombe County Commissioners from simultaneously holding the office of county manager. *Ratcliff v. Co. of Buncombe*, 153.

§ 23.1. Due Process; Taking of Property

The adjustment of Elizabeth City firefighters' accumulated vacation leave did not amount to an unconstitutional taking of property. *Pritchard v. Elizabeth City*, 543.

§ 25.1. Contracts; Protection Against Impairment

An Elizabeth City ordinance limiting the accumulation of vacation leave by firefighters to thirty twelve-hour days per year did not unconstitutionally impair the obligations of the firefighters' contracts. *Pritchard v. Elizabeth City*, 543.

§ 30. Discovery

The trial court did not err in denying defendant's motion to dismiss for failure of the State to disclose inconsistent statements by the victim of an armed robbery and assault. *S. v. Alston*, 459.

CONSTITUTIONAL LAW — Continued

§ 67. Identity of Informants

The court erred in denying defendant's motion to compel the disclosure of the identity of a confidential informant who actually participated in a drug sale and accepted a controlled substance from defendant when the sale was consummated. *S. v. Johnson*, 454.

§ 74. Self-Incrimination

The trial court erred in requiring a defendant charged with breaking and entering and larceny offenses to answer a question on cross-examination concerning his failure to report income to the IRS when he asserted his constitutional right to remain silent on the ground that the answer might tend to incriminate him. *S. v. Hamrick*, 508.

The trial court did not err in admitting a statement made by a coconspirator since the statement did not refer to defendant. *S. v. Lipford*, 464.

CONSUMER CREDIT

§ 1. Generally

The trial court did not err in concluding that defendant violated the Truth-in-Lending Act and Federal Reserve Regulation Z. *Joyce v. Cloverbrook Homes, Inc.*, 270.

The trial court erred in granting plaintiffs the right to rescind their purchase of a mobile home for violation of the Truth-in-Lending Act and Regulation Z. *Ibid.*

CONTRACTS

§ 2.4. Mutuality of Obligation

Where a vendor could not have delivered a warranty deed conveying fee simple marketable title because his wife refused to sign the deed, the vendor could not have enforced the contract against the purchasers; there was thus no mutuality of obligation, and the purchasers could not enforce the contract against the vendor. *Hilliard v. Thompson*, 404.

§ 7. Contracts Restricting Business Competition

An agreement not to compete in the hardware business was enforceable. *Keith v. Day*, 185.

A covenant not to compete with a business is assignable. *Ibid.*

§ 29.2. Calculation of Compensatory Damages

Plaintiff could properly recover lost profits as a result of a breach of a covenant not to compete. *Keith v. Day*, 185.

CONVICTS AND PRISONERS

§ 2. Discipline and Management

A prisoner's Eighth Amendment rights were not violated on the ground he was given meals while incarcerated which did not comport with his "medically prescribed diet" where plaintiff had been placed on a diet at his own request for two weeks for the purpose of losing weight. *Shaw v. Jones*, 486.

Plaintiff had no standing to raise a claim that his constitutional right of access to the courts was denied while he was confined for two days in the Cumberland County jail. *Ibid.*

CORPORATIONS

§ 3. Election, Compensation, and Tenure of Officers and Directors

The trial court did not err in a non-jury proceeding arising from a disputed corporate directors election by finding and concluding that petitioner was entitled to vote his shares cumulatively and that the two nominees for which he voted were elected. *Stancil v. Bruce Stancil Refrigeration, Inc.*, 567.

§ 3.1. Dispute Over Election of Officers

Respondents in a disputed election of corporate directors waived their right to challenge personal jurisdiction based on insufficient service of process. *Stancil v. Bruce Stancil Refrigeration, Inc.*, 567.

Respondents could not assert for the first time on appeal that the trial court lacked subject matter jurisdiction because one of the directors alleged to have been elected in a disputed election was not named in the title of the proceeding. *Ibid.*

The trial judge was within his powers in holding that two directors had been elected in a disputed corporate directors election and ordering that another election be held for the third director. *Ibid.*

COSTS

§ 1.2. Recovery of Costs in Particular Actions

The trial court did not err in ordering plaintiff to pay defendants' costs in defending a frivolous civil rights action. *Shaw v. Jones*, 486.

§ 2. Prosecution Bond

The trial court had authority to dismiss an action on its own initiative when plaintiffs failed to post a prosecution bond within 30 days. *Narron v. Union Camp Corp.*, 263.

COURTS

§ 7.4. Jurisdiction of Inferior Court After Appeal

The trial court was without jurisdiction to consider intervenors' motion requesting attorney's fees where the motion was filed approximately four months after appeal of a child custody order, but the trial court had jurisdiction to consider a rule 60 motion for an award of costs four months after the appeal. *In re Baby Boy Scearce*, 662.

§ 9.4. Jurisdiction to Review Rulings of Another Superior Court Judge; Motions for Dismissal

The trial court erred in granting a Rule 12(b)(6) motion after such a motion had previously been denied by another superior court judge. *Jenkins v. Wheeler*, 512.

CRIMINAL LAW

§ 9. Principals in First or Second Degree; Aiders and Abettors

Defendant could not be convicted as both a principal and an accessory before the fact and after the fact to various crimes. *S. v. Rowe*, 469.

§ 9.1. Principals in the First and Second Degree; Aiders and Abettors; Presence at Scene

The evidence was sufficient to support defendant's conviction of murder, robbery, breaking and entering and larceny although it showed that defendant was not

physically present when the offenses were committed where defendant helped plan the crimes and served as a lookout for the other felons. *S. v. Rowe*, 469.

§ 15. Venue

The fact that a defendant was not in Washington County when a conspiracy was formed and the larceny committed did not deprive Washington County of jurisdiction. *S. v. Cartwright*, 144.

§ 23.3. Guilty Plea; Requirement that Plea be Voluntary

Defendant's guilty plea was not voluntary but was coerced by the trial judge in violation of defendant's constitutional rights to a fair trial and effective assistance of counsel. *S. v. Pait*, 286.

§ 34.1. Guilt of Other Offenses; Inadmissible

Testimony that defendant had been involved in similar transactions involving the larceny of tractors was inadmissible to show a common plan or scheme. *S. v. Hamrick*, 508.

§ 34.5. Guilt of Other Offenses; Admissible to Show Evidence of Other Offenses

The trial court did not err in a prosecution for burglary, larceny and felonious possession of stolen property by allowing into evidence testimony regarding another burglary and safecracking incident. *S. v. Brown*, 622.

§ 39. Evidence in Rebuttal of Facts Brought Out by Adverse Party

Testimony by defendant's roommate in a manslaughter prosecution that defendant consumed Valium and alcohol in combination almost daily was admissible. *S. v. Hillard*, 104.

§ 51.1. Qualification of Experts; Showing Required

The State presented sufficient evidence to support the trial court's conclusion that a witness tendered as an expert in forensic chemistry was also qualified to express an opinion in the field of forensic toxicology. *S. v. Hillard*, 104.

§ 61.2. Competency and Sufficiency of Evidence; Footprints or Shoe Prints

Police officers were qualified to compare shoes and shoe prints and could properly conclude that shoes which defendants were wearing and shoe prints leading from the scene of the crime matched. *S. v. Hall*, 650.

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification In Cases Involving Photographic Identifications

A photographic lineup was not impermissibly suggestive, and in-court identifications were of independent origin and not tainted by any pretrial identification procedures. *S. v. Dorsett*, 515.

§ 73.2. Statements Not Within Hearsay Rule

Testimony about actions of defendant's wife in turning over a ring and bracelet to an officer was not excludable as hearsay even if the wife's actions constituted nonverbal statements, since the testimony was not offered to prove the matter asserted by the wife's nonverbal conduct. *S. v. Parker*, 443.

§ 75.1. Admissibility of Confessions; Effect of Fact that Defendant In Custody or Under Arrest

The trial court properly denied defendant's motion to suppress incriminating statements made to SBI agents in an airport office. *S. v. Thomas*, 200.

CRIMINAL LAW — Continued

§ 75.9. Volunteered and Spontaneous Statements

Defendant's statement that he was at a restaurant where a cocaine sale was supposed to take place was not the product of improper interrogation. *S. v. Collins*, 346.

The trial court was not required to exclude testimony by an arresting officer about a statement made by defendant while in custody before he was informed of his rights because the statement was the result of routine booking questions. *S. v. Mack*, 578.

§ 75.14. Defendant's Mental Capacity to Confess or Waive Rights

The evidence supported the trial court's determination that defendant's inculpatory statement made to police officers at the hospital after an automobile accident was made freely, voluntarily and understandingly. *S. v. Hillard*, 104.

§ 91. Nature and Time of Trial

By entering into a stipulation which covered a superseding indictment, defendant waived any right he may have had pursuant to the Interstate Agreement on Detainers to be tried prior to the end of the agreed upon time period. *S. v. Dorsett*, 515.

§ 99.3. Conduct of the Court; Remarks and Other Conduct during Trial, Generally

The trial court in a larceny case did not express an opinion on the veracity of the victim when the court indicated at a certain point in the victim's testimony that her identification of the stolen items was legally sufficient to support their admission into evidence. *S. v. Froneberger*, 398.

§ 99.6. Conduct of the Court; Questions, Remarks, and Other Conduct In Connection with Examination of Witnesses

The trial judge did not express an opinion during testimony by a breathalyzer operator by questioning the witness and conversing with defense counsel as to the identity of the inventor of the breathalyzer machine. *S. v. DeVane*, 524.

§ 119. Requests for Instructions

The trial court erred in failing to give defendant's requested instructions concerning the time of impression of fingerprint evidence. *S. v. Alston*, 459.

§ 122. Additional Instructions After Initial Retirement of Jury

Where the jury had agreed unanimously on a lesser offense and was simply confused as to whether their rejection of the greater offense had to be unanimous, the trial court's instruction on their duty was proper. *S. v. Sanders*, 438.

§ 138.6. Severity of Sentence; Matters and Evidence Considered

There was no merit to defendant's contention that the court did not list separately for each offense the aggravating and mitigating factors found since the error which resulted in only one aggravating and mitigating factors form sheet being signed and put in the file was a ministerial oversight rather than judicial error. *S. v. Hall*, 650.

§ 138.7. Severity of Sentence; Particular Matters and Evidence

The court erred in finding as an aggravating factor that defendant had been convicted of armed robbery in a case which was on appeal to the Court of Appeals at the time of the sentencing hearing. *S. v. Dorsett*, 515.

CRIMINAL LAW – Continued

§ 138.27. Aggravating Factors; Position of Trust or Confidence

The trial court erred in finding as an aggravating factor that defendant took advantage of a position of trust or confidence in a prosecution for engaging in a sexual act with a person over whom defendant's employer had custody. *S. v. Raines*, 299.

§ 138.37. Mitigating Factors; Cooperative Conduct

The trial court erred when sentencing defendant to more than the presumptive term by not finding in mitigation that defendant testified truthfully for the State in another felony prosecution where there was uncontradicted manifestly credible evidence to that effect. *S. v. Cartwright*, 144.

§ 138.41. Mitigating Factors; Good Character or Reputation

There was no merit to defendant's contention that the trial court erred in failing to find in mitigation that he had been honorably discharged from the armed services. *S. v. Hall*, 650.

§ 142.3. Particular Conditions of Probation or Suspension

The court did not err in requiring as a special condition of probation for felonious larceny that defendant repay loans he obtained from pawnbrokers using the stolen items as collateral. *S. v. Froneberger*, 398.

DAMAGES

§ 11. Punitive Damages Generally

G.S. 28A-18-2 allows for a recovery of punitive damages upon a showing of gross negligence. *Cole v. Duke Power Co.*, 213.

§ 14. Competency and Relevancy of Evidence; Punitive Damages

The trial court properly entered summary judgment for defendant on plaintiffs' claim for punitive damages based on evidence that defendant allowed plaintiff to remain in a hospital ward with a mental patient who exhibited violent behavior and struck plaintiff with a chair. *Burns v. Forsyth County Hospital Authority*, 556.

§ 16.3. Sufficiency of Evidence; Loss of Earnings or Profits

An office products dealer was not precluded from recovering damages from its distributor simply because the dealer did not have a past record of profits. *Olivetti Corp. v. Ames Business Systems, Inc.*, 1.

The trial court did not use an improper measure to determine lost profits in an unfair trade practice action. *Ibid.*

The trial court did not err in an action between an office products distributor and dealer by not awarding lost profits or expenses for certain periods where the dealer did not meet its burden of presenting sufficient evidence to permit determination of damages with reasonable certainty. *Ibid.*

§ 17.7. Punitive Damages

The trial court did not err in an action between an office products distributor and dealer by refusing to assess punitive damages in an amount greater than and in lieu of treble damages. *Olivetti Corp. v. Ames Business Systems, Inc.*, 1.

DEDICATION

§ 4. Withdrawal and Revocation of Dedication

Any dedication or easement of an area of park property on a recorded plat could not be withdrawn where there was evidence that the area had been used for recreational purposes within fifteen years. *Stines v. Willyng, Inc.*, 98.

DEEDS

§ 11.2. Rules of Construction; Effect of Other Instruments

The trial court on remand must determine whether the parties intended a contract for the sale of land to merge into a deed so as to prohibit rescission of the contract. *Opsahl v. Pinehurst Inc.*, 56.

DIVORCE AND ALIMONY

§ 2.2. Pleadings; Answer

The trial court properly refused to grant defendant a directed verdict on his counterclaim for divorce from bed and board because plaintiff failed to reply to the counterclaim. *Skamarak v. Skamarak*, 125.

§ 4.2. Spendthrifts

The trial court in an alimony action erred in refusing to submit an issue as to whether plaintiff was a spendthrift. *Skamarak v. Skamarak*, 125.

§ 16.6. Sufficiency of Evidence

Evidence was insufficient to support the trial court's determination that defendant was a dependent spouse. *Patterson v. Patterson*, 255.

§ 17.3. Amount of Alimony

The trial court failed to make sufficient findings to support its award to plaintiff of $700 per month in alimony in an action for divorce from bed and board. *Skamarak v. Skamarak*, 125.

§ 18.16. Attorney's Fees and Costs

The trial court erred in awarding plaintiff in an alimony action attorney's fees without making any findings of fact concerning attorney's fees. *Skamarak v. Skamarak*, 125.

An award of attorney fees to defendant was improper where there were insufficient findings to support a determination that defendant was a dependent spouse. *Patterson v. Patterson*, 255.

Attorney fees are not recoverable in an action for equitable distribution and fees awarded must be attributable to work by the attorney on divorce, alimony and child support actions. *Ibid.*

§ 23. Jurisdiction and Venue Generally

The court of original venue may in its discretion transfer the venue of an ongoing action for child custody or support to a more appropriate county. *Broyhill v. Broyhill*, 147.

§ 24.2. Child Support; Effect of Separation Agreements

When a motion is made to modify the child support provisions of a separation agreement which has not previously been incorporated into an order or judgment of the court, the parties' only burden is to show the amount of support necessary to meet the reasonable needs of the child at the time of the hearing. *Boyd v. Boyd*, 71.

DIVORCE AND ALIMONY — Continued

The trial court did not erroneously order defendant to specifically perform those portions of a separation agreement relating to payment of medical and dental expenses and maintenance of medical insurance for each child. *Ibid.*

§ 24.9. Child Support; Findings

The trial court's findings were inadequate to support its conclusions as to the amount reasonably required of defendant for the support of his children or his ability to pay that amount. *Boyd v. Boyd*, 71.

The trial court erred in an action for increased child support by finding that defendant's obligations should be retroactive without making findings supporting the amount of the retroactive award or the date to which the obligation was made retroactive. *Ibid.*

§ 25.3. Custody; Consideration of Child's Preference

The trial court did not abuse its discretion in a child custody action by granting primary custody to the father contrary to the expressed wishes of the children. *Griffin v. Griffin*, 665.

The trial court did not err by failing to make a positive determination of when and how the children could make a choice as to their custodial parent. *Ibid.*

§ 27. Child Custody and Support; Attorney's Fees and Costs

Defendant was not excused from any obligation to pay plaintiff's counsel fees in an action for increased child support by reason of his prior voluntary payment of an amount higher than that called for in the separation agreement. *Boyd v. Boyd*, 71.

An award of attorney fees to a plaintiff in an action for increased child support was vacated where the court's findings were insufficient with respect to the amount of the child support and where the Court of Appeals could not say that plaintiff was unable to meet defendant on even terms. *Ibid.*

A contingent fee contract for the payment of legal fees as a percentage of a child support recovery was void as against public policy. *Davis v. Taylor*, 42.

The portion of an attorney fee contract in a paternity and child support case which was not contingent was not severable or enforceable. *Ibid.*

The trial court's failure to make specific findings regarding attorney fees and any miscalculation in the court's findings in an action for paternity and child support were reviewable on appeal despite defendant's failure to request specific or different findings. *Ibid.*

§ 30. Equitable Distribution

Defendant in an equitable distribution action lost the benefit of his objection where evidence of similar import was admitted elsewhere and where he failed to show how the testimony affected the court's judgment. *Lawing v. Lawing*, 159.

Plaintiff's affidavit in an equitable distribution action fully supported the trial court's finding that a ring was worth $5,000 where plaintiff valued the ring at $5,000 and defendant valued it at $750; the court was not required to state its reasons for selecting the higher of the two values. *Ibid.*

The trial court's finding that a particular piece of property was marital property was supported by the evidence. *Ibid.*

The trial court in an equitable distribution action erred in valuing stock as of the date of trial instead of valuing it as of the date of separation. *Ibid.*

The trial court was not required to consider the tax consequences of its order of equitable distribution. *Ibid.*

DIVORCE AND ALIMONY — Continued

Increases in value to separate property remain separate property only to the extent that the increases have been passive. *Ibid.*

The trial court erred in an equitable distribution action by ruling that the appreciation in value of inherited shares in a family business was separate property. *Ibid.*

There was no merit to plaintiff's contention in an equitable distribution action that defendant failed to produce sufficient clear, cogent and convincing evidence that a certificate of deposit was separate property. *Ibid.*

Periodic payments of cash over 18.3 years pursuant to a distributive award were not alimony. *Ibid.*

G.S. 50-20(b)(3) authorizes the court to make distributive awards for periods of not more than six years after the date on which the marriage ceases absent a showing of legal or business impediments. *Ibid.*

The trial court's finding that an equal division of marital property would not be equitable was justified by its finding that defendant had sole custody of the minor child of the marriage. *Patterson v. Patterson*, 255.

There was no merit to plaintiff's contention that the valuation of marital property given by the court-appointed appraiser was erroneous. *Ibid.*

The trial court's order making an equitable distribution of marital funds existing at the separation was vacated where the court made no findings as to joint checking and savings accounts. *Ibid.*

The trial court erred in an equitable distribution action by ordering that further proceedings could be held to accomplish an equitable distribution where a separation agreement specifically provided for the distribution of some property and released the rights of each party in any property of the other. *Rice v. Rice*, 247.

EASEMENTS

§ 4.1. Adequacy of Description

A description on a recorded plat designating areas north and west of platted lots as park property was patently ambiguous and insufficient to create a valid dedication or easement. *Stines v. Willyng, Inc.*, 98.

ELECTION OF REMEDIES

§ 1.1. When an Election is Not Required

Plaintiff was not entitled to recover both punitive damages and treble damages for the same conduct, but she could elect her remedy after the jury's verdict. *Mapp v. Toyota World, Inc.*, 421.

ELECTIONS

§ 15. Regulation of Campaign Contributions

The proper venue of a prosecution for exceeding the statutory limit on individual contributions to a candidate is the county in which the individual contributor resides. *S. v. Bolt*, 133.

ELECTRICITY

§ 4. Care Required of Electric Companies in General

There was no merit to defendant's contention in a wrongful death action that decedent child was a trespasser on an electrical cabinet in a residential area. *Cole v. Duke Power Co.*, 213.

§ 5. Position or Condition of Wires in General

Evidence in a wrongful death action was sufficient for the jury to find that defendant was grossly negligent in maintaining a cabinet with extremely high voltage wires in a residential area. *Cole v. Duke Power Co.*, 213.

§ 9. Intervening Negligence

There was no merit to defendant's contention in an action arising from the electrocution of a child that it was entitled to a directed verdict because any negligence on its part was insulated by the conduct of a third person who removed padlocks from defendant's cabinet containing high voltage wires. *Cole v. Duke Power Co.*, 213.

EMBEZZLEMENT

§ 1.1. Classes of Persons Subject to Embezzlement Statute

A partner cannot be prosecuted for embezzlement. *S. v. Brown*, 281.

§ 4. Indictment for Embezzlement

Indictments charging defendant with embezzlement from a partnership were not patently defective and the trial court erred in dismissing them. *S. v. Brown*, 281.

The unsworn representations of defense counsel at a hearing on defendant's motion to dismiss indictments charging embezzlement did not put the State to the burden of proving that defendant was not a partner in the victimized partnership. *Ibid.*

EVIDENCE

§ 32.6. Parol Evidence; Matters Relating to Validity of Instrument; Fraud; Mistake

Parol evidence regarding provisions for completion of roads and utilities was admissible where no provision of the written contract for the sale of land addressed the time when the roads and utilities were to be completed. *Opsahl v. Pinehurst Inc.*, 56.

§ 34.5. Declarations As to State of Mind

There was no prejudice in a child custody action from the trial court's exclusion of testimony dealing with statements the children had made concerning intimidation by their father and their desire to live with their mother. *Griffin v. Griffin*, 665.

FRAUD

§ 12. Sufficiency of Evidence

The trial court did not err in an action for fraud and unfair trade practices by finding that an office products distributor had made material misrepresentations and that an office products dealer's reliance on such misrepresentations was reasonable. *Olivetti Corp. v. Ames Business Systems, Inc.*, 1.

FRAUD — Continued

The individual defendant's forecast of evidence was sufficient to establish an issue of fact as to whether his signature was obtained on a personal guarantee of a corporation's debt by fraud. *Northwestern Bank v. Roseman*, 228.

The female defendant's forecast of evidence was sufficient to establish an issue of fact as to fraud by defendant bank's agent in obtaining her forged signature on a personal guaranty of a corporation's debt. *Ibid.*

§ 13. Instructions and Damages

The trial court did not err in an action between an office products distributor and dealer by refusing to award to the distributor the full amount allegedly owed it by the dealer on accounts receivable where the court had concluded that the equipment was purchased as a result of the distributor's fraud and unfair and deceptive acts. *Olivetti Corp. v. Ames Business Systems, Inc.*, 1.

GUARANTY

§ 2. Actions to Enforce

The trial court erred in denying plaintiff's motion for summary judgment in an action to recover on a guaranty where the unambiguous language showed it was supported by consideration. *Georgia-Pacific Corp. v. Bondurant*, 362.

HOMICIDE

§ 28.4. Instructions; Duty to Retreat

The trial court erred in refusing to instruct the jury on the absence of a duty to retreat in one's own home where defendant was temporarily living in an apartment leased by the victim's girlfriend who had given defendant permission to stay there for "a week or so." *S. v. Stevenson*, 409.

HOSPITALS

§ 2.1. Control and Regulation

Respondent exceeded its authority in ruling on competing applications for a certificate of need for a new hospital by permitting the Wake County Hospital to determine how many of up to 20 beds at its existing medical center would be transferred to the new facility; however, the error did not prejudice petitioner's application and could be corrected on remand. *In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 628.

The Department of Human Resources did not act in an illegal, unfair or unconstitutional manner when considering competing applications for a certificate of need for a new hospital. *Ibid.*

The findings of the Department of Human Resources in granting a certificate of need for a new hospital were supported by evidence upon review of the whole record. *Ibid.*

The decision of the Department of Human Resources to permit competing applicants for a certificate of need for a new hospital to construct facilities not covered by their applications was not unauthorized; the law does not require that applications be approved precisely as submitted or not at all. *Ibid.*

HUSBAND AND WIFE

§ 11.1. Separation Agreements; Operation and Effect

Where a separation agreement expressly prohibited the wife from going upon the husband's premises without his consent, the wife could properly be convicted of breaking or entering of the husband's dwelling even though she was still married to the husband. *S. v. Lindley*, 490.

§ 12.1. Separation Agreements; Fraud

There was no fiduciary relationship between the parties which would require disclosure on defendant's part where plaintiff claimed that defendant fraudulently concealed the fact that he had borrowed money against the cash value of life insurance policies which he promised in a separation agreement to maintain for her benefit. *Harton v. Harton*, 295.

INFANTS

§ 5. Jurisdiction to Award Custody of Minor

A petition filed by DSS was sufficient to give the court subject matter jurisdiction in a child custody case. *In re Baby Boy Scearce*, 531.

§ 6. Hearing for Award of Custody

The trial court did not err in ordering that DSS have no further responsibility in the matter after the court awarded custody of a foster child to the foster parents. *In re Baby Boy Scearce*, 531.

§ 6.3. Facts Material to Award of Custody; Contests Between Parent and Third Party

The trial court did not abuse its discretion in allowing the foster parents to intervene in a child custody action. *In re Baby Boy Scearce*, 531.

The trial court had the authority to award the legal custody of a foster child to the foster parents. *Ibid.*

§ 9. Appointment of Guardian Ad Litem

The trial court did not err in appointing a guardian ad litem for a baby in a proceeding to determine custody of the baby. *In re Baby Boy Scearce*, 531.

§ 18. Hearings; Admissibility and Sufficiency of Evidence

An order finding a juvenile guilty of first degree rape must be reversed where the evidence did not support the crime alleged in the petition and the petition did not give defendant notice of the crime described in the order. *S. v. Drummond*, 518.

INSURANCE

§ 115. Insurable Interest In Property

The insurable interest of plaintiff mortgagors was not extinguished because a foreclosure sale had taken place and no upset bid had been filed, and the mortgagors could recover under a fire insurance policy on the mortgaged property. *Sprouse v. North River Ins. Co.*, 311.

Where the named mortgagee in a fire insurance policy transferred its mortgage rights to a third party prior to a fire, the assignee owned an insurable interest in the property at the time of the fire and was not barred from recovery for failure to notify defendant insurer that it was mortgagee at the time of the fire. *Ibid.*

KIDNAPPING

§ 1. Definitions

Defendant could properly be convicted of kidnapping where the jury found him guilty of the underlying felony of common law robbery rather than armed robbery as alleged in the indictment. *S. v. Parker*, 443.

§ 1.2. Sufficiency of Evidence

There was sufficient evidence of the element of restraint or removal to support defendant's conviction for kidnapping. *S. v. Parker*, 443.

LANDLORD AND TENANT

§ 13. Termination

Notice of termination of a lease in public housing was not fatally defective because it incorrectly cited a section of the Dwelling Lease as grounds for termination or because the notice did not inform defendants of their right to request a grievance hearing. *Roanoke Chowan Housing Authority v. Vaughan*, 354.

Good cause existed for termination of defendants' lease in public housing for permitting individuals not named on the lease to reside in their apartment. *Ibid.*

LARCENY

§ 7. Weight and Sufficiency of Evidence; Circumstantial Evidence

The court erred in failing to dismiss three of four charges of felonious larceny where the State offered no evidence that defendant stole silver on four separate occasions but only that he pawned silver on four occasions. *S. v. Froneberger*, 398.

§ 7.4. Weight and Sufficiency of Evidence; Possession of Stolen Property

Evidence of felonious possession of a stolen safe was sufficient to be submitted to the jury. *S. v. Brown*, 622.

§ 10. Judgment and Sentence

Punishment for breaking or entering with intent to commit larceny and larceny following a break-in does not violate double jeopardy provisions. *S. v. Rowe*, 469.

Defendants could be punished for breaking and entering with the intent to commit larceny and for larceny pursuant to the breaking or entering without violation of double jeopardy. *S. v. Hall*, 650.

LIMITATION OF ACTIONS

§ 4.1. Accrual of Tort Cause of Action

A wrongful death claim for negligent installation of electrical wiring in a residence purchased from defendants was barred by the statute of limitations. *Sink v. Andrews*, 594.

§ 4.2. Accrual of Negligence Actions

Plaintiff's action to recover damages for a fire allegedly caused by the explosion of a lamp manufactured by defendant was barred by G.S. 1-50(6) where the complaint was filed more than six years after the lamp was purchased. *Cellu Products Co. v. G.T.E. Products Corp.*, 474.

LIS PENDENS

§ 1. Generally

Notice of lis pendens filed by original plaintiffs did not constitute constructive notice of pending litigation affecting title to the property in question so as to defeat the additional defendants' claim to title. *Peoples Freedom Baptist Church v. Watson*, 478.

MALICIOUS PROSECUTION

§ 13. Sufficiency of Evidence

Defendant's taking of a voluntary dismissal without prejudice after she learned her claim was barred by the statute of limitations may not be the basis of a malicious prosecution claim. *Dunn v. Harris*, 137.

§ 13.2. Sufficiency of Evidence; Probable Cause

Plaintiff's evidence was insufficient to show that defendant maliciously and without probable cause initiated an earlier action. *Dunn v. Harris*, 137.

MASTER AND SERVANT

§ 33. Liability of Employer; Respondeat Superior

The trial court erred by granting defendants' motion to dismiss for failure to state a claim upon which relief could be granted where plaintiff alleged that defendants were liable for a false imprisonment and other torts committed by one defendant and two unidentified men acting as employees of defendants' bail bonding business. *Gatlin v. Bray*, 639.

§ 35.2. Admissibility and Sufficiency of Evidence

A jury question was presented as to whether plaintiff customers suffered serious injuries during an armed robbery because of the negligence of defendant's employee in telling one plaintiff, "when you leave call the police we are being robbed." *Helms v. Church's Fried Chicken, Inc.*, 427.

§ 47.1. Strict or Liberal Construction

A workers' compensation claimant was not entitled to a presumption that close cases should be decided in the employee's favor. *Gilbert v. B & S Contractors, Inc.*, 110.

§ 49.1. "Employees" Within the Meaning of the Act; Status of Particular Persons

Plaintiff was not a farm laborer and therefore excluded from workers' compensation coverage where his work involved the commercial processing of agricultural commodities for seed and plaintiff's injury occurred on the one occasion when he was operating a tractor in a field in which crops were eventually to be planted. *Murray v. Biggerstaff*, 377.

§ 55.4. Relation of Injury to Employment

The evidence supported a determination that plaintiff suffered an injury by accident arising out of and in the course of his employment while he was "bush hogging" a field leased by his employer. *Murray v. Biggerstaff*, 377.

§ 55.5. Meaning of "Arising Out of" the Employment

A workers' compensation claimant was not entitled to a presumption that an unexplained death arose out of employment and was compensable. *Gilbert v. B & S Contractors, Inc.*, 110.

MASTER AND SERVANT — Continued

The Industrial Commission did not err by failing to conclude as a matter of law that an employee's death was caused by an injury or accident arising out of or in the course of his employment. *Ibid.*

§ 62. Injuries on the Way To or From Work

A church custodian was not on a special errand for his employer while traveling to church to spend the night because snow was predicted and he had to be at the church the next morning. *Schmoyer v. Church of Jesus Christ of Latter Day Saints*, 140.

§ 68. Occupational Diseases

There was competent evidence to support the finding of the Industrial Commission that plaintiff employee did not suffer from byssinosis. *Carroll v. Burlington Industries*, 384.

The Industrial Commission did not erroneously "discount" a doctor's favorable testimony by failing to make detailed findings relative to it. *Ibid.*

Evidence was sufficient to support a finding that plaintiff worked in the textile industry for more than thirteen years. *Mace v. N. C. Spinning Mills*, 669.

§ 69. Amount of Recovery Generally

The Industrial Commission's finding that plaintiff had a weekly earning capacity of $146 was supported by plaintiff's own testimony and the Commission properly based plaintiff's compensation on capacity to earn rather than actual earnings. *Mace v. N. C. Spinning Mills*, 669.

§ 77.1. Modification and Review of Award; Change of Conditions or Circumstances

A plaintiff who had been given an award for permanent partial disability of the back was entitled to have the Commission consider his referred pain to the extremities in determining whether he had sustained a change of condition and the impairment of use of his legs in determining whether he had become totally disabled and entitled to compensation under G.S. 97-29. *Harmon v. Public Service of N.C., Inc.*, 482.

§ 79.1. Persons Entitled to Payment; Dependents

The dependent of a deceased employee who was receiving benefits for total and permanent disability was not entitled to receive compensation as a survivor. *Costner v. A. A. Ramsey & Sons*, 121.

§ 101. "Employees" within Meaning of Employment Security Law

The evidence did not support a determination by the ESC that truck drivers were employees of plaintiff for whom plaintiff was liable for unemployment insurance contributions. *Reco Transportation, Inc. v. Employment Security Comm.*, 415.

§ 108. Right to Unemployment Compensation

Claimant left work with good cause attributable to her employer and was thus entitled to unemployment benefits where claimant's asthma and bronchitis condition was exacerbated by her exposure to chemicals in her employment, and claimant's immediate supervisor failed to act on her request for a transfer to another department and threatened to fire her if she went to the plant manager. *Ray v. Broyhill Furniture Industries*, 586.

MORTGAGES AND DEEDS OF TRUST

§ 25. Foreclosure by Exercise of Power of Sale In the Instrument

In an action on a fire insurance policy where a foreclosure sale had taken place and no upset bid had been filed prior to the fire, defendant insurer was not entitled to summary judgment on its claim for indemnity against the trustee under a deed of trust on the property on the ground that the trustee had failed to enforce the foreclosure sale. *Sprouse v. North River Ins. Co.*, 311.

§ 29. Bids and Rights of Bidders at the Sale

The insurable interest of plaintiff mortgagors was not extinguished because a foreclosure sale had taken place and no upset bid had been filed, and the mortgagors could recover under a fire insurance policy on the mortgaged property. *Sprouse v. North River Ins. Co.*, 311.

MUNICIPAL CORPORATIONS

§ 9. Rights, Powers, and Duties

The Elizabeth City city council did not intend an ordinance allowing firefighters to accumulate a maximum of thirty days vacation leave to result in the accumulation of twenty-four hours for each of those thirty days even though the firefighters worked twenty-four hour shifts. *Pritchard v. Elizabeth City*, 543.

The Elizabeth City city council was estopped to assert the invalidity of supplementary contracts with firemen for accumulated vacation leave and summary judgment was improperly granted for defendants on a breach of contract claim by the firefighters against the City. *Ibid.*

§ 30.6. Special Permits and Variances

An order by respondent board interpreting its earlier grant of a variance was unsupported by the evidence. *Brummer v. Bd. of Adjustment*, 307.

§ 30.15. Nonconforming Uses Generally

Refusal of defendant board of aldermen to allow plaintiffs to build duplexes on their lots did not amount to an arbitrary and discriminatory enforcement of the zoning ordinance. *Sherrill v. Town of Wrightsville Beach*, 369.

§ 31. Judicial Review

Plaintiffs' challenge to the ordinance originally zoning their property for single family dwellings only was barred by the nine-month statute of limitations. *Sherrill v. Town of Wrightsville Beach*, 369.

§ 31.1. Standing to Appeal or Sue

Plaintiffs did not have standing to challenge an annexation or rezoning ordinance. *Davis v. City of Archdale*, 505.

§ 33.4. Right of Access

The city's approval of defendants' driveway location in 1969 was not an agreement between the parties but a regulatory action for safety purposes and the trial court erred by finding that the city's closing of defendants' driveway amounted to a taking which required compensation. *City of Winston-Salem v. Robertson*, 673.

NARCOTICS

§ 2. Indictment

There was no fatal variance between the indictment which charged that defendant did give a controlled substance to an inmate and the evidence which

NARCOTICS — Continued

showed that defendant attempted to induce a deputy to give marijuana to an inmate. *S. v. Slade*, 303.

§ 4. Sufficiency of Evidence

There was sufficient evidence of possession of cocaine with intent to sell or deliver. *S. v. James*, 91.

§ 4.3. Sufficiency of Evidence of Constructive Possession

There was sufficient evidence of joint custody or routine access to a house to support an inference that defendant had control of the heroin under the porch. *S. v. James*, 91.

§ 4.4. Constructive Possession; Cases Where Evidence Was Insufficient

The evidence was insufficient to convict a defendant of possession with intent to sell and deliver cocaine or of acting in concert. *S. v. James*, 91.

NEGLIGENCE

§ 35.3. Sudden Emergencies

A jury question was presented as to whether plaintiff customers suffered serious injuries during an armed robbery because of the negligence of defendant's employee in telling one plaintiff, "when you leave call the police we are being robbed." *Helms v. Church's Fried Chicken, Inc.*, 427.

§ 44. Verdict and Judgment

The trial court did not err in refusing to set aside a verdict of 1.5 million dollars in compensatory damages for the electrocution death of a child as being excessive and not in accordance with the evidence. *Cole v. Duke Power Co.*, 213.

§ 53.2. Proximate Cause

Plaintiffs' evidence failed to establish that a possible breach of defendant's duty to carry out a physician's order to move one plaintiff from a ward to a semi-private room was the proximate cause of plaintiff's injury when he was hit by a chair thrown by a mental patient. *Burns v. Forsyth County Hospital Authority*, 556.

§ 56. Competency and Relevancy of Evidence

In a negligence action wherein plaintiffs alleged that one plaintiff was injured when he was not moved to a semi-private room as ordered by his doctor and was struck by a chair thrown by a mental patient in the same room, the trial court did not err in excluding from evidence as irrelevant certain medical records of the mental patient. *Burns v. Forsyth Co. Hospital Authority*, 556.

PARENT AND CHILD

§ 1.5. Procedure for Termination of Parental Rights; Right to Counsel

The trial court was not required to conduct two separate hearings for the adjudication and disposition stages of a proceeding to terminate parental rights. *In re White*, 82.

§ 1.6. Procedure for Termination of Parental Rights; Competency and Sufficiency of Evidence

The trial court's findings of neglect were not invalidated by the fact that respondent made some payments to DSS for the support of his children after they were in foster care. *In re White*, 82.

PARENT AND CHILD — Continued

The evidence in a proceeding to terminate parental rights was sufficient to support the trial court's finding that respondent had failed to establish a parental relationship with the children. *Ibid.*

The trial court's finding that respondent does not have the ability to provide proper care, supervision and discipline for his children was supported by a psychologist's testimony. *Ibid.*

The trial court did not base its decision terminating respondent's parental rights only on evidence of neglect which occurred before the children were placed in foster care but properly considered evidence of conditions existing up to the time of the hearing. *Ibid.*

§ 2.3. Child Neglect

There was sufficient evidence that a child was exposed to a substantial risk of physical injury because of her mother's inability to maintain secure living arrangements for her so that the DSS could properly remove her from her mother's custody until such accommodations could be provided. *In re Evans*, 449.

An order removing a child from her mother's custody was improper in conditioning custody on the mother's ability to provide a separate bed for her seven-year-old daughter, in denying custody on the ground that the mother's one-room living arrangement for herself, her son and her daughter was not suitable, and in compelling the mother to submit to psychiatric or psychological evaluation or treatment. *Ibid.*

§ 6.3. Proceedings to Determine Custody; Evidence

Defendant was not prejudiced by the admission of hearsay testimony in a child custody hearing. *Best v. Best*, 337.

The evidence supported the trial court's finding that changed circumstances justified a change of child custody from the mother to the grandmother. *Ibid.*

PENSIONS

§ 1. Generally

Summary judgment was properly granted for an accountant who had his retirement benefits reduced by the amount of his disability benefits. *Cherry, Bekaert & Holland v. Worsham*, 116.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 20.2. Instructions to Jury

The trial court did not err in failing to charge according to the standard jury charge for health care providers where plaintiffs alleged that defendant was negligent in allowing one plaintiff to remain in a hospital ward with a mental patient who exhibited violent behavior which resulted in plaintiff's injury. *Burns v. Forsyth Co. Hospital Authority*, 556.

QUASI CONTRACTS AND RESTITUTION

§ 1.1. Implied Contracts; Effect of Express Contract

The trial court erred in denying defendant's motion for directed verdict on plaintiff's quantum meruit claim for services performed in establishing a hardware store where there was an express contract between the parties. *Keith v. Day*, 185.

QUIETING TITLE

§ 2. Practice and Procedure Generally

Plaintiff had standing to challenge defendants' claim of ownership of former rental property where defendants' answer admitted some possibility of a cloud on plaintiff's deed. *Int. Paper Co. v. Hufham*, 606.

§ 2.2. Burden of Proof; Evidence

The trial court properly granted summary judgment for plaintiff in an action to quiet title to a tract of land which was formerly a part of the Seaboard Coastline Railroad system. *Int. Paper Co. v. Hufham*, 606.

RAPE AND ALLIED OFFENSES

§ 1. Nature and Elements of Offense

Engaging in a sexual act and engaging in vaginal intercourse with a person over whom one's employer has custody are not lesser included offenses of second degree rape or committing a sex act in violation of G.S. 14-27.5. *S. v. Raines*, 299.

As used in G.S. 14-27.7, custody does not mean legal control or restraint but is intended to protect from abuse all hospital patients. *Ibid.*

§ 6. Instructions

The trial court did not err in instructing the jury that a medical hospital's housing of a patient would be custody in a prosecution for engaging in a sexual act with a person over whom defendant's employer had custody. *S. v. Raines*, 299.

RECEIVING STOLEN GOODS

§ 7. Verdict and Judgment

A verdict of "Guilty of Possession of Personal Property of Ronald Hewitt" was not improper when considered with the indictment, evidence and jury instructions. *S. v. Connard*, 327.

RELIGIOUS SOCIETIES

§ 3.1. Schisms and Controversy as to Right to Use and Control Church Property

Plaintiff could properly maintain an action as a church trustee for the recovery of property which was originally deeded to that church. *United Church of God, Inc. v. McLendon*, 495.

The trial court erred in granting summary judgment for defendants in an action involving a dispute over the ownership of church property. *Ibid.*

RULES OF CIVIL PROCEDURE

§ 8.2. Answer

By failing to respond to plaintiff's request for admissions and by filing only a general denial of plaintiff's complaint, defendants thereby admitted the existence of a debt, their liability for it under a guaranty agreement, and facts establishing the timeliness of plaintiff's action. *Georgia-Pacific Corp. v. Bondurant*, 362.

§ 24. Intervention

The trial court did not abuse its discretion in allowing the foster parents to intervene in a child custody action. *In re Baby Boy Scearce*, 531.

RULES OF CIVIL PROCEDURE — Continued

§ 41.2. Dismissal In Particular Cases

The trial court has the authority under Rule 41(b) to impose sanctions less than dismissal including costs and attorney fees. *Daniels v. Montgomery Mut. Ins. Co.*, 600.

§ 56. Summary Judgment

Summary judgment was not improper in an action which involved the interpretation of a partnership agreement. *Cherry, Bekaert & Holland v. Worsham*, 116.

Plaintiff was not prejudiced because the court granted summary judgment for defendant prior to the completion of discovery. *Cellu Products Co. v. G.T.E. Products Corp.*, 474.

There was no merit to defendant general contractor's contention that an order of summary judgment should not have been entered because it could be sued later by other suppliers or subcontractors of defendant paving subcontractor. *Coastal Concrete Co., Inc. v. Garner*, 523.

§ 60.2. Grounds for Relief

The trial court erred in denying plaintiff's Rule 60(b)(1) motion for relief from an order of dismissal and judgment on defendants' counterclaim on the ground of excusable neglect where no representative for plaintiff appeared for trial, plaintiff received no notice of the trial date, and an order allowing plaintiff's counsel to withdraw was not entered until after the date of trial. *Barclays American Corp. v. Howell*, 654.

SEARCHES AND SEIZURES

§ 8. Search and Seizure; Warrantless Arrest

There was no merit to defendant's contention that SBI agents lacked probable cause to arrest him and search his luggage in an airport. *S. v. Thomas*, 200.

SBI agents could not lawfully search defendant's suitcase without a warrant as a search incident to a lawful arrest where the suitcase was locked, large, and defendant was in the private office of two SBI agents. *Ibid.*

§ 31. Form and Contents of Warrant; Description of Property to be Seized

Provisions of a warrant to search defendant's house and van for dilaudid, valium, and "stolen goods" were severable so that police could constitutionally search for the listed drugs or items of the same class. *S. v. Connard*, 327.

§ 33. Plain View Rule

Stolen goods were illegally seized from defendant's house and van where officers could not identify any of the "stolen property" mentioned in the search warrant until after they had entered the house and van, inventoried the items they found, and compared them against stolen property lists. *S. v. Connard*, 327.

§ 40. Execution of Search Warrant; Items Which May be Seized

A bracelet and ring were not the fruits of an illegal search where they were voluntarily turned over to a detective serving a search warrant by defendant's wife before any search had been undertaken. *S. v. Parker*, 443.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1. Generally

The State Personnel Director erred in concluding that the local board of a department of social services became the "local appointing authority" in the absence of a permanent full-time director. *In re Appeal of Brunswick Co.*, 391.

Notice of termination of a lease in public housing was not fatally defective because it incorrectly cited a section of the Dwelling Lease as grounds for termination or because the notice did not inform defendants of their right to request a grievance hearing. *Roanoke Chowan Housing Authority v. Vaughan*, 354.

Good cause existed for termination of defendants' lease in public housing for permitting individuals not named on the lease to reside in their apartment. *Ibid.*

STATE

§ 4.4. Actions Against the State

A contractor could not appeal to the Board of State Contract Appeals on different theories than those on which the claim was filed with the State Highway Administrator. *In re Thompson Arthur Paving Co.*, 645.

TAXATION

§ 26. Franchise and License Taxes

The revenues received by Carolina Telephone from the sale of advertisements to appear in the "yellow pages" are not includable as "gross receipts" for franchise tax purposes. *In re Proposed Assessment v. Carolina Telephone*, 240.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices

The trial court did not err in an action for fraud and unfair trade practices by finding that an office products distributor had made material misrepresentations and that an office products dealer's reliance on such misrepresentations was reasonable. *Olivetti Corp. v. Ames Business Systems, Inc.*, 1.

There was no prejudice in an action for an unfair and deceptive trade practice arising from the sale of a truck in admitting evidence of the cost of replacing four tires and a battery. *Jackson v. Hollowell Chevrolet Co.*, 150.

The trial court did not err in an action for an unfair trade practice arising from the sale of a truck by admitting the testimony of the vice-president of an auto dealership despite his lack of personal knowledge of the condition of the vehicle. *Ibid.*

The trial court properly denied defendant's motion for a directed verdict and judgment n.o.v. in an action for unfair trade practices arising from the sale of a truck. *Ibid.*

There was sufficient evidence against an office products distributor in an action by an office products dealer for unfair trade practices to support the court's findings on damages. *Olivetti Corp. v. Ames Business Systems, Inc.*, 1.

The trial court did not use an improper measure to determine lost profits in an unfair trade practice action between an office products distributor and dealer. *Ibid.*

The trial court did not err by applying G.S. 75-1.1 to a distributor-dealer relationship. *Ibid.*

UNFAIR COMPETITION — Continued

G.S. 75-1.1 was not unconstitutionally vague and overbroad as applied to an action between an office products distributor and dealer. *Ibid.*

The trial court did not err in an action between an office products distributor and dealer by not deducting the distributor's accounts receivable from the damages awarded the dealer prior to trebling the dealer's damages. *Ibid.*

The trial court did not err in an action between an office products distributor and dealer by not awarding lost profits or expenses for certain periods where the dealer did not meet its burden of presenting sufficient evidence to permit determination of damages with reasonable certainty. *Ibid.*

The trial court did not err in an action between an office products distributor and dealer by refusing to assess punitive damages in an amount greater than and in lieu of treble damages. *Ibid.*

The trial court did not err in an action between an office products dealer and distributor by refusing to award reasonable attorney fees. *Ibid.*

Defendant's conduct in representing that the completion dates for roads and utilities for subdivision lots were firm when in fact they were not was within the scope of G.S. 75-1.1, but the court was not required to find that such conduct was unfair or deceptive. *Opsahl v. Pinehurst Inc.*, 56.

Defendants' forecast of evidence was sufficient to establish an unfair and deceptive trade practice by plaintiff bank in obtaining personal guaranties on a corporate debt. *Northwestern Bank v. Roseman*, 228.

Plaintiff's evidence that defendant induced plaintiff to buy a car by promising her that she could return the car if she was not satisfied with it and that defendant had no intention of allowing plaintiff to return the car was sufficient to support an award of compensatory and punitive damages for an unfair trade practice. *Mapp v. Toyota World, Inc.*, 421.

The trial court properly refused to allow defendant to argue to the jury that any damages awarded by the jury for an unfair trade practice could be trebled by the trial court. *Ibid.*

Plaintiff was not entitled to recover both punitive damages and treble damages for the same conduct, but she could elect her remedy after the jury's verdict. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 47. Enforcement of Security Interest; Notice of Sale

Defendant was required to give reasonable notice of a foreclosure sale of a mobile home where defendant had a repurchase agreement with the company to which it had assigned a retail installment loan contract and deed of trust. *Joyce v. Cloverbrook Homes, Inc.*, 270.

There was no merit to defendant's contention that it was not required to give notice of a foreclosure sale of a mobile home under G.S. 25-9-504(3) because the mobile home constituted real property not covered by Article 9. *Ibid.*

A mobile home was a consumer good and there was no merit to defendant's contention that the trial court erred in calculating damages for breach of defendant's duty to give notice of a foreclosure sale. *Ibid.*

VENDOR AND PURCHASER

§ 1. Requisites and Validity of Contracts to Convey and Options

Where a vendor could not have delivered a warranty deed conveying fee simple marketable title because his wife refused to sign the deed, the vendor could not

VENDOR AND PURCHASER — Continued

have enforced the contract against the purchasers; there was thus no mutuality of obligation, and the purchasers could not enforce the contract against the vendor. *Hilliard v. Thompson*, 404.

§ 6. Responsibility for Condition of Premises; Failure to Disclose Material Facts

The trial court properly entered summary judgment for defendants in a wrongful death action in which plaintiff claimed that defendants sold her a house knowing that the electrical wiring was defective and unsafe. *Sink v. Andrews*, 594.

§ 11. Abandonment and Cancellation of Contract

Rescission of a contract for the sale of a lot may be justified on the basis of material breach of the contract because of defendant's failure to complete roads and utilities on time where the contract expressly provided that time was of the essence. *Opsahl v. Pinehurst Inc.*, 56.

The trial court on remand must determine whether the parties intended for a contract for the sale of land to merge into the deed so as to prohibit rescission of the contract. *Ibid.*

WATERS AND WATERCOURSES

§ 3.2. Pollution

The developers of a subdivision who still own the roadways are "landowners" who may be held responsible under the Sedimentation Pollution Control Act for permanent erosion and sediment control measures in the roadways. *Cox v. State ex rel. Summers*, 612.

WILLS

§ 36.1. Defeasible Fees, Possibilities of Reverter, Executory Interests

Where testatrix left a life estate in her home to her husband and a remainder interest to her brother and sister, and the sister predeceased the testatrix and the brother predeceased the husband, the remainder interest after the life estate of the husband passed to the heir at law of testatrix at the time of her death, her husband. *McMillan v. Davis*, 433.

§ 67. Ademption

Testator's specific testamentary gift of his interest in livestock to his daughter was not adeemed by his trustees' sale thereof during testator's incompetency before his death, and the trial court properly directed the executor to distribute to testator's daughter an amount equal to the proceeds of the sale of the livestock. *In re Estate of Warren*, 634.

WITNESSES

§ 10. Attendance, Production of Documents, and Compensation

The trial court exceeded its authority in enjoining plaintiff prisoner from subpoenaing witnesses in any action anywhere in the state without first meeting certain conditions and obtaining the court's approval. *Shaw v. Jones*, 486.

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