NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 83

7 OCTOBER 1986

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6 JANUARY 1987

RALEIGH
1988

CITE THIS VOLUME

83 N.C. App.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

RONALD D. GUPTON, EMPLOYEE, PLAINTIFF v. BUILDERS TRANSPORT, EMPLOYER, AND SELF-INSURED, CARRIER, DEFENDANT

No. 8610IC243

(Filed 7 October 1986)

1. Master and Servant § 69— workers' compensation—injuries compensable under G.S. § 97-31

Where all of an employee's injuries are compensable under N.C.G.S. § 97-31, compensation is limited to an award under that section regardless of the employee's inability or diminished ability to earn wages.

2. Master and Servant § 73.1— workers' compensation—loss of field of vision—applicable statute

An injury in which plaintiff lost 7% of his field of vision in his right eye was compensable exclusively as a partial "loss of vision" under N.C.G.S. § 97-31(16) and (19) and was not compensable under N.C.G.S. § 97-29 as temporary total disability or under N.C.G.S. § 97-30 as permanent partial disability. Loss of visual field and loss of vision are not distinguishable under N.C.G.S. § 97-31.

3. Estoppel § 4.3; Master and Servant § 69— workers' compensation—employer not estopped by letter

A letter from defendant employer's claims manager stating that plaintiff "could" receive certain benefits under N.C.G.S. § 97-30 did not constitute an admission which estops defendant from denying plaintiff's entitlement to compensation under N.C.G.S. § 97-30 where other evidence showed that the letter was only an explanation of possible benefits and not a promise to plaintiff that he would receive those benefits.

4. Estoppel § 4.6; Master and Servant § 69— workers' compensation—estoppel—necessity for reliance

The doctrine of estoppel will not be applied in a workers' compensation case without a showing of detrimental reliance where the employer was not denying liability for coverage but was merely contesting whether additional benefits must be paid.

APPEAL by employee-plaintiff from the Opinion and Award of the North Carolina Industrial Commission entered 17 October 1985. Heard in the Court of Appeals 21 August 1986.

This is a workers' compensation case where the plaintiff suffered a compensable injury to his eye. Plaintiff was initially paid benefits but was denied additional benefits.

Plaintiff was employed by the defendant, Builders Transport, as a long distance truck driver. On 11 September 1984, plaintiff was injured at work when an elastic strap broke and struck him in his right eye. As a result, the plaintiff lost seven percent of his field of vision in the eye, even though his visual acuity in the remaining field was 20/20. This "blind spot" made plaintiff ineligible under Interstate Commerce Commission rules to continue driving a truck. At a meeting on 5 February 1985 between the plaintiff and the defendant's workers' compensation claims manager, Dave Sanders, the parties agreed that plaintiff would have to find another job. Plaintiff subsequently found work as a ceramic tile layer but at a lower wage than he had earned with the defendant.

The defendant paid the plaintiff temporary total disability benefits from the date of his injury until 11 January 1985, the date of plaintiff's maximum medical improvement. Defendant, without the approval of the Industrial Commission, continued to pay compensation to the plaintiff for an 8.4 week period, which was equal to plaintiff's permanent partial disability benefits under G.S. 97-31. During their 5 February 1985 meeting and subsequently in a letter and several telephone conversations, Mr. Sanders discussed with the plaintiff his eligibility for additional benefits under G.S. 97-30. On 14 February 1985, defendant notified plaintiff that it would not make any further payments at the end of the 8.4 week period. Plaintiff then requested a hearing before the Commission on the question of his entitlement to additional benefits under G.S. 97-30.

After the hearing, the Deputy Commissioner denied plaintiff's claim for additional compensation on the grounds that plaintiff's injury was compensable exclusively under G.S. 97-31(16) and (19), which compensates a partial loss of vision. The Deputy Commissioner also found that the defendant was not estopped to deny plaintiff's entitlement to compensation under G.S. 97-30 on the basis of any representations made to plaintiff by defendant. Plaintiff appealed the decision to the Full Commission, which affirmed the Deputy Commissioner. Plaintiff appeals.

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

Womble, Carlyle, Sandridge & Rice, by Richard T. Rice and Nancy R. Hatch for the defendant-appellee.

EAGLES, Judge.

I

Under G.S. 97-31(16), an employee is compensated for the loss of an eye in an amount equal to sixty-six and two-thirds of his average weekly wages for 120 weeks. As in the case of other scheduled injuries listed in G.S. 97-31, this has the practical effect of placing a specific dollar value on the injury based on the plaintiff's past wages. Similarly, when the employee suffers a partial "loss of vision," G.S. 97-31(19) provides that the employee is to be compensated for the loss in the proportion to the 120 week period stated in G.S. 97-31(16) as the partial loss bears to the total loss. Here, the Commission found that the plaintiff "sustained a seven percent permanent partial disability in his right eye," which was compensable under G.S. 97-31. Accordingly, the Commission found plaintiff was entitled to his average weekly wage for 7 percent of 120 weeks, or 8.4 weeks. Since the defendant had already paid the plaintiff that amount, the Commission denied plaintiff's claim for further benefits.

[1] The plaintiff contends that G.S. 97-31 is not the appropriate measure of compensation. Instead, plaintiff argues that he should have been compensated under either G.S. 97-29 or G.S. 97-30. G.S. 97-29 provides compensation for total temporary disability based on the employee's past wages. G.S. 97-30 applies when the disability is partial and benefits are based on the difference between the

employee's wages before the injury and the employee's wages after the injury. Either section would provide a greater measure of compensation to the plaintiff here. We note, however, that where all of the employee's injuries are compensable under G.S. 97-31, compensation is limited to an award under that section regardless of the employee's inability or diminished ability to earn wages. *Loflin v. Loflin*, 13 N.C. App. 574, 186 S.E. 2d 660, *cert. denied*, 281 N.C. 154, 187 S.E. 2d 585 (1972); *Jones v. Murdoch Center*, 74 N.C. App. 128, 327 S.E. 2d 294 (1985); G.S. 97-31.

[2] The plaintiff argues that the injury to his eye is not compensable under G.S. 97-31 and that the Commission decided the case under a misapprehension of the law. Plaintiff urges that the Commission erred by equating a 7% loss of field of vision with a 7% "loss of vision," for which G.S. 97-31(19) provides compensation. Plaintiff argues that since field of vision is distinguishable from visual acuity, G.S. 97-31 is inapplicable and he is entitled to compensation under either G.S. 97-29 or G.S. 97-30. We disagree.

As we have noted, G.S. 97-31 provides proportional compensation for partial "loss of vision." G.S. 97-31(16) and (19). Neither the statutes nor our case law define the term "vision." In the absence of legislative directive, we decline to interpret "loss of vision" so narrowly as to exclude loss of visual field, including only loss of visual acuity. The plaintiff cites our decision in *Little v. Penn Ventilator Co.*, 75 N.C. App. 92, 330 S.E. 2d 276 (1985), *rev'd in part and aff'd in part*, 317 N.C. 206, 345 S.E. 2d 204 (1986) as supporting his argument. Plaintiff's reliance on *Little*, however, is misplaced.

In *Little*, the employee sustained an injury when a metal sliver hit him in the left eye. The injury caused no damage to his vision nor did the employee lose his eye. In affirming the Commission's award under G.S. 97-31(24), which allows the Commission to award a lump sum of compensation where there is permanent injury to an organ for which no provision is made under the other subsections of G.S. 97-31, we held that the Commission properly found that the employee's injury was not covered by subsections (16) and (19). There, we said that "[s]ubsections (16) and (19) of G.S. 97-31 by their very terms contemplate some loss, either of the eye itself or of the vision in an eye." *Id.* at 95, 330 S.E. 2d at 278. There, the employee sustained neither. Here, the plaintiff has obviously sustained some loss of vision.

Plaintiff argues that we should distinguish loss of visual field from "loss of vision" because the latter is "correctable" while the former is not. G.S. 97-31, however, does not distinguish injuries on that basis. An examination of all of the scheduled injuries in G.S. 97-31, which includes loss of arms, legs, and total loss of an eye, reveals that none of them except partial loss of visual acuity are correctable. We find no legislative intent that G.S. 97-31 (19) should compensate only correctable loss of vision.

Since we affirm the Commission's finding that plaintiff's injury is compensable under G.S. 97-31(16) and (19), we find no merit in plaintiff's alternative argument that his injury is compensable under the "catch-all" provisions of G.S. 97-31(24).

II

Plaintiff's second argument is that the Commission erred in finding that the defendant was not estopped from denying plaintiff's entitlement to compensation under G.S. 97-30. The Commission found that the defendant made no specific promises of benefits to the plaintiff and further found that the plaintiff did not reasonably rely to his detriment on the representations the defendant did make. In reviewing those findings we are limited to determining (1) whether there is competent evidence to support the Commission's findings of fact and (2) whether those findings support its legal conclusions. *Barham v. Food World*, 300 N.C. 329, 266 S.E. 2d 676 (1980). After examining the record, we conclude that there is evidence to support the Commission's findings of fact and further conclude that the findings support the Commission's legal conclusion that the doctrine of estoppel is inapplicable here.

[3] Though plaintiff asserts that the defendant told him that he would be compensated for the difference between his wages before the injury and his wages after the injury for a period of up to 276.6 weeks, the Commission found otherwise. Our examination of the record indicates that there is evidence to support the Commission's contrary finding. On 5 February 1985, plaintiff met with Dave Sanders, the defendant's workers' compensation claims manager. At that meeting, the two discussed plaintiff's eligibility for temporary partial disability payments but Sanders made no specific representations to the plaintiff. The next day, Sanders wrote to plaintiff and outlined what his compensation would be under

G.S. 97-30 and said that plaintiff "could" receive those benefits. The plaintiff argues that this letter was an admission by the defendant that he was entitled to G.S. 97-30 benefits.

Other evidence, however, illustrates that the letter was an explanation of possible benefits and was not a promise to the plaintiff that he would receive those benefits. In his letter, Mr. Sanders underlined the word "could" twice. In this context, the underlined "could" meant that plaintiff might receive those benefits, not that in fact he would receive them. Further, Mr. Sanders testified that he told the plaintiff at their 5 February 1985 meeting that he did not know whether the plaintiff was entitled to temporary partial disability benefits under G.S. 97-30. He also testified that he spoke with the plaintiff by telephone the next day and told him that he was sending the letter to clear up any questions he might have but that he did not know whether plaintiff was entitled to additional compensation. Mr. Sanders also testified that he reemphasized the point in several telephone conversations with the plaintiff after plaintiff had received his letter.

Plaintiff himself testified that at the 5 February 1985 meeting the only thing that Mr. Sanders promised him was the 8.4 weeks of compensation they agreed upon. Although plaintiff may have interpreted defendant's representations as a promise to pay him compensation pursuant to G.S. 97-30, there is competent evidence to support the Commission's finding that in fact no promises were made.

[4] We note too that plaintiff has not shown, nor did he even allege, that he detrimentally relied on defendant's representations. Plaintiff contends that in workers' compensation cases the doctrine of estoppel should be applied without the necessity for a showing of detrimental reliance. While the reliance element of the doctrine of estoppel has been treated less stringently in some kinds of workers' compensation cases, under these facts we hold that for an employee to prevail he must have shown detrimental reliance.

The plaintiff relies on *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E. 2d 167 (1982). In *Godley*, the court held that federally paid CETA employees did not have to show detrimental reliance for the state governmental unit which hired them to be estopped from denying coverage of the employee's work related injury.

There, the defendants denied liability for coverage of the employees after the county paid, and the insurance carrier accepted, workers' compensation premiums for the employee. The court, specifically limiting its holding to those facts, determined that this particular situation was best governed, not by "equitable" estoppel, but by "quasi" estoppel, which did not require a showing of "detrimental reliance *per se* by anyone." *Id.* at 361, 293 S.E. 2d at 170. Instead, under the facts of *Godley*, detrimental reliance was conclusively presumed. The court noted that the other workers' compensation cases where the reliance element had been dispensed with involved situations where the defendant sought to avoid coverage of a work related injury after accepting or paying the insurance premiums. In those cases, detrimental reliance may be conclusively presumed because "common sense" would suggest that employees would have made other arrangements to obtain coverage if the employer had not paid or the carrier had not accepted the premiums. *See Godley*, at 360-361, 293 S.E. 2d at 169-170.

Godley is readily distinguishable on its facts. Here, the defendant is not denying liability for coverage of the injury but is merely contesting whether additional benefits must be paid. Nor is this a case where detrimental reliance could be conclusively presumed to exist. Nothing here indicates we should discard the detrimental reliance requirement of the doctrine of estoppel. The doctrine is a remedial device which is used to aid the law in administering justice when injustice would otherwise result. *Thompson v. Soles*, 299 N.C. 484, 263 S.E. 2d 599 (1980). Since plaintiff has not detrimentally relied, there is no injustice to remedy and principles of estoppel are inapplicable.

Plaintiff's final assignment of error is that the Commission erred in including a "comment" section in its opinion and award. While we have said that including a "comment" section sometimes makes our review more difficult than it need be, *see Ward v. Beaunit Corp.*, 56 N.C. App. 128, 287 S.E. 2d 464 (1982), it is not necessarily error to do so. This assignment of error is without merit.

The opinion and award of the Industrial Commission is

Affirmed.

Judges ARNOLD and PARKER concur.

LYNWOOD E. SPENCE v. BARBARA F. SPENCE JONES

No. 8612DC210

(Filed 7 October 1986)

1. **Trial § 3.2— equitable distribution—denial of continuance**

The trial court did not err in denying defendant's motion for a continuance of an equitable distribution proceeding made on the grounds that defendant thought the hearing was limited to a pretrial conference and that defendant needed until the following week to obtain certain information vital to her cause where the case had been removed from the calendar on four or five prior occasions and where the information sought by defendant was available through witnesses present at the hearing.

2. **Divorce and Alimony § 30— equitable distribution—failure to show dissipation of marital assets**

Defendant's offer of proof was insufficient to overcome the presumption that she consented to plaintiff's withdrawals of funds from a joint account or to show that plaintiff dissipated marital assets prior to separation where defendant merely showed that funds withdrawn from the joint account exceeded expenses of the family, but there was no showing as to which spouse made particular withdrawals on specific dates or that plaintiff made non-marital use of withdrawn funds.

3. **Divorce and Alimony § 30— equal division of marital property—failure to find statutory factors**

Failure of the court to make findings regarding the twelve factors set out in N.C.G.S. § 50-20(c) is not error when the court orders an equal division of the marital property.

4. **Divorce and Alimony § 30— equitable distribution—remand for amendment of judgment**

Cause is remanded to the trial court to amend the decretal portion of an equitable distribution judgment to include the disbursement of a credit union account to plaintiff husband where the decretal portion of the judgment did not mention the account but the transcript of the court's oral order shows that the court ordered the account to "be the sole and separate property of the plaintiff."

APPEAL by defendant from *Hair, Judge*. Judgment signed 5 December 1985, *nunc pro tunc* 25 September 1985, in District

Court, CUMBERLAND County. Heard in the Court of Appeals 20 August 1986.

Plaintiff instituted this action 14 May 1984 by filing a complaint seeking an absolute divorce based on a year's separation and an equitable distribution of the marital assets. On 29 May 1984 defendant answered and asserted a counterclaim seeking an equitable distribution of the marital property. On 15 May 1984, plaintiff's motion for an order severing plaintiff's claims for an absolute divorce and equitable distribution was granted. On 25 June 1984 plaintiff was granted an absolute divorce from defendant. On 24 and 25 September 1985, the court heard the parties' equitable distribution claim. The court concluded that an equal division of the marital assets was equitable and entered judgment accordingly. Defendant appeals.

Harris, Sweeny & Mitchell, by Ronnie M. Mitchell, for plaintiff appellee.

Beaver, Thompson, Holt & Richardson, P.A., by F. Thomas Holt, III, for defendant appellant.

JOHNSON, Judge.

[1] In defendant's first Assignment of Error she contends that the court erred in denying defendant's motion for a continuance. We do not agree.

Rule 40(b), N. C. Rules Civ. P., states, in pertinent part, "A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." "The motion must state the grounds therefor and must show good cause for the requested continuance." W. Shuford, N.C. Civil Practice and Procedure sec. 40-4 (2d ed. 1981). Continuances are addressed to the sound discretion of trial judges. *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E. 2d 380, 386 (1976). Continuances are not to be favored, *Piedmont Wagon Co. v. Bostic*, 118 N.C. 758, 24 S.E. 525 (1896), and are not reviewable absent a manifest abuse of discretion, *State v. Williams*, 51 N.C. App. 613, 616, 277 S.E. 2d 546, 547-48 (1981).

Here, defendant moved for a continuance in open court on the morning of 24 September 1985 when the matter was scheduled to be heard. Defendant presented the following grounds for a

continuance: (1) based upon a discussion with the court and plaintiff's counsel the prior day, defendant was of the understanding that the hearing at issue was limited to a pre-trial conference and had been informed only that morning that the trial was set for that day and (2) defendant needed until the next week to obtain certain information vital to her cause, to wit: information from Russ Davenport regarding the joint Merrill Lynch account, plaintiff's retirement rights, and the cash value of a $100,000.00 life insurance policy on plaintiff's life.

The court did not deny defendant's motion until it had explored the matter and ascertained the surrounding facts and circumstances as follows: the case had been removed from the calendar on four or five other occasions; plaintiff was present and ready to proceed; plaintiff, a commercial pilot, objected to rescheduling the hearing to the following week due to conflicts with his flight schedule; both parties had completed discovery; Russ Davenport, a stockbroker for Merrill Lynch, was present in court and could confer with defendant's counsel before the trial actually began and could testify at trial on defendant's direct examination regarding the parties' joint account at Merrill Lynch; the parties had stipulated that on the previous day, 23 September 1985, that plaintiff's retirement fund had no equity. The hearing did not begin until 4:00 p.m. and went into the following day, giving defendant most of that day and evening to prepare for what the court noted was not a complex case. At trial, plaintiff testified that the life insurance policy at issue was a term policy having no cash value. Clearly the court's denial of defendant's request for a continuance under these circumstances was not an abuse of discretion. This Assignment of Error is overruled.

[2] Defendant combines six Assignments of Error in her next argument, wherein she alleges that the court erred in excluding as not relevant testimony regarding various financial transactions by plaintiff prior to the parties' 11 May 1983 date of separation. After the court sustained plaintiff's objections, defendant offered, *inter alia*, the following evidence: that the parties' marital difficulties began the summer of 1981; that the parties received a $737.50 payment of interest on a municipal bond on 3 January 1983; that plaintiff withdrew $2,000.00 from the parties' joint ready asset account with Merrill Lynch on 11 January 1983, representing the $737.50 bond interest and $1,263.00 in ready asset

trust money; that plaintiff withdrew $500.00 from that same account on 10 February 1983; that plaintiff withdrew $850.00 from that account on 28 March 1983; that the difference between the parties' combined salaries between December 1982 through 11 May 1983, the date of separation, and the family's expenses of $2,068.99 per month equaled $12,981.01; that plaintiff withdrew a total of $6,500.00 from the parties' joint checking account between September 1981 through December 1981 and a total of $18,308.60 from that same joint checking account during 1982. All of this evidence came from the testimony of defendant and Russ Davenport of Merrill Lynch. Defendant stated to the court that she was offering the evidence for the purpose of establishing that plaintiff had dissipated marital assets in anticipation of separating. The court would not admit this evidence regarding marital funds, stating, "[T]he court will not consider any transfer of funds in an ordinary course of business before the separation on May the 11th, 1983" and "fault cannot be used . . . in an equitable distribution."

The record reveals that the court was working under a misapprehension of the law. The general rule is "marital fault or misconduct of the parties which is not related to the economic condition of the marriage is not germane to a division of marital property under [G.S.] 50-20(c) and should not be considered." *Smith v. Smith*, 314 N.C. 80, 87, 331 S.E. 2d 682, 687 (1985). However, fault which is related to the economic condition of the marriage may be considered. Fault or misconduct "which dissipates or reduces marital property for nonmarital purposes" is " 'just and proper' under N.C.G.S. sec. 50-20(c)(12)." *Id.* at 88, 331 S.E. 2d at 687.

An offer of proof must be specific and must indicate what the excluded evidence would have been. *Currence v. Hardin*, 296 N.C. 95, 249 S.E. 2d 387 (1978). Defendant contends that the offer of evidence showed that plaintiff "withdrew some $30,850.00 from joint assets for unexplained reasons." We find defendant's offer insufficient to show actual dissipation in anticipation of separation. "[A]bsent clear and convincing evidence to the contrary, creation of a spousal joint account should as a matter of law imply consent by each spouse to use by the other of funds from the account for purposes of sustaining the family or enhancing its standard of living." *McClure v. McClure*, 64 N.C. App. 318, 323, 307

S.E. 2d 212, 215 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E. 2d 651 (1984). "Such consent is thus implied from her volitional creation of, and deposit of funds to, the joint account." *Id.* Here, defendant agreed to the creation of the joint account; she deposited her salary to the joint account. Defendant offered no evidence to show that plaintiff made non-marital use of funds. Defendant merely showed that the funds withdrawn exceeded the expenses of the family. Defendant admitted that the expenses excluded many items, such as costs for "any clothes, car gas, shoes, or anything—grooming or any of those items." Further evidence showed that defendant had equal access to the funds and that the record of withdrawals failed to indicate who of the two parties made a particular withdrawal on a given date.

In conclusion, defendant did not offer clear and convincing evidence that plaintiff alone withdrew the funds without defendant's consent and used the funds for purposes other than sustaining the family. Her offer of proof was insufficient to overcome the presumption that she consented to plaintiff's withdrawals or that plaintiff dissipated the marital assets prior to separation. This Assignment of Error is overruled.

In defendant's last argument she combines four Assignments of Error wherein defendant contends that the evidence is insufficient to support the findings of fact and the findings of fact are insufficient to support the conclusions of law.

Rule 10(a), N.C. Rules App. P., confines this Court's scope of review on appeal to consideration of those exceptions set out in the record on appeal or in the transcript.

> No exception not so set out may be made the basis of an assignment of error; and no exception so set out which is not the basis of an assignment of error may be considered on appeal. Provided, that upon any appeal duly taken from a final judgment any party to the appeal may present for review, by properly raising them in his brief, the questions whether the judgment is supported . . . by the findings of fact and conclusions of law, . . . notwithstanding the absence of exceptions or assignments of error in the record on appeal.

Rule 10(a), N.C. Rules App. P.

Here, defendant did not note her exceptions to the findings of fact in the judgment nor base any assignments of error on the insufficiency of the evidence to support particular findings of fact. Therefore, we are prevented from considering the sufficiency of the evidence on appeal and the court's findings of fact as they appear in the judgment are conclusive on appeal.

[3] Defendant also failed to note her exceptions to the court's conclusions of law. Nonetheless, due to the proviso of Rule 10(a), N.C. Rules App. P., quoted *supra*, and because defendant properly raised the questions in her brief, we may consider whether the judgment is supported by the findings of fact and conclusions of law. The appeal itself constituted an exception to the judgment and brought forward any error of law apparent on its face. *Wade v. Wade*, 72 N.C. App. 372, 376, 325 S.E. 2d 260, 266, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). Specifically, defendant contends that the face of the order of equitable distribution is fatally defective in that the court failed to consider the twelve statutory factors set forth in G.S. 50-20(c). We disagree.

Precisely this issue was raised and resolved in *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E. 2d 915 (1985). As in *Weaver*, we find nothing in the record to indicate that the court did not consider all the statutory factors in ordering an equal division. Here, the equal division was not a clear abuse of discretion. The court made findings of fact as to what constitutes marital property. G.S. 50-20(a); *Little v. Little*, 74 N.C. App. 12, 16, 327 S.E. 2d 283, 287 (1985). The court also made findings of fact as to the net value of the marital property. G.S. 50-20(c); *Little v. Little*, at 18, 327 S.E. 2d at 288. The court then concluded that an equitable division under the circumstances of this case is an equal division. Failure of the court to make findings regarding the twelve statutory factors under G.S. 50-20(c) is not error when the court orders an equal division of the marital property, *Weaver*, *supra*, at 417, 324 S.E. 2d at 920, as the court did in the instant case.

[4] We deem it appropriate, in our discretion, to consider defendant's Assignment of Error, abandoned by her failure to comply with Rules 10(a) and 28 of the Rules of Appellate Procedure, that addresses the court's failure to include in its written judgment the disbursement of the Piedmont Credit Union Account valued at $453.22. The court made the following pertinent findings of fact.

VIII. That the parties have accumulated real and personal property during the course of their marriage, which constitutes 'Marital Property' within the meaning of G.S. 50-20, including the following:

. . . .

(g) An account in Piedmont Credit Union, an individual retirement account at United Carolina Bank, an account with Merrill Lynch, and certain tax free bonds (Catawba Power).

. . . .

XIII. That the Piedmont Credit Union Account contained a net amount of $453.22;

However, the court did not mention the Piedmont Credit Union account in the decretal portion of the judgment. We find this a mere oversight constituting harmless error. The transcript of the court's oral order shows that the trial judge ordered this account to "[b]e the sole and separate property of the plaintiff."

We remand this cause to the trial court to amend the decretal portion of the judgment to include the disbursement of the Piedmont Credit Union account in the amount of $453.22 to plaintiff as his sole and separate property. The judgment is, in all other respects, affirmed.

Remand for entry of judgment consistent with this opinion.

Judges BECTON and COZORT concur.

JOHN W. CHISHOLM, JR., EMPLOYEE, PLAINTIFF v. DIAMOND CONDOMINIUM CONSTRUCTION COMPANY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8610IC242

(Filed 7 October 1986)

1. Master and Servant § 77.1— workers' compensation—claim for additional benefits—change of condition standard

The Industrial Commission properly applied the "change of condition" standard of N.C.G.S. § 97-47 to plaintiff's claim for additional benefits where

plaintiff had previously received compensation for temporary total disability pursuant to an agreement approved by the Commission, and where, following the final compensation payment to plaintiff, defendant insurer filed I.C. Form 28B to close the case and forwarded a copy of Form 28B to plaintiff.

2. Master and Servant § 94.4— workers' compensation—denial of motion to reopen case

The full Commission was not required to make findings of fact before denying plaintiff's motion to remand the case for a hearing to take additional evidence, and the Commission did not err in denying plaintiff's motion where the record reveals only that plaintiff now has access to medical records which were inaccessible to him at the initial hearing, but there was no showing of the nature of the newly-discovered evidence or how it concerns the question before the Commission of whether plaintiff sustained a timely and substantial change of condition.

APPEAL by plaintiff from Opinion and Award of North Carolina Industrial Commission entered 18 September 1985. Heard in the Court of Appeals 26 August 1986.

John W. Chisholm, Jr., a 36-year-old truck driver employed by defendant-employer Diamond Condominium Construction Company, suffered a back injury when he stepped in a hole while delivering a load of lumber. Under the terms of an Industrial Commission Form 21 Agreement for Compensation for Disability between plaintiff and defendant dated 20 August 1974, plaintiff received workers' compensation benefits at the rate of $80 per week beginning 11 July 1974 and continuing for "necessary weeks." The Agreement was approved by the Industrial Commission on 23 August 1974. The record does not reveal whether a full and complete medical report was submitted to the Commission along with the Agreement ultimately approved by the Commission. Plaintiff returned to work for a new employer on 27 November 1974 and continued to work for this and subsequent employers until December 1977, from which time he has been totally disabled.

Plaintiff's final compensation check was forwarded to him 10 December 1974 along with a copy of Industrial Commission Form 28B, also dated 10 December 1974, which reported plaintiff's case closed. On 15 February 1975, plaintiff filed an additional I.C. Form 18 claim alleging injury to his right leg and lower back resulting from the 10 July 1974 accident. Plaintiff did not allege any change of condition or specify any permanent injuries.

The case was heard before the Industrial Commission on 25 October 1983. In denying plaintiff's claim, the deputy commissioner concluded that plaintiff did not sustain a change of condition within two years of the last payment of compensation for disability, and that as such, plaintiff's claim was barred. Plaintiff appealed to the full Commission.

While the appeal to the full Commission was pending appeal, plaintiff filed a motion to remand the case to take additional evidence, and attached supporting affidavits and exhibits thereto. The full Commission denied plaintiff's motion, found no reversible error, and adopted the Opinion and Award filed by the deputy commissioner. Plaintiff appeals.

Lore and McClearen by R. James Lore, for plaintiff appellant.

Gene Collinson Smith for defendant appellees.

MARTIN, Judge.

Plaintiff presents two issues in this appeal arguing that the Industrial Commission erred in its application of G.S. 97-47 to his claim and in its failure to make findings of fact and conclusions of law before denying his motion for hearing to take additional evidence. Upon review of the record, we find no error in the Commission proceedings and affirm its Opinion and Award denying plaintiff's claim.

[1] Plaintiff first contends that the Industrial Commission misapprehended the applicable law in denying his claim, and erroneously applied the "change of condition" standards contained in G.S. 97-47. Plaintiff argues that the issue of whether he underwent a substantial change of condition is immaterial to the resolution of what plaintiff asserts is his right to additional compensation for disability benefits. He further argues that G.S. 97-47 applies only to cases where the claimant has completed the healing period, received a permanent disability rating from a physician, and acquired a final award or other resolution of the claim. We disagree and hold that G.S. 97-47 is dispositive of plaintiff's claim.

Plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant employer on 10 July 1974. Defendant admitted liability and entered into an agreement

with plaintiff for compensation for "necessary weeks" on I.C. Form 21. Pursuant to G.S. 97-82, the agreement for compensation was submitted to the Industrial Commission for approval. Once approved, the agreement became an award of the Commission enforceable, if necessary, by court decree. *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E. 2d 777 (1953). Plaintiff received workers' compensation benefits in the amount of $80.00 per week until 27 November 1974, when he returned to work. Plaintiff's final compensation payment was forwarded to him on 10 December 1974. Following the issuance of plaintiff's final compensation payment, defendant-insurer executed and filed I.C. Form 28B to close the case and forwarded a copy of the form to plaintiff. By its terms, Form 28B gave notice to plaintiff that his case was closed and that he had one year (now two years) in which to notify the Commission, in writing, that he claimed further benefits. G.S. 97-47. Plaintiff was not requested to sign a copy of I.C. Form 28B.

We hold that the execution and filing of I.C. Form 28B in fact closed plaintiff's case and terminated his claim for injuries arising out of the 10 July 1974 accident. *See Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971). Plaintiff's signature was not a necessary element for the proper execution of the form. It is sufficient that the insurer gave plaintiff notice of the closing and of his right to claim further benefits after the closing by forwarding to plaintiff a copy of Form 28B. *See Gay v. Northampton County Schools*, 5 N.C. App. 221, 168 S.E. 2d 57 (1969).

Plaintiff subsequently completed and filed an additional notice of accident, I.C. Form 18, claiming that he was still experiencing impairments in his lower back and right leg as a result of the 10 July 1974 accident. Plaintiff did not specifically allege any change in condition or any permanent injuries. We hold that plaintiff's act of filing an additional I.C. Form 18 was sufficient to give the Commission the requisite written notice of plaintiff's claim to further benefits. *See Shuler v. Talon Division of Textron*, 30 N.C. App. 570, 227 S.E. 2d 627 (1976).

The case was heard and the claim denied pursuant to G.S. 97-47 for plaintiff's failure to show a substantial change in condition within two years of his last compensation check. Plaintiff contends that the court erred in applying the change in condition standards of G.S. 97-47 to his claim because his initial claim was

never finalized. He argues that his initial award for benefits could never have become final because the extent of any permanent disabilities he may have suffered had not been determined. We disagree. Plaintiff's initial compensation award for temporary total disabilities was determined by agreement prior to the time plaintiff became fully aware of the extent of his injuries.

> "Where the harmful consequences of an injury are unknown when the amount of compensation to be paid has been determined by agreement but subsequently develops, the amount of compensation to which the employee is entitled can be redetermined within the statutory period for reopening. It is a 'change in condition' as the term is used in the statute." *Smith v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559 (1956).

Watkins, supra, at 138, 181 S.E. 2d at 592-93. Plaintiff's initial claim was closed upon the filing of Form 28B. As such, the proper procedure for presenting plaintiff's claim for his alleged permanent disabilities was through the statutorily prescribed procedure for compensation for substantial change of condition. The fact that plaintiff alleges further permanent disabilities does not impact on the finality of his award for temporary total disabilities. " 'The fact that the change necessitates making an award in an entirely different category, as when an original award was one of temporary benefits for time loss and the award on reopening would be for total permanent disability, is no obstacle to reopening.' Larson, Workmen's Compensation, § 81.31." *Id.*

After giving notice of his claim for further benefits, plaintiff's claim remained pending until it came on for hearing on 25 October 1983. At that hearing, it was plaintiff's burden to show that he had undergone a substantial change of condition within the requisite statutory period after receipt of his last compensation check. *See Burrow v. Hanes Hosiery, Inc.*, 66 N.C. App. 418, 311 S.E. 2d 30 (1984); *Moore v. Superior Stone Co.*, 242 N.C. 647, 89 S.E. 2d 253 (1955); *Aylor v. Barnes*, 242 N.C. 223, 87 S.E. 2d 269 (1955). The deputy commissioner found that the evidence presented did not show that plaintiff had sustained a substantial change of condition within the prescribed period and the full Commission agreed.

In reviewing an Opinion and Award from the Industrial Commission, it is our task only to determine if there is any competent evidence in the record to support the Commission's findings of fact which, in turn, must support its conclusions of law. *Mills v. Fieldcrest Mills*, 68 N.C. App. 151, 314 S.E. 2d 833 (1984).

Plaintiff's evidence consisted entirely of his own testimony. He testified that on 10 July 1974, while walking back to his truck after unloading some lumber for defendant-employer, he jumped over a foundation and fell into a hole in a twisted position. As he started to get up, he felt something snap in his lower back. His doctor prescribed medication and hot baths for pain stemming from a ruptured disc. Plaintiff stated that he was still experiencing pain when he began work for Pinehurst Race Track on 27 November 1974, and that he still has the same pain. He continued receiving treatments for his back after he returned to work. Plaintiff also testified that he suffered a second injury to his back sometime in 1977, which necessitated surgery to remove two discs from his back. The record contains no medical evidence concerning the cause and extent of plaintiff's injuries. He made no showing of any permanent disability, of any entitlement to further benefits under his original claim, or of any substantial change in his condition. The defendants presented no evidence.

After hearing the evidence, the deputy commissioner made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff worked continuously from 1974 to 1977 and then his condition worsened.

2. Plaintiff did not sustain a change of condition within two years of the last payment of compensation for disability.

****** ******

The foregoing findings of fact engender the following

CONCLUSION OF LAW

Plaintiff's claim is barred because he did not sustain a change of condition for the worse within two years of his last payment of compensation.

Based on the foregoing findings and conclusion, plaintiff's claim was denied. The full Commission affirmed the decision. We hold that the Commission correctly classified plaintiff's claim as one for benefits due to a change in condition and, there being no competent evidence on which to base an additional award of benefits, properly denied plaintiff's claim.

[2] Plaintiff next contends that the Commission failed to make specific findings on whether plaintiff had shown good grounds for remanding the case for a hearing to take additional evidence. Plaintiff argues that specific findings were required because questions of fact crucial to plaintiff's right to compensation were presented in his motion to take additional evidence. He further argues that the deputy's alleged misapprehension of the applicable law should have compelled the full Commission to grant the motion so as to correct the error.

G.S. 97-85 provides in pertinent part that, upon application for review of an award by the full Commission, the "Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, ..." The question of whether to reopen a case for the taking of additional evidence is addressed to the sound discretion of the Commission and its decision will not be reviewed on appeal absent a manifest abuse of discretion. *Guy v. Burlington Industries*, 74 N.C. App. 685, 329 S.E. 2d 685 (1985). In exercising its discretion, the Commission is not directed to make specific findings of fact.

In the present case, plaintiff submitted, in support of his motion, an affidavit alleging that newly discovered physician's records and the deputy commissioner's alleged misapprehension of the applicable law constitute good grounds for granting a hearing to take additional evidence. We disagree. The record before us reveals only that plaintiff now has access to physician's records which were inaccessible to him at the initial hearing. There is no showing of the nature of the newly-discovered evidence or of how it concerns the question of whether or not plaintiff sustained a timely and substantial change of condition. As such, we cannot conclude that the plaintiff has shown good grounds for taking additional evidence or that the Commission abused its discretion by declining to do so.

Affirmed.

Judge BECTON concurs in the result.

Judge PHILLIPS concurs.

HAROLD OVERCASH AND MARTIN A. OVERCASH v. STATESVILLE CITY BOARD OF EDUCATION AND THE CITY OF STATESVILLE

No. 8622SC335

(Filed 7 October 1986)

Schools § 11.2— injury in school baseball game—exclusion from liability coverage —governmental immunity

Under N.C.G.S. § 115C-42 (1983), a local board of education, by purchasing general liability insurance, does not waive all governmental immunity from liability in tort, including liability for injuries expressly excluded from the insurance coverage. Therefore, the doctrine of governmental immunity protected a city board of education from liability for injuries to a player in a school-sponsored baseball game allegedly caused by negligent maintenance of the ball field where the general liability insurance policy purchased by the board contained an exclusion for injury arising out of participation in athletic contests.

APPEAL by plaintiffs from *Mills, Judge.* Judgment entered 13 January 1986 in Superior Court, IREDELL County. Heard in the Court of Appeals 28 August 1986.

Wardlow, Knox, Knox, Freeman & Scofield, by Lisa G. Caddell, for plaintiff appellants.

Avery, Crosswhite & Whittenton, by William R. Whittenton, Jr., for defendant appellees.

BECTON, Judge.

Harold Overcash and his son, Martin A. Overcash, sought recovery from defendant, Statesville City Board of Education, for injuries sustained by Martin Overcash while he participated in a school-sponsored baseball game on the premises of Statesville Senior High School. The defendant Board of Education moved to dismiss the action pursuant to Rule 12(b)(6) of the Rules of Civil Procedure on the grounds of governmental immunity. After con-

sidering affidavits and other evidence of the parties, thereby treating the motion as one for summary judgment, the trial court granted the motion. Plaintiffs appeal. We find that defendant is entitled to judgment as a matter of law and therefore affirm.

At the outset, we note that this appeal is subject to dismissal because appellants failed to comply with Rule 10 of the Rules of Appellate Procedure, which requires any exception which is made the basis of an assignment of error to be set out in the record on appeal. However, the Commentary to Rule 10 explains that the rule's function is to identify for the adverse party and for the reviewing court the particular judicial action assigned as error. Because plaintiffs' appeal is limited to one assignment of error, which is readily apparent to this Court, we are exercising our discretion to decide the case.

The sole question presented for our review is whether under G.S. Sec. 115C-42 (1983) a local board of education, by purchasing general liability insurance coverage, waives *all* governmental immunity from liability in tort, including liability for injuries which are expressly excluded from the insurance coverage.[1]

I

In April 1983, Martin Overcash, who was at that time a member of the Mooresville Senior High baseball team, participated in a ballgame between Mooresville High and Statesville High on the premises of Statesville High. During one of his turns at bat, Martin was walked by the Statesville pitcher. As he was jogging to first base, he fell and broke his leg. Martin alleged that his fall was caused by a metal spike which was embedded in the ground along the base path and which was concealed from view by dirt and the chalk used to designate the base line. This action, alleging negligent maintenance of the ball field by employees of defendant Board of Education, was initiated by Martin and his father to recover for Martin's personal injuries and for medical expenses incurred by Martin's father. The Board of Education asserted the defense of governmental immunity.

A county or city board of education is a governmental agency, and therefore may not be liable in a tort action except insofar

1. The 1985 amendments to this statute have clarified and resolved this issue for future cases.

as it has duly waived its immunity from tort liability pursuant to statutory authority. *Presnell v. Pell*, 298 N.C. 715, 260 S.E. 2d 611 (1979); *Huff v. Board of Education*, 259 N.C. 75, 130 S.E. 2d 26 (1963); *McBride v. Board of Education*, 257 N.C. 152, 125 S.E. 2d 393 (1962); *Fields v. Board of Education*, 251 N.C. 699, 111 S.E. 2d 910 (1960); *Turner v. Board of Education*, 250 N.C. 456, 109 S.E. 2d 211 (1959); *Smith v. Heffner*, 235 N.C. 1, 68 S.E. 2d 783 (1952); *Benton v. Board of Education*, 201 N.C. 653, 161 S.E. 96 (1931).

The plaintiffs claim that, pursuant to N.C. Gen. Stat. Sec. 115C-42 (1983), the defendant Board waived all of its immunity from suit by purchasing liability insurance coverage for damage caused by the negligence or torts of its employees. However, the general liability insurance policy purchased by the Board contained an exclusion for injury arising out of participation in athletic contests sponsored by the insured.

We hold that the waiver of immunity extends only to injuries which are specifically covered by the insurance policy.

II

General Statute Section 115C-42, the controlling statute, provides in part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

Plaintiffs rely upon the following portion of the statute, which states that:

> Any contract of insurance purchased pursuant to this section . . . must by its terms adequately insure the local board of education against any and all liability for any damages by reason of death or injury to person or property

> proximately caused by the negligent acts or torts of the agents and employees of said board of education . . . .

Counsel for the plaintiffs argues that this language constitutes an absolute legislative mandate that a school board which elects to waive any of its governmental immunity by purchasing insurance must obtain insurance coverage for *all* liability caused by the negligence of its employees. Plaintiffs then suggest, citing *Sturdivant v. City of Farmington*, 255 Ark. 415, 500 S.W. 2d 769 (1973) and *Thompson v. Sanford*, 281 Ark. 365, 663 S.W. 2d 932 (1984), that in the event of a failure to obtain total coverage, a school board becomes a self-insurer to the extent of any liability not so covered. We disagree on both counts.

The legislature's intent in enacting a statute is generally determined "not only from the phraseology of the statute but also from the *nature and purpose of the act* and the consequences which would follow its construction one way or the other." *In re Hardy*, 294 N.C. 90, 97, 240 S.E. 2d 367, 372 (1978). *See also Art Society v. Bridges, State Auditor*, 235 N.C. 125, 69 S.E. 2d 1 (1952). Furthermore, individual portions of a statute must be interpreted in the context of the whole and "accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit." *Watson Industries v. Shaw, Comm'r of Revenue*, 235 N.C. 203, 210, 69 S.E. 2d 505, 511 (1952).

A

Applying these principles, we find that the statute as a whole evidences no intent to dictate that local boards of education purchase insurance coverage for all tort liabilities. First, the act's primary purpose appears to be encouraging local school boards to waive immunity by obtaining insurance protection while, at the same time, vesting such boards with discretion regarding whether, and to what degree, to waive immunity. The act "authorizes" and "empowers" but does *not* demand the securing of liability insurance and the resultant waiver of immunity. "It is clear that the Legislature has not waived immunity from tort liability as to county and city boards of education . . . but *has left the waiver of immunity from liability for torts to the respective boards*, and then only to the extent such board has obtained liability insurance to cover negligence or torts." *Fields v. Board of Educa-*

tion, 251 N.C. 699, 701, 111 S.E. 2d 910, 912 (1960) (emphasis added).

Second, the statute plainly states that a waiver exists "only to the extent" that the board is actually "indemnified by insurance for such negligence or tort." This limitation on the waiver of immunity would constitute meaningless surplusage if the statute allowed no limits upon the insurance protection purchased. We find no support for the plaintiffs' position that this phrase refers only to monetary limits upon the waiver of liability and not to exclusions from coverage of specific categories of torts. The Board of Education may exercise its discretion to determine for which, if any, of its potential liabilities to purchase insurance and thereby limit its waiver of liability. Within this context, the statutory language construed by the plaintiffs as a mandate of complete liability coverage should instead be understood as merely a directive to obtain adequate insurance "against any and all liability for any damages" *for which the Board of Education actually acquires insurance.*

In addition to the statute's language and purposes, sound policy dictates that we reject the appellants' "all or nothing" construction of the statute. Were we to hold that a local school administrative unit which elects to purchase any insurance must insure against all tort liabilities and waive all its immunity from suit, the obvious and objectionable consequence would be to discourage school boards from acquiring insurance at all whenever funds for its purchase are limited. That result would directly contradict the intent of the legislature to encourage insurance protection.

Finally, even if the statute could correctly be interpreted as requiring any insurance obtained pursuant to it to cover all tort liability, the act does not prescribe the results of disobedience of such an edict. We ascertain no legislative intent to make the school board a self-insurer under those circumstances and to thus impose a waiver of immunity beyond that which the Board has chosen. "Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the right to sovereign immunity, must be strictly construed." *Guthrie v. State Ports Authority*, 307 N.C. 522, 537-38, 299 S.E. 2d 618, 627 (1983). *See also Floyd v. Highway*

Commission, 241 N.C. 461, 85 S.E. 2d 703 (1955); *Construction Co. v. Dept. of Administration*, 3 N.C. App. 551, 165 S.E. 2d 338 (1969). The statute provides that the defendant Board has waived its immunity to the extent it is indemnified by insurance for its torts. Due to the exclusion of athletic events from its liability insurance policy, the Board is not entitled to indemnification for Martin Overcash's baseball injuries and therefore has not waived its immunity from suit for those injuries. Following the rule of strict construction, we decline to impose any further waiver not expressly created by the statute.

B

In addition to their other arguments, the plaintiffs also suggest in their brief that the mandate of insurance coverage of all negligence should be treated as a part of the insurance contract. The consequence of that position would be to delete the exclusion of athletic events from the policy. Because we find no statutory requirement that the Board insure against all tort liability, and because we find the case authority relied upon by the plaintiffs to be inapposite, we decline to rewrite the insurance policy to cover Martin Overcash's injuries.

III

Summary judgment is appropriate whenever the movant establishes a complete defense to the plaintiffs' claim. *Estrada v. Jaques*, 70 N.C. App. 627, 321 S.E. 2d 240 (1984); *Ballinger v. Secretary of Revenue*, 59 N.C. App. 508, 296 S.E. 2d 836 (1982), *cert. denied*, 307 N.C. 576, 299 S.E. 2d 645 (1983). The defendant Board in this case has established the complete defense of governmental immunity. Therefore, the trial court was correct in granting the Board's motion.

For the reasons set forth above, we

Affirm.

Judges JOHNSON and COZORT concur.

FLEET REAL ESTATE FUNDING CORPORATION v. JOHN N. BLACKWELDER AND NORRIS M. BLACKWELDER

No. 8626SC123

(Filed 7 October 1986)

1. **Principal and Surety § 1; Guaranty § 1; Limitation of Actions § 4.6— suretyship rather than guaranty—statute of limitations**

An agreement executed by defendants under seal which made them primarily liable for a corporation's indebtedness to a bank constituted a suretyship contract governed by the three-year statute of limitations of N.C.G.S. § 1-52 rather than a guaranty under seal governed by the ten-year statute of limitations of N.C.G.S. § 1-47(2), notwithstanding the agreement was titled "Guaranty Agreement." Therefore, plaintiff's action on the agreement was barred by N.C.G.S. § 1-52 where it was filed more than three years after the original corporate borrower was in default and where plaintiff did not allege that defendants authorized or ratified any acknowledgment or payment after default.

2. **Limitation of Actions § 16; Rules of Civil Procedure § 12— statute of limitations—defense raised by motion to dismiss**

Defendant properly raised the defense of the statute of limitations by a Rule 12(b)(6) motion to dismiss when the complaint disclosed on its face that plaintiff's claim was barred by the statute of limitations.

APPEAL by plaintiff from *Grist, Judge*. Judgment entered 18 November 1985 in MECKLENBURG County Superior Court. Heard in the Court of Appeals 25 August 1986.

Plaintiff filed this action on 13 June 1985 to collect $400,329.52 allegedly owed to it under the terms of a "Guaranty Agreement." Plaintiff's complaint alleged, in pertinent part, that:

> 4. On or about April 26, 1978, Blackwelder Furniture Company of Statesville, Inc. (hereinafter "Blackwelder") executed and delivered to NCNB two promissory notes made payable to NCNB in the principal amounts of $730,000.00 and $120,000.00, copies of which are attached to and made a part of this Complaint as Exhibits A and B, respectively (hereinafter "the Notes").
>
> 5. On or about April 26, 1978, in order to secure its obligations to NCNB under the Notes, Blackwelder conveyed to NCNB certain real property and improvements owned by Blackwelder and located in Iredell County, North Carolina, as

more particularly described in the Deed of Trust, a copy of which is attached to and made a part of this Complaint as Exhibit C (hereinafter "the Deed of Trust").

6. On or about April 26, 1978, defendants, for valuable consideration, executed and delivered to NCNB a written Guaranty Agreement (hereinafter the "Guaranty"), under which defendants jointly and severally guaranteed payment of the indebtedness of Blackwelder to NCNB under the Notes. A true copy of the Guaranty is attached to and made a part of this Complaint as Exhibit D.

7. Plaintiff is the successor in interest to all right, title and interest of NCNB in and to the Notes, the Deed of Trust, and the Guaranty.

8. Blackwelder has been and is in default under the provisions of the Notes and the Deed of Trust since on or about February 1, 1982.

9. In June 1984, plaintiff foreclosed the Deed of Trust and sold the real property and improvements subject thereto at a public sale held on June 5, 1984, at the Iredell County Courthouse in Statesville, North Carolina. Said foreclosure proceedings were conducted in accordance with the applicable provisions of the Deed of Trust and Chapter 45 of the North Carolina General Statutes.

10. After applying all credits and the amount received from the sale of the collateral property subject to the Deed of Trust, the outstanding balance due and owing on the Notes, as of April 5, 1985, is $400,329.52.

11. Plaintiff has demanded that defendants pay the sum of $400,329.52, pursuant to the Guaranty, but defendants have failed and refused to pay this amount.

12. By reason of the foregoing, defendants are justly indebted to plaintiff in the amount of $400,329.52, plus interest thereon at the rate of nine and one-half percent (9½%) per annum from April 5, 1985, until paid in full.

Defendant John N. Blackwelder (defendant) filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) "on the ground that [plaintiff's] action as shown on the face of the [c]om-

plaint was not filed within the time required by the applicable [s]tatute of [l]imitations." The trial court found that N.C. Gen. Stat. § 1-52 was the applicable statute of limitations and that this statute had run prior to the commencement of plaintiff's action, and allowed defendant's motion to dismiss. Plaintiff appealed.

Moore, Van Allen, Allen & Thigpen, by Daniel G. Clodfelter, James C. Smith and Charles E. Johnson, for plaintiff-appellant.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Debra L. Foster, for defendant-appellee John N. Blackwelder.

WELLS, Judge.

[1] The dispositive question in this appeal is whether the contract on which plaintiff seeks recovery is one of "guaranty" under seal coming within the ten-year statute of limitations, or is one of "suretyship" coming within the three-year statute of limitations. Plaintiff argues that the court erroneously held that N.C. Gen. Stat. § 1-52, the three-year statute, barred plaintiff's action. Plaintiff contends that N.C. Gen. Stat. § 1-47(2), the ten-year statute, applies because defendant entered a contract of guaranty under seal and that plaintiff's action is not barred under G.S. 1-47(2). We disagree.

While titled a "Guaranty Agreement," the instrument executed and delivered by defendant to NCNB provides, in pertinent part, that:

> This obligation and liability on the part of the undersigned shall be primary and not a secondary obligation and liability, payable immediately upon demand without recourse first having been had by the owner and holder of the aforesaid notes against the Borrower or any person, firm or corporation or property which is security for the indebtedness;
> . . . .

In *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980), our Supreme Court held that an agreement which included language identical to that excerpted above created a contract of suretyship. The Court explained:

> Although contracts of guaranty and suretyship are, to some extent, analogous, and the labels are used inter-

changeably, there are, nevertheless, important distinctions between the two undertakings. . . . A guaranty is a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance. . . . A surety is a person who is primarily liable for the payment of the debt or the performance of the obligation of another. . . . While both kinds of promises are forms of security, they differ in the nature of the promisor's liability. A guarantor's duty of performance is triggered at the time of the default of another. . . . On the other hand, a surety is primarily liable for the discharge of the underlying obligation, and is engaged in a direct and original undertaking which is independent of any default. [Citations omitted.]

While the document at issue is entitled "guaranty agreement," its label is not determinative of its character. It is appropriate to regard the substance, not the form, of a transaction as controlling, and we are not bound by the labels which have been appended to the episode by the parties. . . . The agreement expressly states that

> This obligation and liability on the part of the undersigned shall be a primary and not a secondary obligation and liability, payable immediately upon demand without recourse first having been had by [Branch Banking and Trust] against the Borrower or any person, firm, or corporation; . . . .

By affixing her signature to the document, defendant manifested her assent to enter into a suretyship contract which imposed primary liability upon her for the payment of her husband's debt to the bank. [Citations omitted.]

Following *Trust Co.*, we hold that defendant entered a contract of suretyship with plaintiff's predecessor in interest notwithstanding the instrument's title of "Guaranty Agreement." As in *Trust Co.*, defendant entered a suretyship contract which imposed primary liability upon him for payment of Blackwelder Furniture Company's debt to the bank.

"The statute of limitations barring actions against defendants as sureties is G.S. 1-52, notwithstanding the seal appearing after

their names." *Pickett v. Rigsbee*, 252 N.C. 200, 113 S.E. 2d 323 (1960). *See also Lee v. Chamblee*, 223 N.C. 146, 25 S.E. 2d 433 (1943). "The statute begins to run on the date the promise [to pay] is broken." *Pickett, supra. See also Penley v. Penley*, 314 N.C. 1, 332 S.E. 2d 51 (1985). If the original borrower makes a new promise to pay the debt in writing or actually makes a partial payment after his or her original promise to pay is broken but before the statute of limitations has run, then the statute begins to run anew from the date of this payment or acknowledgment as against a surety who authorizes or ratifies it. *See Pickett, supra*; N.C. Gen. Stat. §§ 1-26, 1-27. *See also Trust Co. v. Martin*, 44 N.C. App. 261, 261 S.E. 2d 145 (1979), *disc. rev. denied*, 299 N.C. 741, 267 S.E. 2d 661 (1980).

Applying the above principles to the facts here, we hold that all the facts necessary to establish the limitation appear on the face of plaintiff's complaint. *See Flexolite Electrical v. Gilliam*, 55 N.C. App. 86, 284 S.E. 2d 523 (1981). Specifically, plaintiff's complaint alleges that the original borrower "has been and is in default . . . since on or about February 1, 1982." Plaintiff does not allege in its complaint that defendant authorized or ratified any acknowledgment or payment after default. *See Pickett, supra.* Plaintiff filed this action on 13 June 1985, more than three years after its cause of action had accrued against defendant. Plaintiff's claim thus is barred by G.S. 1-52. Accordingly, we hold that the court properly granted defendant's motion to dismiss.

[2] Plaintiff contends the court erred in granting defendant's motion to dismiss because his motion "failed to give plaintiff reasonable notice of the facts or law upon which it was based." However, it is well established that "[w]hen the complaint discloses on its face that plaintiff's claim is barred by the statute of limitations, such defect may be taken advantage of by a motion to dismiss under Rule 12(b)(6)." *F.D.I.C. v. Loft Apartments*, 39 N.C. App. 473, 250 S.E. 2d 693, *disc. rev. denied*, 297 N.C. 176, 254 S.E. 2d 39 (1979). Defendant's motion to dismiss specifically alleged that plaintiff's action "as shown on the face of the [c]omplaint was not filed within the time required by the applicable [s]tatute of [l]imitations. Accordingly, we hold that defendant properly raised the defense of the statute of limitations by a Rule 12(b)(6) motion to dismiss.

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

KAREN CLODFELTER BRANKS v. DR. PAUL KERN AND ANIMAL EMERGENCY CLINIC, P. A.

No. 8628SC167

(Filed 7 October 1986)

1. **Negligence § 1.2; Physicians, Surgeons and Allied Professions § 11— cat bite during treatment by veterinarian—standard of care**

In an action to recover for injuries received by plaintiff when her cat bit her while it was being treated by defendant veterinarian, the standard of care owed by defendants to plaintiff was not the veterinary malpractice standard but was the ordinary negligence standard of the duty to exercise due care for plaintiff's safety while she was on defendants' premises.

2. **Negligence §§ 29.2, 34.1— cat bite during treatment by veterinarian—negligence and contributory negligence—issues of material fact**

In an action to recover for injuries received by plaintiff invitee when her cat bit her while the cat was undergoing a catheterization by defendant veterinarian, plaintiff's forecast of evidence was sufficient to present a genuine issue of material fact as to whether defendant veterinarian was negligent in *failing to restrain plaintiff's* cat during the catheterization and in failing adequately to warn plaintiff of the risks of remaining in close proximity to the cat during the procedure. Furthermore, the evidence did not show that plaintiff was contributorily negligent as a matter of law in continuing to pet her cat when she knew the cat was in great pain and had seen the cat snap at the veterinarian's assistant.

APPEAL by plaintiff from *Lamm, Judge*. Summary judgment entered 9 December 1985 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 25 August 1986.

Plaintiff filed this action on 15 April 1985, alleging negligence on the part of defendant Kern and defendant Clinic and seeking actual medical damages and lost wages. Defendants denied these allegations and further pleaded as a defense plaintiff's contributory negligence. Defendants moved for summary judgment.

The forecast of evidence before the trial court tended to show the following events and circumstances. On 21 April 1984, the plaintiff, a postal worker and former nursing student, brought

her cat into the defendant Animal Emergency Clinic. The cat was suffering from blockage of the urethra, a common problem in neutered male cats. The usual treatment in such a case is catheterization, a process which the plaintiff's cat had undergone twice before.

Defendant Kern, an employee of defendant Clinic, was the veterinarian on duty at the time. He asked Ms. Branks to bring the cat into the treatment room. He began the procedure with the plaintiff in the room, his veterinary assistant holding the cat. For medical and financial reasons, no anesthesia was used. The cat seemed in great pain. A few minutes into the procedure he wriggled loose and snapped at the assistant who was holding him. Plaintiff, who was standing at the cat's head and stroking his chest and paws in an attempt to soothe him, was aware that the cat had attempted to bite the assistant. The assistant adjusted his grip on the cat and the veterinarian resumed his work. A few minutes later, the cat again managed to free his head, this time biting the plaintiff who was holding the cat's front paws. Plaintiff's injury did not seem particularly severe at the time; the receptionist bandaged the plaintiff's hand and Dr. Kern successfully opened the cat's blocked urethra. Plaintiff later went to an emergency room and discovered that she had severed a tendon in her hand. Plaintiff incurred medical expenses for treatment to her hand and lost wages as a result of her injury. The trial court granted defendant's motion for summary judgment. Plaintiff appealed.

C. David Gantt for plaintiff-appellant.

Harrell and Leake, by Larry Leake, for defendant-appellee Animal Emergency Clinic.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Russell P. Brannon and Michelle Rippon, for defendant-appellee Dr. Paul Kern.

WELLS, Judge.

The trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to judg-

ment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c), North Carolina Rules of Civil Procedure. As our Supreme Court explained in *Lowe v. Bradford*:

> A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. (Citations omitted.) Generally this means that on "undisputed aspects of the opposing evidential forecast," where there is no genuine issue of fact, the moving party is entitled to judgment as a matter of law. 2 McIntosh, North Carolina Practice and Procedure § 1160.5, at 73 (2d ed. Supp. 1970).

305 N.C. 366, 289 S.E. 2d 363 (1982). The primary issue in the case at bar is whether the plaintiff was injured by the defendant's negligence, a claim for relief which our courts have traditionally been reluctant to keep from the jury. *See Gladstein v. South Square Assoc.*, 39 N.C. App. 171, 249 S.E. 2d 827 (1978), *cert. denied*, 296 N.C. 736, 254 S.E. 2d 178 (1979). Negligence consists of a number of elements, and in order to survive a motion for summary judgment, plaintiff's forecast of the evidence must support the conclusion that the defendant had a duty of care to the plaintiff; that defendant breached his duty; that his lack of due care was the proximate cause of some injury to plaintiff, an important aspect of proximate cause being that the injury was reasonably foreseeable. *See Pittman v. Frost*, 261 N.C. 349, 134 S.E. 2d 687 (1964). *See also Meyer v. McCarley and Co.*, 288 N.C. 62, 215 S.E. 2d 583 (1975). The first question, then, is to what standard of care the defendant veterinarian will be held.

[1] Defendants assert that the proper duty of care in this case is that exercised by skilled veterinarians, similarly situated, engaged in the same type of work—a breach of which is medical malpractice as opposed to ordinary negligence. We disagree. Plaintiff does not allege that her cat was harmed by the defendant's actions. Rather, she asserts that the veterinarian's negligent restraint of her pet and his failure to warn her of any danger allowed the cat to bite her. This is clearly not a case of veterinary medical malpractice, but one of ordinary negligence. Plaintiff was a business invitee of defendant Clinic, *see Goldman v. Kossove*,

253 N.C. 370, 117 S.E. 2d 35 (1960), and as such defendant owed her a duty to exercise due care for her safety while she was on its premises. *See Sibbett v. Livestock, Inc.*, 37 N.C. App. 704, 247 S.E. 2d 2, *cert. denied*, 295 N.C. 735, 248 S.E. 2d 864 (1978). We hold that under the forecast of evidence in this case, Dr. Kern owed plaintiff a duty to exercise reasonable care in preventing the cat from harming the plaintiff. We now consider whether plaintiff's forecast is sufficient to establish a genuine issue of fact as to whether Dr. Kern breached that duty.

[2] Plaintiff asserts that Dr. Kern was negligent in two respects: (1) in his failure to properly restrain the animal and (2) in permitting the plaintiff to remain in the room with no instructions. On the question of duty to warn, plaintiff in her deposition testified that the defendant asked her to bring the cat in and allowed her to remain in the room; he never gave her any direction as to where she should or should not stand. Nor, she contends, did he at any time warn her that the cat might bite her. However, in his own deposition Dr. Kern stated that, after the cat had snapped at the assistant, he told the plaintiff, "Don't let him bite you." This evidence raises a genuine issue of material fact as to the breach of Dr. Kern's duty upon which a jury must pass.

On the restaint issue, however, the parties are in essential agreement as to the facts: (1) that there are a number of ways in which a cat can be restrained; (2) that the defendant Dr. Kern chose to have his assistant grasp the cat and hold him by the scruff of the neck; and (3) that at one point, Dr. Kern tried to put a muzzle on the animal but abandoned the idea when the muzzle fell off. These facts are not in dispute; yet, as Chief Judge Morris wrote in *Gladstein v. South Square Assoc.*:

> . . . it has often been said by the courts of this and many other jurisdictions that only in exceptional cases involving the question of negligence or reasonable care will summary judgment be an appropriate procedure to resolve the controversy. (Citations omitted.) The propriety of summary judgment does not always revolve around the elusive distinction between questions of fact and law. Although there may be no question of fact, when the facts are such that reasonable men could differ on the issue of negligence courts have generally considered summary judgment improper. (Citations omitted.) Judge Parker for this Court explained:

> This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay and what was the proximate cause of the aggrieved party's injuries. *Robinson v. McMahan*, 11 N.C. App. at 280, 181 S.E. 2d at 150; *see also Edwards v. Means, supra.*
>
> The jury has generally been recognized as being uniquely competent to apply the reasonable man standard. *See generally* Prosser, Torts § 37 at 207 (4th Ed. 1971). Because of the peculiarly elusive nature of the term 'negligence,' the jury generally should pass on the reasonableness of conduct in light of all the circumstances of the case. This is so even though in this State '[w]hat is negligence is a question of law, and when the facts are admitted or established, the court must say whether it does nor does not exist.' *McNair v. Boyette*, 282 N.C. 230, 236, 192 S.E. 2d 457, 461 (1972).

Gladstein, supra. In the case at bar, the forecast of evidence before the trial court was sufficient to allow a trier of fact to reasonably find that plaintiff was a business invitee of defendants; that defendant Kern owed plaintiff a duty to exercise reasonable care to restrain plaintiff's cat during the operation and to adequately warn plaintiff of the risk of remaining in close proximity to the cat during the operation; that defendant Kern breached that duty in both respects; that plaintiff was injured and damaged; and that Kern's breach was the proximate cause of plaintiff's injury and damages.

The final question is whether summary judgment is proper on the issue of contributory negligence. Defendant contends that the plaintiff caused her own injury by continuing to pet her cat even though she knew he was in great pain and in fact had seen the cat attempt to bite the assistant. We disagree. Issues of contributory negligence, like those of ordinary negligence, are rarely appropriate for summary judgment. *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E. 2d 47 (1985). Only where plaintiff's own evidence discloses contributory negligence so clearly that no other reasonable conclusion may be reached is summary judgment to be granted. *Izard v. Hickory City Schools Bd. of Education*, 68

N.C. App. 625, 315 S.E. 2d 756 (1984). In the case at bar, reasonable men could differ as to whether, in light of all the circumstances, plaintiff's failure to keep out of harm's way constituted contributory negligence.

The judgment of the trial court must be and is

Reversed.

Chief Judge HEDRICK and Judge WEBB concur.

STATE OF NORTH CAROLINA v. CLIFTON EARL CRANDALL

No. 863SC436

(Filed 7 October 1986)

1. **Criminal Law § 138.33— passive participant—minor role—separate mitigating factors**

The trial court may find as separate mitigating factors that defendant was a passive participant and that defendant played a minor role in the crime if separate evidence is presented to support each mitigating factor. N.C.G.S. § 15A-1340.4(a)(2)(c).

2. **Criminal Law § 138.33— mitigating circumstances—passive participant finding—minor role finding not required**

In a breaking or entering case in which the trial court found as a statutory mitigating factor that defendant was a passive participant in the break-in, the court was not required to find as an additional statutory mitigating factor that defendant played a minor role in the crime where defendant presented no separate evidence of a minor role but relied on the same evidence to support both factors.

APPEAL by defendant from *Phillips (H. O., III), Judge.* Judgments entered 24 April 1985 in PITT County Superior Court. Heard in the Court of Appeals 22 September 1986.

Defendant was convicted of three counts of felony breaking and entering and larceny. In an unpublished opinion we reversed one of these convictions and we remanded the other two convictions for resentencing. Evidence presented at the resentencing hearing tended to show, in pertinent part, that:

On 26 November 1982, defendant was drinking with some friends when one of them suggested that they break into Venters Grocery. Following this suggestion, the group drove to the store and stole various property. The group then went to the E & M Country Store, but made no entry or stole any property at that establishment. From the E & M Country Store, the group proceeded to J. H. Hudson, Inc. where they stole some tools and a television set.

Defendant offered evidence tending to show that he was intoxicated throughout the evening of 26 November during the course of the break-ins. During the Hudson break-in defendant was so intoxicated that he was "passing out" and did not know what was happening. He did not leave the car except to stand by a ditch along the side of the road momentarily and then return to the car. He also helped place some bags in the car when the others returned with the stolen tools and the television set.

Regarding defendant's conviction for the Hudson break-in, the court found in aggravation that defendant had a prior criminal record. The court found a number of factors in mitigation, including that:

> 7. The defendant was a passive participant in the commission of the offense.

The court then concluded that the sole aggravating factor outweighed the mitigating factors and imposed a sentence in excess of the presumptive term. Defendant appealed his sentence for the Hudson break-in.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Ann Reed, for the State.

Appellate Defender Malcolm Ray Hunter, Jr. for defendant-appellant.

WELLS, Judge.

[1] Defendant's sole contention is that the court should have found as an additional statutory mitigating factor that he played a minor role in the commission of the Hudson break-in. We disagree.

In general,

> [e]numerated in G.S. § 15A-1340.4(a)(2) are the statutory factors which *must* be considered by the sentencing judge. The mitigating factor urged here is included. . . . A duty is placed upon the judge to examine the evidence to determine if it would support any of the statutory factors even absent a request by counsel. *State v. Gardner*, 312 N.C. 70, 320 S.E. 2d 688 (1984). The sentencing judge is required to find a statutory factor when the evidence in support of it is uncontradicted, substantial, and manifestly credible. *State v. Jones*, 309 N.C. 214, 306 S.E. 2d 451 (1983). Failure to find a statutory factor so supported is reversible error. *See State v. Spears*, 314 N.C. 319, 333 S.E. 2d 242 (1985).

State v. Cameron, 314 N.C. 516, 335 S.E. 2d 9 (1985).

Citing State v. San Miguel, 74 N.C. App. 276, 328 S.E. 2d 326 (1985), defendant contends the court should have found both that defendant was a passive participant *and* that he played a minor role in the commission of the offense even though these factors are listed in the same statutory subsection.

In *San Miguel*, the court found as factors in aggravation that defendants induced another to participate in the commission of the offense and that defendants occupied a position of leadership or dominance of other participants in the commission of the offense. Defendants contended that the court impermissibly divided the statutory aggravating factor in N.C. Gen. Stat. § 15A-1340.4 (a)(1)(a) into two parts and found each part as a separate factor. The Court disagreed and held that "if evidence is presented showing that a defendant induced another or others to participate . . . and separate evidence is presented showing that the defendant also led or dominated . . ., the court may find two separate aggravating factors." *San Miguel, supra.* The Court reasoned:

> The conduct referred to is of two types—first, inducing others and, second, leading or dominating others. The words used are not generally synonymous. *See* Black's Law Dictionary 697 (rev. 5th ed. 1979) ("induce"); Webster's New Collegiate Dictionary 653 (1977) ("lead"); *see also* Black's Law Dictionary, *supra*, at 436 ("dominate"). Since G.S. 15A-1340.4 (a)(1)(a) is stated in the disjunctive, proof of either type of

> conduct, by the preponderance of the evidence, is sufficient to support the finding of an aggravating factor. *See In re Duckett*, 271 N.C. 430, 437, 156 S.E. 2d 838, 844 (1967) ("the disjunctive . . . 'or' is used to indicate a clear alternative"); *Davis v. Granite Corporation*, 259 N.C. 672, 675, 131 S.E. 2d 335, 337 (1963); *see also* G.S. 15A-1340.4(a).
>
> . . . One of the primary purposes of sentencing is to impose punishment commensurate with the injury caused, taking into account the factors which diminish or increase the offender's culpability. *See* G.S. 15A-1340.3. Both inducing others to commit an offense and leading others during the commission of an offense constitute conduct which increases a defendant's culpability. Since proof of either type of conduct, by the preponderance of the evidence, is sufficient to support the finding of an aggravating factor, proof of both types of conduct should suffice to support the finding of two aggravating factors so as to reflect the defendant's greater culpability.

San Miguel, supra.

The factors here are less easily distinguished than those in *San Miguel.* A passive participant can be defined as one who has an inactive part in the commission of an offense. *See* Black's Law Dictionary (rev. 5th ed., 1979) and Webster's Third New International Dictionary (1976). A minor role can be defined as one in which the individual performs a comparatively unimportant function in the commission of an offense. *See id.* Despite the closeness of these definitions, they still can refer to separate types of conduct. Since N.C. Gen. Stat. § 15A-1340.4(a)(2)(c) is stated in the disjunctive, proof of either type of conduct is sufficient to support the finding of a mitigating factor. *See San Miguel, supra.*

We recognize that a defendant certainly can play an inactive part *and* perform a comparatively unimportant function in the commission of an offense. In fact, these types of conduct may overlap. *See State v. Brown*, 314 N.C. 588, 336 S.E. 2d 388 (1985) (evidence tended to show that far from being a passive participant, defendant played a major role in the commission of the crime). Following the rationale of *San Miguel*, since proof of either passive participation or performance of a minor role, by the preponderance of the evidence, is sufficient to support the finding of a mitigating factor, proof of both types of conduct

should suffice to support the finding of two mitigating factors so as to reflect the defendant's lesser culpability.

However, the *San Miguel* Court further held that the two subsections of N.C. Gen. Stat. § 15A-1340.4(a)(1)(a) could be found as two separate aggravating factors only if there was separate evidence supporting each. This requirement comports with N.C. Gen. Stat. § 15A-1340.4(a)(1) which stipulates that the same evidence may not be used to support more than one aggravating factor. There is no statutory counterpart to this provision of N.C. Gen. Stat. § 15A-1340.4(a)(1) for mitigating factors. However, consistent with the Fair Sentencing Act's requirement of separate evidence to support each aggravating factor, we hold that the same evidence may not be used to find more than one mitigating factor; each mitigating factor can be found only if there is separate evidence supporting it.

[2] Applying the foregoing principles to the evidence here, we hold that the court was not required to find as an additional statutory mitigating factor that defendant played a minor role in the commission of the offense because defendant presented insufficient separate evidence of this factor. Defendant's evidence showed that he was highly intoxicated and was "passing out" during the break-in and was not aware of what was happening. He remained in the car except to stand by a ditch momentarily and later helped place some bags in the car.

This evidence clearly supports a finding that defendant was a passive participant. Arguably, it also suggests that defendant played a minor role in the commission of the crime as well. In this regard, this case demonstrates how the same evidence can give rise to both of these factors. A sentencing judge confronted with this situation must decide which factor best characterizes defendant's conduct under the circumstances. The predominant feature of defendant's conduct here is inactivity and the court thus properly found that defendant was a passive participant. Since the record reveals no additional separate evidence that defendant also played a minor role in the commission of the crime, the court was not required to find this additional statutory factor. We note that, even if defendant had presented separate evidence that he played a minor role, the court still would not have been required

to find this factor unless this evidence were uncontradicted, substantial, and manifestly credible. *Cameron, supra.*

For the foregoing reasons, defendant's sentence in No. 82CRS14923 (Hudson break-in) is

Affirmed.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. TRACY THOMPKINS

No. 8612SC221

(Filed 7 October 1986)

1. **Burglary and Unlawful Breakings § 5.8— breaking or entering and larceny—felonious intent—value of stolen goods—sufficiency of evidence**

The State's evidence of felonious intent and of the value of the stolen goods was sufficient to support defendant's conviction of felonious breaking or entering and felonious larceny where it tended to show that the side door to the victim's house had been kicked in and the door casing was split open while the victim was at work; defendant was twice seen walking from the side of the victim's house, one time carrying a large, square object and the second time carrying a long, rectangular object; a color television, a tape deck and a stereo amplifier were missing from the victim's house; and the victim testified that the missing items were worth about $900.

2. **Criminal Law §§ 101.4, 122.1— denial of jury's request to review evidence—failure to exercise discretion**

The trial judge in a breaking or entering and larceny prosecution erred in denying the jury's request to review the testimony of the State's identification witness on the ground that a transcript was not available where the trial judge's remarks show that he did not exercise his discretion under N.C.G.S. § 15A-1233(a) but denied the request because he felt that he did not have the authority to grant it.

APPEAL by defendant from *Herring, Judge.* Judgments entered 6 November 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 15 September 1986.

Defendant was charged in a proper bill of indictment with second degree burglary and the felonious larceny of a stereo system and a color television.

At trial, the State introduced evidence tending to show the following: At 9:00 p.m. on 21 August 1984, defendant was seen walking from the side of Celia Scarborough's house to the back of the house two times, carrying a large object in his hands each time. Celia Scarborough was at work that night, and when she came home, she found that the side door of her house had been smashed in and her Sony color television and her stereo amplifier and tape deck were missing. She testified that these items were worth about $900.

Defendant was found guilty of felonious breaking or entering and felonious larceny. From judgments imposing prison sentences of three years for breaking or entering and three years for larceny, defendant appealed.

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

Staples Hughes for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant assigns as error the trial court's denial of his motion to dismiss the charges for insufficiency of the evidence. Defendant contends that the evidence of felonious intent was insufficient to support the conviction for felonious breaking or entering. He also argues that the evidence is insufficient to show that the items taken had a value of greater than $400 and thus to support the conviction of felonious larceny. We disagree with defendant's contentions.

The offense of felonious breaking or entering is defined in G.S. 14-54(a) which provides, "Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon." the intent to commit larceny may be inferred from the fact that defendant committed larceny. *State v. Wilson*, 315 N.C. 157, 337 S.E. 2d 470 (1985). G.S. 14-72 defines the offense of felonious larceny as "[l]arceny of goods of the value of more than four hundred dollars."

The evidence in the present case tends to show that Celia Scarborough locked the door to her home when she left on the morning of 21 August 1984. She testified that no one else had a key or permission to enter her house. Her neighbors, Carl and

Lisa Maier, and Carl's sister Karon Maier, testified that about 9:00 that evening they saw a car drive slowly down the street and park near the Scarborough home. A man got out of the car and walked around the house. The Maiers saw the man walk from the side of the house to the rear of the house two times, each time carrying a large object in his hands. One of the objects was large and square and the other object was long and rectangular. The man then walked to his car. Karon Maier identified defendant as the man she had seen at the Scarborough house that night. The sheriff's deputy who investigated the incident testified that the door to the house had apparently been kicked in and the door casing was split open. Celia Scarborough testified that she came home after a neighbor called her at work to tell her what had happened, and she discovered that her color television and part of her stereo system, a tape deck and an amplifier, were missing. She testified that these items were worth about $900.

This evidence is sufficient for the jury to find that a breaking or entering occurred and that defendant was the perpetrator. The evidence tending to show that defendant was seen walking around the house with large objects in his hands and that a television and parts of a stereo were missing supports a finding that defendant committed larceny, and thus supports an inference that he committed the breaking or entering with the intent to commit larceny. Celia Scarborough's testimony about the value of the goods missing from her home is sufficient for the jury to find that they had a value of more than $400. *State v. Cotten*, 2 N.C. App. 305, 163 S.E. 2d 100 (1968). We hold, therefore, that the trial court properly denied defendant's motion to dismiss.

[2] Defendant also contends that the trial court erred by denying the jury's request to review testimony of defendant's alibi witness on the ground that a transcript was not available. We agree.

G.S. 15A-1233 provides, in pertinent part, as follows:

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and

may permit the jury to reexamine in open court the requested materials admitted into evidence.

In *State v. Ashe*, 314 N.C. 28, 33, 331 S.E. 2d 652, 656 (1985), the trial court responded to the jury foreman's request to review portions of the testimony as follows: "There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree upon that recollection in your deliberations." The Supreme Court in *Ashe* held that the trial judge erred in his response to the jury's request. The Court reasoned that the trial judge had not exercised his discretion as required by G.S. 15A-1233(a), because his response indicated that he felt that he could not grant the request. The Court also held that the failure of the trial court to exercise its discretion constituted reversible error because whether the jury fully understood the alibi witness' testimony "was material to the determination of defendant's guilt or innocence." *Id.* at 38, 331 S.E. 2d at 658. (Citation omitted.)

In the present case, after the jury had retired for deliberations, they returned to the courtroom, and the foreman requested to rehear the testimony of Karon Maier and the sheriff's deputy. The trial judge responded as follows:

> All right, sir. Let me advise you that—undoubtedly, this request is based upon your observation of the Court Reporter taking down everything that has been said. A transcript has not been prepared. The Court Reporter is making the recordation for appellate review purposes, and it would take a considerable period of time to type that up. Her notes are in a coded form of shorthand, so it is not possible to arrange that.
>
> In addition to that, the law will not permit me to bring witnesses back to the stand at this stage and have them repeat as closely as they can what has been stated before. So unfortunately, your only recourse is to recall, as best you can, the testimony as it was presented in open court.
>
> I'm sorry that there is no way I can accommodate that request.

This response, like the response of the trial judge in *Ashe*, indicates that the trial judge did not exercise his discretion in deny-

ing the jury's request to rehear testimony, but denied the request because he felt that he could not grant it. The trial court's failure to exercise its discretion constitutes reversible error. The jury requested a review of the testimony of Karon Maier, the only witness to identify defendant as the perpetrator. Whether the jury fully understood her testimony was material to the determination of defendant's guilt or innocence. Therefore, defendant is entitled to a new trial. *Id.*; *State v. Lang*, 301 N.C. 508, 272 S.E. 2d 123 (1980).

Because of our disposition of this case, it is unnecessary for us to address defendant's remaining assignments of error.

New trial.

Judges ARNOLD and ORR concur.

IN THE MATTER OF: LAMONT WALKER, A MINOR; JONAH JONES, A MINOR; JEFFREY JONES, A MINOR, AND FREDDIE WALKER, A MINOR

No. 8612DC333

(Filed 7 October 1986)

1. **Infants § 20— adjudication of delinquency—failure to state standard of proof**

The trial court erred in adjudicating respondents to be delinquent children without stating affirmatively in the adjudication orders that the allegations of the juvenile petitions had been proved beyond a reasonable doubt. N.C.G.S. § 7A-637.

2. **Infants § 18— juvenile—insufficient evidence of breaking or entering and larceny**

Evidence that respondent juvenile was in a nearby yard while three other juveniles broke into the victim's garage and removed property therefrom and that respondent and the three other juveniles were later seen coming from the direction of the victim's house on their bicycles was insufficient to support an adjudication that respondent committed the offenses of breaking or entering and larceny.

APPEAL by respondents from *Guy, Judge*. Judgments entered 5 December 1985 in District Court, CUMBERLAND County. Heard in the Court of Appeals 28 August 1986.

Respondents Lamont Walker (age 10), Freddie Walker (age 12), Jeffrey Jones (age 12) and Jonah Jones (age 13) were each charged, in juvenile petitions, with felonious breaking or entering and felonious larceny. The petitions alleged that on 14 August 1985 respondents broke into Dar Stump's dwelling house and removed three bicycles and some fishing equipment therefrom. Respondents denied the allegations and entered pleas of not guilty.

An adjudication hearing was held on 5 December 1985. At the close of the State's evidence, the court denied each respondent's motion to dismiss. Respondents offered evidence through the testimony of Jeffrey Jones and Lamont Walker. At the conclusion of all of the evidence, the court adjudicated each respondent a delinquent juvenile and entered juvenile disposition orders placing each respondent on probation for one year and requiring payment of restitution and performance of community service work. Each respondent appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David Gordon for the State.

Elizabeth Manton for respondent appellants.

MARTIN, Judge.

[1] Each respondent contends on appeal that the trial court erred by failing to state affirmatively, in the juvenile adjudication orders, that the allegations of the juvenile petitions had been proved beyond a reasonable doubt. As to each respondent, the court made a similar finding of fact: "[T]he Court after hearing all the evidence finds the allegations to be true." The State concedes that the court's failure to state the standard of proof used in making the determinations of delinquency constitutes reversible error and we agree. G.S. 7A-635 requires that the allegations of a juvenile petition alleging delinquency must be proved beyond a reasonable doubt. The pertinent provisions of G.S. 7A-637 provide: "If the judge finds that the allegations in the petition have been proved as provided by G.S. 7A-635, he shall so state." This Court has held that the provisions of the latter statute are mandatory and that it is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt. *In re Johnson*, 76 N.C. App. 159,

331 S.E. 2d 756 (1985); *In re Wade*, 67 N.C. App. 708, 313 S.E. 2d 862 (1984).

[2] By a separate assignment of error, respondent Jonah Jones contends that the evidence was insufficient to support an adjudication that he committed the offenses of breaking or entering and larceny. We agree.

In a juvenile adjudicatory hearing, the respondent is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults. *In re Meaut*, 51 N.C. App. 153, 275 S.E. 2d 200 (1981); *In re Dulaney*, 74 N.C. App. 587, 328 S.E. 2d 904 (1985). The State, therefore, must present substantial evidence of each essential element of the offense charged and of respondent's being the perpetrator. *State v. Myrick*, 306 N.C. 110, 291 S.E. 2d 577 (1982). The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982).

The State's evidence in the present case tended to show that Sharon Jones, a next door neighbor to the victim, saw Freddie Walker, Lamont Walker and Jeffrey Jones attempting to pry open a side door to the victim's residence. She also saw Jonah Jones standing in her yard and, according to her testimony, "he wasn't doing anything." Shortly thereafter, Sharon Jones observed the Walkers and Jeffrey Jones in the victim's garage. There was no evidence that Jonah Jones ever entered the garage. Two other witnesses testified that they saw Freddie Walker come from the direction of the victim's house with some fishing equipment, place it behind another house, and return in the direction of the victim's house. All four respondents were later seen coming from the direction of the victim's house on their bicycles. The evidence showed that neighborhood children frequently cut through the victim's yard while riding bicycles. There was no evidence that any of the bicycles, including the one on which Jonah Jones was riding, were the same bicycles as those allegedly taken from the victim's garage.

The foregoing evidence is insufficient to establish that Jonah Jones actually committed any essential element of the offenses with which he was charged. Nor does the evidence establish his guilt by reason of aiding and abetting the other respondents in

the commission of the offenses. "An aider or abettor is a person who is actually or constructively present at the scene of the crime and who aids, advises, counsels, instigates or encourages another to commit the offense." *State v. Barnette*, 304 N.C. 447, 458, 284 S.E. 2d 298, 305 (1981). However, the mere presence of the defendant at the scene of the crime does not render him guilty of the offense as an aider and abettor; there must be some evidence tending to show that he had the intent to aid the perpetrators and that he, by his word or conduct, encouraged the commission of the offense or made it known that he would assist in its commission if necessary. *State v. Sanders*, 288 N.C. 285, 218 S.E. 2d 352 (1975); *State v. Goodman*, 26 N.C. App. 276, 215 S.E. 2d 842 (1975). Although the evidence in the present case shows that Jonah Jones was in a nearby yard when the offenses were committed, there was no evidence that he encouraged the others to commit the offenses or that he intended to provide assistance to them. The adjudication and disposition orders entered as to him must be reversed and the petition dismissed.

Respondents also assign error to the manner in which the trial court conducted the dispositional hearings in these cases. Although we have examined their contentions and find no merit therein, we deem it unnecessary to discuss the matter in light of our holdings in these cases.

In summary, the adjudication and disposition orders entered as to Lamont Walker, Freddie Walker and Jeffrey Jones are vacated and their cases remanded for a new adjudicatory hearing consistent with this opinion. As to Jonah Jones, the orders of the District Court are reversed and his case is remanded for entry of judgment of dismissal.

Case No. 85-J-402—Lamont Walker—vacated and remanded.

Case No. 85-J-403—Jonah Jones—reversed and remanded.

Case No. 85-J-404—Jeffrey Jones—vacated and remanded.

Case No. 85-J-405—Freddie Walker—vacated and remanded.

Judges WELLS and PHILLIPS concur.

RONALD STIKELEATHER v. BILLY JOE WILLARD

No. 8621SC320

(Filed 7 October 1986)

Malicious Prosecution § 8— complaint based on prior civil suit—failure to allege special damage

Plaintiff's complaint failed to state a claim for malicious prosecution based on a prior civil suit for alienation of affections and criminal conversation where it contained no allegation of a substantial interference with either plaintiff's person or property as contemplated by the special damage requirement for such a claim. Plaintiff's allegations that he suffered injury to his reputation, embarrassment, loss of work and leisure time and that he has incurred expenses in defending the prior civil suit were insufficient to meet the special damage requirement.

APPEAL by plaintiff from *Walker, Judge.* Order entered 5 November 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 16 September 1986.

This is a civil action seeking damages for malicious prosecution and libel. On 24 January 1984 defendant Willard filed a complaint against plaintiff Stikeleather for alienation of affection and criminal conversation seeking $400,000.00 in actual and punitive damages and $15,000.00 in attorneys fees. On 5 November 1984 Willard took a voluntary dismissal without prejudice pursuant to G.S. 1A-1, Rule 41(a). On 24 January 1985 plaintiff Stikeleather filed this action seeking redress for the alienation of affection and criminal conversation action brought against him by Willard. Defendant Willard moved to dismiss plaintiff's complaint for failure to state a claim upon which relief may be granted pursuant to G.S. 1A-1, Rule 12(b)(6). The trial court granted defendant's motion and plaintiff appeals.

William L. Durham, for plaintiff-appellant.

Alexander, Wright & Parrish, by Carl F. Parrish for defendant-appellee.

EAGLES, Judge.

By his sole assignment of error, plaintiff contends that the trial court erred in dismissing his claim for malicious prosecution pursuant to G.S. 1A-1, Rule 12(b)(6). We disagree.

In an action for malicious prosecution the plaintiff must show that the defendant initiated the earlier proceeding, maliciously and without probable cause, and that the earlier proceeding terminated in plaintiff's favor. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). When plaintiff's claim for malicious prosecution is based on a prior civil proceeding against him, plaintiff must also show "that there was some arrest of his person, seizure of his property, or some other element of special damage resulting from the action such as would not necessarily result in all similar cases." *Id.* at 203, 254 S.E. 2d at 625.

The motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6) tests the sufficiency of the complaint. In ruling on the motion the court must determine, as a matter of law, whether the allegations state a claim for which relief may be granted. *Stanback, supra.* "[A] complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." 297 N.C. at 185, 254 S.E. 2d at 615.

Defendant challenged the complaint based on the absence of the special damages element in plaintiff's complaint. Plaintiff contends in his brief that in a malicious prosecution action the real issue is not whether plaintiff's damages are "special," but instead, whether the defendant's former lawsuit was filed "maliciously and without probable cause." In following our Supreme Court's decision in *Stanback, supra*, we must disagree with plaintiff's contentions. The Court in *Stanback* stated that the requirement that a plaintiff show some special damage resulting from a prior lawsuit filed against him "is an essential, substantive element of the claim." *Id.* at 204, 254 S.E. 2d at 626. A complaint must state enough to give the substantive elements of at least some legally recognizable claim and "[w]here the special damage is an integral part of the claim for relief, its insufficient allegation could provide the basis for dismissal under Rule 12(b)(6)." *Id.* Some examples of special damage listed by the Court in *Stanback* include substantial interference with plaintiff's person or property causing execution or an injunction to be issued, a receiver to be appointed, plaintiff's property to be attached or causing plaintiff to be wrongfully committed to a mental institution or to be brought before an administrative board losing his license to sell real estate. *Id.* at 203, 254 S.E. 2d at 625.

Here, plaintiff's complaint fails to allege anything that could be construed as special damages. Plaintiff alleges that he suffered injury to his reputation, embarrassment, loss of work and leisure time and that he has incurred expenses in defending the claim. These allegations fail to allege any substantial interference with either plaintiff's person or property as contemplated by the special damages requirement. As a result, the trial court may properly dismiss plaintiff's complaint for failure to state a claim for which relief can be granted. *Stanback, supra.*

At oral argument plaintiff argued that because of the inherently scurrilous nature of the allegations raised in a complaint for alienation of affection and criminal conversation, the tort necessarily carries with it special damages not peculiar to the ordinary lawsuit. We recognize that the particularly devastating nature of allegations of this sort are unlike the kinds of damages suffered by a defendant in any other type of lawsuit. Were we writing on a blank slate without the guidance of the Supreme Court in *Stanback*, we might well be persuaded by plaintiff's logic. Here, however, we are bound by the mandate of our Supreme Court and believe that the rules announced in *Stanback* and its progeny requiring sufficient allegations of special damages control here.

Affirmed.

Judges WEBB and BECTON concur.

ZELMA E. HAYES v. JOYCE M. DIXON, ADMINISTRATRIX OF THE ESTATE OF KYRL HOUSTON JEFFRIES, NOVELLA J. MARTIN, SAMUEL JEFFRIES AND JOYCE M. DIXON, ADMINISTRATRIX OF ESTATE OF MYRTLE JEFFRIES

No. 8618SC254

(Filed 7 October 1986)

1. Descent and Distribution § 8— illegitimate child—inheritance from father—failure to comply with legitimation statutes

Although defendants admitted that the plaintiff is the illegitimate daughter of decedent, plaintiff has no right to inherit from decedent where there had been no compliance with N.C.G.S. § 29-19(b) governing succession by and through illegitimate children.

2. Descent and Distribution § 8— illegitimate child—right to inherit from father —no constructive compliance with legitimation statutes

Even if constructive compliance with N.C.G.S. § 29-19(b) were recognized as being sufficient to permit an illegitimate child to inherit from its biological father, decedent did not constructively comply with the statute by designating plaintiff, as his daughter, as the beneficiary of a group life insurance policy or by purchasing savings bonds made payable to plaintiff.

3. Descent and Distribution § 8— illegitimate child—right to inherit from father —failure to show legitimation in another state

Plaintiff failed to show that she had been legitimated in accordance with the laws of New York so as to permit her to inherit from her biological father pursuant to N.C.G.S. § 29-18.

APPEAL by plaintiff from *Ross, Judge.* Judgment entered 1 October 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 15 September 1986.

Kyrl Houston Jeffries died intestate in Guilford County, North Carolina, on 5 October 1984. Plaintiff claims and defendants admit that plaintiff is the illegitimate daughter of decedent. Plaintiff commenced this action to establish her right to inherit decedent's estate.

Plaintiff's pleadings and affidavits tended to show the following facts. Plaintiff's birth certificate indicates decedent as her father. Decedent designated plaintiff, as his daughter, as the beneficiary of proceeds from a federal employees group life insurance policy and had purchased savings bonds totalling approximately $6,750.00 made payable to plaintiff.

Defendants, who are decedent's collateral heirs, admit in their answer that plaintiff is the illegitimate daughter of decedent. However, defendants moved for summary judgment on the ground that no genuine issue as to any material fact existed since there had been no compliance with G.S. 29-19 governing succession by and through illegitimate children. The trial court granted defendants' motion for summary judgment. From the order granting summary judgment, plaintiff appeals.

Levitt and Gordon, by Dean L. Gordon; and Faison, Brown, Fletcher, Shearon & Brough, by Reginald B. Gillespie, Jr., for plaintiff appellant.

Street, Welborn & Stokes, by Marquis D. Street, for defendant appellees.

ARNOLD, Judge.

[1] Plaintiff contends that it was error for the trial court to apply G.S. 29-19(b) in this matter where the biological father-daughter relationship between decedent and plaintiff is not a genuine issue. We do not agree.

G.S. 29-19(b) in pertinent part states:

> For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:
>
> (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

Absent the statute, an illegitimate child has no right to inherit from his or her putative father. *See Herndon v. Robinson*, 57 N.C. App. 318, 291 S.E. 2d 305, *appeal dismissed* and *cert. denied*, 306 N.C. 557, 294 S.E. 2d 223 (1982). In the present case, there has been no compliance with G.S. 29-19. Therefore plaintiff has no right to inherit from decedent.

The statute mandates what at times may create a harsh result. It is not, however, for the courts but rather for the legislature to effect any change. We find no error in the application of G.S. 29-19 in this case.

[2] Plaintiff also argues that the decedent's actions during his life constituted constructive compliance with G.S. 29-19. We disagree.

Although we are aware of cases commenting upon constructive compliance, the doctrine has not been specifically recognized in North Carolina. However, even if the doctrine were to exist,

decedent's acts in this case would not rise to the level of constructive compliance with G.S. 29-19.

[3] Plaintiff further contends "that the plaintiff-appellant may be the 'legitimated child' under the laws of the state of New York within the meaning of G.S. 29-18 and therefore entitled to inherit from decedent." We disagree.

G.S. 29-18 states:

> A child born an illegitimate who shall have been legitimated in accordance with G.S. 49-10 or 49-12 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock; and if he dies intestate, his property shall descend and be distributed as if he had been born in lawful wedlock.

We find that plaintiff has made no showing that she has been legitimated in accordance with the applicable law of New York.

Finally, we find plaintiff's argument that it was a denial of equal protection to apply G.S. 29-19 in this case to be without merit.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

GAROLD E. BALLENGER, JR., DEPENDENT CHILD OF GAROLD E. BALLENGER, DECEASED, THROUGH HIS GUARDIAN AD LITEM, BRYAN K. HUSFELT, EMPLOYEE-PLAINTIFF v. ITT GRINNELL INDUSTRIAL PIPING, INC., EMPLOYER, AND INSURANCE COMPANY OF NORTH AMERICA, CARRIER-DEFENDANTS

No. 8510IC964

(Filed 7 October 1986)

Master and Servant § 94.3— workers' compensation—weighing of evidence by Industrial Commission

Language in a prior opinion in this workers' compensation case stating that it was proper for the Industrial Commission to view the expert testimony

in the light most favorable to the plaintiff is withdrawn and the cause is remanded for a determination of whether the Commission actually and dispassionately weighed the evidence before it concluded that there was sufficient evidence to support a finding in plaintiff's favor.

APPEAL by defendants from the Opinion and Award of the North Carolina Industrial Commission entered 20 March 1985. Heard in the Court of Appeals 5 February 1986. Defendant-appellants' Petition for Rehearing allowed 3 July 1986.

Pfefferkorn, Pishko & Elliott, P.A., by Robert M. Elliott, for plaintiff appellee.

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

BECTON, Judge.

In an opinion in the above-styled matter filed 6 May 1986, this Court affirmed the decision of the North Carolina Industrial Commission, awarding $195.00 per week for 400 weeks to plaintiff's dependent. *Ballenger v. ITT Grinnell Industrial Piping*, 80 N.C. App. 393, 342 S.E. 2d 582 (1986). In its opinion, this Court distinguished *Cauble v. The Macke Company*, 78 N.C. App. 793, 338 S.E. 2d 320 (1986), noting that "[a]ll that *Cauble* required is that the Commission weigh the evidence before it concludes that there is some evidence to support a finding in plaintiff's favor." In view of defendant's petition to rehear and a case we did not consider, *Wagoner v. Douglas Battery Mfg. Co.*, 80 N.C. App. 163, 341 S.E. 2d 120 (1986), we now remand the case *sub judice* to the Commission for clarification of its Opinion.

Specifically, we are concerned with the following language in the Commission's Opinion which we endorsed in our prior opinion:

> After considering all of the testimony in the record in the light of the foregoing well-established principles of law and *viewing the totality of the expert testimony in the light most favorable to the plaintiff*, there was "some evidence that the accident at least might have or could have produced the particular injury in question."

(Emphasis added.) This language misstates the applicable law, and we erroneously adopted it. We are constrained to remand this

case to the Commission for a determination whether, uninfluenced by the above-quoted misstatement, the Commission actually and dispassionately weighed the evidence before it concluded that there was sufficient evidence to support a finding in plaintiff's favor.

We re-emphasize that the Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony; it may accept or reject all of the testimony of a witness; it may accept a part and reject a part. *Blalock v. Roberts Co.*, 12 N.C. App. 499, 183 S.E. 2d 827 (1971). Even contradictions in the testimony go to its weight, which is for the fact-finder to resolve. *Evans v. Topstyle, Inc.*, 270 N.C. 134, 153 S.E. 2d 851 (1967).

Our 6 May 1986 opinion is withdrawn to the extent that we erroneously endorsed the Commission's misstatement, specifically, when we said:

> [I]t was entirely proper for the Commission, after considering all the evidence, to view the expert testimony in the light most favorable to the plaintiff.

Ballenger, 80 N.C. App. at 395, 342 S.E. 2d at 584.

The proper view is that the Commission must weigh the evidence, and as the sole judge of credibility and weight, may then find in favor of either plaintiff or defendant.

In all other respects our previous opinion is affirmed.

Affirmed in part and remanded in part.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. BONNIE WESTBROOK McHENRY

No. 865SC331

(Filed 7 October 1986)

Narcotics § 4.1— alteration of prescription—insufficient evidence of obtaining narcotics by fraud

The State's evidence was insufficient to support defendant's conviction of obtaining a controlled substance by fraud in violation of N.C.G.S. § 90-108(a)(10) where it tended to show that defendant received a valid medical prescription for ten Percocet tablets, and that the prescription was altered to show entitlement to forty tablets, but that defendant in fact received only one Percocet tablet pursuant to the prescription and thus did not receive more tablets than her valid prescription authorized.

APPEAL by defendant from *Llewellyn, Judge*. Judgment entered 5 November 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 27 August 1986.

Defendant was charged in a proper bill of indictment with obtaining a controlled substance by forging a prescription in violation of G.S. 90-108(a)(10). The State presented evidence at trial tending to show the following facts:

On 3 May 1985, defendant received a prescription from her dentist for ten (10) dosage units of Percocet for pain. She took the prescription to a drugstore in Wilmington to have it filled. After presenting the prescription at the pharmacy counter, defendant asked for and received one of the tablets for her pain while she waited for the rest of the prescription to be filled. Some minutes later, the pharmacist noticed the prescription had been altered to change the dosage units from ten to "fourty" [sic] tablets. The pharmacist called defendant's dentist and confirmed that the prescription had been written only for ten dosage units. The pharmacist then contacted the sheriff's department, which sent officers who arrested defendant. Defendant contended she did not alter the prescription and that someone must have gone into her car and changed it while she shopped at a nearby store.

At the close of all evidence, defendant moved to dismiss the charge based on the insufficiency of the evidence and requested an instruction on attempt as per G.S. 90-98. The trial court denied these motions.

The jury found defendant guilty as charged and the court entered judgment imposing a one-year suspended sentence, fine, and costs. Defendant appeals from the judgment.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas D. Zweigart, for the State.

Jeffrey S. Miller for defendant appellant.

ARNOLD, Judge.

Defendant contends the evidence was insufficient to support her conviction under G.S. 90-108(a)(10). We agree. To withstand a motion to dismiss for insufficiency of the evidence, there must be substantial evidence of all material elements of the offense charged. *State v. Keyes*, 64 N.C. App. 529, 307 S.E. 2d 820 (1983). In ruling on a motion for dismissal, the trial judge must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *Id.*

General Statute 90-108(a)(10) provides that it shall be unlawful for any person "to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." The evidence shows defendant was given a valid medical prescription entitling her to ten Percocet tablets, a controlled substance under State law. Defendant obtained only one Percocet tablet while possessing an altered prescription. The evidence indicates defendant did not obtain anything to which she was not entitled even though she attempted to gain more tablets by altering the prescription. The alteration of the prescription does not alter the fact that she was entitled to receive ten Percocet tablets, and in fact only received one tablet. The evidence would support a conviction for the attempt to obtain a controlled substance by fraud; however, the trial court refused to give an instruction on attempt and to submit it as a possible verdict. Since defendant did not receive more Percocet tablets than her original prescription authorized, the evidence will not support her conviction. The judgment of the trial court must therefore be

Reversed.

Judges EAGLES and PARKER concur.

KIMBERLY ANN SEABROOKE v. GARRETT WADE HAGIN

No. 8626SC181

(Filed 7 October 1986)

Appeal and Error § 6.2— interlocutory orders not immediately appealable

An order ruling on the sufficiency of service of process and refusing to set aside an entry of default is not immediately appealable.

APPEAL by defendant from *Grist, Judge.* Order entered 14 November 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 19 August 1986.

DeArmon, Burris, Martin, Bryant, McPhail & Troy, by Christian R. Troy, for plaintiff appellee.

Golding, Crews, Meekins & Gordon, by Henry C. Byrum, Jr., for defendant appellant.

PHILLIPS, Judge.

Plaintiff sued defendant for damages allegedly resulting from a motor vehicular collision that occurred in Charlotte. The first summons issued was returned unserved by the Sheriff of Mecklenburg County because he could not locate the defendant at the local address stated therein. Since defendant had a Wisconsin driver's license when the collision occurred another summons was issued to him at the Wisconsin address shown thereon and this summons was served on the N.C. Commissioner of Motor Vehicles by the Sheriff of Wake County pursuant to the provisions of G.S. 1-105, and both the Commissioner and plaintiff sent the papers involved by registered mail to that address. Both sets of papers were returned to the sender stamped "unclaimed." A timely answer to the complaint was not filed and plaintiff obtained an entry of default. Later defendant moved to set the default aside and to dismiss the complaint on the grounds of "insufficiency of process" under Rule 12(b)(4), N.C. Rules of Civil Procedure, and "insufficiency of service of process" under Rule 12(b)(5). When the motion was denied defendant immediately appealed to this Court.

Though not discussed in the brief of either party defendant's appeal is unauthorized and must be dismissed. An order ruling on the sufficiency of service of process is not immediately ap-

pealable; *Love v. Moore*, 305 N.C. 575, 291 S.E. 2d 141, *reh. denied*, 306 N.C. 393, 294 S.E. 2d 221 (1982); nor is an order refusing to set aside an entry of default. *First-Citizens Bank & Trust Co. v. R & G Construction Co.*, 24 N.C. App. 131, 210 S.E. 2d 97 (1974); 1 Strong's N.C. Index 3d, *Appeal and Error* Sec. 6.2 (1976).

Appeal dismissed.

Chief Judge HEDRICK and Judge MARTIN concur.

WILLIAM A. CARTER, JR. v. WILSON CONSTRUCTION COMPANY, INC. AND J. RAY WILSON, JR., INDIVIDUALLY

No. 8619SC227

(Filed 7 October 1986)

1. **Corporations § 5.1— examination of corporate records—shareholder action—showing of proper purpose**

Plaintiff shareholder's evidence was sufficient to show that his request to examine the records of defendant corporation was for "any proper purpose" within the meaning of N.C.G.S. § 55-38(b) where it tended to show that plaintiff offered to sell his stock in defendant corporation to the corporation but his offer was refused; plaintiff had personally guaranteed the debts of a leasing company which conducted related transactions with defendant corporation, including indemnifying its debts and extending loans; and plaintiff had reason to believe, based on information obtained from defendant corporation's management consultant, that certain purchases had not been put on the corporate books, that funds were shuffled between the leasing company and defendant corporation, and that the net worth of defendant corporation had decreased in the past year. Furthermore, defendants' evidence that plaintiff is currently part owner and employee of a business in competition with defendant corporation was insufficient to override the presumption that plaintiff is acting in good faith.

2. **Corporations § 5.1— examination of corporate records—shareholder action—statutory penalty**

The trial court could properly assess under N.C.G.S. § 55-38(d) a $500 penalty against a corporation and another $500 penalty against the corporation's president for refusing to allow a qualified shareholder to examine the corporation's records, the maximum total penalty not being limited by the statute to $500.

3. Corporations § 5.1— examination of corporate records—alleged good faith refusal—no mitigating circumstance

Defendants' contention that a corporation's refusal to allow a qualified shareholder to examine its records was based on its good faith interest in "wanting to protect its current business practices from being divulged to a direct competitor" did not require the trial court to find a mitigating circumstance to compel a decrease in the penalty assessed under N.C.G.S. § 55-38(d) for the refusal to allow the shareholder to examine the corporation's records.

4. Corporations § 5.1— examination of corporate records—shareholder action—statutory penalty—value of stock

The evidence was sufficient to support the court's finding that the value of plaintiff's shares in defendant corporation was at least $20,000 at the time of trial and to support the amount of the penalty assessed by the court under N.C.G.S. § 55-38(d).

5. Attorneys at Law § 7.5— examination of corporate records—shareholder action—attorney fee not allowable

The trial court erred in taxing an attorney fee as part of the costs in a shareholder's action under N.C.G.S. § 55-38 for a writ of mandamus requiring defendants to permit plaintiff to examine a corporation's records and to recover a penalty for defendants' refusal to permit plaintiff to examine the records, since there was no statutory basis for the award of such a fee.

APPEAL by defendants from *Freeman, Judge*. Judgment entered and writ of mandamus issued 1 October 1985 in Superior Court, ROWAN County. Heard in the Court of Appeals 20 August 1986.

On 14 September 1984, plaintiff, a minority stockholder in defendant corporation, instituted this action petitioning for a writ of mandamus ordering defendants to make available to plaintiff books and records of account, minutes, and record of shareholders of defendant corporation. The complaint also prayed for penalties to be assessed against defendants in the amount of ten percent (10%) of the value of plaintiff's shares, not to exceed five hundred dollars ($500.00) pursuant to G.S. 55-38(d) and for an award of attorney's fees. On 2 January 1985, defendants answered. On 1 October 1985, the court concluded the following as a matter of law: that defendants' refusal to allow plaintiff to examine the corporate records was improper; that plaintiff was entitled to a writ of mandamus; that plaintiff was entitled to recover a penalty of $500.00 from each defendant; and that plaintiff was entitled to recover from defendants jointly and severally the sum of two hundred fifty dollars ($250.00) as reasonable attorney's fees due to

"the unwarranted and unjustified refusal" of defendants to make the requested records available to plaintiff. Defendants appeal.

Woodson, Linn, Sayers, Lawther & Short, by Donald D. Sayers, for plaintiff appellee.

Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Richard R. Reamer, for defendant appellants.

JOHNSON, Judge.

Plaintiff owns 317 shares of the common stock of defendant corporation. Plaintiff also owns approximately twenty percent (20%) of the outstanding shares of Wilson Equipment Leasing, Inc., a company which leases equipment to defendant corporation and conducts related transactions with defendant corporation. Plaintiff is now part owner and employee of C & L Contracting, Inc., which, according to defendants, is "in direct competition with [defendant corporation]."

Defendant Wilson is president of the corporate defendant Wilson Construction Company, Inc. Plaintiff, through his attorney, made two written demands for the information at issue prior to filing his complaint. Defendant Wilson responded after the second letter of demand, refusing to make the requested information available.

Plaintiff subsequently instituted this action alleging in his complaint, *inter alia*, that he is a former officer and employee of defendant corporation; that since his resignation as officer and employee on 8 November 1983 he has been unable to gain information regarding defendant corporation; that he is informed and believes that the financial condition of defendant corporation has deteriorated and that such deterioration may be due to improper management; and that his offer to sell his stock to defendant corporation was rejected. Plaintiff further alleged that he requested the information for the following stated purpose: "in order to determine the value of his shares, the financial condition of the company, and whether it is efficiently and properly managed in the best interests of the corporation."

[1] Defendants contend in their first Assignment of Error that the court erred in finding that plaintiff had a proper purpose for obtaining access to the corporate information he requested. De-

fendants further contend that plaintiff's stated purpose was "a mask for more illegitimate purposes that would damage [defendant corporation's] ability to compete." Defendants characterize plaintiff as a "disgruntled minority shareholder" who "left his position without notice," leaving both companies "in pretty bad shape" in order to start his own competing business.

Plaintiff requested access to the records of Wilson Equipment Leasing in the same two letters he requested access to the records at issue. Defendant Wilson granted plaintiff's request to examine those records at the same time he denied plaintiff's request to see defendant corporation's records. Defendants argue that plaintiff's failure to examine the records of Wilson Equipment Leasing as of the time of trial is further evidence of plaintiff's bad faith and his desire to harass the corporate defendant's management.

The pertinent portion of G.S. 55-38 provides as follows:

> (b) A qualified shareholder, upon written demand stating the purpose thereof, shall have the right, in person, or by attorney, accountant or other agent, at any reasonable time or times, *for any proper purpose*, to examine at the place where they are kept and make extracts from, the books and records of account, minutes and record of shareholders of a domestic corporation or those of a foreign corporation actually or customarily kept by it within this State. . . . A shareholder's rights under this subsection may be enforced by an action in the nature of mandamus.

(Emphasis added.)

It is undisputed by the parties that plaintiff is a qualified shareholder. The issue is whether plaintiff's request to examine the corporate records was for "any proper purpose." Absent a statutory restriction, a shareholder has a common law right to inspect and examine the books and records of the corporation, given to him for the protection of his interests. *Cooke v. Outland*, 265 N.C. 601, 610, 144 S.E. 2d 835, 841 (1965). G.S. 55-38(b) does not give a qualified shareholder an absolute right of inspection and examination for a mere fishing expedition, or for a purpose not germane to the protection of his economic interest as a shareholder in the corporation. *Id.* at 611, 144 S.E. 2d 842. For a

shareholder to have the right to actually visit a corporation's office and possibly disrupt its normal operation in order to inspect corporate books and records of account, our legislature has correctly decided that his motives must be "proper." *Morgan v. McLeod*, 40 N.C. App. 467, 473, 253 S.E. 2d 339, 342, *disc. rev. denied*, 297 N.C. 611, 257 S.E. 2d 436 (1979). Purposes which previously have been deemed proper are the shareholder's good faith desire to (1) determine the value of his stock; (2) investigate the conduct of the management; and (3) determine the financial condition of the corporation. *See Cooke v. Outland, supra*, at 611-12, 144 S.E. 2d at 842 (quoting Annot., 15 A.L.R. 2d 11 secs. 7-8 (1951)). The burden of proof rests upon the defendants, if they wish to defeat the shareholder's demand, to allege and show by facts, if they can, that the shareholder is motivated by some improper purpose. *Id.* at 615, 144 S.E. 2d at 845. "In issuing the writ of mandamus the court will exercise a sound discretion, and grant the right under proper safeguards to protect the interests of all concerned." *Id.* at 613, 144 S.E. 2d 843, *quoting Guthrie v. Harkness*, 199 U.S. 148, 156, 50 L.Ed. 130, 133, 26 S.Ct. 4, 6 (1905).

Here, plaintiff stated a proper purpose in his complaint. Defendants must overcome the presumption of good faith in plaintiff's favor by showing that plaintiff's purpose is improper. The evidence adduced at trial by plaintiff tended to show: that plaintiff tried to sell his stock in defendant corporation to defendant corporation, who declined plaintiff's offer to sell; that plaintiff had personally guaranteed the debts of Wilson Equipment Leasing, a corporation which conducted related transactions with defendant corporation, including indemnifying its debts and extending loans; that plaintiff had reason to believe, based on information obtained from defendant corporation's management consultant, that certain purchases had not been put on the corporate books; that funds were shuffled between Wilson Equipment Leasing and defendant corporation; and that the net worth of defendant corporation decreased from August 1983 to August 1984. This evidence supports plaintiff's allegation of a proper purpose.

The evidence adduced at trial by defendants showed that plaintiff is currently part owner and employee of a business, C & L Contracting. According to the testimony of defendant Wilson, "[W]e are in direct competition on all work in the [P]iedmont, North Carolina, that is bridge work" and that to allow plaintiff ac-

cess to the books and records of accounts of defendant corporation "would put us at a disadvantage."

This evidence is insufficient to override the presumption that plaintiff is acting in good faith. As stated in *Cooke v. Outland, supra*, at 613, 144 S.E. 2d at 843, the mere possibility that a shareholder may abuse his right to gain access to corporate information will not be held to justify a denial of a legal right, if such right exists in the shareholder. The trial court properly exercised its discretion in issuing a writ of mandamus. This Assignment of Error is overruled.

[2] Next, defendants contend that the court erred in assessing total penalties of $1,000.00, that is $500.00 from each defendant. Specifically, defendants contend that the penalty is improper in the following regards: (1) the maximum total penalty allowed under G.S. 55-38(d) is $500.00; (2) the court erroneously failed to find mitigating circumstances which would allow for a decrease in the amount of the penalty; and (3) the penalty was based on a value of "at least $20,000.00" for plaintiff's shares in defendant corporation at the time of trial, a value that was insufficiently supported by the evidence. We disagree with each of these contentions. We will address each contention in turn.

G.S. 55-38(d) provides, in pertinent part:

> (d) Any officer or agent or corporation refusing to mail a statement as required by G.S. 55-37 or refusing to allow a qualified shareholder to examine and make extracts from the aforesaid books and records of account, minutes and record of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of ten percent (10%) of the value of the shares owned by such shareholder, but not to exceed five hundred dollars ($500.00), in addition to any other damages or remedy afforded him by law, but the court may decrease the amount of such penalty on a finding of mitigating circumstances.

The plain meaning of the disjunctive "or" indicates that the ceiling penalty of $500.00 may be assessed against each of "[a]ny officer or agent or corporation." G.S. 55-38(d). In *Morgan v. McLeod, supra*, the corporate defendant was assessed a penalty of $500.00 and the two individual defendant officers were assessed a penalty of $251.00 each.

[3] Two, although the statute provides that "the court may decrease the amount of such penalty on a finding of mitigating circumstances," there is no authority compelling the court to find mitigating circumstances. We are unpersuaded by defendants' argument that the corporation's good faith interest in "wanting to protect its current business practices from being divulged to a direct competitor" requires finding a mitigating circumstance sufficient to compel a decrease in the penalty.

[4] Three, this Court alluded to the difficulty in valuing stock in a closed corporation in *Morgan v. McLeod, supra,* at 475, 253 S.E. 2d at 344. "Since it is a relative term, it is necessary that its true meaning be determined by the context in which it appears." *Id.*

In the case *sub judice,* the court made the following finding of fact:

> 12. Evidence was presented by the plaintiff-petitioner in the form of a financial statement for the defendant-respondent corporation showing the shareholders' equity to be $81.98 per share as of August 31, 1983, and while the defendant-respondent, J. Ray Wilson, Jr., president of the defendant-respondent, Wilson Construction Co., Inc., testified the said corporation was worthless at the time of trial, it is found that the value of plaintiff-petitioner's 317 shares is worth at least $20,000.00 at the time of trial.

The only evidence bearing on value that was not specifically addressed in this finding of fact is defendant Wilson's testimony to the effect that an August 1984 financial statement showed an unspecified decrease in value from the August 1983 financial statement. However, no financial statement for 1984 was introduced into evidence. The evidence before the court on 9 May 1985, the day of trial, regarding value was: a 1983 financial statement showing a value of $81.98 per share for 317 shares, which totals $25,987.66, and defendant's testimony that plaintiff's stock is now worth zero. The trial court's finding of fact is conclusive if supported by any competent evidence. *Little v. Little,* 9 N.C. App. 361, 365, 176 S.E. 2d 521, 523-24 (1970). The evidence in the case *sub judice* is sufficient to support the court's finding that the value of plaintiff's shares was worth at least $20,000.00 at the time of trial. This Assignment of Error is overruled.

[5] In defendants' last Assignment of Error they challenge the propriety of an award of attorney's fees in the amount of $250.00. The court made the following finding of fact with respect to attorney's fees:

> 13. The plaintiff-petitioner's attorney of record rendered valuable legal services to the plaintiff-petitioner in the prosecution of this action.

The court made the following conclusion of law with respect to attorney's fees:

> 2. The plaintiff-petitioner is entitled, pursuant to N.C.G.S. [sec.] 55-38(d) to an award from each defendant-respondent of a penalty of 10% of the value of the shares owned by plaintiff-petitioner, not to exceed $500.00, together with a reasonable attorney's fee due to the unwarranted and unjustified refusal by the said defendants-respondents.

In this jurisdiction attorney's fees may not be taxed as a part of the costs, absent an express statutory provision for attorney's fees. *Hopkins v. Barnhardt*, 223 N.C. 617, 620, 27 S.E. 2d 644, 646 (1943). Although G.S. 55-38 does provide for a penalty, it does not expressly provide for an award of attorney's fees. Statutes imposing a penalty are to be strictly construed. *Carolina Milk Producers Assoc. Co-op., Inc. v. Melville Dairy, Inc.*, 255 N.C. 1, 120 S.E. 2d 548 (1961). G.S. 55-38 does not provide statutory authority for an attorney fee award. We know of no other statutory authority for this attorney fee award based on the court's finding and conclusion as stated above. The award of attorney's fees in the amount of $250.00 has no statutory basis and cannot stand. Accordingly, we reverse only that portion of the court's judgment awarding attorney's fees.

Affirmed in part.

Reversed in part.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. JIMMY DEAN CAMERON

No. 8620SC244

(Filed 21 October 1986)

1. **Indictment and Warrant § 12.2— change of date—defendant not prejudiced**

The trial court did not err in allowing the State's motion to change the allegation of the bill of indictment for incest relating to the date of the offense where the indictment alleged the date of the offense as on or about 25 May 1985, a Saturday; the prosecuting witness testified that the offense occurred on Sunday, 26 May 1985; the mother of the witness testified that the witness and her brother visited their grandmother in another town on the weekend of 24-26 May 1985 and that the offense occurred on the previous weekend; a houseguest of defendant who was aware of the incident testified that he visited either over the weekend of 17-19 May or over the following weekend; the mother testified that she received a letter from the houseguest on 21 May 1985 suggesting that she ask her daughter what had happened; and changing the date did not substantially alter the charge against defendant, unfairly surprise him, or prevent him from presenting a defense. N.C.G.S. § 15A-923(e).

2. **Incest § 1— evidence of prior sexual contact with victim—admissibility**

The trial court in a prosecution for incest did not err in admitting evidence tending to show that defendant had had prior sexual contact with his stepdaughter since the evidence was reasonably probative of defendant's knowledge, opportunity, intent, and plan. N.C.G.S. § 8C-1, Rule 404(b).

3. **Incest § 1; Criminal Law § 138.7— court's expression of personal feelings—defendant not prejudiced**

The trial court's remarks in an incest case concerning his personal feelings with regard to the offense charged, though better kept to himself, did not indicate a lack of ability to consider objectively the range of punishments authorized by the legislature or demonstrate an abuse of discretion in imposing the judgment.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 10 October 1985 in Superior Court, UNION County. Heard in the Court of Appeals 26 August 1986.

Defendant was charged with the statutory felony of incest in violation of G.S. 14-178, the bill of indictment alleging that he had carnal intercourse with his eleven year old stepdaughter. He entered a plea of not guilty.

At trial, the State offered evidence tending to show that on a Sunday in May 1985, defendant, his stepdaughter, and one Kenneth Harrington, a family friend who was visiting over the weekend, were watching television in the master bedroom of de-

fendant's residence in Monroe. Defendant's wife, the mother of the prosecuting witness, was at work. At some point in the early afternoon, Harrington left the residence and walked to a nearby convenience store to buy beer and cigarettes. The prosecuting witness testified that shortly after Harrington left, defendant removed his clothes and told her to get onto the bed. Defendant had vaginal intercourse with her. Upon hearing Harrington return, the prosecuting witness jumped into the closet and defendant went out into the hall.

Kenneth Harrington testified that he was away from the residence for approximately twenty minutes. When he returned to the residence and went to the bedroom, he saw the defendant stepping into his trousers and coming out of the bedroom door. He was sweaty and in an apparent state of sexual arousal. Harrington found the prosecuting witness hiding in a bedroom closet; she also was nude. Harrington attempted to discuss the incident with defendant, but defendant would not talk with him. Harrington did not mention the incident to defendant's wife during the remainder of the weekend, but sometime during the following week, after he had returned to his home in Hamlet, he wrote to her and suggested that she ask her daughter about what happened over the weekend. The prosecuting witness said nothing about the incident until about two weeks later, when she told her visiting aunt about it.

The child was examined by a physician on 7 June 1985 and was found to have gonorrhea in her mouth, her rectum, and her vagina. In the opinion of the physician, the disease had been transmitted by sexual contact. The State also produced evidence that defendant had sought treatment from another physician on 6 June 1985 and was found to be suffering from gonorrhea.

Defendant elected not to testify or to offer evidence in his own behalf. The jury found him guilty of incest and the court sentenced him to imprisonment for the maximum term of fifteen years. Defendant has appealed.

Attorney General Lacy H. Thornburg by Assistant Attorney General Philip A. Telfer for the State.

W. David McSheehan for defendant appellant.

MARTIN, Judge.

Defendant contends on appeal that the trial court committed reversible error by allowing the State's motion to change the allegation of the bill of indictment relating to the date of the offense and by denying his motions for dismissal. He also assigns error to the admission of testimony by the prosecuting witness that defendant had had intercourse with her at a previous time. Finally, he contends, the court erred in sentencing him to the maximum permissible prison term for the offense. We have considered each of his assignments of error and conclude that defendant received a fair trial, free from prejudicial error.

[1] The bill of indictment, as returned by the Union County grand jury on 19 August 1985, alleged the date of the offense as "on or about" 25 May 1985, a Saturday. At trial, the prosecuting witness testified that the offense had occurred on Sunday, 26 May 1985. Her mother, however, testified that the prosecuting witness and her brother had visited their grandmother in Hamlet on the weekend of 24-26 May 1985, and that the incident had occurred on the previous weekend. She further testified that she had received the letter from Kenneth Harrington on 21 May 1985, following his weekend visit. Harrington was uncertain of the date of his weekend visit, testifying that he visited the defendant's residence either over the weekend of 17-19 May or over the following weekend. Both the prosecuting witness and her mother testified that the incident had occurred on the weekend that Harrington visited their home and that his visit took place on the weekend prior to the children's visit with their grandmother. At the close of the State's evidence, the prosecutor moved to change the date alleged in the bill of indictment to allege "on or about or between May 18th, 1985, through May the 26th, 1985. . . ." The court allowed the motion over defendant's objection.

Defendant argues that the trial court, by permitting the State to alter the allegations of the indictment relating to time, deprived him of the opportunity to present a defense of "reverse alibi"—that he had no access to the prosecuting witness on the date alleged in the indictment—which he contends was established through his cross-examination of his wife, the mother of the prosecuting witness. He claims surprise and prejudice from the change in dates.

Although G.S. 15A-923(e) prohibits the amendment of a bill of indictment, the term "amendment" has been restrictively defined as "any change in the indictment which would *substantially* alter the charge set forth in the indictment." *State v. Price*, 310 N.C. 596, 598, 313 S.E. 2d 556, 558 (1984) (emphasis added). Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill. *Id.* The failure to state accurately the date or time an offense is alleged to have occurred does not invalidate a bill of indictment nor does it justify reversal of a conviction obtained thereon. G.S. 15-155. However, where a defendant relies upon a defense of alibi, time becomes essential and the foregoing rules may not operate to deprive a defendant of an opportunity to present a defense. *State v. Sills*, 311 N.C. 370, 317 S.E. 2d 379 (1984); *State v. Christopher*, 307 N.C. 645, 300 S.E. 2d 381 (1983); *State v. Whittemore*, 255 N.C. 583, 122 S.E. 2d 396 (1961).

In *Christopher*, the indictment alleged that defendant had engaged in a conspiracy on 12 December 1980. At trial, however, the State offered evidence tending to show that the offense occurred sometime between October 1980 and January 1981, but no evidence was offered tending to show that any crime occurred on 12 December 1980. Our Supreme Court reversed defendant's conviction, stating that such vague evidence as to the date of the offense deprived defendant of his opportunity to offer a defense. Likewise, in *Whittemore*, the State offered evidence tending to show that the offenses for which defendant was on trial were committed on the date alleged in the bill of indictment, and that another separate, but similar, offense was committed by defendant on a later date. After defendant offered evidence of alibi as to the offenses alleged in the bill of indictment, the State offered rebuttal evidence tending to show commission of criminal offenses of the same nature as those charged but occurring at a later time. The trial judge instructed the jury, in effect, that the date of the offenses was immaterial. Under these circumstances, the Supreme Court held that time was material to the defense. In *Sills*, however, a variance of one day between the allegations of the indictment and the date shown by the evidence was found not to be prejudicial, because defendant had presented evidence of alibi for

several days before and after the alleged offense. *See also State v. Wilson*, 264 N.C. 373, 141 S.E. 2d 801 (1965).

In the present case, although the testimony of the young prosecuting witness as to the date of the offense differed from that of her mother, all of the State's evidence showed that the crime, if committed, took place on the Sunday of the weekend during which Kenneth Harrington visited the defendant's residence. Both the prosecuting witness and her mother agreed that his visit was on the weekend before the prosecuting witness went to Hamlet. While defendant's cross-examination of the child's mother may have raised doubts as to the date of Harrington's visit, there was absolutely no indication therefrom that defendant disputed the fact that Harrington had spent a weekend in May at defendant's home in Monroe. Moreover, it is clear from a reading of the entire transcript that defendant was well aware that the conduct for which he was on trial was alleged to have occurred during the course of Harrington's weekend visit. It follows that he was not deprived of an opportunity to prepare and present a defense as to that period of time, notwithstanding the variance in the dates thereof contained in the State's evidence. Thus, the State did not employ a "bait and switch" tactic, as in *Christopher*, or use the date alleged in the indictment for the purpose of "ensnaring" the defendant into presenting a defense for one period of time without the opportunity to defend against another period of time, as in *Whittemore*. What is important is the defendant's understanding of the charge against which he needed to defend. We discern no reasonable possibility that defendant was unfairly surprised.

We also observe that "reverse alibi" was not the primary defense relied upon by defendant. His primary contention was that the allegation of incest was fabricated either by the prosecuting witness alone or by her and Kenneth Harrington together in order to send defendant back to prison. The defendant attempted to portray defendant's wife and Harrington as having an affair and directly asked both of them, as well as the prosecuting witness, if the incident had not, in fact, been made up so that the wife could move back to Hamlet to be near Harrington. Defendant sought to support this theory by showing confusion among the State's witnesses as to the date upon which the incident allegedly occurred.

He was given a full opportunity to develop and present this defense, which ultimately was rejected by the jury.

We conclude that the change of the date of the offense, as permitted by the trial court, did not substantially alter the charge against the defendant, nor did it unfairly surprise him or prevent him from presenting a defense. This assignment of error is overruled.

By related assignments of error, defendant argues that the trial court erred in denying defendant's motion to dismiss at the close of all the evidence and that it erred by not granting defendant's motion to set aside the verdict, both made pursuant to G.S. 15A-1227. A motion to dismiss under G.S. 15A-1227 is substantively identical to a motion for nonsuit under G.S. 15-173. *State v. Greer*, 308 N.C. 515, 302 S.E. 2d 774 (1983); *State v. Ausley*, 78 N.C. App. 791, 338 S.E. 2d 547 (1986). When the State's evidence presents a complete defense, a defendant's motion for nonsuit should be allowed. *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 466 (1969). However, in ruling on the motion, the court must look at the evidence in the light most favorable to the State, and all contradictions and discrepancies are left for the jury. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980); *State v. Gray*, 56 N.C. App. 667, 289 S.E. 2d 894, *disc. rev. denied*, 306 N.C. 388, 294 S.E. 2d 214 (1982).

The defendant premises his contentions of complete defense upon the conflict between the date originally shown on the indictment and the testimony of defendant's wife, the prosecuting witness, and Harrington. As we have already ruled that the trial court did not err in allowing the State to change the date on the indictment, the only remaining inconsistencies are those contained in the testimony of the three witnesses as to the date of Harrington's visit. These inconsistencies are not so severe as to make them irreconcilable; the contradictions were for the jury to resolve and the trial court properly denied defendant's motions to dismiss and to set aside the verdict. *Powell, supra.*

[2] Defendant also contends that the trial court erred by admitting evidence tending to show that he had had prior sexual contact with his stepdaughter. At the trial, the following dialogue took place:

(Mr. Graham)—[Addressed to the prosecuting witness], you have testified today that on this weekend that we're talking about your stepfather placed his penis inside your private parts. I'll ask you if your stepfather had ever done that before the day that you're talking about?

MR. MCSHEEHAN: OBJECTION for the record

THE COURT: OVERRULED. Go ahead

Q. You may answer the question.

A. Yes.

Defendant argues that although the evidence may have been relevant, it was so prejudicial, inflammatory and misleading that it should have been excluded pursuant to G.S. 8C-1, Rule 403.

Rule 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. . . ." " 'Unfair prejudice,' as used in Rule 403, means 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one.' " *State v. DeLeonardo*, 315 N.C. 762, 772, 340 S.E. 2d 350, 357 (1986), *quoting* Commentary, G.S. 8C-1, Rule 403 (Cum. Supp. 1985).

Rule 404(b) permits the introduction of evidence of other criminal acts to prove, *inter alia*, intent, plan or motive. In cases involving alleged sexual offenses, our courts have liberally permitted the introduction of evidence of prior sexual acts committed by the defendant upon the same prosecuting witness. *See, e.g., State v. DeLeonardo, supra; State v. Hobson*, 310 N.C. 555, 313 S.E. 2d 546 (1984); *State v. Effler*, 309 N.C. 742, 309 S.E. 2d 203 (1983).

In our view, the evidence complained of was reasonably probative of defendant's knowledge, opportunity, intent, and plan. We do not view it as so prejudicial as to outweigh its probative value and render it inadmissible. However, even if there was error in the admission of the evidence, defendant has failed to meet his burden of showing a reasonable possibility that a different result would have been reached had the evidence been excluded. G.S. 15A-1443(a). Absent such a showing, any possible error is considered harmless and does not entitle defendant to a new trial.

State v. DeLeonardo, supra; State v. Billups, 301 N.C. 607, 272 S.E. 2d 842 (1981).

[3] Finally, defendant contends that the trial court erred in sentencing him to the maximum term permitted for the offense. Defendant takes no issue with the aggravating factors found by the court, or with the court's refusal to find factors in mitigation. However, defendant contends that the sentence was influenced by improper considerations and amounted to an abuse of discretion. He bases his argument upon the following remarks:

> THE COURT: Well, I try not to let anything I see in this job bother me, but I don't mind saying those sort of things upset me highly. I don't understand what's happened in our society today. Dogs don't even do stuff like this. As the D.A. said, had not somebody made an error and charged you with the right thing, you would have been facing a mandatory life imprisonment. A great deal of people in this society I imagine, if you took a vote, a great deal of people would think the death penalty would not be inappropriate, but I've learned that what I say doesn't make a whole lot of difference, and probably the less I say the better off I am. So the Court would find the aggravating factors in this case, that the victim was very young, that the defendant has a prior conviction or convictions of criminal offenses punishable by more than sixty days, that there are no mitigating facts. The factors in aggravation outweigh the facts in mitigation. The judgment of the Court in this case is that the defendant be sentenced to fifteen years in the North Carolina Department of Corrections. The Court will recommend that he not be considered for parole.

We agree with the trial judge that he would have been better advised to keep his personal feelings to himself; however, we do not consider that his remarks were such as to indicate a lack of ability to objectively consider the range of punishments authorized by the legislature or to demonstrate an abuse of discretion in imposing the judgment. "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E. 2d 126, 133 (1962).

No error.

Judges BECTON and PHILLIPS concur.

STATE OF NORTH CAROLINA v. OLLIE LEWIS BLAKE

No. 8614SC386

(Filed 21 October 1986)

1. **Homicide § 15— deceased's fear of defendant—hearsay testimony—evidence not prejudicial**

Even if the trial court in a homicide case erred in admitting hearsay testimony by a friend of decedent and by a police officer that decedent, on the night of his death, told them that he was afraid of defendant, defendant was not prejudiced thereby since there was overwhelming evidence of the ill will which existed between decedent and defendant.

2. **Homicide § 20— tape recording—admission not prejudicial**

Even if the trial court in a homicide case erred in admitting into evidence a tape recording of telephone calls made to the 911 emergency number, defendant was not prejudiced thereby, since the recording tended to show only that decedent's house was being broken into, shots were fired, and someone was dead at a named location, but no one was accused or implicated in the recording as being the perpetrator and defendant was in no way mentioned as being involved.

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

Evidence was sufficient to support a verdict of second degree murder where it tended to show that defendant argued with decedent and threatened him; on that same night a witness saw defendant's car pull up and park near decedent's home and his wife saw the driver, who had long blond hair and was wearing a dark tee-shirt, get out of the car and walk toward decedent's home just minutes before decedent was killed; another neighbor heard shots fired and saw a man on decedent's back steps; another neighbor also heard the shots and saw a long-haired man running beside decedent's home; decedent ran from his house to the street where he collapsed, dying from a bullet wound; after decedent collapsed, the car did a three-point road turn and left hastily; later that night a deputy sheriff picked up defendant who was standing beside his car; and at the time defendant had shoulder-length dark blond or light brown hair and was wearing a dark tee-shirt.

4. **Criminal Law § 138.14— presumptive sentence—aggravating and mitigating factors not required**

Since defendant was given the presumptive sentence, the trial court was not required to make findings in aggravation and mitigation.

Judge ORR dissenting.

State v. Blake

APPEAL by defendant from *Ellis, Judge*. Judgment entered 22 November 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 17 September 1986.

Defendant was charged in a proper bill of indictment with the murder of Douglas McLamb. At defendant's first trial the judge entered an order declaring a mistrial. At the second trial the jury convicted defendant of second degree murder. At trial, the State presented evidence tending to show the following: Between 6:30 and 7:00 p.m. on 20 October 1984 Douglas McLamb, the deceased, returned from work to find his wife, Linda, babysitting with her niece. McLamb became angry when Linda's sister, Debra Johnson, failed to pick up her daughter at the designated time. Shortly thereafter Debra arrived, accompanied by defendant, her boyfriend, in defendant's black El Camino. Doug McLamb and defendant began arguing. McLamb got his rifle and fired a shot as defendant, Debra and her daughter, Angel, were driving away. One bullet struck the lower frame of the rear window of the El Camino. Debra stopped the vehicle at a nearby convenience store and called the police. Defendant walked back down the street, and he and McLamb began arguing again. A policeman arrived at the scene and defendant tried to talk the policeman out of arresting McLamb. After defendant heard that a bullet struck the El Camino he stopped trying to help McLamb and told him, "If the bullet hit the car that is your ass." McLamb was arrested and taken to the magistrate's office. McLamb's rifle was taken into custody and held for evidence. A policeman testified that on the way downtown McLamb stated that he was afraid of defendant especially now since he had no gun to defend himself. After McLamb's release, his best friend and neighbor, Ricky New, picked up McLamb at the courthouse at about 9:40 p.m. New testified that on the way home McLamb expressed his fear of defendant and his fear that defendant would come back to harm him. New dropped McLamb off at McLamb's home at 915 Washington Street. New testified that about 10 or 15 minutes later he and his wife were watching television when a car with "sort of loud mufflers" pulled up in front of his house and parked across the street. New said he "just got up to see who it was and it was Lewis Blake's car." New telephoned McLamb but the number was busy so he left by the back door to warn him. He heard two loud noises which sounded like gunshots, then saw McLamb come out

the front door and run to the street. New heard another loud noise and saw McLamb collapse in the street. New called the police to report what had happened. New's wife, Melissa, testified that she had seen the El Camino drive up at about 10:00 p.m. and that there appeared to be two people inside. The El Camino was parked about two houses away from the deceased's home. Melissa New saw an average-sized man with long blond hair, wearing a dark tee-shirt and faded jeans or light gray corduroys, get out of the driver's seat and walk down the street in the direction of McLamb's house. She did not see where the driver went. Mrs. New could not identify defendant as being the man she saw. She also heard a loud noise as the deceased ran and fell in the street. Both she and her husband testified that the black El Camino did a three-point road turn and left hastily after McLamb collapsed.

Another neighbor, Mrs. Mazelle Peninger, testified that while on her back porch she thought she heard a shot and saw an unidentified individual on the back stairs of McLamb's house. Her back porch faces the McLamb's back door at an angle. She could not describe what type clothing the person had on or whether the individual had a weapon. Mrs. Peninger's son-in-law, Joseph Chambers, testified that he saw a husky man with long hair, wearing a hat or headband, running beside the McLamb's house. Mr. Chambers testified that the man had on a shirt but he could not describe it. Neither Mrs. Peninger nor Mr. Chambers could identify defendant as the individual they saw that night.

A magistrate who was present at McLamb's booking after his arrest, testified that after McLamb was released, two men, one of whom he recognized as defendant, approached him and asked if McLamb had been released. When he replied affirmatively, they immediately left the office. The magistrate places their inquiry between ten to fifteen minutes after McLamb left.

The State introduced a tape recording of calls received by the emergency 911 dispatcher. At 10:10 and 47 seconds p.m. a call was received, that said, "This is 915 Washington Street. Somebody is trying to kick my door in." Another call came in at 10:11 49 seconds p.m. which said, "There's somebody dead on the street. Washington Street and Monmouth Avenue." This call is consistent with testimony by Ricky New that he called the police and told them that someone had been shot at "Washington and Monmouth."

Defendant was picked up in his black El Camino by a deputy sheriff at about midnight that same night. A friend of defendant's, Richard Clayton, was with him. The deputy testified that defendant was wearing "a black tee-shirt, blue jeans, and a pair of brown boots. . . ." According to a photograph introduced as State's Exhibit No. 3 defendant had shoulder-length dark blond or light brown hair on the night in question.

From a judgment imposing a prison sentence of fifteen years for second degree murder, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Francis W. Crawley, for the State.

Loflin & Loflin, by Thomas F. Loflin, III, and Dean A. Shangler, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends that the trial court erred by admitting hearsay testimony by a friend of decedent and by a police officer, that decedent, on the night of his death, told them that he was afraid of defendant. Assuming that the trial court erred in admitting this evidence, defendant has failed to show that the error was prejudicial. Even without this testimony the record discloses overwhelming amounts of evidence of the ill will that existed between the decedent and defendant, and that defendant had told the decedent earlier in the day that "If the bullet hit the car that is your ass."

[2] Secondly, defendant contends that his Sixth and Fourteenth Amendment rights to confront and cross-examine witnesses against him under the United States and the North Carolina Constitutions were denied by the trial court's admission of a tape recording of telephone calls made to the 911 emergency number. Defendant argues that the findings of fact made by the trial court after a voir dire hearing were not supported by competent evidence and a proper foundation was not laid for the admission of the evidence. Again, assuming that the trial court erred by admitting the tape recording, defendant has not shown that the admission was prejudicial. The recording only tended to show decedent's house was being broken into, shots were fired, and someone was dead at Washington Street and Monmouth Avenue.

No one was accused or implicated in the recording as being the perpetrator and defendant was in no way mentioned as being involved.

[3] Defendant next argues that the trial court erred in failing to grant his motions to dismiss and to set aside the verdict based on the insufficiency of the evidence and that the evidence is insufficient to support a conviction of second degree murder. Where a motion to dismiss is made the court must "consider all the evidence in the light most favorable to the State and . . . give the State the benefit of every reasonable inference to be drawn from it. However, if there is substantial evidence to support a finding that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be denied whether the evidence be direct, circumstantial or both." *State v. Scott*, 296 N.C. 519, 522, 251 S.E. 2d 414, 416 (1979). Summarizing the facts in the present case, the State's evidence tends to show that on 20 October 1984 defendant argued with decedent and threatened him. At about 10:00 that night, Ricky New saw "Lewis Blake's car" pull up and park near decedent's home and his wife, Melissa, saw the driver, who had long blond hair and was wearing a dark tee-shirt, get out of the El Camino and walk towards decedent's home just minutes before decedent was killed. Mazelle Peninger heard shots fired and saw a man on decedent's back steps. Joseph Chambers also heard the shots and saw a long-haired man running beside decedent's home. Decedent ran from his house to the street where he collapsed, dying from a bullet wound. After decedent collapsed the El Camino did a three-point road turn and left hastily. Later that night, a deputy sheriff picked up defendant who was standing beside his black El Camino. At the time defendant had shoulder-length dark blond or light brown hair, and was wearing a dark tee-shirt. When this evidence taken all together is considered in the light most favorable to the State it is sufficient to raise an inference that defendant, angry with McLamb because the latter had shot and hit his El Camino, went to the magistrate's office and learned that McLamb had been released and had no weapon. The evidence is also sufficient to raise an inference that defendant accompanied by a friend drove to McLamb's home in the El Camino where it was observed by witnesses and that defendant broke into McLamb's house, fired several shots, that McLamb ran from his home, defendant fired another shot and hit

McLamb, and that McLamb died as a result of shots fired by defendant. We hold that this evidence is sufficient to support a verdict of guilty of second degree murder.

Next, defendant contends that the trial court erred in refusing to charge the jury in accordance with his requested special instructions designated in the record as 1) "reasonable doubt," 2) "inference may not be based upon inference," 3) "no presumption that owner of a vehicle was the driver," 4) "suspicion or conjecture insufficient to convict" and 5) "facts proved must be inconsistent with defendant's innocence." G.S. 15A-1232 provides as follows: "In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence." We find nothing in the law or evidence given in this case to require the judge to instruct the jury as requested by defendant. We find that the instructions given are full, fair and complete, and are free from prejudicial error. These assignments of error have no merit.

[4] Finally, defendant contends that the trial court erred by failing to find factors in mitigation and imposing the presumptive sentence. This argument is without merit. Since defendant was given the presumptive sentence, the trial court was not required to make findings in aggravation and mitigation. G.S. 15A-1340.4(b); *State v. Welch*, 69 N.C. App. 668, 318 S.E. 2d 4 (1984).

For the foregoing reasons, we hold that defendant had a fair trial free of prejudicial error.

No error.

Judge ARNOLD concurs.

Judge ORR dissents.

Judge ORR dissenting.

I cannot agree with the majority's decision that there was sufficient evidence to go to the jury. In *State v. Chapman*, 293 N.C. 585, 238 S.E. 2d 784 (1977), the Supreme Court reversed de-

fendant Chapman's conviction for secret assault on the grounds of insufficient evidence to submit to the jury.

The evidence in *Chapman* differed significantly from the case *sub judice* in two important aspects. In *Chapman* the defendant was identified as being within close proximity of the scene of the assault shortly before and after the incident. Furthermore, a twelve gauge shotgun was taken from the defendant by the police after the shooting. The gun's breech had a strong odor of gun powder and contained a shell of the same make as a spent shell later found at the scene. The spent shell was later found to have been fired from defendant's gun.

In the case *sub judice*, defendant Blake was not identified as being at the scene at the time of the shooting. The only evidence linking him to the scene was one witness who identified a black El Camino that in his opinion was "Lewis Blake's car." Three witnesses saw a person in the vicinity of the shooting, but did not identify the defendant as that person. Secondly, there was no weapon ever found.

In *Chapman* the Court stated:

> The most the State has shown is that the victim could have been shot by a shell fired from defendant's gun. There is nothing, other than an inference which could arise from mere ownership of the gun, that would tend to prove that defendant actually fired the shot. 'Beyond that we must sail in a sea of conjecture and surmise. This we are not permitted to do.' *State v. Minor*, 290 N.C. 68, 75, 224 S.E. 2d 180, 185 (1976). Even when the State's evidence is enough to raise a strong suspicion, if it is insufficient to remove the case from the realm of conjecture, nonsuit must be allowed. *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 (1967).

Chapman, 293 N.C. at 587-88, 238 S.E. 2d at 786.

I cannot see how the evidence in *Chapman* was insufficient to go to the jury yet the evidence in the case *sub judice* is sufficient as determined by the majority. Here there is no identification of the defendant at the scene of the crime and no weapon involved in the shooting linked to defendant. Based upon the Supreme Court's decision in *Chapman*, I think the evidence was insufficient to go to the jury and the conviction should be reversed.

ADOLPHUS HEFFNER, PLAINTIFF-EMPLOYEE v. CONE MILLS CORPORATION, DEFENDANT-EMPLOYER, AND LUMBERMENS MUTUAL INS. CO., DEFENDANT-CARRIER

No. 8610IC375

(Filed 21 October 1986)

1. **Master and Servant § 69— workers' compensation—payments of plaintiff's future medical bills—award ambiguous**

An award by the Industrial Commission that defendant employer should "pay all medical expenses incurred by plaintiff as a result of his occupational disease when bills for same have been submitted to the Commission through the insurance carrier" was ambiguous as to whether plaintiff's future medical expenses were included, and the Commission was required to find whether further treatment would provide plaintiff with "needed relief" where plaintiff offered evidence on the subject. N.C.G.S. § 97-59.

2. **Master and Servant §§ 68, 69.1— workers' compensation—disability not affected by retirement**

The closing of the plant where plaintiff worked and plaintiff's "retirement" could not serve as the basis for denying plaintiff disability compensation, since disability measures an employee's present ability to earn wages, and the Commission may not deny disability benefits because the claimant retired where there is evidence of diminished earning capacity caused by an occupational disease; furthermore, the Commission's findings that plaintiff worked the last twelve years without missing any time from work, that plaintiff would have continued to work had the plant not closed, and that plaintiff felt that he was able to continue working at the time he quit his job were insufficient to support its conclusion that plaintiff was not disabled, and the Commission's findings were inadequate on the issue of plaintiff's capacity to earn wages in other employment.

APPEAL by plaintiff-employee from the Opinion and Award of the North Carolina Industrial Commission entered 23 January 1986. Heard in the Court of Appeals 17 September 1986.

This is an occupational lung disease case. Plaintiff was a lifelong employee of the defendant Cone Mills. He began working in the "slasher room" of defendant's Eno plant in 1938. After working for about a year, plaintiff left to join the Marine Corps. Upon his discharge in 1945, he returned to the plant and worked as a fireman and a watchman until 1954. Beginning in 1954, he worked in the weave room changing air filters and otherwise working on the air conditioning. From 1962 until 1972, plaintiff's job consisted of overhauling and changing motors in the weave room. In 1972, plaintiff moved out of the weave room and spent his last twelve

years at the plant repairing and overhauling motors in the shop area. In early 1984, plaintiff, then 65 years old, learned that the Eno plant would be closing. Knowing that he shortly would lose his job, plaintiff applied for Social Security retirement benefits and quit his job.

Although the degree of exposure varied with each particular job, plaintiff was exposed to cotton and other kinds of dust throughout his tenure with defendant. As early as 1954 plaintiff began experiencing breathing problems. These problems became progressively worse and on 16 May 1984 plaintiff filed this claim seeking workers' compensation for an occupational lung disease.

After a hearing, the deputy commissioner found that plaintiff was suffering from an occupational disease and awarded him partial disability benefits under G.S. 97-30 and present and future medical expenses under G.S. 97-59. On review, the Full Commission vacated the deputy commissioner's opinion and award and made its own findings of fact and conclusions of law. Although it also found that plaintiff suffered from an occupational disease, it found that he was not disabled. Consequently, the Commission awarded plaintiff medical expenses and $10,000 for a permanent injury to his lungs pursuant to G.S. 97-31(24).

From the opinion and award of the Commission, claimant appeals.

Michaels Law Offices, by John Alan Jones, for the plaintiff-appellant.

Smith, Helms, Mulliss & Moore by J. Donald Cowan, Jr. for the defendant-appellee.

EAGLES, Judge.

The plaintiff-appellant makes two basic arguments: (1) that the Commission erred in failing to make specific findings regarding his entitlement to future medical expenses; and (2) that the Commission's findings on the issue of plaintiff's incapacity for work are insufficient.

I

[1] In addressing plaintiff's right to have the defendant pay his medical expenses, the Commission included in its award the following:

2. Defendant shall pay all medical expenses incurred by plaintiff as a result of his occupational disease when bills for same have been submitted to the Commission through the insurance carrier.

The quoted language would allow one reasonably to conclude that plaintiff's future medical expenses were included. However, we agree with the plaintiff that this portion of the award is somewhat ambiguous, that necessary findings of fact on the issue are absent, and that the case should be remanded for clarification.

While the Commission is not required to make findings on each detail of the evidence or each inference which can be drawn from the evidence, its findings of fact must be sufficient to resolve all of the issues the evidence raises. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963); *Anderson v. Century Data Systems*, 71 N.C. App. 540, 322 S.E. 2d 638, *disc. rev. denied*, 313 N.C. 327, 327 S.E. 2d 887 (1984). G.S. 97-59 requires the Commission to award expenses for future medical treatment to an employee who suffers from an occupational disease for so long as that treatment will either "lessen the period of disability" or "provide needed relief." *Smith v. American & Effird Mills*, 305 N.C. 507, 290 S.E. 2d 634 (1982); G.S. 97-59. The Commission's finding that the plaintiff suffered no incapacity for work, if correct, would obviously preclude them from making any finding on the first grounds. Yet, the Commission, though the plaintiff produced evidence on the issue, failed to find either that further treatment would or would not provide him with "needed relief." For the reasons stated we remand the case for clarification of this finding. *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978).

We note that the only evidence on the issue of whether future medical treatment would provide needed relief came from Dr. Clinton D. Young. Dr. Young testified that continuing medical treatment would be of "substantial benefit" to the plaintiff. He testified that the most important treatment plaintiff should receive is "bronchodilator" medication which allows the plaintiff to breathe easier. Indeed, Dr. Young had testified earlier that, before bronchodilator treatment, plaintiff had a 50% to 75% impairment of his breathing, but that after the treatment, his impairment dropped into the 25% to 35% range. Undoubtedly, this evidence clearly establishes that continuing medical treatment is

reasonably necessary to provide plaintiff with needed relief. Our review of the record discloses no evidence to support a contrary finding.

Defendant argues that Dr. Young's testimony that continuing treatment would be of "substantial benefit" to the plaintiff does not meet the statute's requirement that it provide "needed relief." We disagree. There is nothing talismanic about the phrase "needed relief"; where his testimony is otherwise clear, as here, a medical expert is not required to use those particular words to justify an award for future medical expenses. Dr. Young's choice of words, if anything, clearly exceeds the requirements of G.S. 97-59.

II

[2] The plaintiff next argues that the Commission erred in limiting his compensation to an award for damage to an internal organ under G.S. 97-31(24). Specifically, plaintiff contends that the award was made under a misapprehension of the law and that the Commission's findings are insufficient to determine his entitlement to disability compensation. We agree and remand the case for further consideration and findings as to whether plaintiff may recover compensation under G.S. 97-29 for total disability or under G.S. 97-30 for partial disability.

Whether an employee is disabled within the meaning of G.S. 97-2(9) is a question of law which must be based on findings of fact supported by competent evidence. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E. 2d 798 (1986). The test of disability is whether, and to what extent, an employee's earning capacity is impaired. *Robinson v. J. P. Stevens*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982). Here, the Commission concluded that the plaintiff's occupational disease did not result in a loss of capacity to earn wages and found, as fact, that "[p]laintiff has sustained no incapacity for work resulting from his occupational disease." We believe that the latter statement is merely a restatement of the former and that, as conclusions of law, they are based on insufficient findings of fact.

In order for the Commission to award disability compensation, the plaintiff must prove: (1) that he was incapable of earning the same wages he had earned before his injury in the same em-

ployment, (2) that he was incapable of earning the same wages he had earned before his injury in any other employment, and (3) that his incapacity was caused by his injury or occupational disease. *Hillard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). Here, however, the Commission's findings are insufficient to show that plaintiff has failed to meet his burden under *Hillard.*

In denying plaintiff's claim for disability compensation, the Commission apparently placed great reliance on its conclusion, which would more appropriately be labeled a finding of fact, that the plaintiff's lack of earnings was due to his desire to retire and the closing of the plant where he was working. In doing so, we believe the Commission acted under a misapprehension of the law. Because disability measures an employee's present *ability* to earn wages, *Webb v. Pauline Knitting Industries*, 78 N.C. App. 184, 336 S.E. 2d 645 (1985), and is unrelated to a decision to withdraw from the labor force by retirement, the Commission may not deny disability benefits because the claimant retired where there is evidence of diminished earning capacity caused by an occupational disease. So long as the disease has, in some way, diminished the employee's *ability* to earn wages, he may recover disability compensation. *See Preslar v. Cannon Mills Co.*, 80 N.C. App. 610, 343 S.E. 2d 209 (1986) and *Donnell v. Cone Mills Corp.*, 60 N.C. App. 338, 299 S.E. 2d 436 (1983). Therefore, the plant's closing and plaintiff's "retirement" may not serve as a basis for denying plaintiff disability compensation.

Similarly, the Commission's other findings are insufficient to support its conclusion that the plaintiff was not disabled. The only findings which relate to the issue were that plaintiff worked the last twelve years without missing any time from work, that plaintiff would have continued to work had the plant not closed, and that the plaintiff felt that he was able to continue working at the time he quit his job. Those findings, however, are not enough to support the Commission's conclusion. Instead, their cumulative effect is to show, albeit indirectly, that plaintiff could have continued to work in the machine shop at the plant. Even if the Commission had made that finding, it would not fully dispose of the disability issue.

Whether an employee is disabled is a broad question which cannot be competently answered by merely stating that the plain-

tiff was physically capable of continuing in the same kind of work. *See Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965) (disability refers not to physical infirmity but to a diminished capacity to earn wages). Even if plaintiff could have continued to work in his job with the defendant, the plant's closing precluded his doing so. Consequently, his disability must be considered in light of that fact.

In addition, the Commission's findings are inadequate on the issue of plaintiff's capacity to earn wages in other employment. It is axiomatic that the Commission must decide the disability issue based on the particular characteristics of the individual employee. *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978); *Gibson v. Little Cotton Mfg. Co.*, 73 N.C. App. 143, 325 S.E. 2d 698 (1985). This necessitates a consideration of the employee's age, work experience, training, education, and any other factors which might affect his ability to earn wages. *Little v. Food Service, supra; Peoples v. Cone Mills, supra.* Here, the plaintiff was 65 years old at the time he left his job, had a tenth grade education, and had no other work experience outside of the mill. Further, the evidence indicates that he was subject to certain physical and environmental limitations. The Commission's findings do not indicate that the Commission considered whether, and to what extent, those factors affected his ability to earn wages.

Finally, the defendant has argued that the plaintiff has failed to prove his incapacity for other employment because the evidence shows that he has failed to look for other employment. The Commission, however, did not make a finding to that effect. Furthermore, in *Peoples v. Cone Mills, supra*, decided after the Commission's decision here, the Court held that the employee can meet his burden by showing that because of his age, education, training, physical and environmental limitations, it would be futile for him to look for other employment. Therefore, the fact that plaintiff failed to look for other employment, if true, would merely create another factual issue for the Commission to decide.

The Commission here failed to make specific findings on the crucial questions which necessarily underlie any conclusion as to whether the claimant has suffered any disability. Accordingly, we remand this case for additional findings necessary to support a conclusion on the disability issue and to clarify claimant's entitlement to compensation for future medical expenses.

Reversed and remanded.

Judges WEBB and BECTON concur.

RICHARD V. LEWIS, JR. v. QUINTON A. BRUMBLES

RICHARD V. LEWIS, SR. AND WIFE, BOBBIE LEWIS v. QUINTON A. BRUMBLES

No. 8616SC380

(Filed 21 October 1986)

Automobiles § 89— bicyclist—last clear chance—jury question

In an action to recover for injuries sustained by plaintiff when defendant's car collided with his bicycle, evidence was sufficient to support the trial court's determination that plaintiff's own negligence contributed to his injuries where such evidence tended to show that plaintiff, by his own admission, rode his bicycle across a highway and then attempted to cross back over the center line into the improper left lane without ever looking back or ascertaining that such a maneuver could be made in safety; however, evidence was sufficient to submit the case to the jury on the theory that defendant had the last clear chance to avoid the collision where the evidence indicated that plaintiff negligently placed himself in a position of peril, then never looked back, never saw defendant's vehicle, and therefore could not reasonably have been expected to act to avoid the collision; defendant knew or should have known that plaintiff was in a perilous position of which he was unaware or inattentive; defendant had the time and means to avoid the injury in that after he saw plaintiff's bicycle turn back toward him he blew his horn as many as three times, then pulled into the other lane to pass plaintiff without ever reducing his speed; and defendant, though he had the time and means to avoid the collision, never applied his brakes.

APPEAL by plaintiffs from *McKinnon, Judge*. Judgment entered 6 November 1985 in Superior Court, ROBESON County. Heard in the Court of Appeals 17 September 1986.

Britt & Britt, P.A., by William S. Britt and Evander M. Britt III, for plaintiff appellant.

McLean, Stacy, Henry & McLean, by Everett L. Henry, for defendant appellee.

BECTON, Judge.

Richard "Dick" V. Lewis, Jr. brought this action to recover damages for personal injuries sustained when his bicycle collided with Quinton Brumbles' car. Dick's parents, Richard V. Lewis, Sr. and Bobbie Lewis, also sued Mr. Brumbles for the loss of services of their minor son and for his medical expenses. The cases were consolidated for trial. At the close of all the evidence, the trial judge granted Mr. Brumbles' motion for a directed verdict on the grounds that the evidence established contributory negligence on the part of Dick Lewis as a matter of law. Plaintiffs appeal. We reverse.

The questions presented by this appeal are whether the trial court erred in finding that Dick Lewis was contributorily negligent as a matter of law, and whether the plaintiffs presented sufficient evidence on the issue of last clear chance to withstand Mr. Brumbles' motion for directed verdict.

I

The evidence, when viewed in the light most favorable to the plaintiffs, tends to show the following.

On 20 April 1981, Dick Lewis, who was fifteen years old at that time, rode his bicycle from his parents' home down a sloping driveway of loose sand and out onto Rural Paved Road 2272, a two-lane paved highway which runs north and south. As he went down the driveway, he looked both ways for traffic and saw a car in front of the house which had approached from the left and was already gone by the time he reached the road. He also heard, but did not see, Mr. Brumbles' car approaching, recognizing it by its distinctive sound ("like a chain saw in a fifty gallon barrel"). Dick entered the highway from the west side, crossing to the opposite northbound lane, and making a gradual swinging left turn toward the north. Then, without ever looking back, he proceeded in a continuous circular motion to swing back to the left, across the center line and into the southbound lane, where he was struck by Mr. Brumbles' automobile which had approached from the south and was attempting to pass on the left.

Dick testified that it was his intention in switching lanes to allow Mr. Brumbles to pass by on the right hand side of the road, that it was the custom of neighborhood boys to change lanes in

that manner, and that he had done the same thing in the past when Mr. Brumbles was passing in the neighborhood.

Mr. Brumbles testified that he was proceeding north in the northbound lane at 35-40 miles per hour and observed Dick Lewis before Dick entered the highway. He saw Dick ride across the road from west to east in front of him, turn north in the northbound lane, and then start back across toward the southbound lane. After observing Dick turn back toward the west, Mr. Brumbles blew his horn two or three times without ever reducing his speed, and pulled into the left lane to pass, where his car collided with the bicycle.

The physical evidence at the accident scene indicated that the accident occurred just north of the Lewis driveway, approximately two feet to the west of the center line in the southbound lane. The marks and debris were in the southbound lane. The damage to Mr. Brumbles' car was all on the right front corner.

II

Contributory Negligence

Plaintiffs first argue that the court erred in its determination that Dick's own negligence contributed to his injuries. This contention is without merit.

Directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff, establishes contributory negligence so clearly that no other reasonable inference or conclusion can be drawn therefrom. *Rappaport v. Days Inn of America, Inc.*, 296 N.C. 382, 250 S.E. 2d 245 (1979).

In this State, a person above the age of fourteen is presumed to possess the capacity of an adult to protect himself and is presumptively chargeable with the same standard of care for his own safety as if he were an adult. *Welch v. Jenkins*, 271 N.C. 138, 155 S.E. 2d 763 (1967); *Sadler v. Purser*, 12 N.C. App. 206, 182 S.E. 2d 850 (1971). In this case there was no evidence to rebut that presumption. Furthermore, a bicycle is deemed a vehicle and its rider is a driver within the meaning of our Motor Vehicle Law, *Lowe v. Futrell*, 271 N.C. 550, 157 S.E. 2d 92 (1967), and is thus subject to the rules of the road. *Asbury v. City of Raleigh*, 48

N.C. App. 56, 268 S.E. 2d 562, *disc. rev. denied*, 301 N.C. 234, 283 S.E. 2d 131 (1980).

By his own admission, Dick Lewis rode his bicycle across the highway and then attempted to cross back over the center line into the improper left lane without ever looking back or ascertaining that such a maneuver could be made in safety. The only reasonable inference to be drawn from this evidence is that he failed to exercise the ordinary care of a reasonably prudent person under the circumstances and that such failure was a proximate contributing cause of the accident. *See Lowe v. Futrell.*

His evidence showing that it was the custom of the neighborhood boys to ride in the left lane and allow traffic approaching from behind to pass by on the right, and that he had done this previously when Mr. Brumbles overtook him, may explain Dick Lewis' belief that he could safely move into the left lane. That evidence does not, however, justify his choice of the wrong lane nor negate the inference of negligence which must be drawn from his failure to look back.

III

Last Clear Chance

Plaintiffs next contend that even if Dick Lewis's contributory negligence is conclusively established, there is sufficient evidence to submit the case to the jury on the theory that Mr. Brumbles had the last clear chance to avoid the collision. We agree.

In *Exum v. Boyles*, 272 N.C. 567, 576, 158 S.E. 2d 845, 853 (1968), the Supreme Court stated that to invoke the doctrine of last clear chance

> there must be proof that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so.

In *Clodfelter v. Carroll*, 261 N.C. 630, 634-35, 135 S.E. 2d 636, 639 (1964), the court enumerated the following four elements which an injured pedestrian found to be contributorily negligent

must establish for the doctrine of last clear chance to apply against the driver who struck him:

> (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid the injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

We believe the same principles apply when the injured person is a bicyclist.

The question presented by Mr. Brumbles' motion for directed verdict is whether the evidence which supports the theory of last clear chance, when taken as true, considered in the light most favorable to the plaintiff, and given the benefit of every reasonable inference in the plaintiff's favor, is sufficient to take the case to the jury. *See Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980). In making this determination, Mr. Brumbles' own evidence may be considered to the extent it is favorable to the plaintiff or not in conflict with the plaintiff's evidence. *See Tate v. Bryant*, 16 N.C. App. 132, 191 S.E. 2d 433 (1972).

We now consider the evidence in support of the four elements of the last clear chance doctrine enumerated in *Clodfelter* and *Exum*. First, the evidence clearly indicates that Dick Lewis circled across the highway in front of an oncoming vehicle, thereby negligently placing himself in a position of peril. Furthermore, he never looked back, apparently never saw Mr. Brumbles' vehicle nor ascertained its position and therefore could not reasonably have been expected to act to avoid the collision. *See Watson v. White*, 309 N.C. 498, 308 S.E. 2d 268 (1983). The first element of the *Clodfelter* test is thus satisfied.

Second, Mr. Brumbles testified that he first saw Dick Lewis before Dick ever entered the highway; that he observed the bicycle enter the road, travel into his own (northbound) lane and then *start back* to the left. He witnessed the bike rider's apparent unawareness or disregard for the automobile's approach. Moreover, the evidence that Dick Lewis had moved into the left lane on prior occasions to allow Mr. Brumbles to pass on the right, coupled with the evidence that Mr. Brumbles perceived the bicycle's movement back toward the left lane, suggests Mr. Brumbles should have been on notice that the bicycle might continue into the left lane and was under a duty to attempt to ascertain the rider's next move before passing. We think the foregoing evidence is more than adequate to show that Mr. Brumbles knew or should have known that Dick Lewis was in a perilous position of which he was unaware or inattentive. Therefore the second element of the *Clodfelter* test is satisfied.

With regard to the third element of the test, we reject the plaintiffs' contention that evidence of a statement of Mr. Brumbles to Richard Lewis, Sr., to the effect that he felt like he could have avoided the accident, is determinative. The ability of Mr. Brumbles to avoid the collision is a legal conclusion which must be shown by the facts. *See Henderson v. Henderson*, 239 N.C. 487, 492, 80 S.E. 2d 383, 386 (1954); *Austin v. Overton*, 222 N.C. 89, 21 S.E. 2d 887 (1942). Nevertheless, apart from that statement there is sufficient evidence that Mr. Brumbles had the time and means to avoid injury to Dick Lewis after discovering his perilous position. Taken in the light most favorable to the plaintiff, Mr. Brumbles' testimony indicates that it was only *after* he observed the bicycle turn back toward the left that Mr. Brumbles blew his horn, as many as three times, and then pulled into the left lane to pass. At the time, he was only traveling approximately 35 miles per hour, and he testified that he never reduced his speed because he didn't think it was necessary. Furthermore the physical damage to the right front corner of his car indicates that at the time of impact Dick Lewis was still ahead of Mr. Brumbles and in his clear line of sight.

From this evidence, a jury could reasonably conclude that in the time it took Mr. Brumbles to blow the horn and pull to the left, he could have avoided the accident by applying his brakes

and remaining in the right lane. Hence, the third element of the last clear chance doctrine is met.

Finally, there is also adequate evidence that Mr. Brumbles not only had the time and means to avoid the collision but that he negligently failed to use it. His testimony is clear that he observed all of the bicycle's movements in the road ahead of him. Yet from the time the bike entered the road, Mr. Brumbles never applied his brakes. He attempted to pass without ever slowing down to determine what the moving bicycle was going to do.

> The very presence of a young boy riding a bicycle on a highway is, in itself, a danger signal to a motorist approaching him from the rear. Ordinarily, it is a question for the jury as to whether the motorist has responded to such danger signal as a reasonable man would have done.

Champion v. Waller, 268 N.C. 426, 429-30, 150 S.E. 2d 783, 786 (1966).

We conclude that there is sufficient evidence in support of the doctrine of last clear chance to justify the submission of this case to the jury. Accordingly, we hold that it was error for the trial court to grant the defendant's motion for a directed verdict and that the judgment entered must be

Reversed.

Judges WEBB and EAGLES concur.

EDWARD HORNE, EMPLOYEE, PLAINTIFF v. MARVIN L. GOODSON LOGGING CO., EMPLOYER; SELF-INSURED (HEWITT, COLEMAN & ASSO., INC.), DEFENDANT

No. 8610IC214

(Filed 21 October 1986)

Master and Servant § 93.3— workers' compensation—testimony by plaintiff's medical expert ruled incompetent—error

In a workers' compensation case where plaintiff employee contended that he suffered a permanent disabling brain injury, the Industrial Commission erred in finding that testimony by plaintiff's psychology expert was not competent and in excluding it from consideration.

Judge MARTIN concurs in the result.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and award filed 6 March 1985. Heard in the Court of Appeals 21 August 1986.

Plaintiff appeals from an opinion and award of the Industrial Commission denying plaintiff an award for permanent, disabling brain injury. The claim was heard before Deputy Commissioner Lawrence A. Shuping. Shuping entered an opinion and award in which he found the following facts:

Plaintiff was employed as a truck driver by defendant employer. On 21 July 1980, while pulling down on a chain used to secure a load of logs on his vehicle, a log weighing approximately 1,000 pounds fell 14½ feet striking plaintiff on the head. Plaintiff sustained injuries resulting in a 20 percent permanent partial disability of his back. Plaintiff also sustained permanent and disfiguring scars on his head for which he was awarded $2,500.00. Shuping found that plaintiff has not suffered any type of permanent, disabling brain injury and denied him compensation for a brain injury. Plaintiff appealed to the Full Commission which adopted the opinion of the Deputy Commissioner with one Commissioner dissenting. From the opinion and award of the Commission, plaintiff appeals.

James G. Gillespie, Jr. for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo, for defendant appellee.

Ennis, Friedman & Bersoff, by Donald N. Bersoff; Tharrington, Smith & Hargrove, by Ann L. Majestic, for Amicus Curiae.

ARNOLD, Judge.

Plaintiff contends that the denial of permanent partial disability was not based on substantial evidence, was not adequately supported and was in error as a matter of law. We disagree.

The well-established rule concerning the role of the appellate court in reviewing an appeal from the Industrial Commission is

that the Court is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings. *Guy v. Burlington Industries*, 74 N.C. App. 685, 329 S.E. 2d 685 (1985).

Dr. Robert Wilfong, qualified as an expert in neurosurgery, testified that plaintiff's neurological examination was normal and that there was no permanent disability to the brain. This is competent evidence sufficient to support the finding that plaintiff has not suffered disabling, permanent brain injury.

Plaintiff also contends that competent, credible evidence in the form of testimony by Dr. Antonio Puente was prejudicially excluded from consideration.

The case was heard before Deputy Commissioner Shuping. However, the testimony of Dr. Puente was heard by Deputy Commissioner Morgan Scott. Dr. Puente testified extensively but portions of his testimony were objected to by defendant and sustained by Deputy Commissioner Scott. After sustaining an objection to Dr. Puente's qualifications to render an opinion, Deputy Commissioner Scott stated, "It's not my case, however, and I will defer to what Deputy Commissioner Shuping wants to do with the response, and I will allow him to answer for the record." Although sustaining defendant's objections during the course of Dr. Puente's testimony, Deputy Commissioner Scott allowed Dr. Puente to testify for the record so that Deputy Commissioner Shuping could determine whether to admit the testimony.

It is clear that Deputy Commissioner Shuping considered the testimony and found it to be incompetent and incredible. Deputy Commissioner Shuping found that "to the extent that the testimony of Dr. Puente, which if believed, would tend to establish that he has [such an injury], said testimony is neither accepted as competent nor credible to do so but rather, is in direct conflict with the competent and credible medical testimony of Dr. Wilfong that no such permanent brain injury resulted." Deputy Commissioner Shuping erred in concluding that Dr. Puente's testimony was "incompetent." It reasonably could be argued that the Deputy Commissioner clearly considered this testimony, found it to be incredible, and simply chose not to believe it. However, since it was error to characterize Dr. Puente's testimony as incompetent,

we remand the cause to the Industrial Commission for consideration of the credibility of said testimony.

The Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Mayo v. City of Washington*, 51 N.C. App. 402, 276 S.E. 2d 747 (1981). We express no opinion as to the credibility of Dr. Puente's testimony and leave that determination to the Commission.

Reversed and remanded.

Judge MARTIN concurs in the result.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

Though I agree that the case must be remanded to the Industrial Commission the narrow scope of the remand that the majority directs is not in keeping with the law and I dissent from it.

The facts found by the Commission in this instance are not conclusive, as is usually the case when supported by competent evidence, because they were clearly found under a misapprehension of law as to the admissibility of plaintiff's evidence tending to show that he has a compensable brain injury. *Whitted v. Palmer-Bee Co.*, 228 N.C. 447, 46 S.E. 2d 109 (1947). Furthermore, nothing in the record suggests to me that either Deputy Commissioner Shuping or the Commission majority considered, at least in any meaningful sense, the competent and pertinent neuropsychological testimony of Dr. Puente. Rather, the record indicates that any consideration given to the testimony was utterly meaningless because it was preceded by the erroneous determination that only doctors of medicine can make reliable deductions as to conditions in the brain. No other possible basis for ruling the testimony incompetent is suggested. The witness was well qualified to testify; his opinions were based upon evidence tending to show that plaintiff's brain is gravely impaired due to some cause; no cause of the impairment other than the one thousand pound log striking him on the head is suggested by the evidence; and none of the evidence tending to show that plaintiff's brain has been damaged was addressed by any of the Commission's findings of fact.

The general utility and reliability of expert psychological analysis and testing in evaluating conditions of the brain is recognized alike by the law and the medical profession. Many medical doctors consult as readily with psychologists in cases of suspected brain injury as they order X-rays in cases of suspected bone fractures, or laboratory tests in cases of suspected liver damage. This is because psychology is the study of the human mind and how it works and because the brain controls conduct, thought, speech, feelings and judgment no less than it does limbs and muscles. The circumstances of this case are clearly suitable for such expert psychological analysis. A 1,000 pound log struck plaintiff on the head with such compressive force that it severely damaged several teeth and fractured a bone in his back 18 or more inches from the point of impact. That this great force *could* have injured some of the delicate membranes of the brain is obvious, even though the bones surrounding the brain were not fractured and the *physical* examination and other tests conducted by Dr. Wilfong a year or so after the accident did not indicate any injury to the brain. Conditions in the brain can be indicated by conduct, feelings, and thought, as well as by X-rays and scanning devices, and plaintiff's conduct, feelings and thought since the log struck him on the head, according to uncontradicted evidence, indicate that his brain is gravely impaired.

There is evidence that: Before his injury plaintiff was a normal, sociable, outgoing, even tempered person, who rarely had a headache, slept well, and enjoyed his family and others. Since being hit with the log and for no other apparent reason, plaintiff has been depressed and withdrawn; his nightly sleep has been regularly disturbed and insufficient; he has often lost his temper for no rational reason, even to the point of thinking about running his truck off the road or into cars on the road that delay him; he often has intense headaches that require him to walk the floor for hours if at night and to pull his logging truck off to the side of the road if by day; he occasionally has hallucinations, thinking that he hears non-existent things such as a baby crying in the night; and he no longer likes to associate with others, including his own wife and child. Though this evidence, along with the psychologist's expert opinion about it, is the basis for plaintiff's claim that he has a compensable brain injury the Commission made no findings about the truth or falsity of any of it. Thus, the case

presented to the Commission has not been decided, and it will not be properly decided, in my view, until findings from the competent evidence are made as to whether plaintiff's emotional and mental health, personality and conduct have in fact changed since the log hit him on the head and, if so, what probably caused the change.

My vote is to vacate the decision and to remand to the Commission for a redetermination of the brain injury issue after considering all the competent evidence presented "in its true legal light." *Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E. 2d 84, 87 (1949).

BETTY B. FORTNER, EMPLOYEE, PLAINTIFF v. J. K. HOLDING COMPANY, EMPLOYER, AND AMERICAN INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8610IC216

(Filed 21 October 1986)

Master and Servant § 55.4— workers' compensation—fall while hanging plants—no accident arising out of and in course of employment

Plaintiff's accidental injury did not arise out of and in the course of her employment where the evidence tended to show that she was instructed to pack up office materials, dispose of plants, and close the office permanently; at 3:00 in the afternoon, before she had completed her duties, she took the plants to her house and attempted to hang them; in the process she fell from a chair onto a cement floor and injured her hip; and plaintiff's decision to take the plants to her home and hang them on her porch during working hours was motivated by purely personal considerations and did not result in any substantial benefit to her employer.

Judge PHILLIPS dissenting.

APPEAL by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 19 November 1985. Heard in the Court of Appeals 21 August 1986.

On and before 31 August 1984, plaintiff was employed by J. K. Holding Company, a corporation owned by J. C. Kivett, as the sole employee of its Statesville, N. C. office. Her primary duties consisted of bookkeeping and secretarial work but, as the sole employee, she performed other tasks as well, including running personal errands for Mr. Kivett, cleaning the office, dispos-

ing of trash, and tending to various decorative plants which she and Mr. Kivett kept in the office. Her normal working hours were from 9:00 to 5:00. She was paid $250 per week and was provided a tank-full of gas each month as reimbursement for the business use of her personal automobile.

Mr. Kivett decided to close the Statesville office, effective 31 August 1984, and made arrangements to lease the space to a new tenant beginning 1 September. Since this decision resulted in the termination of plaintiff's job, Mr. Kivett agreed to pay plaintiff her regular salary through the end of 1984 as severance pay. Because he would not be in the office on 31 August 1984, Mr. Kivett instructed plaintiff to pack the office materials and clean and close the office. Mr. Kivett also asked plaintiff to dispose of the plants, except for one which he wanted to keep. He did not tell plaintiff what to do with the plants, but was aware that she was likely to take them to her own home. This was, in fact, what plaintiff did plan to do.

Before leaving her home to go to work on the morning of 31 August 1984, the plaintiff stood on a chair and drove a large nail into her porch. She intended to hang a device, called a single tree, on the nail, from which she would hang the plants from the office. At about 3:00 that afternoon, plaintiff put the plants into her car and drove to her home, intending to hang the plants quickly and then return to the office to complete her work. She chose that time because her daughter would be at home and available to help her hang the plants. Plaintiff testified that had she waited until after work to take her plants home, her daughter would have gone to work and, since plaintiff's husband was out of town, no one would have been available to assist her in hanging the plants.

Upon arriving at her home, plaintiff stood on a chair and hung the single tree on the nail. She stepped down from the chair and noticed that the single tree was crooked. She climbed back onto the chair in order to straighten the device and fell to the cement floor, injuring her hip. After being admitted to the hospital, she made telephone arrangements for others to do the tasks which she had not completed at her employer's office.

Plaintiff applied for workers' compensation benefits. Deputy Commissioner Rush found facts essentially as stated above and

concluded the plaintiff's accidental injury "did not arise out of and in the course of her employment." Her claim for benefits was denied. The Full Commission, with Commissioner Clay dissenting, affirmed the Opinion and Award of Deputy Commissioner Rush. Plaintiff appeals.

Homesley, Jones, Gaines & Fields, by Edmund L. Gaines for plaintiff appellant.

Hedrick, Eatman, Gardner & Kincheloe by Thomas E. Williams for defendant appellee.

MARTIN, Judge.

There is no dispute with respect to the facts found by the Commission. The only question involved in this appeal is whether the Commission properly found and concluded that plaintiff is ineligible for workers' compensation benefits because her accidental injury did not arise out of and in the course of her employment. We affirm.

In order for an injured employee to be eligible for workers' compensation benefits for accidental injury, the claimant must prove that the injury arose out of the employment and that it occurred in the course of the employment. G.S. 97-2(6); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E. 2d 196, 198 (1982). Both elements—i.e., "arising out of" employment and "in the course of" employment—must be satisfied or compensation will be denied the injured employee. *Hoyle, supra.* Although interrelated, each of these elements has a distinct meaning: "[t]he term 'arising out of' refers to the origin or cause of the accident, and the term 'in the course of' refers to the time, place and circumstances of the accident." *Id.*

An injury arises out of the employment when it is a natural and probable consequence or incident of the employment and a natural result of one of the risks thereof, so that there is some causal relation between the injury and the performance of some service of the employment. *Id.* at 252, 293 S.E. 2d at 198, *quoting Perry v. Bakeries Co.*, 262 N.C. 272, 273-74, 136 S.E. 2d 643, 645 (1964). It has been held that the test of whether an accidental injury "arises out of" the employment is whether a contributing proximate cause of the injury was a risk inherent or incidental to

the employment and one to which the employee would not have been equally exposed apart from the employment. *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977).

An injury occurs "in the course of" the employment "when the injury occurs during the period of employment at a place where an employee's duties are calculated to take him, and under circumstances in which the employee is engaged in an activity which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." *Powers v. Lady's Funeral Home*, 306 N.C. 728, 730, 295 S.E. 2d 473, 475 (1982).

Applying these well established principles to the facts of the present case, it is apparent that plaintiff's unfortunate accident neither arose out of her employment nor occurred in the course thereof. Although she had been instructed by her employer to dispose of the plants, her decision to take them to her home and hang them on her porch during working hours was motivated by purely personal considerations, i.e., the availability of someone to assist her. But for this reason, she would not have made the trip, and therefore she cannot be said to have been engaged in an errand undertaken in furtherance of her employer's business. *See Ridout v. Rose's Stores, Inc.*, 205 N.C. 423, 171 S.E. 642 (1933). Moreover, plaintiff's act in standing on a chair on her front porch in order to adjust the device upon which she intended to hang the plants was clearly an act undertaken for her own benefit and not "for the benefit of [her] employer 'to any appreciable extent,'" a fact determinative of compensability. *Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E. 2d 807, 810 (1982). The incidental benefit accruing to J. K. Holding Company—the disposition of the plants so that it could vacate its office—was not so appreciable as to render plaintiff's aesthetic positioning of the plants at her home sufficiently work related as to justify compensation. Finally, plaintiff's employment with J. K. Holding Company did not enhance in any manner the risk that she might fall from a chair at her home, nor was such a risk incidental or inherent to her employment.

We are cognizant that the Workers' Compensation Act is to be construed liberally, to the end that "benefits . . . should not be denied by a technical, narrow, and strict construction." *Roper v.*

J. P. Stevens & Co., 65 N.C. App. 69, 73, 308 S.E. 2d 485, 488 (1983), *disc. rev. denied*, 310 N.C. 309, 312 S.E. 2d 652 (1984). However, even a most liberal construction of the Act does not allow or require the Industrial Commission to view the evidence unrealistically. The evidence in this case overwhelmingly supports a finding that the plaintiff was engaged in a purely personal activity when the accident occurred. Accordingly, the Opinion and Award of the Industrial Commission is

Affirmed.

Judge ARNOLD concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion the majority takes too narrow a view of plaintiff's employment, the activity that brought about her injury, and G.S. 97-2(6). The task that plaintiff's boss assigned her, clearing out the office and getting rid of the plants that adorned it, was certainly for the employer's benefit and how the task was carried out was left to her discretion with the knowledge and expectation that she would take some of the plants home and hang them up, since they were *hanging* plants. She was at the halfway mark in performing the task when she was injured. For the task did not end when she and the plants left the office, or even when they arrived at her home; it included removing the plants from the office, taking them somewhere, disposing of them as she saw fit, and returning to the office if the work day was not over and other work remained to be done, as was the case. If the accident had occurred in taking the plants from the office to the car, or in lifting them out of the car, or on the way to her home, or on the way back to the office, the injury would have been compensable though all of these acts were merely incidental to the task assigned of getting rid of the plants. Yet the majority holds that plaintiff's injury is not covered by the Act though the accident occurred while she was actually getting rid of the plants, the ultimate task she was told to do. The employer received the same benefit from plaintiff hanging the plants on her porch—the disposition of the plants—as it would have received if she had put

them in a garbage dump or given them to a stranger; and that plaintiff also received a benefit from the method of disposition that she was free to select is in my opinion beside the point. In my view plaintiff's injury arose out of and in the course of her employment, and the Commission's finding and conclusion to the contrary was error.

ALFRED A. McGARITY AND WILLIAM A. McGARITY v. CRAIGHILL, RENDLEMAN, INGLE & BLYTHE, P.A., JAMES B. CRAIGHILL, JOHN T. RENDLEMAN, JOHN R. INGLE AND ROBERT B. BLYTHE

No. 8626SC394

(Filed 21 October 1986)

1. **Principal and Agent § 5.2— law firm—member soliciting investments—no agent of firm**

In an action to recover $45,000 as damages for two acts of conversion by a former member of defendant law firm on the ground that the member was an agent of the firm and was acting within the apparent scope of his authority when he solicited and accepted loans from plaintiffs, evidence was insufficient to be submitted to the jury where it tended to show that the firm was not in the business of soliciting or accepting money for investment purposes and there was no evidence that it had ever done so; the firm was not authorized to do so by its articles of incorporation; there was no evidence that the former member's acts could have benefited the firm in any way; there was no evidence that any other member of the firm knew or should have known about the former member's soliciting and accepting the money; and the firm thus could not have committed any acts to hold the former member out as having the authority to do so.

2. **Attorneys at Law § 1— conversion by former member of firm—no duty of firm to supervise—no recovery against firm**

Plaintiffs could not recover in their action to recover $45,000 as damages for two acts of conversion by a former member of plaintiff law firm on the ground that defendants were negligent in failing to supervise the former member adequately and their negligence proximately caused harm to plaintiffs, since plaintiffs failed to show that defendants had a duty to detect and supervise the former member's activities which were outside the practice of law, which he had no authority to take, and of which defendants had no reason to know.

3. **Trover and Conversion § 2— unaware of allegedly wrongful acts by former associate—no recovery for conversion**

In an action to recover for two acts of conversion based on an alleged violation of N.C.G.S. § 78A-56(a) and (c), portions of the N. C. Securities Act

providing for civil liability and criminal penalties for the offering and selling of securities by means of an untrue or misleading statement, plaintiffs were not entitled to recover where there was no evidence whatsoever that defendants knew or acted in reckless disregard of the existence of the facts by reason of which the liability was alleged to exist.

APPEAL by plaintiffs from *Grist, Judge*. Judgment entered 13 December 1985, in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 September 1986.

This is a civil action wherein plaintiffs seek to recover from defendants, an incorporated law firm or "professional association" and its individual members, $45,000.00 as damages for two acts of conversion by Francis O. Clarkson, Jr., a former member of the firm. Plaintiffs' complaint was filed on 29 August 1984. Defendants filed an answer alleging that the complaint fails to state a claim for relief against any of the defendants.

In the pleadings, depositions, interrogatories, admissions of file and affidavits, evidence is presented which tends to show the following:

Craighill, Rendleman, Clarkson, Ingle & Blythe, P.A., was an incorporated law firm, or professional association. Francis O. Clarkson, Jr., was on its board of directors and was one of its employees. Plaintiff Alfred McGarity had been a client of the firm since 1971. The firm had performed various legal services for him and his business, Carolina Institutional Sales.

In October of 1982, Mr. Clarkson asked Mr. McGarity if he was interested in investing in a coal mining operation. Mr. McGarity and his brother, plaintiff William McGarity, both decided to take part. In February 1983 they each delivered $15,000.00 to Mr. Clarkson to invest in the mining operation, and Mr. Clarkson delivered various related documents to them.

On or about 3 October 1983, the firm and Mr. Clarkson reached an agreement whereby Mr. Clarkson was to relinquish his stock in the firm effective 30 September 1983. The other members of the firm stated that, over a period of time, Mr. Clarkson's "way of practicing law . . . didn't fit in too well with the Firm." He was out of the office frequently, generated less and less revenue for the firm, failed to keep accurate time records, and failed to log many long-distance calls. Prior to Mr. Clarkson's resigna-

tion, the other members of the firm asked him to change some of his practices, but never confronted him to ascertain what he was doing with his time or why his practices were not in conformity with the rest of the firm's.

While Mr. Clarkson had been a member of the firm he had told Alfred McGarity that from time to time he "had clients that had recoveries on the horizon" and needed "unsecured capital." Clarkson had invited Mr. McGarity to let him invest his money by lending it to these clients. On several occasions, Mr. McGarity did lend his money to Mr. Clarkson, in varying amounts, with the understanding that it would be lent to Mr. Clarkson's clients. The first loan transaction of this type occurred in December of 1982. The final one occurred on 6 December 1983. On that date, Mr. McGarity delivered to Mr. Clarkson $15,000.00 and Mr. Clarkson executed a note for $18,000.00 payable in 60 days to Mr. McGarity. Mr. Clarkson wrote a check for payment of the note dated 24 February 1984. It was returned for insufficient funds.

Neither Alfred nor William McGarity ever received any accounting for the money they loaned Mr. Clarkson to invest in the coal mine.

On 9 March 1984, an order for relief under 11 U.S.C. Sec. 7 was entered on a petition filed against Mr. Clarkson. All of plaintiffs' claims against Mr. Clarkson have been discharged in bankruptcy.

Based on this evidence, defendants made a motion for summary judgment. The court granted defendants' motion and dismissed plaintiffs' claim.

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr., and Judith E. Egan, for plaintiffs, appellants.

Smith, Helms, Mulliss & Moore, by E. Osborne Ayscue, Jr., and Benne C. Hutson, for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiffs contend that the trial court erred to their prejudice in granting defendants' motion for summary judgment. Plaintiffs argue that there is a genuine issue of material fact in that there is evidence which shows that defendants are liable to plaintiffs for Mr. Clarkson's conversion under four theories.

[1] The first of these theories is agency. Plaintiffs claim that Mr. Clarkson was an agent of the firm, and was acting within the apparent scope of his authority when he solicited and accepted the loans, and thus the firm is liable for his conversion of the loans.

An agent is one who acts for or in place of another by authority from him. *Trust Co. v. Creasy*, 301 N.C. 44, 269 S.E. 2d 117 (1980). An act of an agent done within the scope of his authority is binding on his principal. *Grubb v. Motor Co.*, 209 N.C. 88, 182 S.E. 730 (1935). This includes not only the acts done within the agent's actual authority, but also those done within his "apparent authority." *Id.* An agent's apparent authority is that authority which the principal has held the agent out as possessing, or which he has permitted the agent to represent that he possesses, and which the principal is estopped to deny. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). It has also been described as the power the third person who dealt with the agent had a right to infer that he possessed, from his own acts and those of his principal. *Transit, Inc. v. Casualty Co.*, 20 N.C. App. 215, 201 S.E. 2d 216 (1973), *aff'd*, 285 N.C. 541, 206 S.E. 2d 155 (1974). The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him. *Pipkin v. Thomas & Hill, Inc.*, 33 N.C. App. 710, 236 S.E. 2d 725 (1977), *rev'd in part*, 298 N.C. 278, 258 S.E. 2d 778 (1979).

In the present case, plaintiffs have not presented enough evidence to raise a genuine issue of material fact as to whether Mr. Clarkson was acting within the scope of his apparent authority when he solicited and accepted the money from the McGaritys. The firm was not in the business of soliciting or accepting money for investment purposes, and there is no evidence that it had ever done so. The firm was not authorized to do so by its articles of incorporation. There is no evidence that Mr. Clarkson's acts could have benefitted the firm in any way. There is no evidence that any other member of the firm knew or should have known about Mr. Clarkson's soliciting and accepting the money. Thus the firm could not have committed any acts to hold Mr. Clarkson out as having the authority to do so. Therefore, there was no such authority, under the principle that the scope of an agent's apparent authority is determined by the acts of the principal, not the agent.

In support of their argument, plaintiffs rely heavily on *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). In that case, a lawyer shareholder-employee in an incorporated law firm accepted money from a client who understood that it would be invested by the lawyer in a certain stock. The client never received the stock, and sued for delivery of it or its value. The defendant law firm's motion for summary judgment was granted. Our Supreme Court reversed, holding that the plaintiff's evidence raised a genuine issue of material fact as to whether the lawyer had had apparent authority to accept the money.

The court, in *Zimmerman*, stated that the law of apparent authority is "difficult to apply" because "each case turns largely upon the unique facts presented." *Id.* at 32, 209 S.E. 2d at 800. The facts in *Zimmerman* are quite different from those in the present case. Unlike defendant professional association in the present case, which is empowered by its articles only to render services involved in or ancillary to the practice of law, the defendant professional association in *Zimmerman* was empowered by its Florida charter not only to practice law but also to "have and exercise all powers of any nature whatsoever permitted or conferred by law upon corporations in general, unless specifically prohibited by the Professional Services Corporation Act. . . ." *Id.* at 26, 209 S.E. 2d at 797. Unlike Mr. Clarkson in the present case, the offending lawyer in *Zimmerman* was the president and controlling shareholder of the professional association. Most importantly, in *Zimmerman* there was evidence that the other lawyer shareholder-employees were fully aware not only of the transaction in dispute, but also of the long-standing practice in that firm of making investments for clients. The Supreme Court found significance in each of these elements as it reached its decision that there was a genuine issue of material fact as to the lawyer's apparent authority to accept the money.

In the present case, however, with its much different fact situation, there is no such evidence that Mr. Clarkson was acting within the scope of his apparent authority. Therefore, his acts cannot be binding on the professional association and plaintiffs' first theory of liability fails as a matter of law.

[2] Plaintiffs' second theory of liability is that defendants were negligent in failing to supervise Mr. Clarkson adequately, and

their negligence proximately caused harm to plaintiffs. As with any negligence claim, plaintiffs may not recover unless there existed, at the time and place of inquiry, a duty on the part of defendants to exercise care for the protection of plaintiffs or their property. *Insurance Co. v. Sprinkler Co.*, 266 N.C. 134, 146 S.E. 2d 53 (1966). In order to show such a duty in the present case, plaintiffs would have to show that defendants owed a duty to detect and supervise Mr. Clarkson's activities which were outside the practice of law, which he had no authority to take, and of which defendants had no reason to know. Plaintiffs have not found and cannot find legal authority for such a proposition. Thus plaintiffs' second theory of liability fails as a matter of law.

Plaintiffs' third theory is that defendants have been unjustly enriched at plaintiffs' expense, and therefore must make restitution to plaintiffs. However, plaintiffs have not presented any evidence that defendants have been enriched in any way by the transactions in question. Without enrichment, there can be no "unjust enrichment." *Greeson v. Byrd*, 54 N.C. App. 681, 284 S.E. 2d 195 (1981), *disc. rev. denied*, 305 N.C. 299, 291 S.E. 2d 149 (1982).

[3] Plaintiffs' final theory of liability is based on subsections (a) and (c) of G.S. 78A-56. G.S. 78A-56(a) is the part of the North Carolina Securities Act providing for civil liability and criminal penalties for the offering and selling of securities by means of an untrue or misleading statement. G.S. 78A-56(c) reads, in pertinent part, "Every person who directly or indirectly controls a person liable under subsection (a) . . . , every partner, officer, or director of such a person, every person occupying a similar status or performing similar functions . . . , are also liable jointly and severally with and to the same extent as such person, unless the person who is so liable sustains the burden of proof that he did not know, and did not act in reckless disregard, of the existence of the facts by reason of which the liability is alleged to exist." G.S. 78A-56(c) 1985.

We need not reach the question of whether Mr. Clarkson was liable under subsection (a), because whether he is or not, defendants cannot be liable under subsection (c), since there is no evidence whatsoever that they knew or acted in reckless disregard of the existence of the facts by reason of which the liability is

alleged to exist. Thus, plaintiffs' final theory of liability fails as a matter of law.

Since the pleadings, depositions, interrogatories, admissions of file and affidavits show that plaintiffs cannot succeed under any of their four theories of liability, there is no genuine issue of material fact, and defendants are entitled to judgment as a matter of law. Thus, summary judgment was appropriate.

Affirmed.

Judges ARNOLD and ORR concur.

PAUL W. NEWTON v. ROBERT J. WHITAKER AND WIFE, ELLEN RUTH WHITAKER; WILFRED S. TEMPLETON; GENERAL MOTORS ACCEPTANCE CORPORATION; AND GENERAL MOTORS CORPORATION

No. 8623SC78

(Filed 21 October 1986)

Conspiracy § 2— conspiracy to force plaintiff out of automobile business—sufficiency of complaint

Plaintiff's complaint was sufficient to state a claim for relief where he alleged that the several defendants conspired to force him out of an automobile dealership, which he operated and partially owned, by terminating the credit arrangements under which the dealership did business.

Judge MARTIN dissenting.

APPEAL by plaintiff from *Morgan, Judge*. Order and judgment entered 21 November 1985 in Superior Court, WILKES County. Heard in the Court of Appeals 4 June 1986.

Plaintiff's appeal is from an order and judgment dismissing his complaint as to the defendants General Motors Acceptance Corporation and General Motors Corporation for failing to state an enforceable claim against them.

The claim arose out of the following setting: Before June 1982 plaintiff owned 51% of the stock of Empire Oldsmobile-Cadillac, Inc., an authorized GM dealership in Wilkes County, and managed the business; the defendants Whitaker owned the re-

maining 49% stock interest and furnished financial support to the dealership but did not otherwise participate in its operation or management; the dealership purchased new cars from General Motors under a floor plan arrangement and it purchased parts from General Motors on an open credit account; both the floor plan and credit account were personally guaranteed by the Whitakers.

The claim is stated in the complaint substantially as follows: In June of 1982 the Whitakers advised plaintiff they were not going to put any more money into the dealership; advised an officer of GMAC that they were cancelling their guarantee of the floor plan arrangement; and advised Gary Sigmon, the zone manager of the Oldsmobile division of General Motors, that GMAC was repossessing all of the dealership's automobiles, new and used. Immediately thereafter, Sigmon placed the dealership on a C.O.D. basis for both parts and new cars. Near the first of August 1982 defendants Whitaker also told plaintiff that they were going to sell their dealership stock and would accept a certain price for it, but when plaintiff obtained someone willing and able to pay the price stated they sold the stock to defendant Templeton for less. All the defendants knew plaintiff could not finance the dealership's operation and would have to sell his majority stock interest, and the various acts done by the several defendants were accomplished pursuant to a conspiracy between them to freeze him out of the dealership, which they did to his damage in the amount of at least a million dollars. The acts were also deceptive and unfair in violation of Chapter 75 of the North Carolina General Statutes.

Hall and Brooks, by John E. Hall, for plaintiff appellant.

Petree, Stockton & Robinson, by Jackson N. Steele, for defendant appellees General Motors Corporation and General Motors Acceptance Corporation.

PHILLIPS, Judge.

The gist of plaintiff's claim is that the several defendants conspired to force him out of the automobile dealership, which he operated and partially owned, by terminating the credit arrangements under which the dealership did business. The sole question presented by plaintiff's appeal is whether the complaint sufficient-

ly states a claim of civil liability for conspiracy, a recoverable tort under our law. If it does the unfair and deceptive business practice claim, also asserted in the complaint, can rest thereon, at least at this stage of the case; but if it does not both claims necessarily fail, since the unfair or deceptive business practice claim has no other basis. In this state a civil claim for conspiracy is governed by the following legal principles:

> A conspiracy is generally defined to be "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." *Holt v. Holt*, 232 N.C. 497, 61 S.E. 2d 448 (1950). (Other citations omitted.)
>
> In the *Holt case, supra,* in opinion by *Ervin, J.*, this Court held that "to create civil liability for conspiracy, a wrongful act resulting in injury to another must be done by one or more of the conspirators pursuant to the common scheme and in furtherance of the common object. The gravamen of the action is the resultant injury, and not the conspiracy itself."

Muse v. Morrison, 234 N.C. 195, 198, 66 S.E. 2d 783, 784-85 (1951).

The defendant appellees contend and the judge below apparently held that no recoverable conspiracy has been alleged because the defendants Whitaker had a right to stop guaranteeing the dealership's credit and GMAC had a right to stop financing its purchase of new cars and General Motors Corporation had a right to stop selling cars and parts to the dealership on credit. But the complaint, all that we have to go by at this stage, does not so state; and liberally construed, as the spirit of our rules requires, *Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E. 2d 494 (1974), it cannot be interpreted to so imply. Nor is the complaint fatally deficient because it does not expressly state that the acts which allegedly damaged plaintiff were *wrongful.* Under our modern practice only claims for fraud, duress, libel and slander have to be pleaded with any particularity at all. Rule 9, N.C. Rules of Civil Procedure. In all other instances the complaint is sufficient if it gives "the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, . . ." Rule 8, N.C. Rules of Civil Procedure. Plaintiff's complaint provides that notice, in our opinion. It lists the acts that allegedly forced him

out of the business and alleges that those acts were done pursuant to a conspiracy; which in effect is an allegation that the acts were wrongful, since a conspiracy imparts wrongful conduct. Thus, defendants have been notified of both the factual and legal basis for the claim—all that they need to know in order to answer the complaint and test its allegations through discovery. Further allegations are not required. The unlikelihood of plaintiff being able to prove that the acts which allegedly injured him were wrongful is irrelevant at this juncture; as a complaint is dismissable for want of proof under Rule 12(b)(6), N.C. Rules of Civil Procedure, only when it appears that the proof needed is beyond the realm of possibility. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). And such does not appear in this instance.

Vacated and remanded.

Judge PARKER concurs.

Judge MARTIN dissents.

Judge MARTIN dissenting.

Notwithstanding the liberal construction accorded pleadings by our Rules of Civil Procedure, the allegations of a complaint must be sufficient to state, at least, the substantive elements of some legally recognized claim. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Otherwise, it is subject to dismissal pursuant to G.S. 1A-1, Rule 12(b)(6). *Id.* "For the purpose of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted." *Sutton, supra*, at 98, 176 S.E. 2d at 163. In other words, the sufficiency of the complaint must be judged by the facts alleged, rather than by the conclusions of the pleader.

The substantive elements necessary to support a civil claim for damages caused by a conspiracy consist of (1) an agreement between two or more persons, (2) to commit an unlawful act or to accomplish a lawful purpose in an unlawful manner, and (3) the commission, pursuant to the scheme and in furtherance of its objective, of some act or acts resulting in damage to the plaintiff. *Evans v. GMC Sales*, 268 N.C. 544, 151 S.E. 2d 69 (1966). The com-

plaint in the present action is deficient in two respects. First, there is no factual allegation that General Motors Corporation (GM) or General Motors Acceptance Corporation (GMAC), or anyone acting on behalf of either of them, entered into any agreement or combination among themselves or with the other defendants to take any action with respect to Empire Oldsmobile-Cadillac, Inc. or plaintiff. Nor may such an agreement be reasonably inferred from the facts alleged. According to the allegations of the complaint, all of the acts taken by GM and by GMAC were taken in response to information provided them by defendants Whitaker concerning the financial instability of the dealership, rather than by reason of any agreement to take any action to accomplish some wrongful purpose. Thus, the primary allegation upon which the majority bases its opinion, that of "conspiracy," is in reality nothing more than a conclusion or deduction which is not warranted from the facts which plaintiff has alleged.

Second, even if the complaint was sufficient to allege an agreement, no facts alleged in the complaint would indicate that the acts which GM and GMAC are alleged to have taken, i.e., the cancellation of credit to Empire, or the means by which those acts were accomplished, were unlawful. "An agreement to do a lawful act cannot constitute a conspiracy regardless of the motives of the parties. . . ." *Evans, supra* at 546, 151 S.E. 2d at 71.

Since, in my view, the complaint is insufficient to allege the substantive elements of a claim against either GM or GMAC for damages resulting from a conspiracy, I vote to affirm the trial court's dismissal of plaintiff's claim against both GM and GMAC.

EVA J. WILLIAMS v. JAMES E. SAPP, JR. AND WIFE, RUTH VAN CISE SAPP; AND GLENN W. BROWN, TRUSTEE; AND HAYWOOD SAVINGS AND LOAN ASSOCIATION

No. 8630DC354

(Filed 21 October 1986)

1. Rules of Civil Procedure § 15.2— amendment of complaint proper

The trial court did not abuse its discretion in allowing plaintiff's motion to amend her complaint to allege that she was entitled to an easement by implication. N.C.G.S. § 1A-1, Rule 15(b).

2. Evidence § 47— lawyer's expert opinion—admission error

The trial court erred in allowing an expert witness, an attorney, to give his opinion that, as a matter of law, plaintiff was entitled to an easement by implication. N.C.G.S. § 8C-1, Rule 704.

3. Easements § 6.1— easement by prescription—directed verdict for defendants improper

The trial court erred in granting defendants' motion for directed verdict on the issue of easement by prescription where plaintiff's evidence tended to show that the road across defendants' land was the only means of access to plaintiff's land and had been openly and continuously used by plaintiff, her predecessors in title, and the public for a period of over twenty years; no permission to use the road was asked or given; plaintiff's predecessor in title and plaintiff's son-in-law did some repair work on the road; plaintiff considered her use of the road a right, not a privilege, although there was no evidence that she thought she owned the road; and there was sufficient evidence for a jury to find that there was substantial identity of the easement claimed for a twenty-year period.

APPEAL by defendants from *Snow, Judge*. Judgment entered 14 November 1985 in District Court, JACKSON County. Heard in the Court of Appeals 17 September 1986.

This is a civil action wherein plaintiff filed a complaint seeking a decree pursuant to G.S. 41-10, quieting plaintiff's title to a certain tract of land and determining that plaintiff has an unrestricted easement in fee appurtenant from State Road 1749 to plaintiff's tract. Evidence was presented at trial tending to show the following: Plaintiff and defendants Sapp own adjoining tracts of land which formerly were owned by T. J. Powell. Defendants' tract lies between plaintiff's tract and State Road 1749, which connects to North Carolina Highway 281. The only means of access from plaintiff's tract to State Road 1749 is a road which crosses defendants' tract. At the end of plaintiff's evidence, the trial court granted defendants' motion for directed verdict on the issues of lappages and easement by prescription. At the close of all of the evidence, the trial court allowed plaintiff's motion to amend her complaint to conform to the evidence, to add to the prayer for relief that plaintiff seeks a declaration that she is the owner in fee of an easement by implication over the lands of defendants.

The jury found that plaintiff is the owner of an easement by implication over the land of defendants and described the width

and location of the easement in the verdict. From a judgment entered on the verdict, defendants appealed.

Coward, Cabler, Sossomon & Hicks, P.A., by J. K. Coward, Jr., for plaintiff, appellee, cross-appellant.

W. Paul Holt, Jr., for defendants, appellants, cross-appellees.

HEDRICK, Chief Judge.

[1] Defendants contend that the trial court erred in allowing plaintiff's motion to amend her complaint to allege that she was entitled to an easement by implication and in denying their motions for directed verdict and to dismiss on the issue of easement by implication. Defendants argue that they were prejudiced by the amendment because it was made late in the trial. Plaintiff made the motion to amend her complaint pursuant to G.S. 1A-1, Rule 15(b). The trial judge has broad discretion in ruling on such motions. *Auman v. Easter*, 36 N.C. App. 551, 244 S.E. 2d 728, *disc. rev. denied*, 295 N.C. 548, 248 S.E. 2d 725 (1978). The trial court has authority under this rule to permit an amendment to the pleadings at any time when there is no material prejudice to the opposing party and such amendment will serve to present the action on its merits. *Clark v. Barber*, 20 N.C. App. 603, 202 S.E. 2d 347 (1974). In *Reid v. Bus Lines*, 16 N.C. App. 186, 191 S.E. 2d 247 (1972), this Court held that the trial court did not err in allowing an amendment to conform to the evidence made after all the evidence had been introduced and the parties had argued the case to the jury. In the present case, defendants have failed to demonstrate that they were prejudiced by the amendment to the complaint. We hold, therefore, that the trial court did not abuse its discretion in allowing the amendment.

[2] Defendants also contend that the trial court erred in allowing an expert witness, an attorney, to give his opinion that, as a matter of law, plaintiff was entitled to an easement by implication. We agree with this contention.

Expressions of opinion on a question of law are not admissible into evidence. *Moye v. Eure*, 21 N.C. App. 261, 204 S.E. 2d 221, *cert. denied*, 285 N.C. 590, 205 S.E. 2d 723 (1974). This rule remains unchanged under the new rules of evidence. *State v. Ledford*, 315 N.C. 599, 340 S.E. 2d 309 (1986); *State v. Smith*, 315 N.C.

76, 337 S.E. 2d 833 (1985). G.S. 8C-1, Rule 704, provides that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The commentary to this rule quotes the Advisory Committee Note as follows:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for an exclusion of evidence which wastes time. These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

(Citations omitted.)

In the present case, an attorney testifying as an expert witness for plaintiff was allowed to respond to the following hypothetical question, over the objection of defendants:

> If the jury should find by the greater weight of the evidence that prior to 1938 Tomps Powell and his wife owned all of the land of the Plaintiff and the Defendant, as you have already testified, and in 1938 that Tomps Powell executed a deed to Mr. James Staflebach and his wife for some of the lands owned by Powell, and that later the Plaintiff became the owner of those lands and the Defendant now owns the lands that Powell retained in 1938, and if the jury should further find that . . . there was a road on the land and that the road was used for the purpose of access to a public road, and that the use of that road was so long continued and obvious as to show that it was meant to be permanent, and that the road was the only reasonable means of access to the property, and that the easement is now necessary to the beneficial enjoyment of the Plaintiff's property, do you have an opinion satisfactory to yourself as to whether an easement by im-

plication arose across that portion of the road which crosses the lands owned by the Defendant?

The witness responded that he had an opinion and that in his opinion an easement by implication arose under these circumstances. This opinion merely tells the jury the result that they should reach and, therefore, is not helpful to their determination of a fact in issue, as required by G.S. 8C-1, Rules 701 and 702. *See*, Commentary, G.S. 8C-1, Rule 704. The attorney's testimony regarding his opinion amounts to instructions to the jury on easements by implication. This testimony does not invade the province of the jury, which plaintiff argues is permissible, but invades the province of the court and should not have been admitted. *See, Board of Transportation v. Bryant*, 59 N.C. App. 256, 296 S.E. 2d 814 (1982). This error was clearly prejudicial to defendants, because the jury was required to answer the same question asked of plaintiff's expert witness. We hold, therefore, that defendants are entitled to a new trial on the issue of easement by implication.

[3] By her cross-assignment of error, plaintiff contends that the trial court erred in granting defendants' motion for directed verdict on the issue of easement by prescription. We agree.

In order to prevail in an action to establish an easement by prescription, the party claiming the easement must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981). In *Potts*, the plaintiffs had never asked for or been given permission to use a road across the defendants' land. There was no evidence that the plaintiffs in that case thought they owned the road, but there was evidence that the plaintiffs considered their use of the road to be a right and not a privilege. The Supreme Court held that this evidence was "sufficient to rebut the presumption of permissive use and to allow, but not compel, a jury to conclude that the road was used under such circumstances

as to give defendants notice that the use was adverse, hostile, and under claim of right."

The evidence in the present case tends to show the following: The road across defendants' land is the only means of access to plaintiff's land and has been openly and continuously used by plaintiff, her predecessors in title and the public for a period of over twenty years. No permission to use the road has been asked or given. Plaintiff's predecessor in title, James Staflebach, and plaintiff's son-in-law did some repair work on the road. The evidence in the present case tends to show that plaintiff, like the plaintiffs in *Potts*, considered her use of the road a right, not a privilege, although there is no evidence that she thought she owned the road. Under the decision in the *Potts* case, this evidence is sufficient to allow the jury to find that the use was adverse, hostile or under a claim of right, and that the use was open and notorious, and had been uninterrupted for at least twenty years. There is also sufficient evidence for a jury to find that there is substantial identity of the easement claimed for a twenty-year period. We hold, therefore, that the trial court erred in granting defendants' motion for a directed verdict on the issues of prescriptive easement.

For the foregoing reasons, the judgment of the trial court is reversed and the case is remanded for a new trial. Since we hold that defendants are entitled to a new trial, it is unnecessary for us to address their remaining assignments of error.

New trial.

Judges ARNOLD and ORR concur.

THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY AND CHARLOTTE REHABILITATION HOSPITAL v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, HONORABLE PHILIP J. KIRK, JR. (IN HIS CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES) AND MERCY HOSPITAL, INC.

No. 8610DHR282

(Filed 21 October 1986)

Hospitals § 2.1— award of certificate of need—denial of request for contested case hearing—appeal to Court of Appeals improper

Where defendant issued a certificate of need for 29 rehabilitation beds to Mercy Hospital instead of to plaintiff, and defendant then denied plaintiff's request for a contested case hearing pursuant to N.C.G.S. § 131E-188(a), plaintiff's appeal to the Court of Appeals should be dismissed for lack of jurisdiction, and plaintiff should first exhaust its remedies in the Wake County superior court.

APPEAL by the Charlotte-Mecklenburg Hospital Authority and Charlotte Rehabilitation Hospital from the decision of the Department of Human Resources to issue a Certificate of Need on 27 August 1985 to Mercy Hospital, Inc. Heard in the Court of Appeals 22 August 1986.

Robinson, Bradshaw & Hinson, P.A., by Richard A. Vinroot and David C. Wright III for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sueanna P. Peeler, for defendant appellee North Carolina Department of Human Resources.

Moore, Van Allen, Allen & Thigpen, by Noah H. Huffstetler III, Julia V. Jones and Denise Smith Cline for defendant appellee Mercy Hospital, Inc.

BECTON, Judge.

This appeal concerns the North Carolina Department of Human Resources' decision to issue a Certificate of Need for twenty-nine rehabilitation beds to Mercy Hospital, Inc. (Mercy) instead of Charlotte-Mecklenburg Hospital Authority/Charlotte Rehabilitation Hospital (CRH). The Department of Human Resources (the Department) denied CRH's request for a contested case hearing pursuant to N.C. Gen. Stat. Sec. 131E-188(a) (1985 Cum. Supp.),

and CRH appeals. We conclude that CRH's appeal should be dismissed for lack of jurisdiction.

I

Pursuant to a need identified in the 1985 State Medical Facilities Plan, CRH and Mercy both filed applications for a Certificate of Need to provide twenty-nine additional rehabilitation beds in Health Service Area III. Mercy's application was approved, and CRH's application was denied. CRH then sent a timely, written request for a contested case hearing, pursuant to 10 NCAC 3R.0408 (1985), which stated in pertinent part:

> This is to notify you that the Charlotte-Mecklenburg Hospital Authority and Charlotte Rehabilitation Hospital request a contested case hearing regarding the disapproval of its Certificate of Need Application.

CRH contends that this request was sufficient to notify the Department that CRH intended to appeal not only the *disapproval* of its own application, but also the *approval* of Mercy's application. However, the Department, construing the request as effective to contest the disapproval of CRH's application only, issued a Certificate of Need to Mercy effective 27 August 1985.

CRH then filed a Petition for a Writ of Supersedeas and a Motion for Temporary Stay, a Petition for Writ of Mandamus as well as a notice of appeal to this Court. On 27 September 1985, this Court granted the petition for Writ of Supersedeas, stayed the issuance of the Certificate of Need to Mercy, and ordered the Certificate of Need suspended pending the outcome of this appeal.

Several questions are presented for review, but, according to CRH, the principal question presented by this appeal is whether CRH, having properly perfected a request pursuant to the applicable statutes and regulations, was improperly denied a contested case hearing. The threshold jurisdictional question is whether CRH has met the requirements for an appeal of right to this Court under N.C. Gen. Stat. Sec. 131E-188(b) (1985 Cum. Supp.). Because we resolve the jurisdictional question against CRH, we need not address the other questions.

II

N.C. Gen. Stat. Sec. 131E-188(b) provides in pertinent part:

> (b) Any affected person who was a party in a contested case hearing shall be entitled to judicial review of all or any portion of any final decision of the Department in the following manner. The appeal shall be to the Court of Appeals as provided in G.S. 7A-29(a) . . . .

Mercy argues, and we agree, that since there has been no "contested case hearing" in this case, CRH has not met the jurisdictional requirement for an appeal directly to this Court. CRH counters that a "contested case" need not necessarily encompass an adjudicatory hearing, citing N.C. Gen. Stat. Sec. 150A-2 (1983) and *In re Construction of a Health Care Facility by Wilksboro, Limited*, 55 N.C. App. 313, 285 S.E. 2d 626, *review denied*, 305 N.C. 395, 290 S.E. 2d 365 (1982), in support of that contention.

Wilksboro, as CRH concedes, involved an interpretation of N.C. Gen. Stat. Sec. 150A-43 (1978), and not G.S. Sec. 131E-188(b), the section at issue in the instant case. G.S. Sec. 150A-43 authorized an appeal to the Wake County Superior Court for a person aggrieved by a "final agency decision" in a "contested case." At issue in *Wilksboro* was whether there had in fact been a "final agency decision" pursuant to which a person aggrieved could seek judicial review under G.S. Sec. 150A-43. This Court found that the phrase "contested case" in that statute was not necessarily intended to refer only to actions in which an adjudicatory hearing had been held, but rather to "any agency proceeding, by whatever name called, wherein the legal rights, duties and privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing." *See* G.S. Sec. 150A-2(2).

Although CRH argues that G.S. Sec. 131E-188(b), which became effective approximately two years after the *Wilksboro* decision, should be read to impart the same meaning as G.S. Sec. 150A-43, we are not persuaded. The legislature may have sought to override *Wilksboro*. In any event, G.S. Sec. 131E-188(b) and G.S. Sec. 150A-43 differ in several respects, most significantly in that G.S. Sec. 131E-188(b) provides an appeal directly to this Court for "[a]ny affected person who was a party in a contested case *hearing*" while G.S. Sec. 150A-43 provides a right to judicial review for "[a]ny person who is aggrieved by a final agency decision in a contested case." We decline, as appellant suggests, to

read the insertion of the word "hearing" in G.S. Sec. 131E-188(b) as mere surplusage, and we are constrained to interpret such changes on the supposition that the legislature intended to add some meaning to the statute. *See Lafayette Transportation Service, Inc. v. Robeson County*, 283 N.C. 494, 196 S.E. 2d 770 (1973).

Although we do not have the benefit of a published legislative history to explain the insertion of the word "hearing" into G.S. Sec. 131E-188(b), our research has revealed that under G.S. Sec. 150A-43, which governed certificate of need cases before G.S. Sec. 131E *et seq.* was adopted, a party aggrieved by a final agency decision, including but not limited to a decision rendered after an opportunity for a contested case hearing, had the right to a hearing *de novo* in the Wake County Superior Court. *See* N.C. Gen. Stat. Sec. 150A-45 (1983). Thus, even though a full adjudicatory hearing on the merits of an often complicated and voluminous case had already been held at the agency level, the parties' efforts would be duplicated in the Superior Court prior to the inevitable appeal to this Court.

Apparently seeking to expedite the certificate of need process and to eliminate the unnecessary step of a second full adjudicatory hearing on the merits, the legislature wrote the new statute to provide for an appeal directly to this Court from an adverse decision after a contested case hearing, while all parties aggrieved by any other final agency decision are still required to appeal to the Wake County Superior Court pursuant to N.C. Gen. Stat. Sec. 131E-191(b) (1985 Cum. Supp.).

We do not believe the legislature intended direct appeals to this Court when there had not even been a "first" full adjudicatory hearing in which a record could have been developed. Thus, we conclude that CRH is not entitled to review in this Court until its remedies have been exhausted in the Superior Court. The Certificate of Need issued to Mercy remains suspended pending disposition of this case in the Superior Court.

Appeal dismissed.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. JAMES BRYANT GRAVES

No. 8619SC313

(Filed 21 October 1986)

1. **Arson § 4.1— burning of horse barn—defendant as perpetrator—sufficiency of evidence**

In a prosecution of defendant for burning a horse barn and burning personal property, evidence was sufficient to be submitted to the jury where it tended to show that plaintiff had a grudge against the victim and said he was planning to burn the victim's "work shop"; a few days before the fire defendant offered a friend $200 to "burn something," then later changed his mind and said he'd do it himself; on the morning of the fire defendant placed in a car a milk jug full of green liquid which looked like chain saw oil and a bag of newspapers; defendant and two friends drove to the barn and stopped, and defendant got out with the jug and newspapers; the two friends drove away and returned a few minutes later; defendant got back in the car without the jug and newspapers and smelled of varnish or some chemical; and defendant stated several times that he had burned the barn.

2. **Criminal Law § 138.28— prior offenses—proof by defendant's testimony—consideration as aggravating factor proper**

Defendant's testimony under oath that he had been convicted of driving while his license was revoked and reckless driving constituted an acceptable method of proof of a prior conviction of an offense punishable by more than 60 days' confinement, and the trial court therefore did not err in considering defendant's prior convictions as aggravating factors.

3. **Criminal Law § 138.14— offenses consolidated for judgment—consideration of aggravating and mitigating factors**

In cases where offenses are not consolidated for judgment where the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately in determining which aggravating or mitigating factors pertain to which offense; however, if the offenses are consolidated also for judgment, this separate treatment is not necessary.

APPEAL by defendant from *Davis, Judge*. Judgment entered 31 October 1985 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 22 September 1986.

Defendant was charged in proper bills of indictment with burning a horse barn, in violation of G.S. 14-62, and of burning personal property, in violation of G.S. 14-66. He was tried and found guilty as charged. The two cases were consolidated for pur-

poses of judgment. From a judgment imposing a prison sentence of twenty years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert R. Reilly, for the State.

Bell and Browne, P.A., by Charles T. Browne, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant first contends that the trial court erred to his prejudice in "interrupting" defense counsel during his examination of witnesses. Defendant argues that, in twice sustaining its own objections to questions, and once telling a witness, "Just answer the question," the trial court "appeared partial."

The conduct of a trial is left to the sound discretion of the trial judge, and will not be disturbed on appeal absent abuse of discretion. *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 320 S.E. 2d 892 (1984), *disc. rev. denied*, 312 N.C. 797, 325 S.E. 2d 631 (1985). Examination of the record reveals that each of the judge's actions to which defendant assigns error was calculated to prevent waste of time, and none demonstrated any partiality. The trial judge did not abuse his discretion here.

Defendant next contends that the trial court committed prejudicial error in sustaining the State's objection to a question defense counsel asked David Lackey, a witness for the State, on cross-examination. Defense counsel asked Mr. Lackey, who owned some personal property destroyed in the fire, "Have you ever frequented any gambling establishments in that area?" On voir dire, Mr. Lackey answered, "No." Defendant contends that the question was relevant to show that Mr. Lackey had gambling debts, and thus had a motive to start the fire defendant was accused of starting, namely insurance money. Since Mr. Lackey answered in the negative on voir dire, any error in sustaining the State's objection to the question cannot be prejudicial.

Defendant next contends that the trial court erred to his prejudice in sustaining the State's objection to a question defense counsel asked Charles Kelly, a witness for the State, on cross-examination. Mr. Kelly mentioned that he had turned himself in to the police. Defense counsel asked:

Q: And what were you turning yourself in for?

A: A bunch of stuff.

Q: What, for example?

A: If I was to tell you that, I would be incriminating myself.

STATE: Objection.

COURT: Sustained.

Defense counsel argues that this information is relevant to impeach Mr. Kelly.

The names of the crimes for which Mr. Kelly turned himself in were all the court kept out by sustaining the State's objection. Mr. Kelly had already admitted that he had turned himself in for "[a] bunch of stuff," so it was clear to the jury that he had committed some crimes. Furthermore, defense counsel had earlier impeached Mr. Kelly by asking him in detail whether he had committed eight specific crimes. Therefore, we find that any error by the trial court in failing to require that Mr. Kelly name the crimes for which he turned himself in cannot possibly be prejudicial.

Defendant next contends that the trial court erred to his prejudice in sustaining the State's objection to defendant's testimony regarding the use of drugs by Charles Kelly and Harvey Boone, witnesses for the State. Defendant argues that this testimony is relevant to impeach the testimony of these witnesses by showing that their ability to observe events was impaired.

The testimony that was objected to referred to drug use by Mr. Kelly on the Saturday morning before the fire, and by Mr. Boone on that Saturday night. However, all of the crucial testimony of these two witnesses refers to events occurring on Friday night, Sunday night, Monday morning, or afterwards. The testimony objected to did not show any drug use at any of those times. Therefore, any error by the trial court in sustaining objections to this testimony cannot possibly be prejudicial.

Defendant next contends that the trial court committed prejudicial error in overruling defense counsel's objection to a ques-

tion the prosecutor asked defendant on cross-examination. The prosecutor asked defendant, "You have been over this case with [defense counsel] Mr. Browne, haven't you?" Defense counsel objected on the ground that the question was in violation of the attorney-client privilege. The court overruled the objection. However, defendant never answered the question, and the prosecutor did not ask it again, so any error the court committed in overruling the objection was not prejudicial.

[1] Defendant next contends that the trial court erred to his prejudice in failing to grant defendant's motions to dismiss at the close of the State's evidence and at the close of all evidence, and in denying defendant's motion for appropriate relief. Defendant argues in support of these assignments of error that there was insufficient evidence of defendant's guilt to present to the jury, or to sustain a verdict of guilty.

Between the testimony of Harvey Boone, Jr., and Charles Kelly, the following evidence was presented:

Defendant had had a grudge against Mr. Lackey and said he was planning to burn Mr. Lackey's "work shop" when he and Mr. Kelly went to take Mr. Boone to Fort Bragg. On the Sunday night before the fire, defendant had offered Mr. Kelly two hundred dollars to "burn something," then later said, "I don't want no mistakes. I'll do it myself."

On the morning of the fire, defendant placed in the car a milk jug full of green liquid that looked like chain saw oil, and a bag of newspapers. Defendant, Mr. Boone and Mr. Kelly drove to the barn, stopped there, and defendant got out of the car with the jug and newspapers. Mr. Boone and Mr. Kelly drove away and returned a few minutes later. Defendant got back in the car, without the jug and newspapers, and smelling of varnish or "some kind of chemical." When he got in the car, defendant said, "It's lit, let's go." They drove away, then drove by the barn again, whereupon defendant said "I see smoke." They drove away again, and later stopped once to let defendant get rid of his jacket, which smelled of chemicals, and again to let defendant clean the smell off of his body. On the way back from Ft. Bragg, after dropping Mr. Boone off there, defendant and Mr. Kelly drove by the barn, and defendant said, "I burnt it to the ground." A few days later

defendant, talking about the burning, said "He didn't do it. I done it."

To sustain a conviction, there must be sufficient evidence to provide a reasonable basis for the jury to find that (1) the crime charged was in fact committed, (2) by the person charged. *State v. Conrad*, 293 N.C. 735, 239 S.E. 2d 260 (1977). We hold that the evidence in the present case clearly meets this standard.

[2] Defendant next contends that the trial court erred to his prejudice in considering defendant's prior convictions as aggravating factors. Defendant claims that the State did not prove that defendant had previously been convicted of an offense punishable by more than sixty days' confinement, which is required by G.S. 15A-1340.4 in order to use a prior conviction as an aggravating factor.

A defendant's own statements under oath constitute an acceptable method of proof of a prior conviction. *State v. Thompson*, 309 N.C. 421, 307 S.E. 2d 156 (1983). In the present case, defendant testified that he had been convicted of driving while his license was revoked, a violation of G.S. 20-28, and reckless driving, a violation of G.S. 20-140. Both offenses are punishable by more than sixty days' confinement as evident from the face of the statutes.

[3] Finally, defendant contends that the trial court committed prejudicial error in failing to make separate findings of aggravation and mitigation as to each of the two offenses. In cases where offenses are not consolidated for judgment, where the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately in determining which aggravating or mitigating factors pertain to which offenses. However, if, as in the present case, the offenses are consolidated also for judgment, this separate treatment is not necessary. *State v. Miller*, 316 N.C. 273, 341 S.E. 2d 531 (1986).

We hold that defendant had a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and ORR concur.

WINNIE A. COXE, SINGLE; JO COXE HASTY, SINGLE; AGNES COXE WATKINS, SINGLE; J. ROBERT MATHESON AND WIFE, JANE S. MATHESON; BETTY M. EDWARDS, WIDOW; MARY ELIZABETH WINSTEAD AND HUSBAND, WHARTON H. WINSTEAD; BETTY S. MERRITT; ELLEN M. KANE, WIDOW; FRANCIS COXE v. J. W. WYATT AND WIFE, D. B. WYATT; THE MARCH DEVELOPMENT CORPORATION

No. 8612SC401

(Filed 21 October 1986)

1. **Deeds § 21 — right of first refusal — violation of rule against perpetuities**

Where plaintiffs sold property to defendant corporation and included in the deed was a right of first refusal on another piece of property owned by plaintiffs, the trial court did not err in finding that the right of refusal was void as a matter of law, since the language of the right never mentioned how long it was to last; it therefore appeared perpetual in nature; and the right of first refusal thus violated the rule against perpetuities.

2. **Vendor and Purchaser § 1 — offer to purchase — sufficiency**

A contract existed between plaintiffs and the individual defendants where defendants made a signed written offer to plaintiffs to purchase the land in question, and language of the offer which mentioned the corporate defendant's alleged right of first refusal was ineffective.

3. **Vendor and Purchaser § 1 — offer to sell — insufficiency**

There was no merit to the corporate defendant's contention that property was offered to it by plaintiffs unconditionally, independent of its right of first refusal.

APPEAL by defendant, The March Development Corporation, from *Hobgood, Judge*. Judgment entered 3 December 1985 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 24 September 1986.

On 20 November 1980, plaintiffs or their predecessors in interest sold approximately 20.65 acres of property to appellant The March Development Corporation. Contained in the deed was a right of first refusal "of any bona fide offer to purchase which Grantors may receive for the purchase of that certain 21.18 acre tract owned by the same Grantors. . . ." Approximately five

years later the plaintiffs did receive a written offer to purchase the 21.18-acre tract. The following language was contained in the Wyatt defendants' offer:

> This offer is subject to the right of first refusal, if effective, in favor of The March Development Corporation as found in Book 2798, Page 807, Cumberland County Registry.

By letter dated 29 March 1985 plaintiffs accepted Wyatt defendants' offer. This offer and acceptance was communicated in a letter to The March Development Corporation. The letter acknowledged the corporation's right of first refusal and requested that the corporation make known its intention regarding the purchase of this property for the same price and terms. On 5 April 1985, defendant March Development Corporation notified plaintiff by letter that they intended to purchase the property. A second letter from March Development Corporation was sent reaffirming their intention to purchase the 21.18-acre tract "in accordance with the right of first refusal contained in the Deed. . . ."

Wyatt defendants claimed that the corporation's right of first refusal was invalid and that plaintiffs were contractually bound to convey the tract to them. Defendant March Development Corporation threatened legal action if the property was not conveyed to it.

On 14 August 1985, plaintiffs instituted this action by filing a complaint for declaratory judgment to determine the legal rights of the parties. An answer and a motion for summary judgment were filed by Wyatt defendants on 19 August 1985. The March Development Corporation filed an answer, cross-claim, and a counterclaim on the same day. The March Development Corporation filed a response to Wyatt defendants' motion for summary judgment on 21 November 1985. On 3 December 1985, summary judgment was granted in favor of Wyatt defendants. On 4 December 1985, Wyatt defendants filed a motion for summary judgment to the cross-claim of March Development Corporation. March Development filed a motion for summary judgment on its cross-claim the same day. Plaintiffs filed a reply to the counterclaim of defendant March Development Corporation on 4 December 1985. March Development gave written notice of appeal on 11 December 1985. From the judgments of the trial court, defendant March Development Corporation appeals.

Thorp and Clarke, by Herbert H. Thorp and F. Stuart Clarke, for defendant appellant.

Emanuel and Emanuel, by George W. Kane, III, for plaintiff appellees.

Singleton, Murray & Craven, by Richard T. Craven, for defendant appellees.

ARNOLD, Judge.

Defendant appellant, The March Development Corporation, argues that the trial court erred in granting Wyatt defendants' motion for summary judgment and in denying the appellant's motion for summary judgment. March Development's argument is based on three contentions.

[1] Appellant first contends that the lower court erred in finding that appellant's right of refusal was void as a matter of law. Specifically, appellant claims that the right of first refusal in the present case is not void because it does not fall within the category of preemptive rights as defined by *Smith v. Mitchell*, 301 N.C. 58, 269 S.E. 2d 608 (1980). We disagree.

Smith required that in order for a preemptive right to be valid, it must meet a two-prong test of reasonableness. First, the preemptive right must not violate the rule against perpetuities. Second, it must link the price to the fair market value of the land or to a figure that the seller is willing to accept. *Id.*

Appellant attempts to distinguish the right of first refusal in the case *sub judice* from the definition of a preemptive right found in the *Smith* decision. In *Smith* our Supreme Court stated:

> A preemptive right "requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." 6 *American Law of Property* § 26.64 at 506-07 (1952).

Id. at 61, 269 S.E. 2d at 610. Appellant claims that this language defines a preemptive right only to include a right of first refusal kept by a grantor when selling a particular piece of property. When interpreting the language used by the Supreme Court in

Smith, it is helpful to look at the full passage of the *American Law of Property* from which the quote was taken.

In the *American Law of Property* the sentence immediately preceding the language actually quoted by *Smith* reads: "A preemption is usually found in a conveyance of property." *6 American Law of Property*, § 26.64 at 506-07 (1952). While most preemptive rights are usually rights reserved by the grantor upon conveyance of a piece of property, this is not always true. The right involved in the case *sub judice* is an example of a preemptive right of first refusal not held by the grantor. Thus, the restrictions set forth in *Smith* apply.

Having determined *Smith* to be controlling it next must be determined if the preemptive right in the present case withstands the two-prong test of reasonableness. The first requirement is not met. Appellant's right of first refusal violates the rule against perpetuities. The language which arguably created the preemptive right never mentioned how long it was to last. The right appeared perpetual in nature. This violates the requirement that an interest in property must vest, if at all, within a life-in-being plus *twenty-one* years. *Smith v. Mitchell*, 301 N.C. 58, 269 S.E. 2d 608 (1980). Since the first prong of the test is violated, we need not deal with the second. Defendant appellant's right of first refusal is void as a matter of law.

[2] Next appellant contends that the trial court erred in finding that a contract existed between plaintiff heirs and Wyatt defendants. We disagree.

The Wyatts made a signed written offer to plaintiffs to purchase the 21.18-acre tract of land. The offer contained the following language, "This offer is subject to the right of first refusal, if effective, in favor of The March Development Corporation . . . ." Plaintiffs accepted the offer by letter on 29 March 1985. *See generally Normile v. Miller*, 313 N.C. 98, 326 S.E. 2d 11 (1985). The language of the offer which mentions the alleged right of first refusal is insignificant because that right is void and ineffective. The letter of acceptance by the plaintiff heirs created a valid and enforceable contract.

[3] Lastly, appellant contends that the trial court erred in failing to find a binding contract between appellant March Development

and plaintiff heirs. Specifically, appellant argues that the 21.18 acres were offered to them unconditionally, independent of their right of first refusal. We disagree.

The letter sent to appellant by plaintiff heirs explicitly stated that the heirs had received and accepted a cash offer from Wyatt defendants. The letter next referred to the right of first refusal contained in the deed of 20 November 1980 and requested notification concerning the appellant's intention to purchase the property pursuant to the same terms and conditions. One would have to ignore a substantial portion of the letter to conclude that it contained an unconditional offer. We can find no enforceable contract between appellant March Development and plaintiff heirs. The trial court's order granting summary judgment in favor of defendant appellees and the order denying defendant appellant's motion for summary judgment is

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. WALTER GRAHAM CRAWFORD

No. 8619SC278

(Filed 21 October 1986)

Criminal Law § 75.11— confession—custodial interrogation invoking right to silence—admissibility of subsequent statement

The trial court did not err in admitting an in-custody statement made by defendant after defendant had invoked his right to remain silent where defendant initiated the subsequent conversation with the officer during which the statement was made in response to the officer's question, and where the facts and circumstances surrounding defendant's statement show that defendant knowingly and intelligently waived his right to silence.

APPEAL by defendant from *Gudger, Judge.* Judgment entered 21 November 1985 in Superior Court, CABARRUS County. Heard in the Court of Appeals 16 September 1986.

Attorney General Lacy H. Thornburg, by Associate Attorney General Linda Anne Morris, for the State.

Koontz, Hawkins & Nixon, by M. Wayne Nixon, Jr., for defendant appellant.

BECTON, Judge.

Defendant, Walter Graham Crawford, was found guilty by a jury of the misdemeanor offense of driving while impaired. From a judgment entered on the verdict, defendant appeals. We find no error and affirm.

During the presentation of the State's case, a *voir dire* was conducted to determine the admissibility of an incriminating statement made by the defendant in response to a direct question of the arresting officer while the defendant was in custody. The sole issue on appeal is whether the trial court erred in admitting that statement in evidence.

I

According to the testimony of Officer Levi Powell of the North Carolina Highway Patrol, he was called on 19 May 1985 by another patrolman, Officer Caudle, to a location on Moreland Road near the Charlotte Motor Speedway in Cabarrus County. Officer Caudle had stopped the car driven by the defendant after observing it attempt to pass another vehicle in a no-passing zone. When Officer Powell arrived, he placed the defendant under arrest and immediately transported him to the Cabarrus County Law Enforcement Center for the purpose of administering a breathalyzer test and seeing a magistrate.

Officer Powell informed the defendant of his constitutional rights at 5:17 p.m., reading them from a standard card issued by the Highway Patrol. At that time the defendant elected not to answer any questions or sign a waiver form. The officer testified, "I read him his rights at 5:17, and it has 'waived,' and I've got 'no' checked so he did not waive them." Thereupon, the officer did not ask the defendant any questions. On his standard "AIR" form Officer Powell "X'ed out" all of the questions which are routinely asked of persons charged with driving while impaired.

A short while later, at 5:42 p.m., Officer Powell requested the defendant to take the breathalyzer test and the defendant refused. The officer then asked the defendant why he refused to take the test. In response the defendant stated that he was "under the influence of Valium, Demerol, and Percodan for pain."

Officer Powell testified that after advising the defendant of his rights and while they were waiting for the required amount of time to pass before the breathalyzer could be administered, he and the defendant engaged in conversation which was initiated by the defendant. The defendant was very talkative "but not in response to questions I was asking him." He talked about his physical condition and stated that he had a bad back. In addition, the defendant kept repeating in a "rambling" manner that he worked down at the speedway in a booth, that he had been at work rather than there to see the race, that he couldn't understand why he was in this position when he had just been working out at the track. Officer Powell further testified that the conversation included how the defendant had gotten to where he was stopped and generally what had occurred.

II

The rule is well established that an accused in custody who asserts his right to have counsel present during questioning, may not be subjected to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication with the police. *See Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, 101 S.Ct. 1880, *reh'g denied*, 452 U.S. 973 (1981); *State v. Lang*, 309 N.C. 512, 308 S.E. 2d 317 (1983). In *State v. Bragg*, 67 N.C. App. 759, 314 S.E. 2d 1 (1984), this court extended that principle to cases involving not the right to counsel but the right to remain silent. In that case we stated that "when a person in custody indicates he does not wish to make a statement, the officers may not take an inculpatory statement from him unless the defendant initiates the conversation in which he waives his rights." *Id.* at 760, 314 S.E. 2d at 1-2.

Therefore, in a case such as the one before us in which the defendant indicated he did not wish to answer questions but later responded to further questioning, the crucial issue is who initiated the conversation in which the defendant made the incriminating statement. *See State v. Lang* at 521, 308 S.E. 2d at

321-22. Here, the evidence is uncontroverted that a short time after refusing to answer questions, the defendant began spontaneous communication with Officer Powell which led to a free flow of conversation. Furthermore, that conversation continued up until the time that the defendant refused the breathalyzer and was asked why he refused.

We do not hold that *any* general conversation, however innocuous, initiated by an accused in custody justifies a reinstitution of interrogation after the accused has asserted his right to silence. However, in the present case, the defendant, in a rambling discourse, voluntarily commented specifically upon his physical condition and upon what was happening to him and the events surrounding his arrest. We believe this constitutes an initiation of conversation within the rule of *State v. Bragg.*

The inquiry does not end, however, with a finding that the defendant initiated the later dialogue with the patrolman after invoking his right to silence. There must be a further determination that the defendant knowingly and intelligently waived his rights, under the totality of the circumstances, including the circumstance that the accused reopened the dialogue with the authorities. *State v. Lang*, 309 N.C. at 521-22, 308 S.E. 2d at 322. The waiver of rights need not be an express written or oral statement of waiver but may be inferred from the defendant's actions and words. *North Carolina v. Butler*, 441 U.S. 369, 60 L.Ed. 2d 286, 99 S.Ct. 1755 (1979); *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982); *State v. Connelly*, 297 N.C. 584, 256 S.E. 2d 234 (1979).

The facts and circumstances surrounding the defendant's statement to Officer Powell show that the defendant knowingly and intelligently waived his right to silence. The defendant was adequately advised of his rights when he was taken to the patrol station. Officer Powell testified that the defendant was polite and cooperative, that he knew where he was and was responsive to questions. The officer concluded that the defendant's mental condition was not appreciably impaired. The defendant appeared to understand his rights and elected not to talk to the officer at that time.

There is no evidence that the defendant was coerced in any way. His statement was after a conversation regarding the circumstances of his arrest which was voluntarily and spontaneously

initiated by the defendant. During that conversation, the defendant never requested an attorney or indicated in any manner that he was unwilling to talk any further with the officer.

We conclude from these facts that the defendant waived his constitutional right to silence. Thus, the inculpatory statement was properly admitted in evidence.

III

We reject the defendant's suggestion that the trial judge's failure to make specific findings of fact at the close of the *voir dire* should influence our holding.

> The general rule is that, at the close of a *voir dire* hearing to determine the admissibility of a defendant's confession, the presiding judge *should* make findings of fact to show the basis of his ruling. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976). If there is no conflict in the evidence on *voir dire* or only *immaterial* conflicts, it is not error to admit a confession without making specific findings of fact. . . .

State v. Lang, 309 N.C. at 520, 308 S.E. 2d at 321. In the present case, there was no conflicting evidence on *voir dire* as to the defendant's initiation of the conversation some time after he was advised of his right to remain silent. Furthermore, the other evidence from which we have determined that the defendant knowingly and intelligently waived his rights was also uncontroverted. Therefore, specific findings of fact were not necessary.

No error.

Judges WEBB and EAGLES concur.

MARYLAND CASUALTY COMPANY, A CORPORATION, MAX SHERRILL, TED G. REID AND JOYCE C. REID v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A CORPORATION, AND KELL A. THOMAS, JR.

No. 8626SC276

(Filed 21 October 1986)

Insurance § 84.1— automobile insurance on car—car operable—truck not a substitute vehicle

An automobile insurance policy issued to the individual defendant which covered his 1971 AMC Hornet did not extend coverage to defendant's Chevrolet truck because it did not qualify as a temporary substitute vehicle, since the Hornet, though "rusted out" and in poor condition, was not withdrawn from use, but was still operable and merely parked at home at the time of the accident.

APPEAL by Maryland Casualty Company from *Chase B. Saunders, Judge.* Judgment entered 3 January 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 27 August 1986.

Jones, Hewson & Woolard, by Hunter M. Jones and Harry C. Hewson, for plaintiff appellant.

Golding, Crews, Meekins & Gordon, by Rodney Dean, for defendant appellee.

BECTON, Judge.

Plaintiff, Maryland Casualty Company (Maryland Casualty), provided uninsured motorists coverage for plaintiff Max Sherrill. During the coverage period, Sherrill and plaintiff Ted Reid were involved in a motor vehicle collision with defendant Kell Thomas, Jr. Maryland Casualty alleged in a declaratory judgment action that Thomas was insured by defendant State Farm Mutual Automobile Insurance Company (State Farm) at the time of the accident. State Farm denied coverage. The trial court granted State Farm's motion for summary judgment. Maryland Casualty appeals. We affirm.

I

Kell Thomas acquired six months of automobile insurance coverage from State Farm for his 1971 AMC Hornet automobile.

The coverage became effective 29 June 1981. A renewal premium was due 12 December 1981. Thomas did not pay the premium.

On 21 December 1981 Thomas purchased a Chevrolet truck from a private individual in South Carolina. He drove the truck to North Carolina where he collided with Max Sherrill's automobile. The collision caused personal injuries to Sherrill and his passenger, Ted Reid.

Maryland Casualty paid damages to Sherrill and Reid under Sherrill's uninsured motorists policy. Maryland Casualty then sought to establish in a declaratory judgment action that Thomas' State Farm policy was in full force at the time of the accident and that coverage extended to his Chevrolet truck.

The trial court found there was no genuine issue of material fact regarding the claims against State Farm, thereby granting its motion for summary judgment.

II

Summary judgment is appropriate when the pleadings, depositions, interrogatories and admissions on file, together with affidavits show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mutual Life Insurance Company,* 300 N.C. 247, 266 S.E. 2d 610 (1980). In order to withstand State Farm's motion for summary judgment, Maryland Casualty must present a genuine issue of material fact on two issues—that Thomas' State Farm policy was in full force at the time of the accident and that his newly purchased Chevrolet truck was a covered vehicle. Because we find no evidence tending to show that Thomas' truck was a covered vehicle, we need not address the issue of whether the policy was in force.

III

Maryland Casualty asserts in its brief that a factual dispute exists as to whether Thomas' truck should have received coverage under his AMC Hornet policy. Maryland Casualty claims the truck qualifies as a temporary substitute vehicle. The pertinent portions of Thomas' State Farm policy provide: "Your covered auto means: . . . 4. Any auto . . . you do not own *while used as a temporary substitute* for any other vehicle described in this

definition *which is out of normal use because of* its: a. breakdown; b. repair; c. servicing; d. loss; or e. destruction." (Emphasis added.)

The usual general rules of construction apply to the provision. The provision is construed liberally in favor of the insured if any construction is necessary. *Ransom v. Fidelity and Casualty Co.*, 250 N.C. 60, 108 S.E. 2d 22 (1959). Here the words "out of normal use because of" require that the initially covered vehicle be unavailable due to the effect of one of the listed causes. Maryland Casualty argues that Thomas' deposition tends to show that the Hornet was in poor condition which they claim is the equivalent of a "breakdown." It is true that no one disputes that the Hornet was "rusted out" and in poor condition. Similarly, however, no one disputes that the Hornet was operable at the time Thomas purchased the truck. Indeed, Thomas admits that the car was operating at the time he bought the truck. Therefore it was not "out of use *because of* breakdown" under any reasonable definition assignable to these terms. We hold the trial court was correct in finding that, as a matter of law, poor condition does not amount to a breakdown.

Maryland Casualty cites *Ransom* as authority for the proposition that a vehicle need not be withdrawn from use because of some *mechanical* defect in order for another vehicle to qualify as a substitute. Significantly, however, the initially covered vehicle must nonetheless be actually withdrawn from use. In *Ransom* the insured's car was in a paint shop and the court merely stated that there was no reason to draw a distinction between an automobile's unavailability due to body work versus mechanical repair. In the instant case Thomas freely admitted that his Hornet was operable. In no case has substitute vehicle status been given when the initially insured vehicle was merely parked at home and rusty.

Maryland Casualty also attempts to make such of State Farm agent Neill's entry in his claims journal stating "[he felt] that in the long run the vehicle [Thomas] was driving could and would apply as replacement vehicle and qualify as substitute." We fail to see how this statement forecasting a belief in what might occur in the future helps Maryland Casualty's case. In any event this is a legal conclusion which is not admissible anyway.

We affirm.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. JOSEPH R. MONROE

No. 8620SC223

(Filed 21 October 1986)

1. **Criminal Law § 143.6— probation—committing criminal offense—sufficiency of evidence**

There was no merit to defendant's contention that he did not breach a condition of probation because there was no showing that he committed a criminal offense where defendant was accused of writing worthless checks; defendant was confronted by the manager of a store about his first check returned for insufficient funds and asked if two other checks would also be returned; defendant responded that he would take care of them; by asserting that the checks needed taking care of, defendant implied that he knew that there was an insufficient amount in the account when the checks were drawn; and defendant never cleared up the matter by making payment.

2. **Criminal Law § 143.8— commission of criminal offense—grounds for revoking probation—defendant not entitled to jury trial first**

There was no merit to defendant's contention that, when the commission of a criminal offense is the basis for revoking probation, fundamental fairness requires that the probationer be afforded a jury trial on the offenses prior to revocation; furthermore, any verdict acquitting defendant of said charges is not binding on a judge making independent findings based upon the evidence before him.

APPEAL by defendant from *Freeman, Judge*. Judgment entered 21 October 1985 in Superior Court, MOORE County. Heard in the Court of Appeals 15 September 1986.

On 14 March 1984, the defendant was convicted of two counts of obtaining property by false pretenses. Defendant received a ten-year sentence which was suspended for five years. Defendant's probation was governed by the conditions found in G.S. 15A-1343(b). On 2 August 1984, the defendant was convicted of two counts of uttering a forged instrument. Defendant received a two-year sentence which was suspended for a term of three years, probation governed by G.S. 15A-1343(b). Defendant was again convicted of obtaining property by false pretense on 18 April 1985.

He received a sentence of three years. The sentence was suspended for a three-year period and defendant was placed on probation for that period.

Defendant's probation officer filed several probation violation reports which alleged that defendant had violated G.S. 15A-1343 (b)(1). The statute states that the party on probation shall "commit no criminal offense." On 21 October 1985, in Moore County Superior Court it was adjudged that defendant willfully and without lawful excuse violated the terms and conditions of his probation. The court found that defendant had written two checks to the North Carolina Department of Revenue which were returned for non-sufficient funds. The court also found that the defendant authorized and instructed a third party who was his business partner to write three checks to the Hamlet Wholesale Corporation which were returned for non-sufficient funds. From an order of the superior court revoking the suspended sentence, defendant appeals.

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

David Ray Martin for defendant appellant.

ARNOLD, Judge.

[1] Defendant first argues that the trial court erred in revoking his probation because the trial court's findings of fact in the revocation order do not support the conclusion of law that defendant breached a condition of probation by committing a criminal offense. We disagree.

The court does not specifically state whether the criminal offense committed was a violation of G.S. 14-106, obtaining property in return for a worthless check, or G.S. 14-107, the worthless check statute. However, the evidence presented amply supports a finding that defendant violated G.S. 14-107. Defendant contends that the record shows no evidence of the requirement that when the checks were written defendant knew or had reason to know that there were insufficient funds in the account on which the checks were drawn.

The record shows that when defendant was confronted by the manager of Hamlet Wholesale about the first check returned

for insufficient funds he was asked if the other two checks would also be returned. The defendant made no assurance that the checks were good nor did he claim any knowledge of their standing. Defendant responded, "Oh, yeah, I'll take care of those. I'll be down tomorrow." By asserting that the two checks needed taking care of defendant implied that he knew that there was an insufficient amount in the account when the checks were drawn. Further, defendant never cleared up the matter by making payment. This evidence is sufficient to support the court's holding.

[2] Defendant next argues that the court erred in revoking defendant's probation prior to proving that his conduct amounted to a commission of a criminal offense. Specifically, defendant contends that the proper procedure would have been to try him in superior court on the alleged criminal offenses which were the basis for his revocation. Defendant argues that when the commission of a criminal offense is the basis for revoking probation, fundamental fairness requires that the probationer be afforded a jury trial. We disagree.

Suspension of a sentence or probation is given to one convicted of a crime "as an act of grace." *State v. Boggs*, 16 N.C. App. 403, 192 S.E. 2d 29 (1972). All that is required in revoking a suspended sentence is evidence which reasonably satisfies the judge in the use of his sound discretion that a condition of probation has been willfully violated. *State v. Hewett*, 270 N.C. 348, 154 S.E. 2d 476 (1967). Revocation of probation is solely within the judge's discretion and is outside of the jury's province. *State v. Guffey*, 253 N.C. 43, 116 S.E. 2d 148 (1960). Defendant is not entitled to a jury trial on the matter.

In support of his argument defendant cites *State v. Causby*, 269 N.C. 747, 153 S.E. 2d 467 (1967), which states that when a defendant is acquitted of a criminal charge or such a charge is pending then that charge cannot be the single basis for revoking probation and activating a suspended sentence. It is not shown in the record whether the violations of probation by the defendant in this case have been adjudicated as criminal charges or not. However, it is irrelevant in the case *sub judice* where the judge upon revoking defendant's probation made independent findings of his own as to the commission of these crimes. The judge did not base his holding of revocation solely upon pending criminal

charges. In the case at bar, the judge heard testimony from four witnesses, including the defendant himself. By making his own independent findings the judge concluded that defendant had violated a certain condition of his probation. This the judge is fully authorized to do. *See State v. Guffey*, 253 N.C. 43, 116 S.E. 2d 148 (1960). Any verdict acquitting the defendant of said charges is not binding on a judge making independent findings based upon the evidence before him or her. *See State v. Greer*, 173 N.C. 759, 92 S.E. 147 (1917). *See also State v. Debnam*, 23 N.C. App. 478, 209 S.E. 2d 409 (1974).

Defendant also raises an issue dealing with the adequacy of the notice he received concerning the probation revocation hearing. Defendant neither raised this issue in his assignments of error nor in any exceptions. As a result, Rule 10(a) of the North Carolina Rules of Appellate Procedure bars consideration of this argument on appeal.

Defendant finally contends that G.S. 15A-1343(b)(1) is unconstitutionally vague because of its language stating that a probationer must "commit no criminal offense." As to probationer, this statutory language is absolutely clear. They must not violate any criminal law. It is not plausible that probationers do not receive notice from such language. Defendant's contention is without merit.

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. CARLOUS R. ROBINSON

No. 864SC390

(Filed 21 October 1986)

1. Constitutional Law § 31— trial of defendant's sister—no right to transcript

Defendant was not entitled to a transcript of his sister's trial, though they were charged with the same offense arising out of the same incident.

2. Criminal Law § 113.7— acting in concert—instructions proper

In a prosecution of defendant for manslaughter which occurred during an exorcism, the trial court properly instructed the jury on acting in concert

where the evidence tended to show that defendant was with deceased from the beginning of the "ceremony" until he was declared dead by the rescue squad; defendant and his sister choked deceased until he was crying out and vomiting; and defendant and his sister committed these culpably negligent acts pursuant to the common purpose of ridding the child of demons.

3. Criminal Law § 117.2— interested witnesses—instructions proper

In a prosecution for manslaughter there was no merit to defendant's contention that the trial court erred in denying his request that the jury be instructed that the father of the victim was an interested witness, since the court properly instructed the jury on interested witnesses.

APPEAL by defendant from *Stevens, Judge.* Judgment entered 20 November 1985 in Superior Court, ONSLOW County. Heard in the Court of Appeals 22 September 1986.

Defendant was charged in a proper bill of indictment with manslaughter concerning the death of four-and-a-half-year-old Dennis James Taylor, Jr. on 22 August 1985 in Jacksonville, North Carolina. The State presented evidence at trial which tended to show the following facts. Defendant, a sixteen-year-old self-proclaimed preacher and his twenty-one-year-old sister took the decedent and his mother at approximately nine o'clock p.m. to a building which they were planning to use for a church. Defendant and his sister believed that the child was possessed by demons and that he was in need of an exorcism. After the boy's father arrived at the "church," defendant and his sister performed a "ceremony" which lasted until three o'clock in the morning. During this ceremony, both the defendant and his sister grabbed the child by the neck and throat and shook him. The ceremony ended when the boy appeared limp and lifeless.

Afterwards, everyone went to the Taylor home where the boy was bathed and there was more praying. Upon the father's announcement that he intended to call the rescue squad, defendant objected and instead suggested they call a minister who was a mutual friend. When the minister arrived he noticed the boy's lifeless appearance and he advised that the rescue squad be summoned.

The rescue squad determined the child to be dead. The authorities immediately were summoned. Later it was concluded that Dennis James Taylor, Jr. died of asphyxia brought about by manual strangulation.

Defendant and his sister were both charged with involuntary manslaughter. Defendant's sister was tried earlier and convicted. On 13 November 1985, defendant filed a motion asking for a transcript of his sister's trial. Defendant also requested a continuance until the transcript could be obtained. The trial court denied this motion.

At the close of the State's evidence and again at the close of all evidence, defendant moved to dismiss the charges against him. The trial court denied these motions. Defendant was convicted of involuntary manslaughter and sentenced to five years imprisonment, to be served as a youthful offender. From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Guy A. Hamlin, for the State.

Billy G. Sandlin for defendant appellant.

ARNOLD, Judge.

[1] Defendant contends the trial court erred in denying his request for a transcript of his sister's trial. We disagree.

It is established that all defendants, including indigent parties, are entitled to transcripts when appealing to a higher court or upon retrial when necessary for an effective defense. *See State v. Reid*, 312 N.C. 322, 321 S.E. 2d 880 (1984); *State v. Rankin*, 306 N.C. 712, 295 S.E. 2d 416 (1982); *State v. McNeill*, 33 N.C. App. 317, 235 S.E. 2d 274 (1977). Defendant, however, is asking for the transcript of another. There is no statute or precedent which requires that a defendant be given a transcript of another's trial, regardless of the fact that the other party is a codefendant. We decline to establish such a rule.

[2] Defendant next contends that the trial court erred in instructing the jury on acting in concert. Before the court can instruct the jury on the doctrine of acting in concert, the State must present evidence tending to show two factors: (1) that defendant was present at the scene of the crime, and (2) that he acted together with another who did acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *State v. Joyner*, 297 N.C. 349, 255 S.E. 2d 390 (1979); *State v. Woods*, 77 N.C. App. 622, 336 S.E. 2d 1 (1985). Defendant was

with the deceased from the beginning of the "ceremony" until he was declared dead by the rescue squad. Therefore, the first requirement is satisfied.

Defendant argues that the second requirement is not met because there can be no common plan or scheme to commit a culpably negligent act. We disagree.

There was evidence that defendant and his sister choked Dennis James Taylor, Jr. until he was crying out and vomiting. These acts constitute culpable negligence. Defendant and his sister committed these culpably negligent acts pursuant to the common purpose of ridding the child of demons. The second requirement is satisfied. Because both requirements were met in the case *sub judice*, the trial court properly instructed the jury on acting in concert.

[3] Defendant next argues that the trial court erred in denying his request that the jury be instructed that Dennis James Taylor, Sr. was an interested witness. We disagree.

The trial court instructed the jury in the following manner:

> You may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take the interest of the witness into account. If after doing so you believe the testimony of the witness in whole or in part, you will treat that which you believe the same as any other believable evidence.

We find no error in the judge's instruction on this matter.

Defendant lastly contends that the trial court erred in not allowing defendant's motion for judgment as of nonsuit or to dismiss the charges at the close of the State's evidence and at the close of all evidence and by denying defendant's motion to set aside the verdict. We have reviewed the contentions above and find them to be without merit.

No error.

Chief Judge HEDRICK and Judge ORR concur.

H. S. BAGRI v. E. M. DESAI

No. 8626SC370

(Filed 21 October 1986)

Usury § 1.3— loan to buy motel—interest in excess of legal maximum

An agreement for a $50,000 loan to purchase a motel which required the borrower to pay the lender one-sixth of the motel's profits while the loan was unpaid and one-sixth of any gain on a sale of the motel within three years, in addition to 15% interest, violated the usury statute, N.C.G.S. § 24-8; therefore, the lender could not recover unpaid interest or a portion of the profits and gain from sale.

APPEAL by plaintiff from *Saunders, Judge*. Judgment entered 7 January 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 24 September 1986.

This is a civil action wherein plaintiff seeks to recover $167,748.03 under several theories, including breach of contract. In his complaint, filed 20 February 1984, plaintiff alleges the following: The $167,748.03 is due him under an agreement with defendant whereby plaintiff would advance defendant $50,000, and defendant would use that sum together with other money to buy a certain motel. For the use of plaintiff's money, defendant would pay plaintiff 15% interest plus one-sixth of the profits earned by the motel while the advance and interest remained unpaid, plus one-sixth of any gain resulting from the sale of the motel if the motel were sold within three years.

Plaintiff further alleges the following: He advanced defendant $50,000. Defendant bought the motel. Defendant repaid the $50,000 plus all but $3,045.23 of the interest due. However, defendant never paid plaintiff any of the profit earned by the motel, or any of the gain resulting from the sale of the motel. Up until defendant finished repaying the principal, the motel had had a net profit of $188,296.78. Defendant later sold the motel, within the three-year period. Thus, defendant owes plaintiff interest of $3,045.23, profits of $31,382.80, and $133,320.00, one-sixth of the gain on the sale. Plaintiff therefore asks for judgment in the amount of $167,748.03.

Defendant filed an answer and counterclaim alleging that the loan agreement was usurious in violation of G.S. 24-2 and G.S. 24-8, and thus plaintiff's entire interest should be forfeited.

Defendant made a motion for summary judgment. The court granted defendant's motion, and finding no just reason for delay, entered final judgment dismissing plaintiff's claim.

Plaintiff appealed.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for plaintiff, appellant.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Gaston H. Gage and Debra L. Foster, for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff contends that the trial court erred to his prejudice in granting defendant's motion for summary judgment. Plaintiff argues that the interest charged defendant was not usurious, but legal under G.S. 24-1.1.

To establish that an agreement is usurious, it must be shown that (1) there was a loan, (2) there was an understanding that the money lent would be returned, (3) for the loan a greater rate of interest than allowed by law was charged, and (4) there was corrupt intent to take more than the legal rate for the use of the money. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Here, the first two requirements are clearly established: There was a loan, and an understanding that the money lent would be returned.

The facts show that the third requirement, that a greater rate of interest than allowed by law was charged, is also satisfied. Whether or not plaintiff's charging of the 15% interest is legal under G.S. 24-1.1, his requiring that defendant also pay one-sixth of the motel's profits and one-sixth of any gain on the sale of the motel is clearly prohibited by G.S. 24-8, which provides in pertinent part that "[n]o lender shall . . . require in connection with a loan any borrower, directly or indirectly, to pay . . . or otherwise confer upon or for the benefit of the lender . . . any sum of money, thing of value or other consideration other than that which is pledged as security . . . together with fees and interest provided for in chapter 24 or chapter 53 of the North Carolina General Statutes, where the principal amount of a loan is not in

excess of three hundred thousand dollars ($300,000.00). . . ." The one-sixth interest in the profits and gain on resale of the motel is a "sum of money, thing of value or other consideration" and it is not security, fees or interest. Under *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), a violation of G.S. 24-8 satisfies the third requirement for establishing usury.

The fourth requirement, corrupt intent to take more than the legal rate for the use of the money, is simply the intentional charging of more for money lent than the law allows. *Id.*

The penalty for usury, under G.S. 24-2, includes forfeiture of the entire interest which has been agreed to be paid for the loan. It therefore becomes clear that even if the facts as claimed by plaintiff are taken as true, he cannot recover what he claims is due him. In such a case, summary judgment is proper. *Lowder v. Lowder*, 68 N.C. App. 505, 315 S.E. 2d 520, *disc. rev. denied*, 311 N.C. 759, 321 S.E. 2d 138 (1984). It was therefore not error for the trial court to grant defendant's motion for summary judgment.

Since upon plaintiff's version of the facts he is not entitled to recover, any other error by the trial court is harmless. *Rankin v. Oates*, 183 N.C. 517, 112 S.E. 32 (1922). Therefore, we need not reach plaintiff's two other assignments of error.

Affirmed.

Judges ARNOLD and ORR concur.

STATE OF NORTH CAROLINA v. ANGELA EVANS WALDEN

No. 8615SC233

(Filed 21 October 1986)

Criminal Law § 75.2— confession—statements by officers—confession voluntarily and understandingly made

Defendant's confession was voluntarily and understandingly made where defendant was arrested at 9:00 p.m. for robbery of a grocery store; when she was read her rights by an officer at 10:30 p.m., she declined to give a statement and the questioning ceased; shortly after midnight defendant was approached by a detective who had learned that she once was employed at the robbed store, but after her rights were again read to her, she again refused to

make a statement; thereafter, defendant talked with two officers for about fifteen minutes and was told, in substance, during the conversation that the officers knew she had worked at the store involved, that her bond would be about $35,000, and that it might help her in court if she made a statement and cooperated with them; defendant was advised of her rights once more, and at 12:50 a.m. agreed to make a statement; and defendant was 25 years old and a high school graduate with 1½ years of business school training.

Judge BECTON concurs in the result.

APPEAL by defendant from *Farmer, Judge.* Order entered 13 September 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 26 August 1986.

Attorney General Thornburg, by Assistant Attorney General David R. Minges, for the State.

Daniel Snipes Johnson for defendant appellant.

PHILLIPS, Judge.

This case has been here before. In 1983, after being convicted along with three others of the common law robbery of a Burlington grocery store, defendant appealed to this Court citing as error the use of her in-custody confession for impeachment purposes. That contention could not be resolved by us because the trial judge's findings of fact as to the voluntariness or involuntariness of the confession were inadequate, and we remanded to the trial court with instructions to hold a hearing, make adequate findings of fact from the evidence presented, determine whether or not defendant's statement was voluntarily and understandingly made, and if it was to order defendant's commitment in accord with the judgment of conviction, but if it was not to vacate the judgment. *State v. Walden*, 75 N.C. App. 79, 330 S.E. 2d 271 (1985). At the hearing so held the State introduced the complete record of the previous trial, the defendant presented the defendant's testimony and that of two officers who were present when she gave the statement, and the court made various findings of fact and determined that defendant's in-custody statement was voluntarily and understandingly made. The findings and determination are based upon the evidence in its totality, as our law requires, *State v. Corley*, 310 N.C. 40, 311 S.E. 2d 540 (1984); and they are amply supported by competent evidence. *State v. Temple*, 302 N.C. 1, 273 S.E. 2d 273 (1981). Thus, we affirm them.

The evidence before the court, in pertinent part, shows that: Defendant was arrested at nine o'clock during the evening of 14 May 1983 in connection with the robbery of a grocery store in Burlington. When she was read her rights by an officer an hour and a half later, she declined to give a statement and the questioning ceased. Shortly after midnight defendant was approached by a detective who had learned that she once was employed at the robbed store, but after her rights were again read to her she again refused to make a statement. Thereafter, however, she talked with two officers for about fifteen minutes and during their conversation she was told, in substance, that the officers knew she had worked at the store involved, that her bond would be about $35,000, and that it might help her in court if she made a statement and cooperated with them. Following that conversation defendant was advised of her rights still again and at 12:50 a.m. she agreed to make a statement. In the statement she admitted that she knew her companions were going to rob the grocery store and that she participated as the get-away driver. This evidence does not show, as defendant argues, that her confession was coerced because the officers continued to talk to her after she had invoked her right to remain silent. Defendant was twenty-five years old and a high school graduate that had attended business school for a year and a half. Her initial refusal to make a statement was honored and the police did not approach her again until two hours later when they told her that they had just learned of her past connection with the robbed grocery store and the evidence indicates that the talking and signing that she did thereafter was done voluntarily and understandingly. The mere fact that a confession is made after a defendant is confronted with new information normally calling for an explanation does not render the confession involuntary. *State v. Temple, supra; State v. Mitchell*, 265 N.C. 584, 144 S.E. 2d 646 (1965), *cert. denied*, 384 U.S. 1024, 16 L.Ed. 2d 1029, 86 S.Ct. 1972 (1966). Nor does it appear that her confession was involuntary because she believed from the officers' remarks that she would be rewarded if she confessed. The remarks suggested no reward and were too speculative to warrant such a belief by defendant. Similar remarks by police officers under similar circumstances have been held not to justify any hope that preferential treatment would be received. *State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985); *State v. Branch*, 306 N.C. 101, 291 S.E. 2d 653 (1982); *State v. Thomas*, 34 N.C. App. 534, 239 S.E. 2d 281 (1971).

Affirmed.

Judge MARTIN concurs.

Judge BECTON concurs in the result.

J. HENRY FORD AND WIFE, DORIS FORD v. PEACHES ENTERTAINMENT CORPORATION, THE CITY OF GREENSBORO, INSURANCE SERVICES OFFICE, INC., AND DREW HENDERSON

No. 8618SC431

(Filed 21 October 1986)

Automobiles § 43.2— false alarm—collision with fire truck—negligence in causing alarm not proximate cause of accident

Defendants' negligent testing of a sprinkler system which caused an alarm to sound at the fire department was not a proximate cause of an accident between plaintiff's vehicle and the fire truck which responded to the alarm; therefore, the trial court properly allowed defendants' motion to dismiss in plaintiff's action to recover for personal injuries sustained in the collision.

APPEAL by plaintiffs from *Seay, Judge.* Judgment entered 28 February 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 14 October 1986.

This is a civil action in which the plaintiffs seek to recover damages for personal injury arising out of a collision with a fire truck in Greensboro, North Carolina. The plaintiffs' complaint alleges that the defendant Peaches' employee, the defendant Drew Henderson, negligently tested a sprinkler system causing an alarm to sound at the fire department. On its way to Peaches' place of business a fire truck collided with the plaintiff Mr. Ford's car, resulting in his bodily injury. The trial court allowed the motions of defendants Peaches, Drew Henderson and Insurance Services to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). The plaintiffs appealed.

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

Maupin, Taylor, Ellis & Adams, P.A., by Thomas W. H. Alexander and James E. Gates, for defendant appellees Insurance Services Office, Inc. and Drew Henderson.

Tuggle, Duggins, Meschan & Elrod, P.A., by Kenneth R. Keller and Kenneth L. Jones, for defendant appellee Peaches Entertainment Corporation.

WEBB, Judge.

The sole question presented by this appeal is whether the trial court properly allowed the defendants' motions to dismiss. The plaintiffs argue that the court incorrectly concluded that the defendants' negligence was not a proximate cause of this accident. We cannot agree.

A motion to dismiss for failure to state a claim upon which relief may be granted under G.S. 1A-1, Rule 12(b)(6) is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory. *Brewer v. Hatcher*, 52 N.C. App. 601, 279 S.E. 2d 69 (1981). For the plaintiffs' complaint to withstand a motion to dismiss the facts alleged must demonstrate that the defendants' negligence was a proximate cause of their injuries. "An essential element of causation is foreseeability, that which a person of ordinary prudence would reasonably have foreseen as the probable consequence of his acts. A person is not required to foresee all results but only those consequences which are reasonable." *Bogle v. Duke Power Company*, 27 N.C. App. 318, 321, 219 S.E. 2d 308, 310 (1975), *disc. rev. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976). This collision was not a reasonable result of the defendants' negligently causing a fire truck to be summoned such that a person of ordinary prudence should have foreseen it. Their negligence was not a proximate cause of the plaintiffs' injury and the trial court properly allowed the motions to dismiss.

We believe that *Hairston v. Alexander Tank and Equipment Co.*, 310 N.C. 227, 311 S.E. 2d 559 (1984) upon which the plaintiffs rely is distinguishable. That case held a jury could find that there was proximate cause when the defendant negligently installed a

wheel on the automobile of the plaintiff's intestate and the wheel came off, causing the vehicle to stop on the highway so that it was struck and the plaintiff's intestate was killed. It is reasonably foreseeable that the loss of a wheel will cause a vehicle to stop on a highway where it is at risk from other traffic. It is not reasonably foreseeable that in the event of a false alarm a fire truck will cause an accident in responding to the alarm.

Affirmed.

Judges BECTON and EAGLES concur.

MICHAEL JOHNSON v. HAMPTON INDUSTRIES, INC.

No. 8610SC266

(Filed 21 October 1986)

Venue § 1— failure to press motion for change—waiver of right

Defendant's failure to put its motion for change of venue on a hearing calendar until eight months after the case was filed, the hearing date being two months later, was unreasonable and thus a waiver of its right to have the case removed.

APPEAL by defendant from *Brannon, Judge.* Order entered 27 January 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 21 August 1986.

Donald B. Hunt for plaintiff appellee.

Allen, Hooten & Hodges, by John C. Archie, for defendant appellant.

PHILLIPS, Judge.

Plaintiff, a Lenoir County resident, sued defendant, a North Carolina corporation, for breach of his employment contract and discrimination against the handicapped, and Prudential Insurance Company of America, a foreign corporation doing business in Wake County, for wrongfully interfering with his employment contract. Prudential has since been eliminated from the case by an order of summary judgment. In answering the complaint de-

fendant moved for change of venue to Lenoir County as a matter of right on the ground that none of the parties were residents of Wake County. The motion, not heard until some ten months after it was filed, was denied by Judge Brannon, who concluded that defendant had waived its right to a change of venue by failing to press the motion. The conclusion is based on findings that though the motion could have been heard at numerous sessions of court during the intervening months defendant made no attempt to have it heard before the date that it was heard.

The court's findings of fact are supported by the record and they support the court's conclusion that defendant waived its right to have the venue changed. A defendant's failure to press his motion for change of venue has been held to be a waiver many times. *Miller v. Miller*, 38 N.C. App. 95, 247 S.E. 2d 278 (1978). Since civil cases in this state are ordinarily deemed ready for trial five months after filing, Rule 2(c), General Rules of Practice for the Superior and District Courts, and the motion could have been calendared for hearing at many earlier court sessions, we cannot say that the court erred in concluding that defendant's failure to put its motion on a hearing calendar until eight months after the case was filed, the hearing date being two months later, was unreasonable and thus a waiver of its right to have the case removed.

Affirmed.

Judges ARNOLD and MARTIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 OCTOBER 1986

EDWARDS v. GASKINS No. 862SC402	Beaufort (84CVS152)	Affirmed
FALLS v. YOUNG No. 8627DC377	Gaston (83CVD2819)	No Error
FOSTER FARMS, INC. v. STEWART No. 8622SC245	Davie (82CVS278)	Affirmed
NOBLES v. WILLIAMS No. 863DC170	Pitt (85CVD649)	Affirmed
QUEEN v. QUEEN No. 8619SC516	Randolph (85SP245)	Affirmed
RILEY v. ROBINSON No. 8615SC205	Orange (84CVS1117)	Affirmed
SATTERFIELD v. SATTERFIELD No. 8614SC237	Durham (84CVS1147)	Reversed and Remanded
STATE v. BOWEN No. 8613SC502	Bladen (85CRS6574)	No Error
STATE v. LOWERY No. 8621SC453	Forsyth (85CRS24254) (85CRS24255) (85CRS24256) (85CRS24257) (85CRS24258) (85CRS24259)	Affirmed
STATE v. McKENDALL No. 8611SC475	Lee (84CRS9164)	Affirmed
STATE v. RADER No. 862SC318	Hyde (86CRS99)	Affirmed
STATE v. TEASLEY No. 8612SC224	Cumberland (85CRS11078)	No Error
STATE v. WATSON No. 8626SC467	Mecklenburg (84CRS54206)	No Error

FILED 21 OCTOBER 1986

DAVIS v. SOWERS No. 8615SC381	Orange (84CVS779)	Affirmed

IN RE CHERRY No. 8619DC641	Rowan (85-J-121) (85-J-122)	Affirmed
QUIROS v. OBSERVER TRANSPORTATION CO. AND ESC OF N. C. No. 8626SC633	Mecklenburg (86CVS1211)	Affirmed
STATE v. ADAMS No. 8619SC293	Cabarrus (85CRS7360) (85CRS7361)	No Error
STATE v. BARRETT No. 863SC569	Pitt (85CRS10685)	No Error
STATE v. COLTRANE No. 8619SC499	Randolph (81CRS6344) (85CRS13284)	Affirmed
STATE v. ERVING No. 8626SC325	Mecklenburg (85CRS24913)	No Error
STATE v. EVANS No. 8626SC512	Mecklenburg (85CRS9657)	Affirmed
STATE v. HOLT No. 8617SC508	Stokes (85CRS1245)	No Error
STATE v. MASON No. 864SC360	Onslow (85CRS14443)	No Error
STATE v. PATTERSON No. 8625SC472	Burke (85CRS604)	No Error
STATE v. POOVEY No. 8626SC492	Mecklenburg (84CRS25753)	No Error
STATE v. ROWE No. 868SC457	Wayne (84CRS11208)	No Error
STATE v. SHELTON No. 8621SC403	Forsyth (85CRS25296)	No Error
STATE v. SMITH No. 8614SC446	Durham (85CRS11821) (85CRS12823)	Appeal Dismissed
STATE v. STOUTT No. 8610SC474	Wake (84CRS43130)	No Error
STATE v. TAYLOR No. 8611SC382	Johnston (85CRS7692)	Affirmed

In re Charter Pines Hospital, Inc. v. N. C. Dept. of Human Resources

IN THE MATTER OF: CHARTER PINES HOSPITAL, INC., A NORTH CAROLINA CORPORATION, PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT-APPELLEE, PITT COUNTY MEMORIAL HOSPITAL, INC., INTERVENOR, AND COMMUNITY HOSPITAL OF ROCKY MOUNT, INTERVENOR

No. 8510SC1081

(Filed 4 November 1986)

1. **Hospitals § 2.1— proposed psychiatric hospital—certificate of need—letters of support properly required**

Respondent's request for additional information, including its request that petitioner provide letters of support from various health care professionals and service groups for a proposed psychiatric hospital, did not amount to the establishment of a criterion for review of petitioner's application for a certificate of need and was therefore neither unlawful nor improper.

2. **Hospitals § 2.1— proposed psychiatric hospital—certificate of need—evidence of support—notice of support requirement**

There was no merit to petitioner's contention that respondent erred by excluding critical evidence on the issue of support for a proposed psychiatric hospital and by failing to give petitioner proper notice of the support requirement, since all of the excluded evidence would have been relevant only upon the issue of whether respondent's request for letters of support was an action taken upon unlawful procedure or was in excess of respondent's authority, neither of which was the case; the excluded evidence was outside the scope of permissible subject matter at a contested case hearing as defined in applicable regulations; and petitioner received adequate and particular notice of respondent's need for additional evidence on the issue of support through a notice of incompleteness from the health planner in the certificate of need section of respondent.

3. **Hospitals § 2.1— proposed psychiatric hospital—lack of support from health care community**

Substantial evidence existed in the record as a whole to support respondent's findings and conclusions that petitioner's proposal to construct a psychiatric and substance abuse hospital lacked the necessary support from the health care community where there was no evidence of support from local mental health centers, substance abuse facilities, courts, local hospitals, or medical education facilities—entities from whom expressions of support were specifically requested in respondent's notice of incompleteness and whose support, according to respondent, was crucial to the success of such a project; there was substantial evidence of active opposition to the proposal from key health care facilities and professionals in the area, including letters of opposition from several doctors listed on petitioner's application as supporters of the proposal; and though respondent ultimately did receive some documentation of support for petitioner's proposal, it was not representative of all the counties petitioner proposed to serve.

4. **Hospitals § 2.1— proposed psychiatric hospital—no approval of fewer beds than proposed—no error**

Respondent did not abuse its discretion by failing to approve a certificate of need for seven fewer beds than petitioner requested in its application, since petitioner presented no evidence in its application or at the contested case hearing which indicated a willingness to accept a certificate of need for fewer beds than those proposed; and petitioner's proposal was for a *minimum* number of beds which would "allow the facility to achieve the necessary economies of scale that will result in both improved patient care, financial viability and cost control."

5. **Hospitals § 2.1— proposed psychiatric hospital—need for beds—application of methodology proper**

Use by respondent's health planner of the State Medical Facilities Plan methodology to compute psychiatric bed need in the subject health systems area and in petitioner's proposed service area was an issue specifically not reviewable at the contested case hearing, but application of the SMFP methodology to petitioner's proposal was reviewable; the hearing officer's findings and conclusions on the issue of bed need were supported by substantial evidence.

Judge WELLS concurring.

APPEAL by petitioner from *Bailey, Judge.* Judgment entered 26 June 1985 in WAKE County Superior Court. Heard in the Court of Appeals 7 April 1986.

In February 1983, petitioner Charter Pines Hospital, Inc. (Charter) made application, pursuant to G.S. 131-180 (1981), *repealed and recodified* at G.S. 131E-182 (Cum. Supp. 1985), to the North Carolina Department of Human Resources (DHR) for a certificate of need (CON) to construct a psychiatric and substance abuse hospital. Charter proposed a sixty-five (65) bed freestanding psychiatric hospital with twenty-one (21) beds designated for addictive disease treatment and forty-four (44) beds designated for psychiatric care. The project was to be located in Greenville, North Carolina, in Health Systems Area VI (HSA VI), a health planning area designated by the State Medical Facilities Plan (SMFP) encompassing twenty-nine (29) counties in eastern North Carolina. Charter's application was assigned for review to John C. Heffner, Health Planner, DHR CON Section.

Upon receipt of a CON application, CON regulations provide for a fifteen (15) day period within which the application is given a preliminary review for completeness. Additional material may be requested and received by the CON Section during that period. Applications are deemed incomplete if they contain insuffi-

cient information to conduct the CON review. 10 NCAC 3R .0305 (1983). On 18 February 1983, Heffner notified Charter that he deemed its CON application to be incomplete and he requested additional information.

On 24 February 1983, Charter furnished the additional information. Charter's application was deemed complete for review on 28 February 1983, and the CON Section thereafter began its review of the application on 1 March 1983.

The Project Review Committee of HSA VI recommended disapproval of Charter's application on 13 April 1983 and E.C.H.S.A. [Eastern Carolina Health Systems Agency], the federally created health planning body for HSA VI, recommended disapproval for the following reasons:

1. It is inconsistent with the philosophy, goals and objectives of the HSP [Health Systems Plan]. The philosophy of the HSP in regard to mental health services is that they be deinstitutionalized and provided throughout the area by community hospitals and community mental health centers. This application is specifically inconsistent with Goal #2, Objective #2 of the Adult Mental Health Section which calls for the development of short term psychiatric beds in local hospitals, especially in the Lenoir, Onslow, Roanoke-Chowan, Pitt and Albemarle catchment areas. This application proposes to take 63% of the psychiatric beds available to all of NC HSA VI and would preclude development in the *other* high priority areas. (Criteria #1)

2. There are alternative, less costly means of providing the proposed health service, specifically community hospitals. (Criteria #5)

3. The applicant does not have sufficient support from existing health and social service providers in the area to be served by the facility to assure necessary or appropriate referral, back-up and support services. (Criteria #8) (emphasis original)

On 13 June 1983, pursuant to 10 NCAC 3R .0309(c) (1983), Heffner again requested additional information from Charter, responses and answers to which were received on 28 June 1983. Based upon Heffner's review, and in consideration of the recom-

mendation of E.C.H.S.A., the CON Section subsequently determined that Charter's proposal "did not conform to applicable plans, standards, and criteria" and, by letter of 28 July 1983, notified Charter that its application was not approved. Charter thereafter requested, and was granted, a contested case hearing.

Pitt County Memorial Hospital, a hospital located in Greenville which currently provides psychiatric bed facilities and plans to expand its existing facilities, and Community Hospital of Rocky Mount, a hospital located in Rocky Mount with plans to construct psychiatric beds, were granted leave to intervene in the contested case hearing. After receiving voluminous evidence, the Hearing Officer issued a Proposal for Decision recommending disapproval of Charter's application, concluding that Charter's proposed project failed to conform with applicable criteria, standards and plans in the areas of adequate support from the health care community, bed need, and duplication of facilities and services. The proposed decision was adopted as the final decision of the Division of Facility Services, DHR, by I. O. Wilkerson, Director, on 24 August 1984.

Charter petitioned for judicial review of the decision in Wake County Superior Court pursuant to Chapter 150A of the General Statutes. Charter appeals from a judgment affirming the final agency decision.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Barbara P. Riley, for respondent appellee North Carolina Department of Human Resources.

Sanford, Adams, McCullough & Beard, by Heman R. Clark and Renee J. Montgomery; and King & Spalding, by Richard L. Shackelford, for petitioner appellant.

Hollowell & Silverstein, P.A., by Edward E. Hollowell and Robert L. Wilson, Jr.; and James T. Cheatham, P.A., by James T. Cheatham, for intervenor appellee Pitt County Memorial Hospital, Inc.

Poyner & Spruill, by J. Phil Carlton and Susan K. Nichols, for intervenor appellee Community Hospital of Rocky Mount.

MARTIN, Judge.

The applicable standard of judicial review of a final decision of the Department of Human Resources with respect to an appli-

cation for a certificate of need was set out in G.S. 150A-51 (1983), *amended and recodified* at G.S. 150B-51 (1985) (effective 1 January 1986).

> 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.

Charter assigns error to the findings, inferences, conclusions and decision of DHR concerning Charter's application for a certificate of need, contending that DHR's decision was in violation of constitutional and statutory provisions, grounded upon unlawful procedure, affected by error of law, unsupported by substantial evidence, and was arbitrary and capricious. Charter urges this court to reverse the judgment of the Superior Court which affirmed DHR's decision, and grant Charter a certificate of need. We disagree with Charter's contentions and, for the following reasons, affirm the decisions of the Superior Court and DHR.

The lengthy and detailed briefs submitted for our consideration by the parties and intervenors in this action focused our attention on three (3) primary questions presented by this appeal. (1) Whether DHR correctly applied the statutory criteria relating to community health care support for the Charter proposal; (2) Whether DHR correctly determined that Charter's proposal exceeded the psychiatric bed need within the applicable Health Service Area; and (3) Whether DHR's determination that Charter's proposal was nonconforming was arbitrary and capri-

cious. The governing CON law at the time of Charter's application, and therefore dispositive of the issues in this appeal, was G.S. 131-175 to -188 (1981), *amended and recodified* at G.S. 131E-175 to -191 (Cum. Supp. 1985), and the corresponding provisions of the North Carolina Administrative Code effective at that time. We will address Charter's assignments of error as they relate to these issues and the appropriate standards of review.

I

[1] Charter first contends that DHR, through project analyst Heffner, improperly required Charter to provide letters of support as a part of its CON application. Charter argues that DHR acted upon unlawful procedure, exceeded its statutory authority, and denied Charter equal protection under the law by imposing the requirement for letters of support without first promulgating the requirement as a regulation. Charter further argues that DHR erred as a matter of law and denied Charter due process of law by excluding critical evidence on the issue of support and by failing to give Charter proper notice of the support requirement. Finally, Charter argues that DHR's findings and conclusions on the issue of support are not based on substantial evidence. We find no merit in Charter's contentions and overrule these assignments of error.

Charter first contends that DHR's request for letters of support (as specified in the notice of incompleteness forwarded to Charter on 18 February 1983) exceeded its statutory authority and was based upon unlawful procedure because the letters requirement was not specified in CON regulations promulgated by DHR pursuant to G.S. 131-181(a) (1981). Charter correctly argues that there is no requirement in any statute or department regulation or plan that letters of support must accompany a CON application, and that criteria to be used by DHR to review CON applications should be promulgated as regulations. G.S. 131-177(5) (1981). We hold, however, that DHR's request for additional information, including its request that Charter provide letters of support for the proposed hospital, did not amount to the establishment of a criterion for review of Charter's application, and was, therefore, neither unlawful nor improper.

The record is clear as to the circumstances leading to project analyst Heffner's request for letters of support from various

health-care professionals and service groups. Upon receipt of Charter's application, Heffner conducted a preliminary review to determine whether Charter had furnished sufficient information for the CON review. The application form submitted was provided to Charter by DHR pursuant to G.S. 131-180 (1981) and specifically requested the following information:

> PLEASE LIST THE PHYSICIANS WHO HAVE EXPRESSED SUPPORT FOR THE PROPOSAL, BY SPECIALTY. HOW HAVE THESE INDIVIDUALS AND OTHER MEDICAL PERSONNEL CRUCIAL TO THE VIABILITY OF THE PROPOSAL BEEN INVOLVED IN THE PLANNING PHASE OF THE PROJECT? PLEASE INDICATE IF OTHER GROUPS/INDIVIDUALS, WHO COULD AFFECT THE PROJECT'S SUCCESS, HAVE EXPRESSED SUPPORT FOR IT.

Charter responded as follows:

> From the earliest contacts made in the area up to the present, the physicians of the area, particularly the psychiatrists in private practice and those on the faculty of the ECU Medical School, have been included in the entire development process: assessment of need, program determination, and the like. Since the Charter Pines Hospital will have an open staff, these physicians will be the Medical Staff for the Charter Pines Hospital. This is why their involvement was solicited from the very beginning.
>
> All of the following physicians have been involved to a greater or lesser degree in the initial planning and development efforts to establish Charter Pines Hospital. All of them will continue to be invited to participate in the development and eventual operations of Charter Pines Hospital once it is approved by the State.

Jarrett Barnhill, M.D.	ECU Medical School Faculty
Jascha Danoff, M.D.	ECU Medical School Faculty
Ray Evan, M.D.	Private Psychiatrist
William Fore, M.D.	Past President, Pitt Co. Medical Soc.
Jerry Gregory, M.D.	ECU Medical School Faculty
William Laupus, M.D.	Dean, ECU Medical School
James Mathis, M.D.	ECU Medical School Faculty
Leslie Mega, M.D.	ECU Medical School Faculty
Barry Moore, M.D.	Private Psychiatrist
Philip Nelson, M.D.	Private Psychiatrist

Robert Nenno, M.D.	Pitt Co. Community Mental Health
Robert Ratcliffe, M.D.	Private Psychiatrist
Everett Simmons, M.D.	ECU Medical School Faculty
Jon Tinglestad, M.D.	ECU Medical School Faculty
William Walker, M.D.	ECU Medical School Faculty
Alfred Youngue, M.D.	Private Psychiatrist
Judith Yongue, M.D.	Private Psychiatrist

All of the physicians above were invited to visit an operating Charter Medical hospital. Some of them did go to visit Charter Ridge Hospital, Lexington, Kentucky which was developed by Charter Medical Corporation in a joint effort with the University of Kentucky Medical School. It is anticipated that a similar close affiliation will be developed with the ECU Medical School once the facility is approved by the state.

Active involvement with the project development has been and is being solicited from the area's Community Mental Health Services, Substance Abuse Services, School Systems, Courts, mental health professionals as well as psychiatrists, Nursing Schools, and similar interested groups.

It is apparent that, although it listed a substantial number of names in response to the question on the application, Charter's response contained absolutely no indication that any of the listed professional groups and individuals from the primary and secondary service areas had ever expressed any support for the proposal. Heffner testified that, because he was unable to find any documentation for Charter's assertions of support, he deemed the application incomplete in that respect. Along with his requests for additional information relating to multiple other areas which had been inadequately addressed in the application, Heffner requested the following information:

> Please provide letters of support. Letters should be provided from physicians, hospitals, community mental health services and substance abuse services providers, school systems, courts, as well as mental health professionals, nursing schools, and similar groups.

Charter contends that Heffner, by requesting letters of support, improperly created a new review criterion in violation of the Administrative Procedure Act (APA), CON law, and the Code of

Federal Regulations. Citing the case of *Comm'r of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E. 2d 547, *reh'g denied*, 301 N.C. 107 (1980), Charter argues that Heffner acted upon unlawful procedure by establishing the letters of support requirement without DHR's having promulgated it as a regulation under the APA. In *Rate Bureau*, the Supreme Court held that although the Commissioner of Insurance had the statutory authority to require that data submitted in an insurance rate-making case be audited, he acted upon unlawful procedure by attempting to establish such a rule without properly promulgating it under the procedures of the APA.

In our view, the facts of the present case so distinguish it from *Rate Bureau* that the holdings in that case are not dispositive of the issues in this appeal. In *Rate Bureau*, the Commissioner of Insurance attempted to establish and apply the rule requiring that data be audited by finding and concluding that unaudited reports were unreliable and by denying rate increases based upon the failure of the applicants to comply with the Commissioner's unpromulgated rule. On the other hand, Mr. Heffner, by requesting that Charter provide letters of support, was not seeking to impose an administrative rule or requirement that such letters be submitted with a CON application. His request was not a rule at all. Rather, he was seeking, after reviewing the somewhat elusive response which Charter provided with respect to the relationship between its proposed facility and the existing health care delivery systems in the area, to obtain the information originally requested and to substantiate that support for the proposed facility actually existed. The hearing officer, therefore, concluded:

> 9. When the review process disclosed clear lack of support, or opposition, from some of the health care community, the Certificate of Need Section was required to seek to document or refute the application's unsupported assertions of compliance with the network, continuum of care, and other health community relationship criteria and standards; the lack of support (from Mental Health Centers, courts, drug programs, etc.) and evidence of opposition (from the local hospital, medical school, etc.) in the record compel the conclusion that the project application does not conform with applicable

criteria; the immediate or long-term success of the project is in doubt.

The specific issue of whether a request by DHR for letters evidencing support for a proposal imposes a requirement in excess of its statutory authority or amounts to an agency action based on unlawful procedure has not previously been addressed by appellate decision in North Carolina. However, our opinion in *Hospital Group of Western N.C. v. N.C. Dept. of Human Resources*, 76 N.C. App. 265, 332 S.E. 2d 748 (1985) is indicative that such letters may constitute evidence of the existence or nonexistence of statutory factors determinative of need. *See* G.S. 131-181(3) (1981). In *Hospital Group*, DHR requested letters in support of petitioner's hospital from "physicians, community mental health centers, schools, churches, the court systems and other groups/individuals. . . ." *Hospital Group* at 269, 332 S.E. 2d at 752. Eight letters were received, none of which were from schools or courts, and all of the letters received were from only one county out of a twenty-nine (29) county area. Based on those letters, this court upheld DHR's determination that there was insufficient support for the proposed hospital.

We hold that Heffner's request for documentation of Charter's alleged support was entirely reasonable and within DHR's authority in order to obtain the necessary information to properly review the application. *See* 10 NCAC 3R .0309(c) (1983). This assignment of error is overruled.

[2] Charter next contends that DHR erred as a matter of law and denied it due process of law by excluding critical evidence on the issue of support and by failing to give Charter proper notice of the support requirement. Again, we disagree.

Charter attempted to introduce: (1) evidence of other applications which were approved by the CON Section without the type or quantity of letters of support required of Charter; (2) evidence that the basis of Pitt County Memorial Hospital's opposition to Charter's proposal was not legitimate; (3) evidence that the expectation of letters of support is unrealistic and unnecessary; and (4) the "Draft Criteria and Standards for Short-Stay Alcohol and/or Drug Abuse Intensive Treatment Beds" showing that a requirement of letters of support had been deleted from those regulations before they were promulgated. This evidence would have

been relevant only upon the issue of whether Heffner's request for letters of support was an action taken upon unlawful procedure or was in excess of DHR's statutory authority. In view of our holding that Heffner's request for letters was within Heffner's statutory authority and was procedurally permissible, we can conceive of no possible prejudice occasioned to Charter by the exclusion of such evidence. We note also that the excluded evidence was outside the scope of permissible subject matter at a contested case hearing as defined in 10 NCAC 3R .0408(c) (1983) and 10 NCAC 3R .0420 (1983). Additionally, Charter received adequate and particular notice of DHR's need for additional evidence on the issue of support through Heffner's notice of incompleteness. These assignments of error are overruled.

[3] Charter further contends that DHR's findings and conclusions on the issue of support are "unsupported by substantial evidence . . . in view of the entire record as submitted." G.S. 150A-51(5) (1983). The applicable standard of review, prescribed by the foregoing statute, is the whole record test. Under the whole record test, the reviewing court must consider all the evidence to determine whether the agency's decision is supported by substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comm'r of Insurance v. Rating Bureau,* 292 N.C. 70, 80, 231 S.E. 2d 882, 888 (1977). In determining the substantiality of the evidence, the court must consider all the evidence, including that which contradicts the agency's decision. The court may not substitute its judgment for that of the agency "even though the court could justifiably have reached a different result had the matter been before it *de novo.*" *Thompson v. Board of Education,* 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977). A proper application of the whole record test takes into account the expertise of an administrative agency. *High Rock Lake Assoc. v. Environmental Management Comm.,* 51 N.C. App. 275, 276 S.E. 2d 472 (1981).

After review and consideration of the record as a whole, we acknowledge that it contains considerable evidence from which, if this case were before us *de novo,* we might justify a different result. Under the whole record test, however, we must determine only whether DHR's decision has a rational basis in the evidence presented. *In re Rogers,* 297 N.C. 48, 253 S.E. 2d 912 (1979). We find that it does.

In his proposal for decision, adopted by DHR as its Decision and Order, the hearing officer made, among others, the following findings of fact on the issue of support.

> (34) The response to the incomplete notice provided no letters of support from any hospital, community mental health service, substance abuse services provider, court, or nursing school, and there was no other documentation to corroborate the application's indications of support or assistance from these organizations.
>
> (35) The response did provide one letter of support from a physician, three from schools, and several from mental health professionals.
>
> (36) In denying the Charter Pines application, the Certificate of Need Section specifically found that the project lacked the necessary support from the health care community and thereby was Non-Conforming with Review Criteria (a)(5), (a)(6), (a)(7), (a)(21), and special criteria in 10 NCAC 3R .2505(b) and .2506.
>
> (37) At hearing the proponents produced a great volume of petitions and other documents and extensive testimony showing local support from some health professionals and parts of the business community, and they produced evidence of support from some psychiatrists and some schools, but except for the unsubstantiated assertions of employees of Charter Medical Corporation that support would be developed after construction of the project, there was still no evidence of support from local mental health centers, substance abuse service providers, courts or court personnel, local hospitals, or medical education facilities.

The hearing officer subsequently made, among others, the following conclusions.

> 12. This project was denied, not for lack of letters, but for lack of support; there is no requirement that proponents produce *letters* of support, but where allegations of support are questioned and contradicted in the review process, unless support or other positive indications of the questioned health community participation are demonstrated by letters, other

documents, independent testimony, or similar reliable evidence, the proponents' project must be found Non-Conforming.

13. The Charter Pines project is Non-Conforming with Review Criteria (a)(1), (a)(5), (a)(6), (a)(7), and (a)(21), and with special criteria .2504(a), .2505(b) and .2506. (emphasis original)

We find substantial evidence in the record to support these findings and conclusions. We acknowledge, as did the hearing officer, Charter's efforts to demonstrate local support for the project through personal letters, public petitions and the live testimony of medical professionals. We must, however, defer to the expertise of CON analysts in determining the sufficiency of the support evidenced in Charter's application and its level of conformity with CON review criteria. *See, State ex rel. Utilities Comm. v. Duke Power,* 305 N.C. 1, 287 S.E. 2d 786 (1982). Heffner testified that although he ultimately did receive some documentation of support for Charter's proposal, it was not representative of all the counties Charter proposed to serve, and did not include indications of support from most of the facilities specified in the notice of incompleteness.

After an exhaustive review of the record, we, also, find no evidence of support from local mental health centers, substance abuse facilities, courts, local hospitals, or medical education facilities—entities from whom expressions of support were specifically requested in the notice of incompleteness and whose support Heffner stated was crucial to the success of such a project. In addition, the record discloses substantial evidence of active opposition to the proposal from key health care facilities and professionals in the area, including letters of opposition from several doctors listed on Charter's application as supporters of the proposal.

We conclude that substantial evidence exists in the record as a whole to support the agency's findings and conclusions that Charter's proposal lacked support. These assignments of error are, therefore, overruled.

II

Charter next contends that DHR, through project analyst Heffner, erroneously determined that Charter's psychiatric bed proposal exceeded psychiatric bed need in HSA VI. Charter

argues that DHR's conclusion that there is a need for only 37 psychiatric beds, 7 beds fewer than Charter's 44 bed proposal, is based upon unlawful procedure, violates the APA and CON law, and denies Charter due process of law and equal protection under the law. Charter further argues that DHR's findings and conclusions on bed need are not supported by substantial evidence. We reject these arguments.

[4] Charter first asserts, notwithstanding its assignments of error related to the methodology of computing bed need, that there is no real issue between the parties as to bed need because Charter is willing to accept an approval by DHR for seven (7) fewer beds than proposed in the application. Unquestionably, DHR is authorized to approve projects for fewer beds than are proposed by an applicant. G.S. 131-182(b) (1981). The power to make such conditional approvals is discretionary, however, and not mandatory. *See In re Humana Hosp. Corp. v. N.C. Dept. of Human Resources*, 81 N.C. App. 628, 345 S.E. 2d 235 (1986).

We are not persuaded that the evidence presented in the present case would support an approval conditioned on Charter's acceptance of seven (7) fewer beds. Charter presented no evidence in its application or at the contested case hearing which indicated a willingness to accept a certificate of need for fewer beds than those proposed. Moreover, Charter's proposal was for a *minimum* total of 65 beds. That total, including 21 addictive disease beds and 44 psychiatric beds, was presented in Charter's initial proposal as the minimum number of beds which would "allow the facility to achieve the necessary economies of scale that will result in both improved patient care, financial viability and cost control." There being no evidence in the record to indicate that Charter's proposal was economically feasible with fewer beds, we find no basis in the record for such a conditional approval, and we cannot say that DHR abused its discretion by failing to approve a certificate of need for seven (7) fewer beds.

[5] Charter next argues that Heffner departed from the SMFP bed need methodology and, in effect, created his own methodology for determining the psychiatric bed need in Charter's service area. Charter asserts that Heffner's computation of psychiatric bed need was fatally flawed because his methodology used different assumptions in calculating need and inventory of psychiat-

ric beds while the SMFP methodology requires the use of the same assumptions in calculating need and inventory of psychiatric beds. Charter further argues that DHR, by refusing to scrutinize Heffner's methodology as compared to other methodologies proposed by Charter, created an irrebuttable presumption that Heffner's methodology was correct, resulting in a complete denial to Charter of any review of the need for its proposed project. We disagree.

Under G.S. 131-181(a)(1) (1981), DHR is required to consider the relationship of a proposed project to the SMFP. Promulgated as a CON regulation, the SMFP provides bed need projections for use in determining whether proposals for additional beds and services can be approved under the CON program. 10 NCAC 3R .1003(a)(4) (1983). The SMFP also adopts methodologies for use in determining the need for particular health services such as psychiatric beds.

Under CON regulations, the "correctness, adequacy, or appropriateness of criteria, plans, and standards shall not be an issue in a contested case hearing." 10 NCAC 3R .0420 (1983). At the contested case hearing, Heffner testified that he utilized the 1983 SMFP methodology to compute psychiatric bed need in HSA VI and in Charter's proposed service area. As a result, the hearing officer concluded:

> 17. The methodology used by the Certificate of Need Section to determine the 37-bed need is from the 1983 SMFP, and like the HSA need determination, it is also not subject to review for correctness. 10 NCAC 3R .0420.

It follows, therefore, that no presumption, irrebuttable or otherwise, was created or applied by the acts and conclusions of the hearing officer. Rather, he properly concluded that the *use* of the methodology required by the SMFP was an issue specifically not reviewable at the contested case hearing. Heffner's *application* of the SMFP methodology to Charter's proposal was, however, open to scrutiny at the contested case hearing for analytical, procedural and mathematical correctness.

Charter presented evidence that Heffner's application of the SMFP methodology to Charter's proposal was analytically flawed. Ronald T. Luke, Ph.D., an expert in the field of health planning,

testified that he reviewed Heffner's analysis of Charter's proposal and the psychiatric bed need in the proposed service area. He testified that Heffner utilized inconsistent assumptions in his SMFP analysis which resulted in a showing of inadequate need for Charter's psychiatric bed need proposal. Dr. Luke testified that Heffner projected the need for state psychiatric beds by assuming that the utilization of state psychiatric beds for Charter's proposed service area is the same as that for the entire HSA. However, in determining the inventory of existing state psychiatric beds in Charter's proposed service area, Heffner calculated, and used, the actual utilization rate, rather than the assumed utilization rate, of state psychiatric beds within Charter's proposed primary service area. Dr. Luke found a "gross and fatal inconsistency" in Heffner's analysis which was "indefensible by logic, by the state plan" or by any plan he "could imagine." He testified that the analysis was further flawed by Heffner's failure to visit or contact existing psychiatric facilities for observation and study of their interaction. Luke concluded that the SMFP methodology, if applied correctly, yielded an unmet bed need of at least 44 psychiatric beds in Charter's service area and not 37 beds as computed by Heffner.

Also testifying as an expert in health planning, Heffner acknowledged the inconsistencies alleged by Charter and stated that they were the result of his application of the SMFP methodology on a sub-HSA level. He further testified that he adopted the sub-HSA approach in order to accurately account for local circumstances, and that the use of a sub-HSA approach was an acceptable methodology for computing bed need.

After hearing the testimony of both experts, the hearing officer concluded:

> 18. It is appropriate to apply the 1983 SMFP methodology at the sub-HSA level because it is the best and most reliable methodology available, and it is a flexible methodology, as is indicated by reference to specific adjustments for special local circumstances. 1983 SMFP, Part IV, *Data Analysis*, and *Description of the Psychiatric Bed Need Methodology*. The proponents' implied suggestion, that the great volume of quality professional effort that produced the SMFP methodology be passed over for some other meth-

odology either from another state with vastly different demographic characteristics or from some national organization, is rejected.

19. The calculations under the 1983 SMFP methodology were done properly, and they were not invalidated by inconsistent assumptions or flawed logic as suggested by the proponents at hearing.

* * *

23. The Charter Pines proponents have not demonstrated an unmet need for psychiatric beds in the proposed service area that is as great as their proposed project's 44 beds; the need is less than that proposed.

24. Because the number of proposed psychiatric beds exceeds the unmet need for the service area, the project is Non-Conforming with Review Criteria (a)(1), (a)(3), (a)(5), (a)(6), (a)(12), (a)(17), (a)(19), and (a)(21), and special criteria .2504(a) and .2508(a).

We hold that the hearing officer's findings and conclusions on the issue of bed need are supported by substantial evidence. The parties presented conflicting expert testimony concerning the proper application of the 1983 SMFP methodology. The record shows that all the evidence was fully considered by the hearing officer.

> North Carolina is in accord with the well-established rule that it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence if any.

Duke Power, supra, at 21, 287 S.E. 2d at 798. The hearing officer was empowered to use his own best judgment in evaluating the weight and credibility of the evidence in light of his administrative expertise. He was not bound by the testimony of Charter's expert, nor was he required to accept it as true. His determination that Heffner properly applied the 1983 SMFP methodology to Charter's proposal for psychiatric beds required the use of his administrative expertise in judging the credibility of the expert tes-

timony presented. We cannot second-guess the exercise of that expertise and, finding substantial evidence in the record to support DHR's findings and conclusions, overrule these assignments of error.

III

Finally, Charter contends that DHR's determination that Charter's proposal did not conform to CON criteria, standards, and plans was arbitrary and capricious. Charter argues that DHR demonstrated an irrational unfairness by treating Charter differently than other similarly situated applicants and by violating all of the standards set out in G.S. 150A-51. We disagree and overrule this assignment of error.

Agency decisions are arbitrary or capricious when they are " 'whimsical' because they demonstrate a lack of fair and careful consideration; when they fail to indicate 'any course of reasoning in the exercise of judgment,' or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances though within the letter of statutory requirements." *Rate Bureau, supra,* at 420, 269 S.E. 2d at 573 (citations omitted). In light of our resolutions of the other issues in this case, we do not find that DHR acted "whimsically" or unfairly in its disapproval of Charter's proposal. To the contrary, we find that Charter's application was given a careful and thorough review according to the applicable criteria, standards, and plans of the CON law. DHR's decision is amply supported by substantial evidence and reflects reasoned decisionmaking on the part of the agency officials involved. Charter's remaining assignments of error are therefore overruled.

IV

In summary, we hold that DHR's findings, conclusions, and decision to disapprove Charter's application for a certificate of need are supported by substantial evidence and are unaffected by other error of law. The decisions of the Department and the Superior Court are

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

Judge WELLS concurring.

I find the majority opinion to be correct in law and I therefore concur. But, in concurring, I must say two things. One, if I had the power of *de novo* review in this case, I would vote to reverse and to approve Charter Pine's application. Second, I find the administrative review process in the case to be characterized by bureaucratic nit-picking, especially on the issue of support for the proposed facility. This aspect of the matter must be very frustrating for those who are interested in providing additional facilities to accommodate the public need for mental health care.

STATE OF NORTH CAROLINA v. JASON OLEEN BROOKS

No. 8620SC365

(Filed 4 November 1986)

1. **Criminal Law § 91— continuance to prepare for trial—no affidavits filed—continuance properly denied**

In a prosecution of defendant for possession with intent to sell and deliver and sale and delivery of cocaine, the trial court did not err in denying defendant's motions for continuance at the commencement of trial where defendant stated that he needed additional time to obtain an independent chemical analysis of the white powder sold to an undercover agent and additional time to allow his counsel to review the transcript of the probable cause hearing for the principals in the crimes charged, but he filed no affidavits in support of his motions and showed no prejudice from the denial of the continuance.

2. **Bills of Discovery § 6— confession by alleged codefendant—no recess**

The trial court did not err in failing to grant defendant's motion for a recess where defendant alleged that the State failed to provide a statement of a codefendant which it intended to offer at trial, but the witness to whose testimony defendant objected was not a codefendant in a joint trial. N.C.G.S. §§ 15A-903(b), 15A-910(2).

3. **Constitutional Law § 30; Criminal Law § 89.8— promises to perpetrator—statement by perpetrator—failure to disclose promises to defendant—defendant not prejudiced**

Though the State failed to comply with N.C.G.S. § 15A-1054(c) by not disclosing to defendant that a law enforcement official had promised to speak to the district attorney on a witness's behalf and see what he could do regarding a reduction in her sentence in exchange for her "truthful" testimony against defendant, and though the trial court erred in failing to grant a recess when the information became known, such error was not prejudicial where the

court did provide defense counsel with an extended lunch recess to enable him to prepare his cross-examination of the witness, and defendant ultimately was able to attack the credibility of the witness's testimony through the testimony elicited from the law enforcement official on cross-examination.

4. Criminal Law § 42.6— cocaine—chain of custody—admissibility

The State sufficiently established the chain of custody of two plastic bags of cocaine to permit their admission into evidence where an undercover SBI agent testified that he received the two bags from a named person on the morning of 18 June and kept them on his person until he delivered them to a detective in the Sheriff's Department; the detective testified that he received the bags from the SBI agent on the morning of 18 June and that he marked the date and initialed them; and the SBI agent testified that he was absolutely certain that the bags introduced into evidence were the same bags which he had turned over to the detective on 18 June.

5. Criminal Law § 79— defendant as aider and abettor—testimony by perpetrator admissible

In a prosecution of defendant for possession with intent to sell and deliver and delivery of cocaine where the State prosecuted defendant on the theory that he was an aider and abettor, the trial court did not err in admitting evidence that one of the principals had conversations with defendant concerning cocaine when she first met him and that defendant and his wife were present at the principals' house the night an SBI agent first contacted them about purchasing cocaine, since such evidence was relevant to show defendant's motive, presence, and relationship to the actual perpetrators, as well as guilty knowledge. N.C.G.S. § 8C-1, Rules 401 and 403.

6. Criminal Law § 79— defendant as aider and abettor—statements by perpetrator—order of testimony immaterial

The trial court did not err by allowing an SBI agent to testify concerning statements made by the actual perpetrators of the crime charged and by allowing one perpetrator to testify about statements made by defendant, since the State's evidence established a *prima facie* case of conspiracy, and it was immaterial whether the testimony of acts or declarations of a co-conspirator was admitted before or after the conspiracy was established. N.C.G.S. § 8C-1, Rule 801(d).

7. Narcotics § 4— possession with intent to sell and deliver and delivery of cocaine—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for possession with intent to sell and deliver and delivery of cocaine where it tended to show that one perpetrator asked defendant to lend her husband his truck or take him to get some cocaine; defendant followed the perpetrator back to her house where her husband entered defendant's truck and the two left; when the two returned, the husband indicated to his wife, with defendant present, that he and defendant had gone to Charlotte and purchased cocaine there; the husband, wife and defendant returned to defendant's residence to use more cocaine and weigh out cocaine on a scale in the kitchen; and the husband then left to deliver cocaine to the undercover SBI agent.

8. Criminal Law § 138.14— maximum sentence—one aggravating factor—no mitigating factors—sentence proper

The trial court properly found that the aggravating circumstance of prior convictions, in the absence of any factor in mitigation, warranted the imposition of a maximum term of ten years for sale and delivery of cocaine.

APPEAL by defendant from *Freeman, Judge*. Judgments entered 7 November 1985 in UNION County Superior Court. Heard in the Court of Appeals 20 October 1986.

Defendant was charged in separate indictments with possession with intent to sell and deliver cocaine and sale and delivery of cocaine in violation of N.C. Gen. Stat. § 90-95(a)(1). Defendant was tried on the theory that he was an aider and abettor in the commission of these offenses. The State's evidence tended to show, in pertinent part, that:

On 17 June 1985, while working undercover, Agent Hawkins of the State Bureau of Investigation contacted Ronald McManus about purchasing some cocaine. Hawkins had purchased cocaine from McManus approximately one week before. Hawkins arrived around midnight at the McManus residence with Linda McNamee, an informant. Hawkins and McNamee met with McManus and his wife, Pam, who was also present. Hawkins asked Ronald to get him an ounce and an eighth of cocaine. Ronald indicated that he needed to make arrangements right away because "his man would not deal if it got too late." Pam then announced that she would go get defendant, whom she referred to as "the man in the blue and white Blazer." The McManuses had agreed earlier that she would contact defendant and ask him to drive her husband or lend her husband his truck so that he could obtain the cocaine. Hawkins paid Ronald McManus $2,200 for the cocaine, and then he and Linda McNamee left.

Pam McManus went to defendant's house and relayed her husband's message to him. Defendant asked, "Is he really going to do it, Pam?" and then laughed. Pam answered affirmatively, and defendant indicated that he would go to her house. Defendant also stated that he would remain in his truck because he "did not want these people [Hawkins and McNamee] to see him." When defendant arrived, Ronald entered his truck and told Pam that they would return around 2:00 a.m.

Pam began to worry when her husband and defendant did not return. She went out looking for them and ultimately found them at another friend's house. Both men were "high" on cocaine. Ronald stated that they had been to Charlotte, visited a friend of Ronald's, and purchased cocaine.

Ronald, Pam, and defendant drove to a nearby field in defendant's truck where defendant injected Pam with cocaine. The three then returned to defendant's house where they used more cocaine. During this time, defendant's wife, Nora, weighed out cocaine on a scale in the kitchen.

Ronald called Agent Hawkins around 7:30 a.m. and arranged for the delivery of the cocaine at a car wash in Monroe. Ronald and Pam met Hawkins at the car wash around 8:00 a.m. Hawkins entered their car, and, while the three drove around the area, Ronald handed him two plastic baggies containing white powder. Hawkins transferred the bags to Detective Blume of the Union County Sheriff's Department. Blume, in turn, sent the bags to an S.B.I. laboratory where a chemical analysis showed that the white powder in the bags contained cocaine.

Defendant presented evidence through Ronald McManus and others that he had no involvement in the cocaine sale to Agent Hawkins.

At the commencement of trial, the court denied defendant's motions for a continuance. The court also denied defendant's motion for a recess when the State called Pam McManus as a witness and denied defendant's motion to dismiss at the close of all the evidence.

The jury returned verdicts of guilty on all charges. Defendant appealed from judgments of imprisonment.

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

W. David McSheehan for defendant-appellant.

WELLS, Judge.

[1] Defendant contends the trial court erred in denying his motions for a continuance at the commencement of his trial. Defendant did not submit an affidavit in support of these motions.

Counsel for defendant simply stated that he needed time to examine what had been produced in discovery. In particular, counsel stated that he needed additional time in order to obtain an independent chemical analysis of the white powder sold to Agent Hawkins.

Defendant contends on appeal that because the court refused to grant his motions for a continuance, he was denied his constitutional right to effective assistance of counsel in that he was not given a reasonable time to investigate and prepare his case. We disagree.

Ordinarily, a motion for a continuance is a matter within the trial court's discretion, and thus any ruling is not reversible absent an abuse of discretion. *State v. Massey*, 316 N.C. 558, 342 S.E. 2d 811 (1986). However, if a motion to continue is based on a constitutional right as is the case here, then it presents a question of law which is fully reviewable on appeal. *Id. See also State v. Covington*, 317 N.C. 127, 343 S.E. 2d 524 (1986). "A motion for a continuance should be supported by an affidavit showing sufficient grounds for the continuance." *State v. Kuplen*, 316 N.C. 387, 343 S.E. 2d 793 (1986). "A continuance is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts, but a mere intangible hope that something helpful to a litigant may possibly turn up affords no sufficient basis for delaying a trial." *State v. Pollock*, 56 N.C. App. 692, 289 S.E. 2d 588, *appeal dismissed*, 305 N.C. 590, 292 S.E. 2d 573 (1982), *citing State v. Tolley*, 290 N.C. 349, 226 S.E. 2d 353 (1976). Even if a trial court erroneously denies a motion for a continuance, a defendant still must show that he was prejudiced thereby. *Massey, supra.*

We hold that the defendant has not shown that the denial of his motions for a continuance was prejudicial error or an abuse of the trial court's discretion. Defendant filed no affidavits in support of his motions. We could surmise that, by conducting his own analysis, defendant sought to challenge the State's contention that the white powder sold to Agent Hawkins was indeed cocaine. However, defendant offered evidence through the direct testimony of Ronald McManus that the white powder sold to Agent Hawkins was cocaine. The nature of the substance thus was never a material issue in the case.

Defendant also contends that his counsel lacked sufficient time to review the transcript of the probable cause hearing for Ronald and Pam McManus, which defendant requested during discovery and received two days before trial. Additionally, defendant contends that the "record . . . reflects that the time between the indictment and . . . trial . . . was insufficient for the [d]efendant to prepare any defense. . . ." However, in this regard neither of defendant's oral motions made at the commencement of trial was "supported by some form of detailed proof indicating sufficient grounds for . . . delay." *State v. Searles*, 304 N.C. 149, 282 S.E. 2d 430 (1981). Defendant raises these specific contentions for the first time on appeal. Further, defendant has not shown that counsel's performance at trial or prior to trial was in any way deficient. *See State v. Teasley*, 82 N.C. App. 150, 346 S.E. 2d 227 (1986). Accordingly, this assignment of error is overruled.

In a related assignment of error, defendant contends the trial court erred in denying his motion for a mistrial. Defendant argues that "because the trial court . . . erroneously denied his motion[s] for a continuance," he was entitled to a mistrial. This contention is premised on defendant's "continuance" argument, *supra*, and it fails for the reasons set forth in discussing that argument.

[2] Defendant contends the court erred in failing to grant his motion for a recess pursuant to N.C. Gen. Stat. § 15A-910(2). We disagree.

When the State called Pam McManus to testify, defendant moved for a recess arguing that the State had failed to comply with an order for discovery entered by the court on 5 November 1985. Specifically, defendant maintained that the State failed to comply with paragraph "c" of the 5 November Order which required the State to provide "[a]ll written, recorded, or oral statements of a codefendant which the State intends to offer at trial, as provided by G.S. 15A-903(b)." N.C. Gen. Stat. § 15A-903(b), however, is limited to joint trials of codefendants. Defendant acknowledges this limitation in G.S. 15A-903(b) but contends that the 5 November Order effectively modified this section, presumably by its failure to mention expressly the "joint trial" limitation. However, we disagree with defendant's interpretation of the 5 November Order and hold that G.S. 15A-903(b) is inapplicable because defendant and Pam McManus were not tried jointly.

[3] Defendant further contends that the court should have granted a recess pursuant to N.C. Gen. Stat. § 15A-1054(c) which provides as follows:

> When a prosecutor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess.

When the State called Pam McManus to testify, counsel for defendant also moved for a recess pursuant to G.S. § 15A-1054 on grounds of surprise. At this point, the prosecutor, counsel for defendant and the court engaged in the following colloquy:

> [Counsel for defendant]: If it please the Court, under 15A-1054, subsection c, the prosecutor has not disclosed to us any terms of any arrangements that they have made with this lady.
>
> [State]: If Your Honor please, it appears that 15A-1054 applies when an agreement has been made. There has been no agreement made at this time.
>
> [Counsel for defendant]: I believe we're entitled to explore that possibility with her before she starts testifying.
>
> [State]: I do not see where he sees that in 1054.
>
> The Court: You're just stating as an officer of the court that there's been no agreement, no grant of immunity or charge reduction for this witness?
>
> [State]: No promises have been made to her at all, if Your Honor please.
>
> The Court: The Court will deny the motion.

On cross-examination Pam McManus testified as follows:

> Q. What promises, if any, have you been told by Mr. Hawkins or anyone else related to the State about what they would do for you if you testified?

A. Not any at all.

Q. Have you discussed that?

A. Have we discussed it?

Q. Yes, ma'am.

A. No.

Q. Have you asked them—when was it that you contacted the State about testifying?

A. Thursday, a week ago.

Q. Did you contact them or did they contact you?

A. I contacted them.

Q. And did you ask them if they were going to give you any help?

A. I asked for protection for my life.

Q. Did you ask them if they were going to give you any help or reduction or sentence concessions in this case?

A. No.

Q. You didn't mention that to them at all?

A. No.

She further testified:

Q. Is it not true, Ms. McManus, that the State has agreed to dismiss your case if you come up here and testify against this defendant?

A. No. It is not true.

. . .

Q. What have you hoped to gain in the way of a sentence reduction or a concession in your case from your testimony in this case?

A. I don't hope to gain nothing but my life.

Q. Your life?

A. Yes.

She also acknowledged that the State had provided her with protection, food and lodging and that it had paid for two long distance telephone calls which she made.

At the close of defendant's evidence the State recalled Agent Hawkins as a rebuttal witness. On cross-examination, Hawkins acknowledged that he had made several attempts to persuade Pam McManus to testify. In this regard, Hawkins also acknowledged that he made the same "offer" to both Pam and Ronald McManus, namely: "I can't promise you any concessions now, but I will speak to the prosecutor about your cooperation and see about a reduction in your sentence." Hawkins subsequently explained: "I told Ms. McManus that upon her truthful testimony in court to the statement that she did give me, that I would speak with the District Attorney regarding her assistance in this case . . . ."

In *State v. Lowery*, 318 N.C. 54, 347 S.E. 2d 729 (1986), defendant contended that the court abused its discretion by denying his motion for disclosure by the State of all promises and inducements offered to Vincent Johnson in return for his testimony at trial, pursuant to G.S. § 15A-1054(c). Our Supreme Court disagreed and held that defendant's rights under G.S. § 15A-1054(c) were not violated because

> [(1)] there [was] no formal agreement between the State and Vincent Johnson [and (2)] defendant's counsel was aware sufficiently in advance of trial that the witness was going to testify for the State under a hope of leniency to have brought out in cross-examination the circumstances under which the testimony was being offered.

Lowery, supra. The Court further explained:

> All of the evidence produced by the defendant and Small shows that Johnson and his attorney were cooperating with the prosecution without the benefit of a formal agreement but with the hope, perhaps even an expectation based upon familiarity with the District Attorney's practices, that if Johnson testified in the case against the defendant and Small, the State would enter into a plea bargain afterwards.

Id.

As in *Lowery, supra,* there is no evidence here of a formal agreement between the State and Pam McManus at the time she testified as a witness at defendant's trial. However, unlike in *Lowery,* a law enforcement official, Agent Hawkins, promised to speak to the district attorney on her behalf and see what he could do regarding a reduction in her sentence in exchange for her "truthful" testimony against defendant.

We have stated previously that: "Promises by prosecutors of assistance or leniency, even if tentative, might be interpreted by a witness as contingent upon the nature of his [or her] testimony." *State v. Spicer,* 50 N.C. App. 214, 273 S.E. 2d 521, *appeal dismissed,* 302 N.C. 401, 279 S.E. 2d 356 (1981). Similarly, this promise by Agent Hawkins may very well have induced Pam McManus to testify on behalf of the State and also may have influenced the nature of her testimony. Pam McManus' credibility as a witness was an important issue in the prosecution of defendant and any promise of assistance which might be interpreted by her as contingent upon the nature of her testimony was relevant to her credibility. We thus hold that the State failed to comply with G.S. § 15A-1054(c) by not disclosing this information. However, defendant ultimately was able to attack the credibility of the testimony of Pam McManus through the testimony elicited from Agent Hawkins on cross-examination as a rebuttal witness. Further, the record reflects that the court did provide counsel for defendant with an extended lunch recess to enable him to prepare his cross-examination of Ms. McManus.

We therefore hold that the court's failure to grant a recess in this instance does not constitute prejudicial error. We are not persuaded that had this error not been committed a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a). This assignment of error is overruled.

[4] Defendant contends the court erred in admitting two plastic bags containing the cocaine which Ronald McManus delivered to Hawkins (State's exhibits two and three), because the State failed to establish the requisite chain of custody. Defendant asserts that the State failed to identify these exhibits as the objects that Ronald McManus delivered to Hawkins. In particular, defendant emphasizes that Hawkins did not place any identifying marks on the bags and that some time elapsed between delivery of the bags

to Hawkins and the transfer of them from Hawkins to Detective Blume of the Union County Sheriff's Department. Defendant does not challenge the sufficiency of the evidence on chain of custody after the time of delivery to Blume.

We hold that the evidence presented by the State regarding the chain of custody " 'is sufficient to reasonably support the conclusion that the substance analyzed [was] the same as that obtained from defendant [and therefore] both the substance and the results of the analysis [were properly] admissible.' " *Teasley, supra, quoting State v. Callahan*, 77 N.C. App. 164, 334 S.E. 2d 424 (1985). In particular, Hawkins testified that he received the two bags containing white powder from Ronald McManus on the morning of 18 June and "kept [them] on [his] person . . ." until he delivered them to Blume. Blume testified that he received the bags from Hawkins on the morning of 18 June and that he marked the date and initialed them. Hawkins testified that he was absolutely certain that exhibits two and three were the same bags which he had turned over to Blume on 18 June. As in *Teasley, supra*, any weaknesses here in the chain of custody regarding the actions or inactions of Hawkins go to the weight rather than the admissibility of the evidence. This assignment of error is overruled.

Defendant contends that on three occasions the court "infringed on his right to full and effective cross-examination of the State's witness Pam McManus." Our review of these exceptions reveals no prejudicial error.

The scope of cross-examination is limited to those matters which are relevant to the issues before the jury. N.C. Gen. Stat. § 8C-1, Rule 611(b) of the N. C. Rules of Evidence; *State v. Hosey*, 79 N.C. App. 196, 339 S.E. 2d 414, *cert. granted*, 316 N.C. 382, 342 S.E. 2d 902 (1986). Further,

> The wide latitude accorded the cross-examiner "does not mean that all decisions with respect to cross-examination may be made by the cross-examiner." . . . Rather, the scope and duration of cross-examination rest largely in the discretion of the trial judge. . . . "The judge has discretion to ban unduly repetitious and argumentative questioning, as well as inquiry into matters of only tenuous relevance." [Citations omitted.]

State v. Satterfield, 300 N.C. 621, 268 S.E. 2d 510 (1980).

Defendant contends the court improperly sustained the State's objection to his question regarding the kind of medication prescribed for the witness while she was "coming out of [her cocaine] addiction." Defendant also asserts that the court improperly sustained the State's objection to his question concerning the distance between the witness' house and downtown Monroe. The record indicates that the witness had already testified substantially on these matters during cross-examination.

Defendant lastly contends that the trial court improperly sustained the State's objection concerning the witness' clarity of mind since 18 June 1985. Assuming, *arguendo*, that this contention has some merit, defendant was not prejudiced thereby because the witness testified that cocaine caused her to lose control over her mind and that she had used cocaine after 18 June 1985. In sum, "We cannot say from an examination of this record that the [court] abused [its] discretion or deprived defendant of a fair trial by the rulings here challenged." *Satterfield, supra.* Accordingly, this assignment of error is overruled.

Defendant contends the court erred in refusing to grant his motion to strike all uncorroborative portions of a written statement from Pam McManus which was read to the jury by Agent Hawkins. The State offered the statement to corroborate the witness' testimony. Defendant neither moved to strike or exclude any specific part of the statement nor called "to the attention of the trial court the objectionable part" of the witness' statement. *State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). Accordingly, defendant may not now object on appeal to the introduction of specific portions of the witness' statement. N.C. Gen. Stat. § 8C-1, Rule 103(a)(1); *Britt, supra. See also State v. Brooks*, 260 N.C. 186, 132 S.E. 2d 354 (1963). In any event, the portions of Ms. McManus' statement which defendant asserts are noncorroborative actually represent slight variations which do not render it inadmissible. *Britt, supra.* This assignment of error is overruled.

Defendant contends the court erred by admitting, over his objection, evidence "which lacked logical relevance and created the substantial danger of unfair prejudice to the defendant." Specifically, defendant asserts that the court should not have admitted evidence that: (1) Agent Hawkins had previously pur-

chased cocaine from Ronald McManus before the 17-18 June transaction; (2) Agent Hawkins told McManus on 17 June that he wanted to purchase additional amounts of cocaine; (3) Pam McManus had conversations with defendant concerning cocaine when she first met him; (4) Defendant and his wife were present at the McManuses' house the night Agent Hawkins first contacted them about purchasing cocaine; (5) Defendant kept "scales" at his residence; and (6) Defendant and Ronald McManus had a fist fight approximately nine years earlier. Defendant argues that this evidence should have been excluded under N.C. Gen. Stat. § 8C-1, Rules 401, 402 and 403. We disagree.

Regarding the first two items enumerated above, defendant has waived his right to raise on appeal his objections to this evidence because the same evidence was later admitted without objection. *State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). Ronald McManus testified without objection that he sold cocaine to Agent Hawkins around 13 June and that Hawkins asked to purchase additional amounts of cocaine from him on 17 June. "Where evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 319 S.E. 2d 584 (1984). Although the North Carolina Rules of Evidence do not address this rule explicitly, there is no indication that they are intending to change it. 1 Brandis on North Carolina Evidence § 30 (1983 Supp.). Brandis suggests that this rule simply illustrates the provision in N.C. Gen. Stat. § 8C-1, Rule 103(a) which requires an objecting party to show that the court's ruling affects a substantial right. *Id.*

[5] Regarding items 3, 4 and 5 above, we hold that this evidence was clearly admissible under G.S. 8C-1, Rules 401 and 403. In general, evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence is relevant. G.S. § 8C-1, Rule 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, conclusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. G.S. § 8C-1, Rule 403. Unfair prejudice has been defined as an undue tendency to suggest decision on an improper basis, commonly,

though not necessarily, an emotional one. Commentary to N.C. R. Evid. 403. Whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986).

The State prosecuted defendant on the theory that he was an aider and abettor in the commission of the crimes charged. This Court has stated that:

> Circumstances to be considered in determining whether a defendant aided and abetted the actual perpetrator of a crime include the following: (1) the relationship of the defendant to the actual perpetrator; (2) the motive tempting the defendant to assist in the crime; (3) presence of the defendant at the time and place of the crime; and (4) conduct of the defendant both before and after commission of the crime. [Citation omitted.]

State v. Cassell, 24 N.C. App. 717, 212 S.E. 2d 208, *appeal dismissed*, 287 N.C. 261, 214 S.E. 2d 433 (1975). Further, "the charge of possession with intent to sell involves guilty knowledge, which in drug cases ordinarily must be shown by circumstantial evidence indicating involvement in drug traffic." *State v. Shaw*, 53 N.C. App. 772, 281 S.E. 2d 702, *disc. rev. denied*, 304 N.C. 590, 289 S.E. 2d 565 (1981).

In light of the charges against defendant and the theory of prosecution we hold that this evidence was relevant in that it tended to show defendant's motive, presence, and relationship to the actual perpetrators, as well as guilty knowledge. *See Shaw, supra.* Further, we perceive no danger of unfair prejudice that substantially outweighed the probative value of this evidence. *State v. Teasley, supra.*

Lastly, we hold that the evidence concerning a prior altercation between defendant and Ronald McManus, though arguably not relevant, was not sufficiently prejudicial as to affect the outcome of the trial. Accordingly, this assignment of error is overruled.

[6] Defendant contends the court erred by allowing Agent Hawkins to testify concerning statements made by Ronald and Pam McManus and by allowing Pam McManus to testify about statements made by defendant. Specifically, defendant contends these

statements by defendant's co-conspirators, although made in furtherance of the conspiracy, were inadmissible because "the State failed to demonstrate that a conspiracy existed between the defendant and the codefendants *before* the State's witnesses testified to hearsay statements." (Emphasis added.) We disagree.

Defendant acknowledges that G.S. § 8C-1, Rule 801(d) provides that hearsay statements made by a co-conspirator in furtherance of the conspiracy are admissible when offered "against a party . . ." as an exception to the hearsay rule. Further, our Supreme Court has stated:

> When the State shows a *prima facie* conspiracy, the declarations of the co-conspirators in furtherance of the common plan are competent against each of them. . . . This is so even where the defendants are not formally charged with a criminal conspiracy. [Citations omitted.]

State v. Covington, 290 N.C. 313, 226 S.E. 2d 629 (1976).

The State's evidence here showed that defendant and the McManuses were carrying out a plan or agreement to possess cocaine with the intent to sell and deliver it and a plan or agreement to sell and deliver it. This evidence established a *prima facie* conspiracy. *See id.* Further, while a *prima facie* case of conspiracy must be made out before the close of the State's evidence, "our courts often permit the State to offer the acts or declarations of a co-conspirator before the *prima facie* case of conspiracy is sufficiently established." *State v. Polk*, 309 N.C. 559, 308 S.E. 2d 296 (1983). The trial court thus properly admitted the statements by defendant's co-conspirators. This assignment of error is overruled.

[7] Defendant contends the trial court erred in denying his motions to dismiss, at the close of all the evidence, the charges of possession of cocaine with intent to sell and deliver and sale and delivery of cocaine in violation of G.S. § 90-95(a)(1). Relying on *State v. Parker*, 268 N.C. 258, 150 S.E. 2d 428 (1966) and *State v. LeDuc*, 306 N.C. 62, 291 S.E. 2d 607 (1982), defendant contends that:

> The State's entire case rested on the inference that since the defendant drove his truck to the house of Mr. McManus, picked up Mr. McManus as a passenger outside the McManus

house, and drove the truck away from the house, the defendant went to Charlotte with Mr. McManus and purchased an ounce and a half of cocaine.

However, through the testimony of Pam McManus, the State offered direct evidence of defendant's participation in the crimes charged. Pam McManus testified that on the night before Agent Hawkins bought the cocaine, she went to defendant's house and requested that he lend her husband his truck or take him to get some cocaine. Defendant followed Pam McManus back to her house where Ronald McManus entered defendant's truck and the two left. When the two returned, Ronald McManus indicated to his wife, with defendant present, that he and defendant had gone to Charlotte, and purchased cocaine there. Pam, Ronald and defendant returned to defendant's residence to use more cocaine and weigh out cocaine on a scale in the kitchen. Ronald McManus then left to deliver cocaine to Hawkins. The foregoing evidence shows that the State's case did not rest on inference but rather on direct evidence of defendant's participation. Defendant's argument thus is without merit. Accordingly, this assignment of error is overruled.

[8] Defendant contends the court erred in sentencing him for his conviction for sale and delivery of cocaine to the maximum term of ten years. Specifically, defendant contends that the sole aggravating factor found, his prior convictions, is not sufficient to "support such a severe sentence." However, "[e]xcept for maximum sentence limitations in G.S. 14-1.1, the severity of a sentence imposed pursuant to the Fair Sentencing Act, insofar as it is based on a weighing of aggravating and mitigating factors is within the discretion of the judge." *State v. Salters*, 65 N.C. App. 31, 308 S.E. 2d 512 (1983), *disc. rev. denied*, 310 N.C. 479, 312 S.E. 2d 889 (1984). As in *Salters*, we hold that the court "properly found that this aggravating circumstance, in the absence of any factor in mitigation, warranted the imposition of a term that exceeded the presumptive." *Id.* Accordingly, this assignment of error is overruled.

No error.

Judges BECTON and ORR concur.

TONY C. HARRIS v. DUKE POWER COMPANY, A CORPORATION

No. 8626SC300

(Filed 4 November 1986)

Master and Servant § 10.1— discharge from employment—employment terminable at will

Plaintiff failed to state a claim for breach of his employment contract where plaintiff's employment was terminable at will, and "Rules of Conduct" promulgated by defendant, which plaintiff contended were made an express part of his original contract of employment and which restricted defendant's right to terminate, stated by their own terms that their application was within defendant's discretion and stated that discharge from employment could take place "if warranted."

Judge PHILLIPS dissenting.

APPEAL by plaintiff from *Saunders, Chase B., Judge,* MECKLENBURG County Superior Court. Order entered 29 January 1986. Heard in the Court of Appeals 28 August 1986.

Plaintiff brought this action as a result of his discharge from employment by defendant Duke Power Company (Duke). In his complaint, plaintiff alleged that he had been employed by Duke since 1977, and had worked in the pipe fabrication shop of Duke's Catawba Nuclear Plant at Rock Hill, S.C. since 1983. He alleged that at the time of his employment, and throughout the course thereof, Duke maintained a written personnel policy providing, *inter alia,* for the terms and conditions of termination of employment for work-related conduct. According to the complaint, the policy categorized rules infractions into three classes, Class A, Class B, and Class C. Three Class A infractions within twelve months could result in termination of employment as could two Class B infractions within the same period. The most serious offenses were categorized as Class C offenses; an employee committing a single Class C offense was subject to discharge.

Plaintiff alleged that during the month of October, 1984, he performed a "tack" as requested by a fitter. Sometime later, he learned that the "tack" was being investigated, and he was questioned about it by two of Duke's management employees. On 14 November 1984, he was told by his foreman that his employment was being terminated for "B" and "C" violations, but Duke refused to provide him with a termination notice or to explain what

violations he had committed. He alleged that at the time of his discharge, he had no active "A" or "B" violations on his record. At most, he alleged, the "tack" which he performed amounted to "Concealing defective work," a Class B violation. Plaintiff alleged that the written personnel policy was made a part of his employment contract and that he had been discharged in violation thereof.

Duke moved to dismiss the complaint pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. From an order granting Duke's motion and dismissing the action, plaintiff appeals.

Russell, Sheely & Hollingsworth by Michael A. Sheely, and Edlestein & Payne, by M. Travis Payne, for plaintiff appellant.

Mullins & Van Hoy, by Philip M. Van Hoy, and Robert M. Bisanar for defendant appellee.

MARTIN, Judge.

Plaintiff excepted and assigned error to (1) the dismissal of his tort claim for wrongful discharge, and (2) the dismissal of his claim for breach of his employment contract. He has not presented or discussed the issue of dismissal of his tort claim and we, therefore, conclude that he has abandoned that claim in this court. N.C. R. App. P. 28(a). The sole remaining issue is whether the complaint was sufficient to state a claim for relief against Duke for breach of its employment contract with plaintiff. We hold that it was not and affirm the order of the trial court.

In order to withstand a motion to dismiss made pursuant to Rule 12(b)(6), the complaint must give sufficient notice of the events and circumstances from which the claim arises, and must make allegations sufficient to satisfy the substantive elements of at least some recognizable claim. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); *Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983). In considering the motion, the allegations contained within the complaint must be treated as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282, 79 A.L.R. 3d 651 (1976).

Plaintiff contends that his complaint was sufficient to survive the motion to dismiss because he alleged that the personnel policy

promulgated by Duke became a part of his employment contract, and that Duke's failure to follow the terms and conditions for termination set out in the policy constituted a breach of his contract. We hold, however, that even if the policy was made part of the contract, plaintiff has no right to relief because his employment was terminable at Duke's will.

With few and narrow exceptions, North Carolina adheres to the common law rule that employment contracts of indefinite duration are terminable at the will of either party. *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403 (1971); *Hogan v. Forsyth Country Club*, 79 N.C. App. 483, 340 S.E. 2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E. 2d 14 (1986); *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986). "Where a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause, except in those instances in which the employee is protected from discharge by statute." *Smith v. Ford Motor Co.*, *supra*, at 80, 221 S.E. 2d at 288, 79 A.L.R. 3d at 659.

In *Roberts v. Mills*, 184 N.C. 406, 114 S.E. 530 (1922), it was recognized that an additional agreement, which was itself enforceable under contract law, could restrict the employer's right to terminate at will. In that case, the employer offered in January to pay a 10% bonus at Christmas of the same year to employees employed continuously during that year. The plaintiff was discharged in September without bonus pay. The plaintiff alleged that he had intended to quit his job in January but stayed on because of the bonus. The Court ruled that while the agreement did not alter the terminable at will nature of the employment contract, it did create a right *quantum meruit* for the bonus that the plaintiff had earned up to the time of discharge.

More recently, this court held that where an employee gave additional consideration beyond the usual obligation of service to the employer, such additional consideration could give rise to a contract of employment for so long as the services were performed satisfactorily even though no definite term was agreed upon. *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E. 2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E. 2d 490 (1985). In *Sides*, the plaintiff alleged that she moved to North Carolina from Michigan in reliance upon her defendant-employer's promises that

she could be discharged only for incompetence. The move from Michigan was, according to the *Sides* court, sufficient additional consideration to remove the plaintiff's employment contract from the terminable-at-will rule. Since the plaintiff alleged that she was discharged for reasons other than unsatisfactory performance, her complaint was sufficient to state a claim for breach of the employment contract.

In *Walker v. Westinghouse, supra,* another panel of this court suggested that unilaterally imposed employment manuals or policies, if expressly included in the employment contract, could restrict an employer's right to terminate an employee at will. Thus, in *Trought v. Richardson,* 78 N.C. App. 758, 338 S.E. 2d 617 (1985), *disc. rev. denied,* 316 N.C. 557, 344 S.E. 2d 18 (1986), the court recognized a claim for breach of an employment contract based on the provisions of an employer's personnel policy manual. In that case, the plaintiff alleged that she was required, at the time of her employment, to sign a statement that she had read the manual and agreed to abide by the regulations and benefits contained therein. The manual itself provided that an employee could be terminated *only* for cause, and that certain procedures were required for termination. Though the court did not expressly say as much, it apparently felt that because plaintiff was required to sign the statement, the manual became an express part of her contract of employment. The provisions of the personnel policy relating to the reasons and procedures for termination of employment were sufficiently specific to amount to an express contractual limitation on the right of the employer to terminate the plaintiff at its will. The plaintiff's allegations that she was discharged for reasons other than "for cause" and in violation of the required procedures were deemed sufficient to state a claim for breach of her employment contract.

In the present case, plaintiff does not contend that he furnished any consideration to Duke, other than the usual obligation of service, or that he entered into any supplemental agreement, in addition to his original contract of employment, which would restrict Duke's right to terminate his employment at its will. Thus, our decision in *Sides* affords him no relief. Rather, plaintiff alleges that the "Rules of Conduct," unilaterally promulgated by Duke, were made an express part of his original contract of employment and that the "Rules" restrict Duke's right to terminate. We find no such restriction.

The "Rules of Conduct," attached to plaintiff's complaint, contain provisions similar to those in *Walker v. Westinghouse, supra.* They state that they "are not intended to be all-inclusive. They serve as examples of the types of offenses that require disciplinary action." Discharge from employment is provided for "if warranted." The application of the "Rules of Conduct" is, by the terms thereof, within Duke's discretion rather than restrictive of its right to terminate employment. *See Walker, supra.* Moreover, neither the allegations of the complaint nor the provisions of the "Rules of Conduct" disclose any representation that Duke would not discharge plaintiff except "for cause." Thus, our decision in *Trought v. Richardson, supra,* is not applicable and we are bound by the holding in *Walker.* Plaintiff's employment, being of indefinite duration and not otherwise protected from termination by statute or contract, was terminable at Duke's will and the trial court properly dismissed plaintiff's claim for breach of contract. *Still v. Lance, supra, Nantz v. Employment Security Comm.*, 290 N.C. 473, 226 S.E. 2d 340 (1976).

As ably discussed by Judge Eagles in *Walker*, we recognize that a number of jurisdictions are, upon varying theories, limiting or abandoning the application of the employment-at-will doctrine, particularly where employee manuals are involved. *See also,* Note, *Employee Handbooks and Employment-at-Will Contracts,* 1985 Duke L.J. 196 (1985). We must, however, apply the law of North Carolina as established by our Supreme Court. *Cannon v. Miller,* 313 N.C. 324, 327 S.E. 2d 888 (1985). Accordingly, we hold that plaintiff has failed to state a cognizable claim for breach of his employment contract.

Finally, we note that defendant has cited as authority, and quoted extensively from, an unreported opinion of this court filed in 1984. We have declined to consider the cited case in reaching our decision and remind counsel of the provisions of Rule 30(e) of the North Carolina Rules of Appellate Procedure, which explicitly states: "[a] decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose. . . ."

Affirmed.

Judge WELLS concurs.

Judge PHILLIPS dissents.

Judge PHILLIPS dissenting.

In my opinion this is a simple, well pleaded breach of contract suit that was improperly dismissed at the pleading stage. Except for legal inhibitions and limitations irrelevant to this case, employers and employees no less than others have the right under our law to contract as they see fit. Plaintiff's complaint clearly and explicitly alleges that the parties entered into a valid employment contract in which it was agreed that he would be dismissed only for certain stated causes, that the defendant breached the contract by firing him for a cause not agreed to, and plaintiff was damaged as a consequence. Thus, a claim for which our law has always authorized relief has been alleged and plaintiff is entitled to the opportunity to prove it.

Nor in my opinion is the case controlled by *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E. 2d 79 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E. 2d 39 (1986); because in *Walker* the employer expressly retained the discretionary right to do as it saw fit, which this employer did not do so far as plaintiff's complaint shows. Furthermore, if the parties did contract that plaintiff would be discharged only upon certain conditions, as plaintiff alleges, the employment was not nevertheless at will as the majority states, but an employment subject to being terminated upon the conditions stated, a different matter altogether. For if there was a valid contract it necessarily follows that defendant was obligated to follow the contract and did not have the right to violate it at will. I also disagree with the determination that as a matter of law the alleged contract was entered into without consideration. The complaint alleges that there was mutual consideration for the contract and in my view the allegation is not necessarily unprovable. Certainly, protection against being arbitrarily discharged from one's job can be a valuable consideration to anyone accepting employment, and acquiring a stable and secure work force can be a valuable benefit to any employer. Whether the parties entered into a valid contract and, if so, what its terms and considerations were are not questions of law, but fact, and I vote to return the case to the trial court for resolution in the usual way.

GREEN HI-WIN FARM INC. AND EDDIETRON, INC. v. GILMER L. NEAL, JR., STEPHEN M. WESTMORELAND AND WIFE JANICE C. WESTMORELAND, DUKE POWER COMPANY, AND STEVEN C. MOORE AND WIFE DORIS H. MOORE

No. 8621SC336

(Filed 4 November 1986)

1. **Appeal and Error § 31.1— jury instructions—failure to object**

Defendant in a processioning proceeding could not complain on appeal that the trial court failed to give equal stress to his evidence tantamount to an implicit expression of opinion or that the charge was incomplete, since the court, at the close of the jury charge, asked each party out of the presence of the jury if they had any objections to the jury charge and counsel for defendant responded negatively. Appellate Rule 10(b)(2).

2. **Boundaries § 10.1— expert witness surveyor—opinion testimony admissible**

The trial court in a processioning proceeding did not err in admitting over objection the opinion of the expert witness surveyor as to the location of the beginning point of defendant's property, since such testimony was not an opinion embracing the ultimate issue but was instead an elaboration of an earlier statement made on direct examination.

3. **Rules of Civil Procedure § 53— processioning proceeding—compulsory reference not required**

There was no merit to defendant's contention in a processioning proceeding that, because the case involved a complicated question of boundary, the court was compelled to order a compulsory reference pursuant to N.C.G.S. § 1A-1, Rule 53(a)(2)(c), since the word "may" as used in the rule connotes permissive and not mandatory power in the court to grant the reference.

APPEAL by defendant Gilmer L. Neal, Jr. from *Rousseau, Judge.* Judgment entered 13 August 1985, Superior Court, FORSYTH County. Heard in the Court of Appeals 28 August 1986.

Plaintiffs instituted this processioning proceeding pursuant to G.S., Chap. 38 on 7 July 1980 to establish the true boundary between the western edge of their properties as it abuts the eastern boundary of defendant Gilmer L. Neal, Jr.'s property. Defendant Neal filed answer disputing plaintiffs' boundary contentions. No boundary dispute exists between plaintiffs and defendants Stephen M. Westmoreland and wife Janice C. Westmoreland; Duke Power Company; Steven C. Moore and wife, Doris H. Moore, who were named party defendants merely as possible affected adjoining property owners. Defendant Duke Power Com-

pany filed answer averring that the boundary between the properties in question is as contended by plaintiffs. On 29 October 1980, Joyce Engineering and Mapping Company, Inc., the court appointed surveyor, presented a report and map to the court regarding the property at issue as ordered. On 13 November 1980, A. E. Blackburn, Clerk of Forsyth Superior Court, confirmed the map presented by Joyce Engineering and Mapping Company as the true and accurate description of the disputed boundary. This map was consistent with plaintiffs' contentions. On 25 November 1980, defendant Gilmer Neal, Jr. appealed to Superior Court for trial de novo and requested a trial by jury. On 3 November 1983, the court granted defendant Neal's motion pursuant to G.S. 38-3 and ordered the court appointed surveyor to survey the boundary line in accordance with his contentions and present a plat of those contentions to the court. This matter came to trial during the 10 June 1985 session of Forsyth County Superior Court. From a jury verdict finding the true boundary to be as contended by plaintiffs, defendant Neal appeals.

Sparrow & Bedsworth, by W. Warren Sparrow and George A. Bedsworth, for plaintiff appellees.

R. Michael Wells, for defendant appellant Neal.

Womble Carlyle Sandridge & Rice, by W. P. Sandridge, Jr., for defendant appellee Duke Power Company.

JOHNSON, Judge.

[1] Defendant Gilmer L. Neal, Jr., by his first Assignment of Error, contends the court erred in its charge to the jury by failing to give equal stress to his evidence tantamount to an implicit expression of opinion adverse to his cause. At the close of the jury charge the court asked each party out of the presence of the jury whether they had any objections to the jury charge. Counsel for defendant Neal responded, "No, sir."

Rule 10(b)(2), N.C. Rules App. P., states:

> No party may assign as error *any portion* of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided,

> that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

Rule 10(b)(2), N.C. Rules App. P. (emphasis added). The review of the evidence and the statement of the parties' contentions are a "portion of the jury charge" and come within the purview of Rule 10(b)(2), N.C. Rules App. P. The Rules of Appellate Procedure are mandatory. *Craver v. Craver*, 298 N.C. 231, 258 S.E. 2d 357 (1979). By failing to articulate an objection at the trial before the jury retired to consider its verdict, defendant is deemed to have waived his objection pursuant to the clear language of Rule 10(b)(2), N.C. Rules App. P. Nonetheless, we have reviewed the court's restatement of the facts and contentions of the parties and find no inaccuracies or expression of opinion. Defendant's argument is without merit. This Assignment of Error is overruled.

[2] Defendant, by his second Assignment of Error, contends the court erred by admitting over objection the opinion of the expert witness surveyor as to the location of the beginning point of defendant's property. We acknowledge a line of cases in support of his position, including two cases which defendant cited as authority. *Stevens v. West*, 51 N.C. 49 (1858); *Carson v. Reid*, 76 N.C. App. 321, 332 S.E. 2d 497 (1985), *aff'd*, 316 N.C. 189, 340 S.E. 2d 109 (1986); *Combs v. Woodie*, 53 N.C App. 789, 281 S.E. 2d 705 (1981). Defendant argues that the testimony elicited from the surveyor impermissibly invaded the province of the jury. We are unpersuaded by defendant's argument. Defendant incorrectly classifies the testimony at issue as an opinion embracing the ultimate issue. Rather, the testimony, when placed in context, is seen to be an elaboration of an earlier statement made on direct examination. Specifically, on direct examination by plaintiff, the same expert testified without objection regarding a deed as follows:

> A. All right. The deed begins reading, 'Beginning at the intersection of the westerly line of the Gil Neal property and the center line of the railroad—' at the beginning of this thing.
>
> Q. Go ahead.
>
> A. If I can explain? That is a miscall where it says, 'Beginning at the intersection of the westerly line of the Gil Neal

property,' which would be over here. The following calls will illustrate why I'm saying that, because it goes then from that point north 27-52 east 47.8 feet, which is over in here. It followed the old deed from Neal, Sr., to Haithcox.

On cross-examination by counsel for defendant Duke Power Company the following exchange occurred, with the exception at issue noted:

Q. Is that an error, that saying east when you mean west and west when you mean east, is that something you run into not infrequently in your work?

MR. RUTLEDGE: Object.

THE COURT: Sustained to that.

Q. Well, is there any question in your mind that the beginning point is, in fact, where you identify the beginning point?

MR. RUTLEDGE: Your Honor, object.

A. No, sir, no question.

THE COURT: Overruled. *EXCEPTION NUMBER 5*

Q. You may answer the question.

A. No question about it.

Q. Why is there no question about it?

A. Because it matches up with the old deed from Neal to Haithcox and several other deeds and maps of the area.

The question to which defendant Neal objects is a permissible attempt to test the reliability of the expert witness' earlier statement made on direct examination. The question does not offend North Carolina's "wide-open" cross-examination rule. *See* G.S. 8C-1, Rule 611(b) and commentary. This Assignment of Error is overruled.

We note in passing that defendant's reliance upon *Stevens v. West, supra,* and *Combs v. Woodie, supra,* is misplaced. Even though commenced in 1980, this case did not go to trial until 1985. This proceeding was pending 1 July 1984, the effective date of Chapter 8C, the Evidence Code; hence, Chapter 8C was applicable to this cause. *See* 8C-1 Editor's Note. G.S. 8C-1, Rule 704, pro-

vides that opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." This rule abrogates the doctrine that opinion testimony should be excluded for the reason that it goes to the ultimate issue which should be decided by the trier of fact. *Livermon v. Bridgett*, 77 N.C. App. 533, 538, 335 S.E. 2d 753, 756 (1985), *disc. rev. denied*, 315 N.C. 391, 338 S.E. 2d 880 (1986).

[3] Defendant, in his third Assignment of Error, contends the court abused its discretion by failing to order a compulsory reference. We disagree.

Rule 53(a), N.C. Rules Civ. P., provides as follows:

(a) Kinds of Reference.

(1) *By Consent.* Any or all of the issues in an action may be referred upon the written consent of the parties except in actions to annul a marriage, actions for divorce, actions for divorce from bed and board, actions for alimony without the divorce or actions in which a ground of annulment or divorce is in issue.

(2) *Compulsory.* Where the parties do not consent to a reference, the court may, upon the application of any party or on its own motion, order a reference in the following cases:

a. Where the trial of an issue requires the examination of a long or complicated account; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

b. Where the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect.

c. Where the case involves a complicated question of boundary, or requires a personal view of the premises.

d. Where a question of fact arises outside the pleadings, upon motion or otherwise, at any stage of the action.

Defendant Neal argues that because this case involved a complicated question of boundary, the court was compelled to order a compulsory reference pursuant to Rule 53(a)(2)(c), N.C. Rules Civ.

P. Defendant misconstrues this statute. The word "may" as used in the rule connotes permissive and not mandatory power in the court to grant the reference. W. Shuford, N.C. Civil Practice and Procedure sec. 53-4 (2d ed. 1981). Once a court orders a reference, whether upon application by any party or on its own motion, it is "compulsory" only as to the parties to the processioning action. This Assignment of Error is overruled.

[1] Defendant, in his fourth and last Assignment of Error, presents an argument again challenging the jury charge. This time defendant contends the jury charge was incomplete, that the court failed to instruct the jury fully "by not explaining the call for monument, by not determining which objects were monuments and by not defining the technical terms 'call' and 'course.' "

At the charge conference conducted in chambers the following exchange took place:

> THE COURT: Well, this is the charge conference. You have any requests, Mr. Rutledge?
>
> MR. RUTLEDGE: [Counsel for defendant] No, sir, I do not.
>
> THE COURT: Do you have any requests about natural monuments or stakes?
>
> MR. RUTLEDGE: Yes, I think natural monuments would take priority over determining distances over artificial stakes if you would give the jury some guidance on those rules.
>
> THE COURT: Monuments prevail over distances.
>
> MR. SANDRIDGE: Along that same line, Your Honor, I would also ask the Court charge that the monuments are, in fact, corners and that this is law from my brief that recites the calls and the distances are merely ways of identification where those corners are. The corners control.
>
> MR. RUTLEDGE: Your Honor, my request was for natural monuments.
>
> THE COURT: Yes, sir.

The court did instruct the jury that natural monuments take priority over stakes as requested by defendant. Defendant had an opportunity to object to the court's instructions or request special

instructions out of the presence of the jury when the charge conference was conducted in chambers and again at the close of the jury charge when the court asked all parties whether they had any objections. Defendant failed on both occasions to raise any of the objections which he now attempts to raise for the first time on appeal. Defendant is deemed to have waived all such objections to the jury instruction under Rule 10(b)(2), N.C. Rules App. P.; *City of Winston-Salem v. Hege*, 61 N.C. App. 339, 341, 300 S.E. 2d 589, 590 (1983). Defendant's last Assignment of Error is overruled.

No error.

Judges BECTON and COZORT concur.

DOWAT, INC. v. TIFFANY CORPORATION

No. 8621SC279

(Filed 4 November 1986)

Process § 14— service of process on Secretary of State—no business transacted in North Carolina—service of process insufficient

Allegations in this case involving property in North Carolina provided sufficient grounds for the trial court to exercise personal jurisdiction over defendant foreign corporation, but service of process on the Secretary of State of North Carolina was insufficient to allow the court to exercise personal jurisdiction over the corporate defendant, since there was no showing that defendant had transacted business in this state without a valid certificate of authority. N.C.G.S. § 1-75.4(6), 55-131(b)(a), 55-144, 1A-1, Rule 4(j)(6).

APPEAL by plaintiff from *Walker, Judge*. Judgment entered 4 November 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 27 August 1986.

This is a civil action instituted by plaintiff, Dowat Inc., on 10 September 1985 against defendant Tiffany Corporation. Plaintiff is a North Carolina corporation. Defendant is a South Carolina corporation. Plaintiff relied upon G.S. 15-144 as authority for the substituted service of a complaint and a set of interrogatories on defendant through the Secretary of State of North Carolina. The interrogatories served upon defendant sought information per-

taining to the extent of defendant's ownership of real property in North Carolina. Defendant was allowed forty-five (45) days from receipt of service to comply with these discovery requests.

In Count I of plaintiff's complaint, plaintiff, *inter alia*, alleged the following:

> 3. During the years 1975 to the present Eugene M. Doub and Heather Hills Executive Golf Village participated in a scheme through which they embezzled substantial sums of money from the plaintiff herein. This scheme is described with more particularity in the Complaint filed in *Thomas Watts and Dowat Inc. v. Eugene M. Doub and Heather Hills Executive Golf Village, Inc.*, 85CVS1349, Forsyth County, North Carolina, the allegations of which are hereby incorporated by reference as if set forth verbatim.
>
> 4. On information and belief, funds misappropriated from Dowat were used to purchase or improve property owned by [Eugene M] Doub and Heather Hills, this property is more particularly described in Exhibit 'A' hereto, which is hereby incorporated herein by reference as if set forth herein verbatim.
>
> 5. The above-described property was held by [Eugene M] Doub and Heather Hills in trust for the benefit of the plaintiff to the extent of all of their funds used to purchase and improve the said property together with the profit [Eugene M] Doub and Heather Hills realized as a result of the use of the plaintiff's funds.
>
> 6. The constructive trust described hereunder extends to all of the property described above until such a time as the defendant proves that only a portion of the above property is equitably subject to the constructive trust.
>
> 7. On information and belief, the Tiffany Corporation acquired the property described above with actual or constructive notice of the constructive trust described herein and, therefore, the above property is held by Tiffany in trust for the benefit of the plaintiff as described herein.

On 14 October 1985, defendant served plaintiff with a copy of its pre-answer motions to dismiss plaintiff's complaint for lack of

jurisdiction over the person (Rule 12(b)(2), N.C. Rules Civ. P.), for insufficiency of service of process (Rule 12(b)(5), N.C. Rules Civ. P.), for failure to state a claim upon which relief may be granted (Rule 12(b)(6), N.C. Rules Civ. P.), and for failure to join a necessary party (Rule 12(b)(7), N.C. Rules Civ. P.). On 24 October 1985, the court granted defendant an extension of time to 15 December 1985 to answer plaintiff's interrogatories. On 31 October 1985, defendant brought on for hearing its aforementioned motion to dismiss. During this hearing defendant objected to plaintiff's attempt at incorporation by reference of the complaint in 85CVS1349 as a violation of Rule 10(c), N.C. Rules Civ. P. The court, after reviewing defendant's motion to dismiss, "advised counsel for plaintiff that the defendant's Motion to Dismiss would be held under advisement until Monday, November 4, 1985, to allow plaintiff sufficient time to make a determination as to whether it wished to take a voluntary dismissal pursuant to the provisions of Rule 41(a), North Carolina Rules of Civil Procedure and thereafter refile the instant action." Plaintiff chose not to take a voluntary dismissal. On 4 November 1985, pursuant to Rules 12(b)(2), (b)(5), (b)(6), and (b)(7), N.C. Rules Civ. P., the court allowed defendant's motion to dismiss plaintiff's complaint. Plaintiff appeals.

Howard, Howard, Morelock and From, P.A., by John N. Hutson, Jr., for plaintiff appellant.

B. Ervin Brown, II, for defendant appellee.

JOHNSON, Judge.

The first issue we must decide is whether the trial court erred in allowing defendant's motion to dismiss plaintiff's complaint on the basis of insufficiency of service of process and lack of jurisdiction over the person. However, before we discuss the ultimate issue with respect to service of process, relevant precedent, *see Canterbury v. Hardwood Imports*, 48 N.C. App. 90, 268 S.E. 2d 868 (1980) (even though a corporate defendant had actual notice and there was sufficient minimum contacts whereby a North Carolina Court could exercise jurisdiction, substituted service or process on the Secretary of State was improper; therefore, plaintiff's complaint was properly dismissed pursuant to Rule 12(b)(5), N.C. Rules Civ. P.) leads us to believe that a brief discus-

sion of the intricate jurisdictional features of this case is appropriate.

The complaint filed by plaintiff seeks a determination of the parties' interest in real property located in the state of North Carolina. We hold, pursuant to G.S. 1-75.4(6), that the allegations of this case involving local property would have provided sufficient grounds for the trial court to exercise personal jurisdiction over defendant if there had been sufficient service of process. However, due to plaintiff's failure to properly serve process on defendant, there was no basis for the court to constitutionally exercise personal jurisdiction over the foreign corporate defendant in the case *sub judice*. In order for the trial court to exercise jurisdiction there must be proper notice afforded to a defendant. It is undisputed that defendant is a foreign corporation without a certificate of authority to transact business in the state of North Carolina. Rule 4(j), N.C. Rules Civ. P., states the manner of service to exercise personal jurisdiction over defendant as follows:

> (j) *Process-Manner of service to exercise personal jurisdiction*
>
> —In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:
>
> . . . .
>
> (6) Domestic or Foreign Corporation—Upon a domestic or foreign corporation:
>
> (a) By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director or managing agent with the person who is apparently in charge of the office; or
>
> (b) By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or [of] process or by serving process upon such agent or the party in a manner specified by any statute.
>
> (c) By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested ad-

> dressed to the officer, director or agent to be served as specified in paragraphs a and b.

Rule 4(j)(6), N.C. Rules Civ. P. Instead of serving process on defendant pursuant to paragraphs (a) and (c), plaintiff construed G.S. 55-144 as authorizing the Secretary of State of North Carolina to be the agent of defendant and served process thereto, pursuant to paragraph (b) of Rule 4(j)(6), N.C. Rules Civ. P. G.S. 55-144 states the following:

> Sec. 55-144. Suits against foreign corporations transacting business in this State without authorization.
>
> Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State . . ., then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served.

G.S. 55-144. For purposes of determining what does not constitute "transacting business," following G.S. 55-144 there is a cross-reference to G.S. 55-131. G.S. 55-131 excludes the following activity from the meaning of "transacting business" for purposes of G.S. 55-144:

> (9) Conducting an isolated transaction completed within a period of six months and not in the course of a number of repeated transactions of like nature.

G.S. 55-131(b)(9).

An explicit prerequisite to the authorization of substituted service of process on the Secretary of State of North Carolina as agent of defendant is that defendant must have transacted business in this state without a valid certificate of authority. The manner in which statutes such as G.S. 55-144 are to be construed has been stated as follows:

> Statutes authorizing substituted service of process, service by publication or other particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity.

Hassell v. Wilson, 301 N.C. 307, 314, 272 S.E. 2d 77, 82 (1980) (citing *Sink v. Easter*, 284 N.C. 555, 202 S.E. 2d 138 (1974)). Rele-

vant case law indicates that "transacting business" within this state for purposes of G.S. 55-144 means engaging in, carrying on or exercising in this state some of the functions for which the corporation was created. *See Radio Station WMFR, Inc. v. Eitel-McCullough, Inc.*, 232 N.C. 287, 59 S.E. 2d 779 (1950). *Accord, e.g., Troy Lumber Co. v. State Sewing Machine Corp.*, 233 N.C. 407, 64 S.E. 2d 415 (1951). This is in accordance with the notion that by a foreign corporation doing business in this state there is an acceptance by it of the statutory method of service of process and a recognition of its validity to confer jurisdiction on our courts pursuant thereto. *See State ex rel Anderson-Oliver v. United States Fidelity Co.*, 174 N.C. 417, 93 S.E. 948 (1917). There was a change from the statutory language "doing business," *see* G.S. 55-38, to "transacting business," *see* G.S. 55-144; however, the change from the language in the predecessor to G.S. 55-144 has been viewed as a liberalization of the statute. *See Abney Mills v. Tri-State Motor Transit Co.*, 265 N.C. 61, 143 S.E. 2d 235 (1965). Even so, the complaint set forth *supra*, in the case *sub judice*, is fatally deficient. In *Abney Mills, supra*, this Court held that there are no precise, fixed and definite rules that may be applied to determine if a foreign corporation has transacted business within the meaning of G.S. 55-144. Each case must be determined on its own facts. *Abney, supra. See e.g. United States v. Atlantic Contractors, Inc.*, 231 F. Supp. 356 (E.D.N.C. 1964). The facts of this case support the trial court's judgment that the attempted substituted service of process was improper and insufficient.

Plaintiff next argues that pursuant to Rule 4(d), N.C. Rules Civ. P., it had until 9 December 1985 to cure any defects in the summons by issuance of an alias and pluries summons. Plaintiff contends that the trial court should have merely quashed the summons. We disagree. The issuance of an alias and pluries summons requires no action by the trial court. It is plaintiff's responsibility to cure any defects in an original summons. Defendant's motion to dismiss was before the court and was properly considered. Plaintiff argues that if the court had allowed the issue of jurisdiction to stay open until defendant answered interrogatories then it would have been established that defendant was transacting business in North Carolina. There is nothing in the record on appeal to support such a contention. At first glance the result in the case *sub judice* may appear harsh, but a close reading of the

trial court's order reveals otherwise. At the hearing on plaintiff's motion the trial court advised plaintiff's counsel that the option to take a Rule 41, N.C. Rules Civ. P., voluntary dismissal would remain open until 4 November 1985, and that pursuant thereto, the action could be refiled. This would have afforded plaintiff one year to properly prepare its case. Plaintiff, having chosen to forego this opportunity availed to it by the trial court, may not now be heard to complain of the harshness of the trial court's judgment. Because of our holding that there was insufficient service of process, we need not address plaintiff's remaining assignments of error. For reasons stated hereinabove, the judgment appealed from is

Affirmed.

Judges BECTON and COZORT concur.

HUSSEIN SAYYED MUSSALLAM (MUSTAFA) v. EEVA HANNELLE MUSSALLAM

No. 8618DC240

(Filed 4 November 1986)

1. **Principal and Surety § 1— bond to require production of child**

Evidence was sufficient to support the trial court's order that plaintiff's $25,000 secured civil bond was posted solely for the purpose of producing the child of the parties and not for further proceedings requiring the husband's presence.

2. **Principal and Surety § 11; Penalties § 1— bond to require production of child —forfeiture—proceeds to custodial parent**

A bond to ensure that a minor child will be returned to the jurisdiction of the court, if forfeited, is not available to the county school fund, but instead should be distributed to the parent who had been awarded custody and who was damaged by the act of the non-custodial parent. N.C.G.S. § 50-13.2(c); Art. IX, § 7 of the N. C. Constitution.

APPEAL by the Guilford County Board of Education from *Daisy, Judge*. Order entered 25 October 1985 in District Court, GUILFORD County. Heard in the Court of Appeals 26 August 1986.

John F. Comer for plaintiff appellee Hussein Sayyed Mussallam.

Manlin M. Chee, and Smith, Patterson, Follin, Curtis, James and Harkavy, by John R. Kernodle, Jr., for defendant appellee Eeva Hannelle Mussallam.

Hatfield & Hatfield, by John B. Hatfield, Jr., for defendant appellee Sureties, Doris H. Harshaw and Jo Wilkins.

Douglas, Ravenel, Hardy, Crihfield & Lung, by John W. Hardy, for appellant Guilford County Board of Education.

BECTON, Judge.

This appeal concerns the distribution of the proceeds of a forfeited bond. The action began as a domestic dispute between a former husband and wife over the custody of their child. Appellant, Guilford County Board of Education, was not a party to the underlying civil litigation; it sought to intervene when the forfeiture of the secured bond was imminent. On 25 October 1985, Guilford County District Court Judge Daisy concluded that the husband had fled the jurisdiction of the court; that the husband's $25,000 secured civil bond was posted "solely for the purpose of producing the child of the parties and not for further proceedings requiring the [husband's] presence"; that the Guilford County Board of Education had no interest in the bond; and that the mother should get the proceeds of the forfeited bond. The Guilford County Board of Education appeals. We affirm.

I

On 27 January 1981, the husband, Hussein Sayyed Mussallam, a Kuwait citizen, obtained a divorce in Kuwait from Eeva Hannelle Mussallam, his Finnish wife. Approximately six months later, the husband filed an action in Finland, where his wife and minor child resided, seeking custody of the child. The wife was granted custody. In 1985, the wife brought the seven-year-old child to visit the husband, who was then living in Greensboro, North Carolina, and the husband hid the child and refused to return the child to the wife.

Seeking enforcement of the Finnish custody decree pursuant to N.C. Gen. Stat. Secs. 50A-15 and -23 (1984), the wife filed a Mo-

tion in the Cause in Guilford County on 7 May 1985 asking for immediate custody of her daughter. After a show cause hearing, District Court Judge Williams found the husband in willful contempt of the Finnish custody decree and ordered that the husband be held in custody until he purged himself of contempt "by sending for the minor child, NORA KASSANDRA MUSSALLAM, and bringing her to this court. . . ."

The husband petitioned the superior court for a modification of the terms of the order, and on 17 May 1985 the superior court set a secured bond of $25,000 and ordered the husband to appear in District Court with the minor child on 31 May 1985. On Saturday, 25 May 1985, the husband posted the $25,000 bond through two sureties and was released from custody.

When the husband failed to appear in district court with the minor child on 31 May 1985, the district court judge ordered that the $25,000 secured bond be immediately forfeited and the husband taken back into custody and held without bond. The husband has not been located since.

On 11 September 1985, the sureties on the bonds filed motions to release the bonds or to assess civil damages. The attorneys for the Guilford County Board of Education filed an answer to the motions of the sureties seeking forfeiture of the entire amount of the bonds to the Guilford County School Fund.

II

The Guilford County Board of Education contends that District Court Judge Daisy erred (1) in finding as a fact that the Superior Court's order was solely for the purpose of producing the child of the parties and not for further proceedings requiring the presence of the husband as an appearance bond; and (2) in concluding that the bond undertaken is not an appearance bond but is a compliance bond and that the Guilford County Board of Education is not entitled to the proceeds of any forfeiture. We address the contentions *seriatim.*

[1] A. Judge Daisy's finding that Judge Beatty's order was solely for the purpose of producing the minor child was supported by evidence.

Because the husband had apparently sent the minor child to Kuwait, District Court Judge Williams found the husband in "will-

ful contempt of the Finnish custody decree" and ordered him placed in jail until he brought the child before the court. Judge Williams expressed his concern that the husband might flee the country. However, because Judge Williams made no findings regarding whether the husband had the means or the ability to bring the child before the court while the husband remained in jail, the husband, through counsel, sought and obtained a habeas corpus hearing in superior court.

Superior Court Judge James Beatty ordered that "the [husband] return to district domestic court on May [31], 1985 and at that time make the child, Nora Kassandra Mussallam (Mustafa) available to the court, in compliance with the order of Judge Williams or be returned to custody; . . . [and that the father] remain within the jurisdiction and not remove himself from Guilford County until the said child is returned; . . . .

The terms of Judge Beatty's order and, indeed, the record as a whole reflect the common goal of the court and of the mother—to ensure that the child be returned to the custody of the mother. As we read Judge Beatty's order, once the child was brought to court, the husband was free to do whatever he wanted to do, including leave the jurisdiction.

When District Court Judge Daisy considered the motions of the sureties and of the Guilford County School Board, he, based on the motions and the entire court record, found as follows:

> Although Judge Beatty's order required the [husband's] appearance in district court, it was solely for the purpose of producing the child of the parties and not for further proceedings requiring the [husband's] presence.

This finding was based on the court's review of the entire file, and we find that it is supported by the record.

[2] B. The Guilford County Board of Education is not entitled to the proceeds from the bond forfeiture in this case.

Article IX, Section 7 of the Constitution of North Carolina provides that only "the *clear proceeds* of all penalties and forfeitures and of all fines collected in the several counties *for any breach of the penal laws of the State*, shall belong to and remain in the several counties, and shall be faithfully appropriated

and used exclusively for maintaining free public schools." (Emphasis added.) This constitutional mandate has been codified in N.C. Gen. Stat. Sec. 115C-452 (1983) and is the basis upon which the Guilford County Board of Education contends it is entitled to the forfeited bonds in this case. The constitutional mandate makes clear that a fine imposed in a criminal case must be paid to the county school fund after the costs of collection are taken out. *Shore v. Edmisten*, 290 N.C. 628, 227 S.E. 2d 553 (1976). But the case *sub judice* is not a criminal case. Simply put, the $25,000 secured by the sureties in this matter is not "clear proceeds" flowing into state coffers because of "any breach of the penal law of the State." As stated by the wife in her brief, in this case, "a civil bond was set for the purpose of redressing wrongs committed by one private individual toward another private individual, not for criminal acts against society as a whole in violation of the 'penal laws'." The entire proceedings in this case—the underlying civil domestic action as well as the civil contempt proceedings—were undisputedly civil in nature. "The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court." *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E. 2d 135, 142 (1980).

Further, Judge Daisy's finding that the bond posted was a compliance bond distinguishes this case from *In re Wiggins*, 171 N.C. 372, 88 S.E. 508 (1916) in which a warrant was issued for Wiggins' arrest and Wiggins posted a $300.00 "bond for his appearance." *Id.* at 374, 88 S.E. at 509.

Moreover, N.C. Gen. Stat. Sec. 50-13.2(c) (1984) specifically authorizes the setting of a bond to ensure that a minor child will be returned to the jurisdiction of the court. In our view, such a bond, if forfeited, would not be available to the county school fund, but rather would be distributed to the parent who had been awarded custody and who was damaged by the act of the non-custodial parent. Indeed, the proceedings in this case can be compared to other civil cases in which parties are required to post bond and where, if the party fails to prevail, the bond is forfeited to the opposing party, not to the school fund. By way of example, it is a common practice in this State for district courts to set secured bonds in civil child support actions when the supporting parent has failed to appear in court to show cause why he or she

should not be held in contempt, and for the secured bond, if posted, to be forfeited and the proceeds applied to any outstanding arrearages owed by the supporting parent. *See Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E. 2d 668 (1978); *Wolfe v. Wolfe*, 64 N.C. App. 249, 307 S.E. 2d 400 (1983).

The district court judge properly concluded that the bond in this case was a compliance bond, not an appearance bond. But even if the bond were an appearance bond, we believe it was designed to ensure the wife a measure of recovery in the event the husband failed to comply with the court's order. The result is particularly compelling in this case because, as the wife points out in her brief:

> A private citizen from another land has suffered the horrendous loss of her child. She faces the prospect of never seeing her daughter again; of new trials in an unfriendly, foreign religious court; and of untold costs if she should try to locate and regain custody of her daughter. For the public schools of Guilford County to benefit from the proceeds of this civil bond forfeiture would be a manifest injustice not contemplated or permitted under the laws of the State of North Carolina.

Based on the foregoing, the judgment of the Guilford County District Court is

Affirmed.

Judges PHILLIPS and MARTIN concur.

WALTER G. BAUM v. CAROLISTA FLETCHER GOLDEN

No. 8615SC283

(Filed 4 November 1986)

Husband and Wife § 11.1; Judgments § 37.3— provisions of separation agreement —prior action—no res judicata

Where a judgment was obtained against plaintiff for the cost of jewelry and stones supplied to plaintiff and defendant in a jewelry business which they maintained while married, and plaintiff then brought this action for indem-

nification from defendant on the ground that the parties' separation agreement provided that defendant would satisfy the debt for the merchandise, a prior action between the parties involving enforcement of the separation agreement was not res judicata in this indemnification action, since defendant brought the prior action to enforce a provision of the separation agreement pertaining to real property; plaintiff answered defendant's complaint averring as an affirmative defense that defendant had breached the agreement by refusing to discharge the indebtedness to the jewelry supplier and he therefore should be relieved of his obligation to perform under the separation agreement; and plaintiff's claim for indemnification due to the judgment obtained against him was not put in issue.

APPEAL by plaintiff from *Preston, Judge.* Judgment entered 4 December 1985 in Superior Court, ORANGE County. Heard in the Court of Appeals 22 August 1986.

Plaintiff, Walter Baum (hereinafter Mr. Baum), and defendant, Carolista Fletcher Golden (hereinafter Ms. Golden), were formerly married. During their marriage the parties operated a jewelry business in Chapel Hill, North Carolina, known as "Carolista Jewelry Designers" and a jewelry business located in Dare County, North Carolina, known as "Baum Jewelry Company." In the course of their business Ralph Burke Dawson delivered jewels, on consignment, to the parties at their places of business. On 13 June 1980, the parties entered into a contract of separation. In pertinent part paragraph 16 of the contract of separation provided the following:

> The wife shall be fully responsible for the business indebtedness to RALPH BURKE DAWSON and this account shall be satisfied in full at the discretion of the said RALPH BURKE DAWSON.

On 15 December 1980, Ms. Golden instituted a separate action against Mr. Baum in Dare County seeking specific performance of a provision in the contract of separation regarding real property (80CVS324). Mr. Baum answered Ms. Golden's complaint and averred, *inter alia,* as an affirmative defense, that Ms. Golden had breached paragraph 16 of the separation agreement by refusing to discharge the indebtedness owed to Ralph Burke Dawson (80CVS324). Case number 80CVS324 was submitted to a jury. When case number 80CVS324 was submitted to the jury one of the issues submitted was as follows:

> Did Plaintiff [defendant herein], Carolista Fletcher, breach the separation agreement dated June 13, 1980?

The jury answered this issue affirmatively and even though there was no counterclaim filed by Mr. Baum the jury awarded him one dollar ($1.00) in damages. Ms. Golden was also awarded one dollar ($1.00) in damages but this award was set aside by the court and replaced with a $750.00 award for her damages. This judgment was entered 1 December 1983. During the time of the aforementioned litigation, on 7 April 1982, Ralph Burke Dawson filed a complaint against Mr. Baum and Ms. Golden. (82CVS307). Mr. Dawson averred in his complaint, *inter alia*, that Mr. Baum and Ms. Golden were in breach of their consignment agreement with him. Mr. Baum answered Mr. Dawson's complaint and asserted a cross-claim against Ms. Golden. Subsequent thereto, Mr. Baum amended his answer, filed a third-party complaint against Ms. Golden and pleaded in pertinent part that Ms. Golden breached paragraph 16 of the contract of separation. On 27 July 1983, Mr. Baum's third-party complaint was dismissed without prejudice for insufficiency of process. On 29 July 1983, Mr. Baum refiled his third-party complaint. Mr. Baum was allowed a voluntary dismissal without prejudice and refiled his third-party complaint on 12 February 1984. Service of process was never obtained upon Ms. Golden in the Dawson action (82CVS307). On 17 July 1984, Mr. Dawson obtained a judgment of $14,974.00 against Mr. Baum and the court allowed Mr. Baum to voluntarily dismiss, without prejudice, his third-party complaint (82CVS307).

On 12 February 1985, Mr. Baum filed this action against Ms. Golden. Mr. Baum averred, *inter alia*, the following:

> VIII. That in the action entitled Ralph Burke Dawson, Plaintiff v. Walter G. Baum, Defendant 82CVS307, Orange County, North Carolina, Ralph Burke Dawson obtained a judgment against Walter G. Baum on July 17, 1984 in the amount of $14,974.00 for the value of the stones and jewelry described in Exhibit A.

Mr. Baum claimed that he was entitled to indemnification from Ms. Golden. On 15 April 1985, Ms. Golden answered Mr. Baum's complaint and pleaded "the Judgment [80CVS324] as res judicata and collateral estoppel on the issue of Plaintiffs breach." On 4 November 1985, Ms. Golden filed a motion for summary judg-

ment. On 4 December 1985, the court granted Ms. Golden's motion for summary judgment. Mr. Baum appeals.

Northern, Blue, Little, Rooks, Thibaut & Anderson, by David M. Rooks, for plaintiff appellant.

Faison, Brown, Fletcher & Brough, by O. William Faison and John E. Tate, Jr., for defendant appellee.

JOHNSON, Judge.

The sole issue on appeal is whether the judgment in 80CVS324 may be pled as *res judicata* and bar plaintiff's claim for relief such that defendant was entitled to a judgment as a matter of law. We hold that the forecast of the evidence that would have been submitted does not entitle defendant to a judgment as a matter of law.

In pertinent part, Rule 56(c), N.C. Rules Civ. P., allows the court to grant summary judgment as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

Rule 56(c), N.C. Rules Civ. P. Summary judgment is a drastic remedy. *See First Federal Savings & Loan Assn. v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972). The purpose of allowing summary judgment is to defeat attempts to use formal pleadings to delay recovery of just demands. *See Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976). Bearing these principles in mind, we now review the propriety of the court's order allowing defendant's motion for summary judgment.

The principles of *res judicata* and collateral estoppel are distinctly different and the distinction is recognized by North Carolina courts. *See J. T. McTeer Clothing Co. v. Hay*, 163 N.C. 495, 79 S.E. 955 (1913). *Res judicata* is a principle of claim preclusion and collateral estoppel is a principle of issue preclusion. The North Carolina Supreme Court has stated the following:

> *Res judicata* deals with the effect of a former judgment in favor of a party upon a subsequent attempt by the other party to relitigate the same cause of action.

King v. Grindstaff, 284 N.C. 348, 355, 200 S.E. 2d 799, 804 (1973). The Court in *King, supra*, relied upon its prior reasoning in *Masters v. Dunstan*, 256 N.C. 520, 124 S.E. 2d 574 (1962), wherein the Court set forth the following:

> 'It is fundamental that a final judgment rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions *and facts in issue*, as to the parties and privies, in all other actions involving the same matter.' *Bryant v. Shields*, 220 N.C. 628, 18 S.E. 2d 157. '. . . [sic] *(W)hen a fact has been agreed upon, or decided in a court of record*, neither of the parties shall be allowed to call it in question, and have it tried over again at any time thereafter, so long as the judgment or decree stands unreversed.' *Humphrey v. Faison*, 247 N.C. 127, 100 S.E. 2d 524, citing and quoting *Armfield v. Moore*, 44 N.C. 157.

Dunstan, supra, at 523-24, 124 S.E. 2d at 576 (emphasis supplied). In *Cannon v. Cannon*, 223 N.C. 664, 28 S.E. 2d 240, 243 (1943), the Court succinctly stated the following about the dispositive rule of law in the case *sub judice*:

> [T]he fundamental principle that in order to support the plea of res judicata, *the fact or facts*—whether called 'subject matter' or otherwise designated—necessary to support relief or recovery in the second or subsequent action *must have been definitely comprehended in the issues* and judgment in the prior action, *and must have been put in issue* when an opportunity was afforded him to do so *in order to render the prior judgment determinative or effective as res judicata.*

Id. at 670, 28 S.E. 2d at 243 (emphasis supplied). The doctrine of *res judicata* must be strictly applied. *Id.*

The doctrine of collateral estoppel has been described as follows:

> Under a companion principle of *res judicata*, collateral estoppel by judgment, parties and parties in privity with them—even in unrelated causes of action—are *precluded from retry-*

ing fully litigated issues that were decided in any prior determination and were necessary to the prior determination.

King, supra, at 356, 200 S.E. 2d at 805.

In the case *sub judice* plaintiff's complaint alleged, *inter alia,* as set forth *supra,* that Ralph Burke Dawson had obtained on 17 July 1984 a judgment (82CVS307) against him in the amount of $14,974.00. Plaintiff's first claim for relief was that defendant breached the contract of separation by failing to satisfy the obligation owed to Ralph Burke Dawson and therefore he was "entitled to *indemnification* from defendant" (emphasis supplied). In the prior action (80CVS324), which Ms. Golden pleads as *res judicata,* Mr. Baum, in his answer, merely pleaded as an affirmative defense that Ms. Golden had breached the parties' contract of separation by refusal to discharge the indebtedness to Ralph Burke Dawson and that due to this failure of consideration he should be relieved of his obligation to perform under the separation agreement. Plaintiff's claim for relief based on indemnification, due to the judgment (80CVS324) obtained against him, was not put in issue. We have reviewed the record on appeal and have surmised that there was testimony adduced with respect to the indebtedness to Ralph Burke Dawson. However, plaintiff's claim for relief and the forecast of the evidence in the case *sub judice,* with respect to the loss suffered by plaintiff are distinctly different from the facts adduced in the prior action (80CVS324). The jury's affirmative answer to the issue, pertinent to the case *sub judice,* does not preclude defendant from being held liable pursuant to paragraph 16 of the parties' contract of separation. It was reversible error for the trial court to rule that defendant was entitled to a judgment as a matter of law. For the aforementioned reasons, the judgment is

Reversed.

Judges EAGLES and COZORT concur.

EDWARD MILES LITTLE AND ROBERT MORGAN v. CITY OF LOCUST, NORTH CAROLINA ZONING BOARD OF ADJUSTMENT AND THE LOCUST, NORTH CAROLINA CITY COUNCIL

No. 8620SC501

(Filed 4 November 1986)

Abatement and Revival § 3; Administrative Law § 6; Rules of Civil Procedure § 11— petition for certiorari—notice of proceedings—verification of pleadings —no summons required

In three proceedings for certiorari to obtain judicial review of decisions by a zoning board of adjustment denying applications to establish a mobile home park and to put a mobile home on a lot sold by one petitioner to the other, there was no merit to respondents' contentions that (1) one petitioner's second "action" should be dismissed because of "a prior pending action," since a petition for certiorari is not an action for civil redress or relief, petitioner's first petition to judicially review a zoning board decision made on 16 February 1984 was no bar as a "pending action" to his second petition to review a decision which was not made until more than a year later, and when the second petition was filed the first proceeding was not even pending because the first petition along with the decision it addressed became as nothing when the judge ordered respondent board to hear the matter de novo; (2) all "actions" should be dismissed because they were not verified, since N.C.G.S. 1A-1, Rule 11 provides that pleadings need not be verified; and (3) all "actions" should be dismissed because they were not accompanied by a summons, since a petition for certiorari is not the beginning of an action for relief and issuing a summons would be a pointless absurdity because no one is being sued and the only thing sought is a review and ruling by a judge.

APPEAL by respondent municipality from *Freeman, Judge.* Orders entered 31 October 1985 in Superior Court, STANLY County. Heard in the Court of Appeals 15 October 1986.

No brief filed for petitioner appellees.

Steven F. Blalock and Brown, Brown, Brown & Stokes, by Richard Lane Brown, III, for respondent appellants.

PHILLIPS, Judge.

These three proceedings for *certiorari* were brought in the Stanly County Superior Court to obtain a judicial review of three decisions made by the Zoning Board of Adjustment of the City of Locust. Two of the decisions denied petitioner Little's application to establish a mobile home park on certain of his land, and the other denied the application of petitioner Morgan to put a mobile

home on a lot that Little contracted to sell him. Since the respondent Zoning Board raised somewhat the same legal questions in opposing each proceeding the proceedings were consolidated by the trial court for the purpose of ruling on those questions. And after two and a half years in court those questions, based on respondents' defenses to the petitions, are the only things that have been ruled on in this case though zoning board decisions are usually reviewed with dispatch, as they should be since G.S. 160A-388(e) makes all such decisions reviewable by "proceedings in the nature of certiorari" and all that is needed is the record of the decision involved and a Superior Court judge to review it. Which means, of course, that respondents' appeal is fragmentary, premature and unauthorized. G.S. 1-277; G.S. 7A-27; Rule 54, N.C. Rules of Civil Procedure. Nevertheless, in view of the inordinate delay already caused by respondents' meritless defenses, the proper administration of justice requires that they be eliminated from the case without further ado, Rule 2, N.C. Rules of Appellate Procedure; thus, we accept the appeal and affirm the orders appealed from.

These simple, expedient proceedings for the mere review of three zoning board decisions came to their present inexpedient state as follows: After the application of Edward Miles Little to establish a mobile home park on his land was denied by the respondent Zoning Board of Adjustment at its meeting on 16 February 1984, he petitioned the Superior Court for a writ of *certiorari* to review the legality of *that* decision; but he did not expedite the proceeding by obtaining an *ex parte* order directing the respondents to send up the record of the decision, as is usually done since G.S. 160A-388(e) makes zoning board decisions judicially reviewable upon complying with its terms. In any event, after receiving a copy of the petition respondents applied for and were allowed *sixty days* within which to file answer or other pleading, though no basis for any delay at all was stated and an appropriate answer could have been stated in a few lines. When the answer was eventually filed respondents asserted various defenses to the petition, among which were that the petition did not "state any claim upon which relief may be granted," and that the court had no jurisdiction because no summons had been issued and the petition was not verified. When the matter came on for hearing several months later Judge Mills remanded it to the

respondent Board for a hearing *de novo* because the purported record of the Board's decision before the court was inadequate for a proper review. After the *de novo* hearing was held on 5 March and 13 March 1985 the Board again denied the application and petitioner petitioned the court for a review of *that* decision. In answering this petition respondents repeated the myriad defenses earlier asserted and added a new one—that there was "a prior pending action." Meanwhile, petitioner Morgan's application to put a mobile home on the lot petitioner Little had agreed to sell him was also denied by the respondent Board at its 5 March and 13 March 1985 meetings and his petition for *certiorari* to review that decision was met with the same defenses first asserted against petitioner Little. Sometime along the line, just when or how the record does not show, the records of the respondent Board's March 1985 decisions were sent to the court, but before they could be reviewed the motions to dismiss the three petitions were heard, denied and appealed from.

In appealing respondents still contend that petitioner Little's second "action" should be dismissed because of "a prior pending action," and that all the "actions" should be dismissed because they were not accompanied by a summons and were not verified. The verification defense is refuted by Rule 11, N.C. Rules of Civil Procedure, which provides that: "Except when otherwise specifically provided by these rules or by statute, pleadings need not be verified or accompanied by affidavit"; and by the fact that no other civil procedure rule or statute requires that a petition to review a zoning board decision be verified. The summons and prior action defenses have no possible relevance to these proceedings, the nature of which has apparently not been recognized by respondents. A petition for *certiorari* is not an action for civil redress or relief, as is a suit for damages or divorce; a petition for *certiorari* is simply a request for the court addressed to judicially review a particular decision of some inferior tribunal or government body. Thus, petitioner Little's first petition to judicially review a zoning board decision made on 16 February 1984 was no bar as a "pending action" to his second petition to review a decision that was not made until more than a year later. Furthermore, when the second petition was filed the first proceeding was not even pending, because the first petition along with the 1984 decision that it addressed became as nothing when the judge

ordered the respondent Board to hear the matter *de novo*; and in any event the second decision could not have been reviewed pursuant to a petition to review a different decision. As to the absence of a summons, a petition for *certiorari* is not the beginning of an action for relief, as respondents suppose; in effect it is an appeal from a decision made by another body or tribunal. *Certiorari* was devised by the early common law courts as a substitute for appeal and it has been so employed in our jurisprudence since the earliest times. McIntosh, N.C. Practice and Procedure in Civil Cases Secs. 705, 706 (1929); *Gidney v. Hallsey*, 9 N.C. 550 (1823). The procedure devised was simple and expeditious and none of the statutes approving its use have changed it. Thus, issuing a summons in a proceeding for *certiorari* would be a pointless absurdity since no one is sued and the only thing sought is a review and ruling by a judge. In such proceedings jurisdiction is obtained not by issuing a summons, but by simply petitioning an authorized court to review the decision in question. In the only recorded instance in this state that we are aware of where appellate review of a zoning board decision was sought by a civil suit with summonses issued to the zoning board members, this Court noted that such action was inappropriate and treated the suit as a petition for *certiorari*. *Deffet Rentals, Inc. v. The City of Burlington*, 27 N.C. App. 361, 219 S.E. 2d 223 (1975).

The orders overruling respondents' defenses to the petitions are affirmed and these matters are remanded to the Superior Court for the judicial review that petitioners have been entitled to since these proceedings for *certiorari* were filed.

Affirmed and remanded.

Judges PARKER and COZORT concur in the result.

ALICE K. PHILLIPS v. JAMES A. PHILLIPS

No. 8610DC439

(Filed 4 November 1986)

1. **Divorce and Alimony § 17.3— alimony—wife as dependent spouse—sufficiency of evidence**

The trial court did not err in determining that plaintiff wife was the dependent spouse, though plaintiff's salary was higher than that of defendant, where the court found that plaintiff had monthly expenses of $1,300 and a monthly salary of $978; from these facts the court could have found that plaintiff was both actually substantially dependent on defendant and substantially in need of defendant's support; and the court's findings illustrated that it properly considered the parties' earnings, earning capacity, debts, assets, and accustomed standard of living. N.C.G.S. § 50-16.1(3).

2. **Divorce and Alimony § 17.3— alimony—wife's living expenses—findings proper**

There was no merit to defendant's contention that the trial court's finding that plaintiff's reasonable expenses were $1,300, which equalled the parties' combined expenses prior to this action, showed that she needed financial support only to increase her standard of living, not to maintain it.

3. **Divorce and Alimony § 17— husband's removal of personal property from wife's home—order improper**

The trial court's order preventing defendant from removing his personal property from the marital home absent an agreement between the parties and proper scheduling between their attorneys exceeded what was necessary to insure peaceful removal of defendant's personal property.

APPEAL by defendant from *Payne, Judge*. Judgment entered 8 August 1985 in District Court, WAKE County. Heard in the Court of Appeals 24 September 1986.

Plaintiff brought this action for divorce from bed and board and alimony. The defendant answered and counterclaimed for divorce from bed and board, alimony, and equitable distribution.

The relevant findings of the trial court were not excepted to and are conclusive on appeal. Those findings show the following. The parties were married on 25 May 1980. During the marriage, defendant subjected plaintiff to verbal abuse and sufficient physical abuse as to give rise to grounds for alimony under G.S. 50-16.2(7). While living together, the parties' monthly expenses were $1,300.00. Of that amount, defendant contributed $600.00 from his monthly income of $706.00 and the plaintiff contributed the bal-

ance out of her $978.00 monthly salary. At the time of the trial, each party's income had remained unchanged and plaintiff's and defendant's expenses were $1,300.00 and $1,000.00 respectively. In addition, plaintiff owned a 1983 Ford automobile, was liable for the mortgage debt of the marital home, and had other debts in excess of $1,000.00. Defendant had cash assets of almost $1,000.00, title to a 1984 Ford, and $370.00 in outstanding debts. Both parties had an ownership interest in the marital home.

The trial court denied all portions of defendant's counterclaim, granted plaintiff a divorce from bed and board, and awarded plaintiff possession of the marital home and its furnishings as permanent alimony. The court concluded that the plaintiff was a dependent spouse within the meaning of G.S. 50-16.1(3) and that defendant was a supporting spouse within the meaning of G.S. 50-16.1(4). It also concluded that the defendant was able to comply with the alimony award and that the award was fair and reasonable under all the circumstances.

Carter G. Mackie, for the plaintiff-appellee.

Donald B. Hunt, for the defendant-appellant.

EAGLES, Judge.

Defendant first argues that the trial court erred in determining that the plaintiff was a dependent spouse and accordingly that the award of alimony is invalid. We disagree.

G.S. 50-16.1(3) defines a "dependent spouse" as one who is either (1) actually substantially dependent on the other spouse for his or her maintenance and support or (2) substantially in need of that maintenance and support. In *Williams v. Williams*, 299 N.C. 174, 261 S.E. 2d 849 (1980), our Supreme Court discussed that definition. There, the Court held that a spouse is "actually substantially dependent" if they are without the means to provide for his or her accustomed standard of living. Even if a spouse is not actually substantially dependent, they are nevertheless a dependent spouse under the second part of the statute's definition if, considering the parties' earnings, earning capacity, estates, and other factors, the spouse seeking alimony demonstrates the need for financial contribution from the other spouse to maintain his or her accustomed standard of living.

[1] Applying those principles here, we hold that the trial court did not err in determining that the plaintiff is a dependent spouse. The trial court found that plaintiff had monthly expenses of $1,300 and a monthly salary of $978. That leaves her with a deficit of $322 a month. From these facts, the trial court could have found that plaintiff was both actually substantially dependent on defendant and substantially in need of defendant's support. Furthermore, the trial court's findings illustrate that it properly considered the parties' earnings, earning capacity, debts, assets, and accustomed standard of living.

[2] The defendant argues that the trial court's finding that the plaintiff's reasonable expenses are now $1,300, which equals their combined expenses prior to this action, shows that she needs financial support only to increase her standard of living, not to maintain it. Nothing else in the record, however, supports defendant's argument and it does not necessarily follow that one's standard of living has risen merely because their expenses have increased. Therefore, defendant's argument is without merit.

Once a trial court determines that a spouse is dependent and is entitled to alimony, its award will not be disturbed on appeal absent a showing of abuse of discretion. *Quick v. Quick*, 305 N.C. 446, 290 S.E. 2d 653 (1982). The trial court concluded that the defendant was able to comply with the award and that the award was fair and reasonable under all the circumstances. We find no abuse of discretion in these conclusions.

Contrary to the trial court's conclusion, defendant contends that he does not have the financial ability to comply with the award. Although the defendant's reasonable monthly expenses exceed his monthly income by approximately $300, the same is true for the plaintiff. Neither party can, therefore, afford to vacate the home and pay for other living accommodations. The plaintiff, however, is the only one eligible for an award of alimony. Since it is the plaintiff, and not the defendant, who will continue making the mortgage payments, we believe that the trial court's award of possession of the home and furnishings is fair and just to both parties. Consequently, we hold that the trial court did not abuse its discretion.

The defendant next argues that the trial court made two findings of fact, which are actually conclusions of law, that the

plaintiff is a dependent spouse. Defendant argues that they are unsupported by the necessary factual findings. We have already decided, however, that the trial court's conclusion that plaintiff is a dependent spouse is supported by facts to which the defendant has not excepted. Therefore, we need not decide whether the trial court mislabeled any of its findings.

Defendant has also assigned as error that portion of the judgment which excludes him from the marital home. Since, as defendant admits, G.S. 50-16.7(a) allows a trial court to order possession of real property as alimony, we fail to see the basis of his argument. Excluding the supporting spouse from the marital home is simply a natural consequence of a judgment which grants possession of the marital home to the dependent spouse. This assignment of error is without merit.

[3] Finally, defendant challenges the trial court's order in the judgment which prevents him from removing his personal property absent an agreement between the parties and proper scheduling between their attorneys. We have a difficult time believing that this question has not become moot in the time since the judgment was issued. Since, however, the question is raised and argued in the briefs, we will address it.

The obvious and legitimate intent of the order is to insure that the removal of defendant's personal property is accomplished peacefully. Certainly, in issuing its judgment, a trial court has broad discretion in the manner in which it grants relief and it may order whatever relief the circumstances demand. See 49 C.J.S. *Judgments* Section 67 (1947). Even so, we believe the order here exceeds what is reasonably necessary. The order subjects the removal of defendant's property to the unbridled discretion of the plaintiff. Given what has apparently been an unfriendly history between the parties since their separation, a possibility exists that the plaintiff could abuse the order. Therefore, we reverse this part of the judgment and remand the case for entry of a more appropriate order regarding the removal of defendant's personal property.

Affirmed in part; reversed and remanded in part.

Judges WEBB and BECTON concur.

RAYMOND ALLEN SMITH, PLAINTIFF APPELLEE v. CARL SCOTT ALLISON, DEFENDANT APPELLANT v. DANIEL'S STEAKHOUSE, THIRD PARTY DEFENDANT

No. 8626SC349

(Filed 4 November 1986)

1. **Uniform Commercial Code § 29— promise to pay—no contradiction by parol evidence**

In an action to recover on two promissory notes executed by defendant, the promise to pay set forth in the notes could not be contradicted or destroyed by parol evidence that defendant would not be called upon to pay in accordance with the terms of the notes.

2. **Uniform Commercial Code § 33— signing in representative capacity—parol evidence not admissible**

In an action to recover on two promissory notes executed by defendant, parol evidence was inadmissible to show that defendant signed as an agent of his employer, since he merely signed his own name on both notes without indicating that he was signing in a representative capacity or naming his principal. N.C.G.S. § 25-3-403(2)(a).

3. **Uniform Commercial Code § 28— promissory notes—consideration to promisor unnecessary**

In an action to recover on two promissory notes executed by defendant, the trial court did not err in excluding testimony that defendant never received any money or anything of value himself in exchange for signing the notes, since it is not necessary that the promisor receive consideration or something of value himself in order to provide consideration sufficient to support a contract.

APPEAL by defendant from *Owens, Judge.* Judgment entered 23 October 1985 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 13 October 1986.

This is a civil action wherein plaintiff seeks to recover $12,000 plus interest allegedly due on two promissory notes executed by defendant. Defendant filed a third party complaint against Daniel's Steakhouse, Inc., seeking indemnification for any losses sustained as a result of plaintiff's action, which he voluntarily dismissed on 26 September 1985. In his answer to plaintiff's complaint, defendant denied that he was indebted to plaintiff and alleged that plaintiff made the $12,000 loan to Daniel's Steakhouse, Inc., and not to defendant.

Following a trial, the jury found, pursuant to the issues submitted, that defendant had signed the notes, consideration was given for the notes, plaintiff had demanded payment, defendant had not paid and defendant was indebted to plaintiff in the amount of $12,000. From a judgment entered on the verdict, defendant appealed.

Dozier, Brackett, Miller, Pollard & Murphy, by Fritz Y. Mercer, Jr., for plaintiff, appellee.

Lila Bellar and Harper & Connette, by Edward G. Connette, for defendant, appellant.

HEDRICK, Chief Judge.

Based on his first four assignments of error and his first thirty-eight exceptions duly noted in the record, defendant contends that the trial court erred in excluding evidence offered by defendant tending to show "the nature of the transactions, the representative capacity in which he had signed the notes, and the failure of consideration necessary to support the notes." By his remaining assignment of error argued on appeal and Exceptions Nos. 40-44, defendant contends that the jury verdict and the judgment entered thereon were incorrect as a matter of law because of the exclusion of this evidence. Defendant argues that the evidence he proposed to introduce was excluded because of the trial court's "misinterpretation of Rule 601 (the Dead Man's Statute) and the nature and scope of attorney client privilege." The record before us does not disclose the reason for the exclusion of much of the evidence defendant sought to introduce. The trial court's rulings, however, were not erroneous, because all of the evidence was irrelevant or barred by the parol evidence rule.

[1] Defendant contends that the evidence he sought to introduce was admissible to show that he and plaintiff agreed that he would not be asked to repay the $12,000 debt secured by the notes and that the notes would be substituted for a note executed by the president of Daniel's Steakhouse, Inc. We disagree. The promise to pay set forth in the notes could not be contradicted or destroyed by parol evidence that the maker thereof would not be called upon to pay in accordance with the terms of the notes. *Vending Co. v. Turner*, 267 N.C. 576, 148 S.E. 2d 531 (1966).

[2] Defendant also contends that this evidence was admissible in support of his defense that he is not liable on the promissory notes because he signed them as an agent of his employer, Daniel's Steakhouse, Inc. G.S. 25-3-403 provides, in pertinent part, as follows:

> (2) An authorized representative who signs his own name to an instrument
>
> (a) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;

Parol evidence is inadmissible to show agency status when the agent merely signs his own name but does not indicate either the fact of representation or the name of his principal. J. White & R. Summers, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE Sec. 13-5 (1972). In the present case, defendant merely signed his own name on both notes without indicating that he was signing in a representative capacity or naming his principal. Pursuant to G.S. 25-3-403(2)(a), therefore, he is personally obligated and the parol evidence that defendant sought to introduce is inadmissible to show agency status.

[3] Defendant also contends that some of the evidence excluded by the trial court is relevant to his defense that he received no consideration for executing the notes. In particular, defendant argues that the trial court erred in excluding testimony that defendant never received any money or anything of value himself in exchange for signing the notes. This contention is also without merit. It is not necessary that the promisor receive consideration or something of value himself in order to provide consideration sufficient to support a contract. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). A benefit to a third person is sufficient consideration for a promise. *Id.* Defendant alleged in his answer and sought to testify at trial that plaintiff intended to lend $12,000 to Daniel's Steakhouse, Inc., when defendant executed the notes and that the funds were advanced directly to the corporation. This evidence tends to show that there was sufficient consideration to support the contract between plaintiff and defendant. It is not relevant to support defendant's contention that he received no consideration for executing the notes.

For the foregoing reasons, we hold that the trial court did not err in excluding the evidence defendant sought to introduce.

No error.

Judges ARNOLD and ORR concur.

CHARLES L. FAIRCLOTH AND LONNIE VANCE MICHAEL v. HUGH JOSEPH BEARD, McDANIEL LEWIS BEARD, BEARD FABRICS, INC., BEARD PROPERTIES, LIMITED, A PARTNERSHIP, AND HJB PROPERTIES, LIMITED, A PARTNERSHIP

No. 8615SC270

(Filed 4 November 1986)

Jury § 1; Appeal and Error § 6.2— jury trial allowed—no appeal from order

Where plaintiffs brought a shareholder derivative suit alleging self-dealing by defendants and seeking damages, the imposition of a constructive trust, and other relief, and plaintiffs demanded trial by jury, defendants could not appeal from the trial court's denial of their motion to invalidate all demands for a jury trial.

APPEAL by defendants from *McLelland, Judge.* Order entered 23 January 1986 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 17 September 1986.

Ridge, Richardson & Johnson, by Paul H. Ridge and Daniel Snipes Johnson, for appellants.

Hemric, Hemric & Hemric, P.A., by H. Clay Hemric and Nancy G. Hemric, and Wishart, Norris, Henninger & Pittman, P.A., by W. Kelly Elder, Jr., for appellees.

ORR, Judge.

Appellants are four of five defendants named in a shareholder derivative suit brought by plaintiffs Faircloth and Michael on behalf of the North Carolina corporation Beard Fabrics, Inc. Plaintiffs' original complaint, filed in Alamance County 21 May 1982, alleged self-dealing by defendants and requested relief in the form of damages, the imposition of a constructive trust or equita-

ble lien upon any real property owned by the corporation, court-supervised liquidation and dissolution of the corporation, including the appointment of a receiver, and the costs and expenses of maintaining the action. In their complaint plaintiffs demanded trial by jury on all issues so triable. The answer of defendant corporation Beard Fabrics, Inc., also included a demand for a jury trial. In a supplemental complaint filed 27 November 1985, plaintiffs alleged that defendant officers had breached their fiduciary duty to the corporation, for which plaintiffs sought punitive damages in addition to the recovery of compensatory damages sought in the original pleadings.

On 2 January 1986 defendants moved to invalidate all demands for a jury trial on the grounds that no such right exists with respect to this controversy. The trial court denied defendants' motion. Defendants' appeal rests upon the sole question whether their motion was erroneously denied.

An order that denies a motion to invalidate a party's request for a jury trial is interlocutory: it does not determine the issues. *Waters v. Personnel, Inc.*, 294 N.C. 200, 240 S.E. 2d 338 (1978). *See also Dunlap v. Dunlap*, 81 N.C. App. 675, 344 S.E. 2d 806 (1986). Whether an appeal may be taken from such an order is governed by statute, the pertinent provisions of which have been succinctly restated by the Supreme Court:

> Pursuant to G.S. Sec. 1-277 and G.S. Sec. 7A-27, no appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination.

A.E.P. Industries v. McClure, 308 N.C. 393, 400, 302 S.E. 2d 754, 759 (1983). The crux of this appeal, therefore, is whether a substantial right of the appellants has been jeopardized by the trial court's order. We hold that no such right is affected under the circumstances presented by this case.

Article I, Section 25, of the North Carolina Constitution guarantees the right to a trial by jury "in all cases where the prerogative existed at common law or by statute at the time the 1868 Constitution was adopted," *N.C. State Bar v. DuMont*, 304 N.C. 627, 641, 286 S.E. 2d 89, 98 (1982); but no constitutional provi-

sion has been interpreted to guarantee a trial by judge on demand. Nor is there an analogue to G.S. 1A-1, Rule 38(a) and (b), preserving the right to trial by jury, which states the right to a trial by judge. Indeed, Rule 39 acknowledges a judge's considerable discretion in trying issues with or without the advisory or binding advice of a jury. This Court has held that an order *denying* a party's "motion for a jury trial is interlocutory but does affect a substantial right within the meaning of N.C.G.S. 1-277(a)." *In re Ferguson*, 50 N.C. App. 681, 682, 274 S.E. 2d 879, 879 (1981). However, we find no authority in support of appellants' contention that an order denying a party's motion to strike the adversary's demand for a jury trial affects a substantial right of the moving party.

It is important to recognize that the trial court's order in this case is no more than a denial of the defendants' motion to invalidate the plaintiffs' demand for a jury trial. The order before us includes no finding by the trial court that the parties were or were not entitled to a trial by jury, as Rule 39(a) permits the trial court to do; nor does the record indicate that the trial judge was opting under Rule 39(c) for an advisory jury. The trial court's order did not exercise the court's discretion pursuant to Rule 39. In this context, we hold that no substantial right of appellants was affected by the trial court's order. Appellants' appeal is accordingly

Dismissed.

Chief Judge HEDRICK and Judge ARNOLD concur.

AUSTIN BRADSHAW, PETITIONER-APPELLEE v. ADMINISTRATIVE OFFICE OF THE COURTS AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLANTS

No. 8627SC385

(Filed 4 November 1986)

Master and Servant § 101— unemployment compensation—eligibility of magistrate

A magistrate is not a "member of the judiciary" pursuant to N.C.G.S. § 96-8(6)i so as to make him ineligible for unemployment insurance benefits.

Bradshaw v. Administrative Office of the Courts

APPEAL by respondents from *Snepp, Judge*. Order issued 4 February 1986 in Superior Court, LINCOLN County. Heard in the Court of Appeals 24 September 1986.

Claimant, Austin Bradshaw, served as a magistrate in Lincolnton for a period of twelve years. After that time, he was not reappointed to another term. Bradshaw filed a claim for unemployment insurance benefits, but his claim was denied. He then filed a protest to that determination.

After an evidentiary hearing on the matter, a special deputy commissioner for the Employment Security Commission held claimant to be an exempt employee within the meaning of the Employment Security Law. The Chief Deputy Commissioner issued an order upholding this ruling. Claimant appealed to the superior court of Lincoln County.

On appeal the superior court issued an order reversing the decision of the Commission. From the decision of the superior court, the Employment Security Commission and the Administrative Office of the Courts now appeal.

C. Coleman Billingsley, Jr., attorney for appellant Employment Security Commission of North Carolina.

Douglas Johnston, attorney for appellant Administrative Office of the Courts.

No brief filed for petitioner appellee.

ORR, Judge.

The single issue before the Court in this case is whether a magistrate is a "member of the judiciary" pursuant to N.C. Gen. Stat. 96-8(6)i (1985) such that he is ineligible for unemployment insurance benefits. We hold that a magistrate is not a "member of the judiciary" for the purpose of determining unemployment insurance eligibility.

The applicable statute in this case provides:

> On and after January 1, 1978, the term "employment" includes services performed for any State and local governmental employing unit. Provided, however, that employment shall not include service performed (a) as an elected official; (b) as

> a member of a legislative body or a member of the judiciary, of a State or political subdivision thereof; . . . .

G.S. 96-8(6)i. This statute was enacted by the North Carolina General Assembly following amendments to the Federal Unemployment Tax Act which, in general, required states to provide unemployment compensation coverage to all employees of state and local governments. Senate Report No. 94-1265, Pub. L. No. 94-566, 1976 U.S. Code Cong. & Ad. News 5, p. 5997-98.

In defining the scope of the coverage exemption for "members of the judiciary," respondents would have this Court look to the similarity in job function between magistrates and judges. We believe, however, that this approach fails to comport with the declared purpose of North Carolina's Employment Security Law and the history behind the enactment of G.S. 96-8(6)i.

The North Carolina Employment Security Law states that its underlying purpose is to provide for protection from involuntary unemployment. N.C. Gen. Stat. 96-2 (1985). This policy declaration has been interpreted as calling for strict construction of those sections in the Act which impose disqualifications for its benefits. *In re Watson*, 273 N.C. 629, 639, 161 S.E. 2d 1, 10 (1968). Thus, at the outset, we must narrowly interpret the phrase, "member of the judiciary," in order to effectuate State legislative intent.

Additionally, an underlying purpose of the 1976 Federal Unemployment Tax Act amendments was to require states to provide their employees with unemployment insurance coverage. Pub. L. 94-566, 1976 U.S. Code Cong. & Ad. News 5. Because North Carolina's judiciary exemption is a product of this federal legislation, it must also be construed to effectuate the federal legislative intent that states provide their employees with unemployment insurance.

Despite any similarity in function between judges and magistrates, the employment status of magistrates more closely resembles that of other state employees than judges. Magistrates are appointed. N.C. Gen. Stat. 7A-171 (1981). Judges, on the other hand, are elected. N.C. Gen. Stat. 7A-10 (1981) (Supreme Court justices); *id.* at 7A-16 (Court of Appeals judges); N.C. Const. Art. IV, Sec. 9(1) (superior court judges); and N.C. Gen. Stat. 7A-140 (1981) (district court judges). Additionally, magistrates are consid-

ered state employees for the purpose of determining retirement benefit eligibility while judges are placed under the Uniform Judicial Retirement System. *See* N.C. Gen. Stat. 135-1(10) and 135-55 (Supp. 1985). For the reasons set forth, we hold that magistrates are not "members of the judiciary" for determining unemployment benefit eligibility.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

DONALD E. TOLLIVER, PETITIONER-APPELLEE v. EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLANT

No. 8610SC356

(Filed 4 November 1986)

Master and Servant § 10— reversal of State Personnel Commission decision—remand for new hearing

The superior court did not err in reversing a decision of the State Personnel Commission and remanding the case for a new hearing where the court found that the employee's rights may have been prejudiced by agency findings and conclusions made upon unlawful procedure, affected by error of law, unsupported by substantial evidence, and that were arbitrary or capricious. N.C.G.S. § 150A-51.

APPEAL by respondent from *Preston, Judge*. Order entered 8 January 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 17 September 1986.

Petitioner Donald Tolliver, a former permanent employee of the North Carolina Employment Security Commission, was terminated in August of 1981 due to a Reduction-In-Force. He filed a grievance, protesting his termination, with the North Carolina Personnel Commission and presented his case at an evidentiary hearing. The State Personnel Commission's chief hearing officer reviewed the record and rendered a proposal for decision in favor of Tolliver's former employer.

Petitioner then appealed to the full Commission. On appeal Tolliver argued that numerous procedural errors occurred during

his hearing; that the State Personnel Commission improperly withdrew an order for rehearing after official tape recordings of the hearing were partially erased; and that the opinion of the hearing officer was prepared improperly by an officer who did not preside at the actual hearing. The full Commission issued an order upholding the conclusions of the hearing officer and denying petitioner's motion for rehearing.

Petitioner further appealed to the superior court of Wake County. The superior court reversed the decision of the full Commission and remanded the case for a new hearing. From this decision defendant appeals.

Donald B. Hunt for petitioner appellee.

T. S. Whitaker, Chief Counsel and James A. Haney for defendant appellant.

ORR, Judge.

N.C. Gen. Stat. 126-43 (1981) provides that the Administrative Procedure Act applies to the State Personnel System and hearing and appeal matters before the Commission. Under the North Carolina Administrative Procedure Act, section 150A-51 governs scope of review. This statute in pertinent part reads:

> 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:
>
> . . .
>
> (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 submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. 150A-51 (1983) (Although Chapter 150A has been rewritten and recodified, 1985 N.C. Sess. Laws, c. 746, s. 19 pro-

vides that the act shall not affect contested cases commenced before 1 January 1986.).

In the case at bar the superior court did find that Mr. Tolliver's rights may have been prejudiced by agency findings, conclusions, and decisions made upon unlawful procedure, affected by error of law, unsupported by substantial evidence, and that were arbitrary or capricious. The court supported its conclusion with a list of eleven findings of procedural and substantive error. After thorough review of the record, we conclude that the agency's finding was properly reversed and remanded for rehearing in accordance with the statute.

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

IN THE MATTER OF VINCENT BRENNER, LISA HOLLAND

No. 868DC534

(Filed 18 November 1986)

1. Parent and Child § 2.3— child custody—neglect—failure to comply with prior court directives

There was no merit to respondent's contention that the trial court erred by removing custody of her children from her because she failed to comply with prior court directives where respondent had previously stipulated that her children were neglected; the court found that custody should remain in respondent but specified certain conditions applicable to her, including that she cooperate with community level services; and the court acted with full statutory authority when it conducted a hearing upon a social worker's motion and determined that respondent's subsequent refusal to cooperate with the community level services and orders applicable to her constituted a change of circumstances affecting the best interests of the children sufficient to require modification of the prior custody order.

2. Parent and Child § 2.3— child custody—neglect—burden of proof not shifted to parent

There was no merit to respondent's contention in a child custody hearing that the trial court improperly shifted the burden of proof to her in its order removing custody from respondent where the order provided that it would be reviewed in 90 days; at that time respondent should show evidence of a stable environment and that she should work with various community agencies and

personnel to stabilize her situation so that the children could be returned to her; these portions of the order had no bearing on burden of proof but simply stated with particularity what it was necessary for respondent to do prior to the review in order to regain custody of her children; and the order was consistent with prior orders and illustrated the court's continued interest in strengthening the home situation and maintaining the family structure.

3. **Parent and Child § 2.3— child custody—neglect—findings of fact**

Respondent in a child custody proceeding could not complain about the trial court's findings of fact which related to events prior to the penultimate review of her case, since the findings objected to related to evidentiary rather than ultimate facts; there were other evidentiary facts sufficient to support the ultimate facts found by the court; and evidence of prior neglect which led to an adjudication of neglect shows circumstances as they were and is therefore relevant as to whether a change of circumstances has occurred since that order.

4. **Parent and Child § 2.3— child custody—neglect—findings of fact**

Evidence was sufficient to support various findings of the trial court with regard to respondent's neglect of her children, and the findings were sufficient to support its conclusion that custody of the children should be put with the Department of Social Services for placement; furthermore, a conflict in the order with regard to placing custody of the children in the mother or in the Department of Social Services could be resolved by considering the evidence, findings, and the court's oral order at trial.

APPEAL by respondent from *Setzer, Judge*. Judgment signed 20 December 1985 in District Court, WAYNE County. Heard in the Court of Appeals 21 October 1986.

Petitioner Louise Rockstad, social worker with the Wayne County Department of Social Services, instituted this juvenile proceeding on 24 April 1985. Petitioner alleged that the minors Lisa Holland, born 9 September 1980, Sheila Holland, born 14 October 1982, and Vincent Brenner, born 8 October 1983, did not receive proper care from their mother Litha Holland and were neglected within the meaning of G.S. 7A-517(21). Specifically, petitioner alleged, *inter alia*: that respondent "does not take care of them [her children] herself for more than a few days at a time. She often leaves them in the care of other relatives who do not properly take care of them either"; that on "several occasions . . . there has been no food in her residence"; that respondent "has not applied for AFDC, food stamps, or medicaid to help provide for her children"; and that respondent "at times has had a problem with alcohol and drugs but she has not sought help from Mental Health on a consistent basis."

On 24 April 1985, the court appointed Farris Duncan as attorney advocate and Mary M. Borden as guardian ad litem for the minors. On 31 May 1985, the court found as fact that the mother Litha Holland agreed and stipulated that the children were neglected within the meaning of G.S. 7A-517(21) and agreed to cooperate with the Wayne County Department of Social Services and to abide by certain terms of the court regarding care of her children. The court ordered that the juveniles be adjudicated neglected juveniles, that custody remain with the mother, and that the matter be set for review in sixty (60) days. Respondent entered into a service agreement with the Wayne County Department of Social Services and her social worker Louise Rockstad.

The matter came on for review on 22 July 1985, at which time the court found as fact that the mother Litha Holland had signed a consent form to allow the maternal grandfather to adopt the minor Shelia Holland. The court ordered that custody of Lisa Holland and Vincent Brenner remain with the mother despite her failure to comply with prior orders. Respondent was ordered to "have sufficient food on hand for her children . . . maintain a suitable resident [sic] . . . enroll Lisa Holland in kindergarten . . . go to the Mental Health Center for evaluation and therapy if recommended by the Center and . . . report to this Court concerning the evaluation and treatment. . . ." The matter was scheduled for further review. On 14 October 1985 this matter was reviewed. The court had access to a court summary prepared by Mary M. Borden, the guardian ad litem, a court summary prepared by Louise Rockstad, the assigned social worker, a letter from Charles Holden of the Wayne County Mental Health Center, and the service agreement previously signed by the mother. Again custody was ordered to remain with the mother Litha Holland; again respondent was ordered to comply with the service agreement respondent previously entered into; again the matter was set for review. Shortly thereafter, on 29 October 1985, Louise Rockstad filed a motion for review requesting that the Wayne County Department of Social Services be given custody of the minors Lisa Holland and Vincent Brenner. Specifically, the movant alleged that the mother had stopped cooperating with the social worker, refused the social worker entry to the Holland home, failed to abide by the terms of the service agreement and that it was in the best interest of the children to place them in the custody of the Wayne County Department of Social Services.

In an order signed on 20 December 1985, the court ordered that the Wayne County Department of Social Services have custody and placement responsibility of the two minors, that the mother "work with the Guardian ad litem, the Homemaker, the Social Worker, and the Mental Health Center to attempt to stabilize her situation so that the children can be returned to her." The matter was to be reviewed in ninety days with notice to all parties. From this order respondent Litha Holland appeals.

Baddour, Lancaster, Parker, Hine & Keller, P.A., by E. B. Borden Parker, for petitioner appellee.

R. Michael Bruce, for respondent appellant.

JOHNSON, Judge.

G.S. 7A-666 authorizes a juvenile's parent to appeal any final order of the court in a juvenile matter. G.S. 7A-666 defines a final order to include one which modifies custodial rights; hence, this matter is properly before this Court. G.S. 7A-666(4).

[1] In respondent's first Assignment of Error she contends that the court erred by removing custody from respondent because she failed to comply with prior court directives. Respondent claims that the court was limited to finding her in contempt and that the court could not "punish her" by removing her children from her custody. Respondent's argument is without merit.

On 20 May 1985, Lisa Holland and Vincent Brenner were adjudicated neglected children. G.S. 7A-517(21). At the adjudication hearing, the mother Litha Holland stipulated that the children were neglected. A neglected juvenile is defined, in pertinent part, as "[a] juvenile who does not receive proper care, supervision, or discipline from his parent . . .; or who lives in an environment injurious to his welfare. . . ." G.S. 7A-517(21). G.S. 7A-647 prescribes the dispositional alternatives that are available to the court once a minor is adjudicated neglected. G.S. 7A-647 states, in pertinent part:

> [Sec.] 7A-647. *Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.*
>
> The following alternatives for disposition shall be available to any judge exercising jurisdiction and the judge

may combine any of the applicable alternatives when he finds such disposition to be in the best interest of the juvenile:

. . . .

(2) In the case of any juvenile who needs more adequate care or supervision or who needs placement, the judge may:

a. Require that he be supervised in his own home by the Department of Social Services in his county, a court counselor or other personnel as may be available to the court, subject to conditions applicable to the parent or the juvenile as the judge may specify; or

b. Place him in the custody of a parent, relative, private agency offering placement services, or some other suitable person; or

c. Place him in the custody of the Depatment [sic] of Social Services in the county of his residence, or in the case of a juvenile who has legal residence outside the State, in the physical custody of the Department of Social Services in the county where he is found so that agency may return the juvenile to the responsible authorities in his home state.

When disposing of the case the court's paramount consideration must be the best interest of the juvenile. *See* G.S. 7A-647. *In re DiMatteo*, 62 N.C. App. 571, 303 S.E. 2d 84 (1983). The court must also be guided by the express purpose of dispositions as stated in G.S. 7A-646, as follows:

Sec. 7A-646. Purpose.

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile to achieve the objectives of the State in exercising jurisdiction. If possible, the initial approach should involve working with the juvenile and his family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate

community-level services to be provided to the juvenile and his family in order to strengthen the home situation.

In the initial disposition in the case *sub judice* the court found as fact that it was in the best interest of these juveniles to remain in the custody of respondent. What serves the best interest of a juvenile constitutes a conclusion of law, rather than a finding of fact. *See Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E. 2d 466, 468 (1978). The court also specified conditions applicable to respondent. G.S. 7A-647 authorizes the judge to specify conditions applicable to the parent. G.S. 7A-647(2)(a). The mother agreed to comply with the court's orders applicable to her, indicating a spirit of cooperation. Specifically, on 31 May 1985, the court ordered, *inter alia*:

2. That the custody of these juveniles shall remain with the mother Litha Holland and Litha Holland shall:

a. Maintain a stable residence for her children.

b. Be evaluated at the Mental Health Center and participate in therapy if it is recommended by the Mental Health Center.

c. Care for the children by herself and live in the same residence with the children.

d. Not leave her children in the care of Dorothy Pendergraft.

e. Cooperate with the homemaker, social worker, foster grandparents and Guardian Ad Litem.

f. Have sufficient food on hand for the children.

g. That the respondent mother shall report any move that she makes to the Wayne County Clerk of Superior Court, the Guardian Ad Litem, and the Department of Social Services.

The court's jurisdiction continues during the minority of a juvenile who has been found neglected. G.S. 7A-664(c). G.S. 7A-664 empowers the court to conduct review hearings and to modify or vacate orders throughout the juvenile's minority due to a change of circumstances or the needs of the juvenile. G.S. 7A-664(a) and (c). The court previously deemed it in the best interest of the minor children that the mother comply with those orders of the court applicable to her. The court acted with full statutory authority when it conducted a hearing upon the social worker's

motion and determined that respondent's subsequent refusal to cooperate with the community-level services and orders applicable to her constituted a "change of circumstances" affecting the best interest of the juveniles sufficient to require the modification of the prior custody orders. This Assignment of Error is overruled.

[2] In respondent's second Assignment of Error respondent contends that the court erroneously and impermissibly shifted the burden of proof to respondent. Specifically, respondent refers to that portion of the court's decree signed 20 December 1985 as follows:

> 5. That Litha Holland shall show evidence of a stable environment to the Court at the review.
>
> 6. That Litha Holland shall work with the Guardian ad litem, the Homemaker, the Social Worker, and the Mental Health Center to attempt to stabilize her situation so that the children can be returned to her.

Respondent maintains that the burden of proof should be with the movant, the Wayne County Department of Social Services. We are unpersuaded by respondent's argument.

Once a court removes custody of a neglected juvenile from his parent, the court must review the custody order within six months. G.S. 7A-657 provides, *inter alia*:

> In any case where the judge removes custody from a parent or person standing in loco parentis because of dependency, neglect or abuse, the juvenile shall not be returned to the parent or person standing in loco parentis unless the judge finds sufficient facts to show that the juvenile will receive proper care and supervision.
>
> In any case where custody is removed from a parent, *the judge shall conduct a review within six months* of the date the order was entered, and shall conduct subsequent reviews at least every year thereafter. . . .
>
> *The court shall consider information from* the Department of Social Services; the juvenile court counselor, the custodian, guardian, *the parent* or the person standing in loco

parentis, the foster-parent, the guardian ad litem; and any public or private agency which will aid it in its review.

. . . .

The judge, after making findings of fact, shall enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the juvenile. If at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement.

(Emphasis added.)

At the next statutorily imposed review the court would be required by G.S. 7A-657 to receive evidence from respondent and others, weigh all evidence presented, and enter an order in the best interest of the juveniles. Paragraphs 5 and 6 of the decretal portion of the order at issue have no bearing on the burden of proof at the 17 December 1985 hearing. Rather, paragraphs 5 and 6 and the other portions of the decree applicable to respondent enunciate with particularity what the court deems necessary for respondent to do prior to the next review to be in a position to regain custody. These orders applicable to respondent are consistent with prior orders and illustrate the court's continued interest in strengthening the home situation and maintaining the family structure. This Assignment of Error is overruled.

[3] In respondent's third Assignment of Error respondent contends that the court erred by failing to limit evidence and findings based thereon to matters which transpired between 14 October 1985, the date of the penultimate review, and 17 December 1985, the date of the last review. Respondent contends that she was notified and given an opportunity to prepare for a hearing on only questions which arose after 14 October 1985. We disagree.

We need not address respondent's evidentiary objections because, by failing to object to the evidence at trial, respondent waived evidentiary objections on appeal. *See* Rule 46(b), N.C. Rules Civ. P.

The findings to which respondent makes exception pertinent to this Assignment of Error are:

4. That during the summer and through part of the fall Litha Holland lived at Pinewood Trailer Park.

5. That Litha Holland was told by the operator of Pinewood Trailer Park to leave because of the damage done to the trailer.

. . . .

16. Litha Holland used the Medicaid stamps for her children when she received Medicaid.

As stated previously, the court had the authority to place the juveniles in the custody of the local Department of Social Services as soon as they were adjudicated neglected. The court had the authority to modify its prior orders upon a finding of a change of circumstances and concluding such modification was in the best interest of the juveniles. The findings to which respondent objects are not dispositive of these key issues. There are two kinds of facts, ultimate facts and evidentiary facts. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 342, 218 S.E. 2d 368, 372 (1975). Ultimate facts are the final facts required to establish a plaintiff's cause of action or a defendant's defense, whereas evidentiary facts are subsidiary facts which tend to prove the ultimate facts. *Id.* The trial judge is required to find only the ultimate facts. *Id.* The facts to which respondent excepts are evidentiary facts. We find other evidentiary facts sufficient to support the ultimate facts found by the court. Hence, the error, if any, is nonprejudicial.

Moreover, our Supreme Court has held that evidence of neglect by a parent prior to losing custody of a child and an adjudication of neglect are both admissible in subsequent proceedings to terminate parental rights so long as any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect are also considered. *In re Ballard*, 311 N.C. 708, 715, 319 S.E. 2d 227, 232 (1984). We find this rule applies with equal force to a subsequent proceeding to remove custody from a parent. Evidence of prior neglect which led to an adjudication of neglect shows circumstances as they were and therefore is relevant to whether a change of circumstances has occurred since that order. This Assignment of Error is overruled.

[4] In respondent's fourth through sixth Assignments of Error, she contends the evidence is insufficient to support the following findings of fact:

> 6. That during the time that Litha Holland resided at Pinewood Trailer Park her children were observed scantily clothed and running about the park unsupervised on many occasions.
>
> . . . .
>
> 10. Lisa Holland missed at least fourteen days of school while she lived at Pinewood Trailer Park and Litha Holland cannot explain these absences.
>
> . . . .
>
> 12. That since Litha Holland has lived in Pikeville, Lisa Holland has missed six or seven days of school, only one of which has been due to illness.

Findings of Fact are conclusive on appeal if supported by any competent evidence. *Little v. Little*, 9 N.C. App. 361, 176 S.E. 2d 521 (1970). We have reviewed all the evidence and find some evidence to support each of these findings. On direct examination respondent was asked, "Before you went to Pikeville you kept Lisa out of school more than 14 days didn't you?" Respondent answered, "I would get up some mornings late and I didn't have transportation to take her to school when she missed the bus." Respondent's answer constitutes an admission. Respondent contends in support of this Assignment of Error that the question was impermissibly leading. Respondent failed to raise this objection at trial; hence, it is waived on appeal. *See* Rule 46(b), N.C. Rules Civ. P. This Assignment of Error is overruled.

In respondent's seventh Assignment of Error she contends that the evidence is insufficient to support the court's Finding of Fact 18. We disagree.

Finding of Fact 18 states:

> 18. That it is not in the best interest of these juveniles to remain in the custody of Litha Holland until Litha Holland will comply with the directives set out by the Court.

As stated previously, what serves the best interest of a juvenile is properly a conclusion of law. *See Steele, supra.* A conclusion of law must be based on the facts found by the court, and those facts must be supported by the evidence. *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E. 2d 26 (1977). Findings of fact are conclusive if supported by any competent evidence. *Little, supra.*

The court made the following facts which are supported by competent evidence:

> 3. By order of this Court dated July 22, 1985, the Court ordered as follows:
>
> (1) That the custody of these children shall remain with Litha Holland.
>
> (2) That Litha Holland shall comply with the previous orders of this Court and shall cooperate with the Social Worker, Homemaker, Guardian ad litem, and Foster Grandparents.
>
> (3) That Litha Holland shall always have sufficient food on hand for her children, shall maintain a suitable residence and should obtain the necessary documents so that she can enroll and shall enroll Lisa Holland in kindergarten.
>
> (4) That Litha Holland shall go to the Mental Health Center for evaluation and therapy if recommended by the Center and the Center shall report to this Court concerning the evaluation and treatment prior to August 26, 1985.
>
> . . . .
>
> 7. That Litha Holland refused to cooperate with the Social Worker and testified that the Social Worker "got on my case."
>
> 8. Litha Holland stopped attending the Mental Health Center because the substance abuse counsellor "got on my case."
>
> 9. Litha Holland testified that she quit using drugs approximately five months ago and her sister testified that she had not seen her drunk in two months.
>
> . . . .

11. That after Litha Holland moved from Pinewood Trailer Park on or about the end of October, 1985, she stayed with her father for a week or a week and a half and then moved to Pikeville where she currently resides with her two children.

. . . .

13. That Litha Holland did not go for a recertification for AFDC and Medicaid because on that date she had something else to do and has not made a new appointment.

14. Litha Holland did not inform the DSS Homemaker of her change of address and the Homemaker had to find her through her father.

15. That Litha Holland now has only SSI income for herself which she would have to spend on her children.

. . . .

17. Litha Holland has without just cause or excuse failed to obey the previous orders of this Court.

These findings are sufficient to support the conclusion that it was in the best interest of these juveniles not to remain in the custody of respondent. This Assignment of Error is overruled.

In respondent's eighth and ninth Assignments of Error, respondent contends that the findings of fact are insufficient to support the conclusion of law "[t]hat the custody of these children should be put with the Wayne County Department of Social Services for placement."

Finding of Fact 18 states:

18. That it is not in the best interest of these juveniles to remain in the custody of Litha Holland until Litha Holland will comply with the directives set out by the Court.

Finding of Fact 19 states:

19. That it is essential to the welfare of the children to remain in the custody of their mother.

Both of these findings are conclusions of law. Because the second statement is equivalent to concluding that the best interest of the juveniles is to remain in the custody of respondent,

the two conclusions are in direct conflict. The record resolves the conflict. As a conclusion of law, the second statement is not supported by the evidence or the findings of fact. Moreover, the court stated in its oral order at trial, *inter alia*:

> COURT: Mr. Parker based upon the evidence presented it is clear to this Court that Mrs. Holland has not abided by any of the conditions set out by the Court in previous orders which were conditions set out for the [sic] basically for the best interest of the children. I will remove the children from the home and place legal custody with the Department of Social Services and give them full placement authority meaning they can place the children back in Mrs. Holland's home if they desire or any foster care which they desire.

It is beyond doubt that the court intended the neglected juveniles Lisa Holland and Vincent Brenner to be in the custody of the Wayne County Department of Social Services. No other result could follow from the evidence and all other findings and conclusions. Because all Assignments of Error have been overruled, the order signed 20 December 1985 is

Affirmed.

Judges WEBB and PHILLIPS concur.

NANCY CLINE PRESCOTT v. JOSIAH THOMAS PRESCOTT, JR.

No. 8626DC526

(Filed 18 November 1986)

1. Rules of Civil Procedure § 60— motion to set aside consent order—objection to jurisdiction—timeliness

The trial court properly dismissed plaintiff's motion made pursuant to N.C.G.S. § 1A-1, Rule 60(b) to set aside a 24 February 1981 consent order where the order itself provided that the court had jurisdiction over all matters; plaintiff signed the order; the time period plaintiff allowed to elapse before objecting to the jurisdictional findings in the order was not reasonable; because of plaintiff's consent and acquiescence for nearly 32 months to the consent order, plaintiff failed to preserve her objection; and the trial court specifically found that plaintiff's testimony was not credible with respect to consent or lack thereof to the order she sought to have set aside.

2. Divorce and Alimony § 27— child support—no award of attorney fees

The trial court in a proceeding for child support did not err in denying plaintiff's motion for an award of attorney fees since N.C.G.S. § 50-13.6 provides that, before ordering payment of a fee in a support action, the court must find as fact that the party ordered to furnish support has refused to provide adequate support, but the court made no such finding in this case, and the record revealed that defendant complied with all orders which directed him to make child support payments and, when necessary, voluntarily made payments for the support of the parties' children though he was not obligated to do so pursuant to the consent order in question.

3. Divorce and Alimony § 24.5— child support—modification of prior order

Findings of fact and conclusions of law were sufficient to support the trial court's award of $422 per month per child, though the award was a modification of a 1981 order wherein plaintiff was given a lump sum award, and failure of the court to make an award of child support on an ongoing basis would unjustifiably and adversely affect the children and their well-being.

APPEAL by plaintiff from *Matus, Judge*. Judgment entered 31 July 1985 in District Court, MECKLENBURG County. Heard in the Court of Appeals 21 October 1986.

On 15 March 1961, plaintiff, Nancy Cline Prescott, and defendant, Josiah Thomas Prescott, Jr., were duly married to each other. Two children were born of the marriage: Josiah Thomas Prescott, III, born 5 May 1969, and David Blair Prescott, born 2 October 1971.

In the month of November, 1977 defendant informed plaintiff of his desire for a separation and proceeded to move out of the marital residence. On 14 April 1978, plaintiff filed her complaint alleging abandonment and seeking, *inter alia*, temporary and permanent alimony, custody of the parties' two minor children, temporary and permanent child support, sequestration of the marital residence along with all of the furnishings therein, and attorney's fees. On 28 August 1978, the court granted all of plaintiff's requests and granted defendant visitation privileges with the minor children. This 28 August 1978 order sequestered the former marital residence for plaintiff and the minor children's use, subject to her assumption of payments due the mortgagor and sequestered a 1975 station wagon automobile for plaintiff's use, subject to her paying the indebtedness owed on said automobile. The parties were granted an absolute divorce in 1979.

There have been numerous orders and motions filed in this case because of plaintiff's wilful, deliberate, and contemptuous refusal to abide by orders of the court to continue with her mental health treatment, to allow defendant to exercise his visitation privileges with the children, and to make mortgage and automobile payments. One such contempt order was entered 20 August 1979, in which plaintiff was given a thirty (30) day suspended sentence. On 24 July 1980, plaintiff was again adjudged in contempt of court and the court activated the thirty (30) day sentence imposed on 20 August 1979. In the 24 July 1980 contempt order the court also ordered that the custody order of 28 August 1978 remain in effect. Both parties gave notice of appeal to this Court.

While the parties' appeals were pending with this Court, defendant, in February 1981, pursuant to G.S. 7A-289.24(1), petitioned the District Court of Mecklenburg County to have plaintiff's parental rights terminated. When the petition came on for hearing 24 February 1981, the parties waived a hearing and entered into a consent order whereby the parties agreed: (1) the parties would withdraw their respective appeals pending with this Court; (2) plaintiff would have exclusive custody of the minor children and defendant's visitation rights would be terminated; (3) defendant would convey, to plaintiff in trust for the minor children as a lump sum award of child support, his one-half equity in the marital residence which one-half is estimated to be between twenty-five and thirty thousand dollars; and (4) the consent order would be entered in all pending files including 78CVD2731.

On 31 August 1983, defendant filed a motion for change of custody (78CVD2731), alleging, *inter alia*, a substantial change of circumstances, to wit: plaintiff had incurred financial difficulties threatening a foreclosure of the former marital home; that the threatened foreclosure has forced plaintiff to take a second job requiring plaintiff to leave the minor children unattended for extended periods of time; that these changes ultimately led plaintiff to abandon the children by transferring their care, custody and control to the paternal grandparents. On 13 October 1983, plaintiff filed a motion to dismiss for failure to state a claim upon which relief may be granted, an answer, a counterclaim, and a motion to set aside the consent order of 24 February 1981. In her answer, plaintiff denied all pertinent allegations of abandonment

asserted in defendant's petition. The stated basis for plaintiff's motion to set aside the consent order was that it was void and "beyond the power of the parties and the court." Plaintiff also moved the court to restore defendant's visitation rights and to modify the lump sum award of child support due to changed circumstances.

On 19 January 1984, defendant filed a reply to plaintiff's motion and counterclaim. Defendant's reply alleged that on 12 October 1983, the parties were represented at a hearing on defendant's 31 August 1983 motion for change of custody; that at the conclusion of the conference, with the consent of the judge, defendant agreed to cooperate with plaintiff in reaching a settlement of the parties' dispute.

On 26 February 1985, defendant, pursuant to G.S. 50-13.2, filed a motion for joint custody of the parties' minor children. On 21 March 1985, the court ordered that defendant pay temporary child support payments. On 8 May 1985, plaintiff, with leave of the court, amended her pleading filed 13 October 1983. The court treated plaintiff's amended pleading as a response to defendant's 26 February 1985 motion for joint custody. Plaintiff amended her pleading to request that the court set aside the 24 February 1981 consent order "upon the separate grounds of lack of jurisdiction, duress, estoppel or breach." On 26 June 1985, defendant filed a reply to plaintiff's amendment generally denying plaintiff's allegations and requested the court to dismiss plaintiff's prayers for relief because (1) they were not asserted in an independent action, and (2) plaintiff's motion was not made within a reasonable time pursuant to Rule 60(b), N.C. Rules Civ. P.

Finally, on 31 July 1985, the court (1) denied plaintiff's motion to set aside the 24 February 1981 consent order, (2) found a substantial change of circumstances since the filing of the 24 February 1981 consent order to justify a modification of the terms of said order dealing with child support and visitation, and (3) denied plaintiff's motion for an award of attorney's fees. Plaintiff appeals.

Hamel, Helms, Cannon, Hamel & Pearce, P.A., by Thomas R. Cannon and A. Elizabeth Green, for plaintiff appellant.

A. Marshall Basinger, II, for defendant appellee.

JOHNSON, Judge.

[1] Plaintiff's primary argument is that the trial court committed reversible error in denying her motion, pursuant to Rule 60(b), N.C. Rules Civ. P., to set aside the 24 February 1981 consent order which was undersigned by Judge Larry Thomas Black. There are two contentions made by plaintiff in support of her argument: (1) the final orders embraced matters that were the subject of an appeal plaintiff had pending with this Court, and (2) the trial court lacked subject matter jurisdiction to enter the order.

The pertinent provisos of Rule 60(b), N.C. Rules Civ. P. are as follows:

> (b) Mistakes, inadvertence, excusable neglect; newly discovered evidence; fraud, etc.—On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (4) The judgment is void;
>
> . . . .
>
> The motion shall be made within a reasonable time. . . .

Rule 60(b), N.C. Rules Civ. P. What constitutes a reasonable time depends upon the circumstances of the individual case. *Nickels v. Nickels*, 51 N.C. App. 690, 692, 277 S.E. 2d 577, 578, *disc. rev. denied*, 303 N.C. 545, 281 S.E. 2d 392 (1981) (23 months after a consent judgment was entered was an unreasonable time to wait to move the court to set aside the judgment). Our review of plaintiff's first argument is limited to determining whether the trial court abused its discretion. *Burwell v. Wilkerson*, 30 N.C. App. 110, 226 S.E. 2d 220 (1976). It is the duty of the trial court to make findings of fact, *Hoglen v. James*, 38 N.C. App. 728, 248 S.E. 2d 901 (1978), and they are conclusive on appeal if supported by any competent evidence, *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E. 2d 890 (1971). Bearing these principles in mind, we begin our discussion of the trial court's order in the case *sub judice* denying plaintiff's Rule 60(b) motion.

In the case *sub judice* the trial court made specific findings of fact as follows:

> 3. Lastly, the plaintiff contends that the said 'Final Order' of February 24, 1984 [sic] is void for lack of the plaintiff's voluntary consent thereto, and asks that the Order be set aside pursuant to N.C.G.S. 1A-1, Rule 60(b)(4), and the Court finds that the plaintiff has failed to raise this issue within a reasonable time as required by that rule, and in support thereof, the Court makes the following specific findings:
>
> (a) Pursuant to the plaintiff's testimony, she was made aware that there may be 'problems' with that order at the time that she signed it and she at that time discussed with her then attorney the prospects of later challenging the Order;
>
> (b) Also pursuant to her testimony, the plaintiff understood the Order and there is, therefore, no excuse for her delay in challenging it based on her lack of understanding;
>
> (c) During this period between the entry of said Order and the filing of her motion, as amended, the plaintiff was employed on and off, and although she was receiving no child support she had the equity in the once marital home that she could, and in fact did, liquidate in 1983, and in addition, she has relied during the course of these proceedings on her parents for support and funding of counsel fees. Thus, the Court finds from any one or more of these sources the plaintiff had the funds with which to raise this issue prior to the motion she filed in 1983 and amended in 1985;
>
> (d) When the plaintiff first filed her motion in 1983, the same was based upon the theory that the Court could not enter such an order, and in fact, the issue of the plaitniff's [sic] lack of consent thereto based upon coercion and duress never surfaced as an issue for the Court until her amendment filed May 8, 1985, over four years following the entry of said 'Final Order';
>
> (e) During the hearing to determine whether or not the Court should entertain the plaintiff's motion and as to whether it was timely filed, the plaintiff testified as to the alleged circumstances surrounding her signing the said 'Final Order,' and the Court finds that her testimony in this regard is total-

ly incredible and thus, affected her credibility on the issue of whether she had timely raised this issue.

There is substantial competent evidence in the record on appeal to support the trial court's findings of fact. Relying upon *Nichols, supra,* the trial court concluded, as a matter of law, the following:

> The plaintiff's motion under Rule 60(b)(4) to set aside the 1981 'Final Order' on the grounds that it is void because of plaintiff's lack of voluntary consent thereto was not raised within a reasonable time under the circumstances of this case based upon the evidence presented and received by the Court in this case, the first such motion being thirty-two months after the entry of the Order, and the amendment to that motion wherein this issue is effectively raised being some fifty-one months after the entry of the 'Final Order.' *Nichols v. Nichols*, 51 N.C. App. 690 (1981).

We cannot say that the trial court abused its discretion in refusing to set aside a consent order that plaintiff had signed over four years ago. The court's conclusion is supported by the findings made and the findings made are supported by the testimony and prior order entered during prior proceedings which were referred to by the parties as a "war."

Plaintiff argues that a party may challenge lack of subject matter jurisdiction at any time during the proceedings. Plaintiff, in her brief, mistakenly cites *Sloop v. Fribery*, 70 N.C. App. 690, 320 S.E. 2d 921 (1984), for the proposition that "[T]he question of subject matter jurisdiction cannot be conferred by waiver, estoppel, or consent." Our interpretation of this Court's holding in *Sloop, supra,* is contrary to plaintiff's interpretation. In *Sloop, supra,* we held that respondent failed to preserve his objection to the trial court's subject matter jurisdiction because of his consent and acquiescence for several years to the judgment. *Sloop, supra,* at 693, 320 S.E. 2d at 923. In support of our holding, we stated: "Language in the earlier cases supports this holding. An *absolute want* of subject matter jurisdiction might constitute a fatal deficiency, but consent to judgment and acquiescence thereto over a period of years was held grounds to deny a subsequent motion attacking it." *Id.* (emphasis in original) (citing *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E. 2d 876, 880 (1961); *Branch v. Houston*, 44

N.C. (Bush Eq.) 85 (1852) ("total want" of jurisdiction); 21 C.J.S. Courts sec. 110 (1940)).

Within the order that plaintiff seeks to have set aside, the trial court found as fact, *inter alia*, the following:

> THIS CAUSE coming on to be heard before the undersigned Larry Thomas Black *presiding over the District Court* of Mecklenburg County and it appearing to the Court that this is an action instituted by the Petitioner Josiah Thomas Prescott, Jr., father, against Nancy C. Prescott, mother for the termination of parental rights of David Blair Prescott, Josiah Thomas, III pursuant to G.S. 70A-289 (2.2) (sic); and it further appearing to the Court that when the matter was called for hearing the Petitioner [plaintiff herein] was represented by H. Edward Knox and the Respondent [defendant herein] was represented by Larry L. Eubanks. The parties have advised the Court that all matters and things in controversy arising from this Petition as well as all matters in controversy arising from and pending in Docket No. 78-CVD-2731 (or any other applicable files pending in Mecklenburg county) have been settled and compromised to the end that a Final Order may be entered. The parties, as evidenced by their signatures hereon, have stipulated and authorized the court to make the following findings of fact:
>
> 1. *The Court has jurisdiction in this action and has been authorized to assume jurisdiction over all matters pending in 78-CVD-2731 and the Court may enter an Order in this cause which may be treated as a Final order in 78-CVD-2731 and a true copy shall be filed in the other action and treated as a Final Order.*

(Emphasis supplied.) Plaintiff's signature appears at the end of this order, which was filed 24 February 1981. There does not appear to be an absolute want of subject matter jurisdiction. We hold that the time period plaintiff has allowed to elapse before objecting to the jurisdictional findings set forth hereinabove is not reasonable. The trial court's order dismissing plaintiff's Rule 60(b), N.C. Rules Civ. P., motion was proper. We further hold that because of plaintiff's consent and acquiescence for nearly thirty-two (32) months to the consent order, plaintiff failed to preserve her objection. *Sloop, supra.* The trial court specifically found as

fact that plaintiff's testimony was not credible with respect to consent or lack thereof to the order she seeks to have set aside. After carefully reviewing the record on appeal and finding that plaintiff executed a trust agreement pursuant to the consent order, we conclude that there is substantial competent evidence to support the trial court's findings.

[2] Plaintiff next argues that the trial court erred in denying her motion for an award of attorney's fees. We disagree.

The statutory basis for an award of attorney's fees in an action for custody or support is stated in G.S. 50-13.6, as follows:

> In an action or proceeding for custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the court *may in its discretion* order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expenses of the suit. Before ordering payment of a fee in a support action, *the court must find as fact* that the party ordered to furnish support has refused to provide support which is adequate under the circumstances then existing at the time of the institution of the action or proceeding.

G.S. 50-13.6 (emphasis supplied). In the case *sub judice*, the trial court did not find as fact that defendant had failed to supply adequate child support. The record on appeal reveals that defendant complied with all orders that directed him to make child support payments and when necessary defendant voluntarily made payments for the support of the parties' children even though he was not obligated to make such payments under the 1981 consent order. We hold that the court's findings were supported by competent evidence and further hold that it was not an abuse of discretion for the trial court to deny plaintiff's motion for an award of attorney's fees.

[3] Plaintiff's final argument is that the order of 31 July 1985 should be vacated because the trial court made insufficient findings of fact and conclusions of law. After extensively reviewing the record on appeal, we deem plaintiff's argument to be without merit. Significantly, plaintiff does not argue the insufficiency of the $422.00 per month, per child, payments defendant was or-

dered to pay. We note that the court's order to defendant that he pay $422.00 per month, per child, is a modification of the 1981 order wherein plaintiff was given a lump sum award. The terms of the agreed upon lump sum award required defendant to convey his equity (each party had $25,000.00 to $30,000.00 in equity) in the former marital residence to plaintiff in trust for the parties' children. As the court found as fact, to a large extent plaintiff expended the proceeds from the sale of the marital home on attorney's fees. Thus, as the trial court noted, even though the dissipation of the lump sum award was in no way the fault of defendant, the 1981 order must be modified to award child support "on an ongoing basis since for the court to do otherwise would unjustifiably and adversely affect the minor children and their well being." We hold that the trial court did not abuse its discretion; that the court's order has a rational basis therein; and that further proceedings would require an additional expenditure of funds and energy by the parties which should rather be directed toward the best interests of their children.

Affirmed.

Judges WEBB and PHILLIPS concur.

STONEWALL INSURANCE COMPANY v. FORTRESS REINSURERS MANAGERS, INC., ET AL.

No. 8510SC889

(Filed 18 November 1986)

1. **Insurance § 149— railroad liability reinsurance—meaning of "for its own account"**

A provision in a railroad liability reinsurance certificate that the reinsured warranted to retain "for its own account" a liability of $500,000 was unambiguous and included only net retention and not net retention plus treaty reinsurance with another reinsurer.

2. **Insurance § 149— railroad liability reinsurance—breach of condition precedent**

An insurer's breach of a provision in a railroad liability reinsurance certificate warranting that the insurer would retain a liability of $500,000 "for its own account" constituted a breach of a condition precedent which relieved defendant reinsurer of its duty to perform under the certificate regardless of plaintiff's good faith or prejudice to defendant reinsurer.

3. Insurance § 149— liability reinsurance certificate—no reformation for mutual mistake

The trial court did not err in failing to reform a reinsurance certificate on the ground of mutual mistake to include treaty reinsurance in the amount retained by plaintiff insurer "for its own account."

4. Insurance § 149— liability reinsurance certificate—company retention provision—no waiver of violation

The evidence did not require the trial court to find that defendant reinsurer waived plaintiff reinsured's violation of the company retention provision of the reinsurance certificate or that defendant reinsurer was estopped to plead such alleged violation.

5. Insurance § 149— special ceding not treaty reinsurance

The evidence supported a finding by the trial court that reinsurance specially ceded by the reinsured to a third reinsurer was "not treaty reinsurance."

6. Insurance § 149— liability reinsurance—interpretation of provision—competency of claims manager to testify

Defendant reinsurer's claims manager, who had 35 years of experience in the insurance and reinsurance industry, was competent to testify as to defendant's interpretation of the company retention provision of its reinsurance policy with plaintiff reinsured. N.C.G.S. § 8C-1, Rules 401 and 701.

APPEAL by plaintiff from *Bailey (James H. Pou), Judge.* Judgment entered 14 March 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 3 March 1986.

In September 1973, North River Insurance Company (hereinafter "North River") issued its policy of liability insurance to the Florida Eastcoast Railroad (hereinafter "Railroad"), effective from 9 September 1973 through 9 September 1974. Under the terms of the coverage, the Railroad was responsible for defending and paying each claim which fell within the initial $300,000 of liability, and any loss in excess of $300,000 was insured by the North River policy up to $2,000,000.

Prior to the inception of the policy period, North River purchased from Stonewall Insurance Company (hereinafter "Stonewall") a policy of reinsurance on the Railroad risk. Stonewall's reinsurance policy insured, on a pro-rata basis, $1,225,000 of North River's liability under its policy with the Railroad.

On 7 September 1973, Fortress Reinsurers Managers, Inc. (the corporate defendant's name was subsequently changed to Penn Re, Inc., hereinafter referred to as "Penn Re") agreed to re-

insure $500,000 of the exposure Stonewall had on the North River-Railroad policy. Penn Re's Certificate of Facultative Reinsurance contained a retention provision which is the subject of the present appeal. The retention provision reads:

> The Company [Stonewall] warrants to retain for its own account the amount of liability specified in Item 3 unless otherwise provided herein, and the liability of the Reinsurer specified in Item 4 shall follow that of the Company, except as otherwise specifically provided herein, and shall be subject in all respects to all the terms and conditions of the Company's policy.

The amount of company retention shown in Item 3 of the Reinsurance Certificate issued to Stonewall was $500,000.

Stonewall, at the time it contracted for reinsurance of the North River-Railroad policy, had in existence a reinsurance treaty with a third company, the American Mutual Reinsurance Company (hereinafter "AMRECO"). The terms of that treaty excluded from automatic coverage a railroad risk such as that covered by North River's policy with the railroad. Pursuant to the terms of the treaty, Stonewall submitted its reinsurance of the North River policy on the Railroad for consideration as a special cession. Prior to 9 September 1973, AMRECO waived the exclusions in the treaty and issued its Special Cession Certificate wherein Stonewall would remain liable on the first $50,000 of loss and AMRECO would be liable on the remaining $450,000.

On 11 December 1973, an accident occurred involving Jack Russell and the Railroad. Thereafter, North River made payment under its policy with the Railroad for that accident. Stonewall made payment to North River under its policy of reinsurance with North River in the amount of $1,263,775.75 on this claim. Subsequently, Stonewall made demand upon Penn Re in an amount totalling $500,563, such sum representing Penn Re's share of losses and expenses paid by Stonewall for the Russell claim.

Further, an accident occurred on 16 March 1974 involving the Railroad and R. J. Bernard. North River, under its policy insuring the Railroad, made payment to Bernard in the amount of $400,000. North River made demand upon Stonewall for payment in the amount of $246,163.75, representing Stonewall's portion of losses and expenses incurred on the Bernard claim. Stonewall

made payment to North River in the amount of $246,163.75 under its policy reinsuring North River and, in turn, made demand upon Penn Re for payment in the amount of $100,475, said sum representing Penn Re's share of paid losses and expenses by Stonewall on the Bernard claim.

Penn Re denied liability on both claims by contending that the $500,000 shown by Stonewall as the amount of company retention in Item 3 of the Reinsurance Certificate was not retained by Stonewall "for its own account" as required by the company retention provisions. The $500,000 designated as company retention was made up of $50,000 retained "net" by Stonewall and $450,000 reinsured under its treaty with AMRECO through the Special Cession Certificate issued by AMRECO to Stonewall.

On 16 September 1981, Stonewall filed this civil action and sought (i) $601,038.39 in damages based on alleged breach of the certificate of reinsurance, (ii) $10,000,000 in punitive damages, and (iii) treble damages for unfair trade practices in violation of G.S. 75-1.1. Penn Re answered and asserted, among other defenses, that although Stonewall warranted to defendants that it was retaining $500,000 of the risk reinsured by the certificate, Stonewall breached that provision of the certificate by reinsuring $450,000 (90%) of that amount without informing defendants, thereby relieving defendants of any liability under the certificate of reinsurance.

On 10 November 1982, Judge Robert L. Farmer entered summary judgment for Penn Re on Stonewall's claims for punitive and treble damages. Stonewall's remaining contract claim was tried before Judge Bailey, sitting without a jury. Judge Bailey concluded that compliance with the warranty of retention was a condition precedent to Penn Re's obligation to reimburse Stonewall for any losses pursuant to the certificate and that Stonewall had materially breached the warranty of retention. From judgment in favor of defendants, plaintiff appealed. From the trial court's denial of its motion to amend its answer and counterclaim, defendants cross-appealed.

Young, Moore, Henderson and Alvis, P.A., by R. Michael Strickland and David P. Sousa for plaintiff-appellant.

Sanford Adams McCullough and Beard by H. Hugh Stevens, Jr., William G. Pappas and John J. Butler for defendants-appellees.

PARKER, Judge.

[1] Plaintiff first contends that the trial court erred in failing to conclude as a matter of law that amounts Stonewall reinsured through treaty insurance are held by plaintiff "for its own account," or, alternatively, that Penn Re's company retention language is ambiguous and that such ambiguity must be construed in favor of Stonewall. The question is what do the words "for its own account" mean. Plaintiff contends that "for its own account" means net retention plus treaty reinsurance; defendant contends "for its own account" means only net retention. Net retention is that amount which the reinsured insurance carrier will pay on an insured claim. Treaty reinsurance is that portion of an insured claim which has been ceded to another insurance company, and which will be paid by that insurance carrier.

Plaintiff argues that because premiums charged for treaty reinsurance are calculated to cover the losses incurred such that the reinsured will ultimately pay in full any losses, the amount of company retention reinsured through treaty reinsurance is in fact an amount held for its own account. In other words, since plaintiff will ultimately be required to pay the amount ceded to AMRECO, plaintiff has not reduced its risk and has retained for its own account the full $500,000.

In interpreting the language of a contract, "words of a contract referring to a particular trade will be interpreted by the courts according to their widely accepted trade meaning." *Peaseley v. Coke Co.*, 282 N.C. 585, 597, 194 S.E. 2d 133, 142 (1973). The instant case concerns a specialized area of insurance law; therefore, parol evidence as to the meaning of the term "for its own account" was necessary to determine the usual and ordinary meaning of that term in the reinsurance industry. After hearing substantial evidence from both parties as to the meaning of the term in the reinsurance industry, the trial judge found "that the phrase 'for its own account' is not ambiguous and did not permit

Stonewall to reinsure any portion of the warranted retention in any fashion without the express approval of the defendants." The court further stated:

> [T]he court is not persuaded by the evidence that there exists any common understanding or custom in the reinsurance industry whereby the terminology 'for its own account' contemplates or implicitly approves any reinsurance of the warranted retention via treaty reinsurance. Rather, the expert witnesses presented by both sides agreed that the reinsurance industry is essentially unregulated, at least with regard to the language and construction of reinsurance contracts, and that such contracts . . . are negotiated and entered into on an individual basis . . . [and] their exact wording varies.

When the trial judge sits as the trier of fact without a jury, the court's findings are conclusive on appeal if there is any competent evidence to support them even though the evidence might sustain findings to the contrary. *Williams v. Insurance Co.*, 288 N.C. 338, 218 S.E. 2d 368 (1975). The two people who negotiated the contract on behalf of plaintiff and on behalf of defendants testified. The testimony of both was that there was no discussion as to whether a portion would be ceded to treaty insurance or not. Hence there was no evidence of an intention by the parties to include treaty reinsurance as part of the amount retained by the company for its own account. We hold that the trial court did not err in finding the term "for its own account" unambiguous and in ruling as a matter of law that the term did not include both net retention and treaty reinsurance.

[2] Plaintiff next argues that even if plaintiff breached its warranty of retention the trial court's conclusions are erroneous as a matter of law inasmuch as there are no findings of fact or conclusions of law regarding plaintiff's good faith or any prejudice to defendants. In support of this position, plaintiff relies upon the case of *Insurance Co. v. C. G. Tate Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981) wherein the Supreme Court held that in order for an insurance carrier to avoid liability on account of breach of a notice provision, there must be findings of fact regarding the insured's good faith and any prejudice suffered by the insurer. We agree with defendants that public policy con-

siderations regarding the reasonable expectations of individual insureds which undergird the *Tate* decision are inapplicable to the case at bar. The contract of reinsurance at issue in this case was negotiated at arm's length by representatives of the respective insurance companies. While this is a case of first impression in this jurisdiction, there is substantial authority from other jurisdictions that the policy considerations applicable to conditions precedent in contracts of primary insurance between individual consumers are inapplicable in policies of reinsurance between insurance carriers standing on equal footing. *See, e.g., Liberty Mutual Insurance v. Gibbs*, 773 F. 2d 15 (1st Cir. 1985) and *Matter of Pritchard and Baird, Inc.*, 8 B.R. 265, 270 (D.C.N.J. 1980), *aff'd without opinion*, 673 F. 2d 1301 (3rd Cir. 1981).

The rule has long been established in this jurisdiction that one party's failure to comply with a condition precedent to a contract relieves the other party of its duty to perform under the contract irrespective of the party's good faith or the prejudicial effect. *See, e.g., Parrish Tire Co. v. Moorefield*, 35 N.C. App. 385, 241 S.E. 2d 353 (1978). Representatives of Fortress who testified explained that having the ceding company actually liable on the risk was significant to Fortress in terms of management and handling of claims. We hold that plaintiff's compliance could reasonably be expected to influence the decision of the insurance company and that the trial court did not err in concluding that plaintiff's breach of the condition precedent was material. *Bryant v. Nationwide Mutual Insurance Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985).

[3] Plaintiff next argues that the trial court erred in not reforming the policy to reflect the intent of the parties that treaty participation would be included in the amount retained by plaintiff "for its own account." In making this argument, plaintiff relies heavily upon the testimony of Carmen Fiore, who was the executive vice president of defendant's Facultative Reinsurance Division at the time the plaintiff's policy was issued. According to Fiore's testimony, his understanding was that the policy language "for its own account" included both net retention and treaty reinsurance, and it was not the intent of the company to exclude treaty participation. Although Mr. Fiore was in charge of the Facultative Reinsurance Division and supervised the underwriters, Fiore admitted that he never had any discussion with his under-

writers as to what the term "company retention" included. Mr. Hugh C. Brewer, III, the underwriter who actually handled the issuance of plaintiff's contract, testified that no one at Penn Re ever discussed with him his negotiations with Stonewall and that he made no assumptions one way or another at the time the certificate was negotiated whether or not treaty reinsurance might be applicable to the $500,000 of company retention. Plaintiff argues that because Mr. Brewer was shocked when he found out how defendants were interpreting the language, there must have been a mistake. This mistake, according to plaintiff, is sufficient to satisfy the requirement of mutual mistake for purposes of reformation. The testimony of Fiore and Brewer is equivocal at best. Count three of the complaint, which plaintiff contends raised the issue of reformation, alleges reliance upon oral agreements and representations made before issuance of the written certificate of facultative reinsurance; however, the record is void of any evidence concerning any prior oral agreements. The evidence does not support a finding on the issue of reformation, and this assignment of error is overruled.

[4] Plaintiff next argues that the trial court erred in concluding that Penn Re had not waived the alleged violation of the company retention and in concluding that Penn Re was not estopped to plead such alleged violation. In order for there to be either waiver or estoppel, the party against whom the waiver or estoppel is asserted must have full knowledge of his rights and of facts which will enable him to take action as to their enforcement. The trial court found, and the evidence supports the finding, that Stonewall reinsured its warranted retention "without the knowledge or approval of the defendants." Plaintiff's assertion that defendants waived strict enforcement of the contract language or that defendants were estopped to assert any violations of the warranty against plaintiff is not supported by the evidence.

[5] Plaintiff next argues that the trial court erred in reciting that the reinsurance between Stonewall and AMRECO was facultative reinsurance. The court did not find that the special cession was facultative reinsurance, but rather that it was "not treaty reinsurance" and had the "essential characteristics" of facultative reinsurance. As the trial judge noted, the other findings and conclusions made it unnecessary to decide what kind of reinsurance the special cession was. Plaintiff has nowhere contended that the

term "for its own account" included facultative reinsurance. Plaintiff's position is that the term includes net retention plus treaty reinsurance. For this reason, this error, if any, was not prejudicial to plaintiff's claim. Further, there was evidence to support the trial court's finding that the insurance was not treaty insurance. Penn Re's expert testified as follows:

> The objective of both treaty and facultative is primarily the same thing. It's a mechanism through which liability is transferred from one company, the reinsured company, to a second company, the reinsuring company. The facultative transfer of that liability is done on an individual risk basis, which gives both the ceding company and the assuming company the opportunity to thoroughly consider that individual risk and that individual piece of business and to consider the liability which is being transferred one to the other.
>
> Treaty business does exactly the same thing, except the transfer is on a book of business, rather than on a single piece of business. Both forms of reinsurance are done under contract and the provisions of those contracts are negotiable between the two parties.

Another reinsurance expert testified as to characteristics of facultative reinsurance such as (i) reinsurance of an individual risk, (ii) an individually derived premium for the risk, (iii) specific underwriting information on the risk and (iv) the reinsurer's right to accept or reject a particular risk. Plaintiff's witnesses testified in accord with this testimony by defendants' experts. This Court is bound by the trial judge's findings when there is competent evidence to support those findings. This assignment of error is overruled.

Plaintiff next contends that the trial court erred in failing to make proper and adequate findings of fact and conclusions of law. The basis of this argument is that the narrative portion of the memorandum of decision does not constitute adequate findings of fact. We have carefully considered this assignment of error and reject plaintiff's contention. While it is true that Rule 52(a) of the North Carolina Rules of Civil Procedure requires that "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of appropriate judgment[,]" Rule

52(a)(3) provides "[i]f an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein." In our view, the findings of fact and conclusions of law are sufficiently specific for this Court to undertake appellate review. *See Coble v. Coble*, 300 N.C. 708, 268 S.E. 2d 185 (1980).

Similarly, plaintiff's argument that the trial court required plaintiff to present persuasive evidence to overcome *Fortress v. Jefferson*, 465 F. Supp. 333, *aff'd*, 628 F. 2d 860 (4th Cir. 1980) is meritless. The reference to the case was merely a citation of authority about which plaintiff had argued extensively before the court.

[6] Plaintiff next argues that the trial court erred in allowing testimony by one E. M. Cheek, Jr., as to his interpretation of the policy language concerning company retention. Cheek was defendant's claims manager and had some 35 years of experience in the insurance and reinsurance industry. The basis of plaintiff's argument is that if this testimony had not been allowed, then plaintiff's testimony would have been uncontroverted. Considering his years of experience with the company and his position with the company, Mr. Cheek was, in our opinion, competent and qualified to testify as to the company's interpretation of its policy language. *See Rule 701, N.C. Rules of Evidence*. Moreover, even assuming *arguendo* that it was error to permit the testimony of Mr. Cheek, the rule is that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent, and consider that only which tends properly to prove the facts to be found. *Jackson v. Collins*, 9 N.C. App. 548, 176 S.E. 2d 878 (1970). Similarly, plaintiff's assignment of error No. 18 concerning the testimony of witnesses Bogan and McIlwain is meritless. As noted by the Supreme Court in *State v. Pridgen*, 313 N.C. 80, 88, 326 S.E. 2d 618, 623 (1985):

> [I]t is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions.

See also Rule 401, *N.C. Rules of Evidence*.

Finally, plaintiff argues that the trial court erred in granting defendants' motion for summary judgment on the issues of bad faith and unfair and deceptive trade practices. These claims are premised on plaintiff's interpretation of the retention clause. In other words, plaintiff argues that defendants acted in bad faith and engaged in unfair and deceptive practices by interpreting the retention clause to exclude treaty insurance. Our holding today that the trial judge did not err in finding the language "for its own account" did not include the amount ceded to a reinsurance carrier renders error, if any, in entry of the 10 November 1982 summary judgment harmless. This assignment of error is overruled.

Because of our disposition of this appeal, we need not consider defendants' cross assignments of error.

The judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

JAMES A. DEAN, EMPLOYEE, PLAINTIFF v. CONE MILLS CORPORATION, EMPLOYER, AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8610IC455

(Filed 18 November 1986)

1. **Master and Servant § 94— workers' compensation—findings of fact—any competent evidence test**

   In workers' compensation actions findings of fact supported by any competent evidence are conclusive and binding on appeal.

2. **Master and Servant §§ 68, 93.3— workers' compensation—doctor's testimony—contradictions on issue of causation—failure of employee to show his greater risk**

   There was no merit to plaintiff's contention in a workers' compensation proceeding that a doctor's testimony was incompetent evidence because he was not the examining physician, since the doctor was a licensed physician board certified in pulmonary and internal medicine, served on the Textile Occupational Lung Disease Panel for the Industrial Commission, and testified that he reviewed plaintiff's testimony, the deposition of the examining physi-

cian, and plaintiff's medical records; however, his testimony could be considered incompetent evidence because he contradicted himself on the issue of causation, but defendant nevertheless failed to prove that he contracted an occupational disease where he failed to prove that his occupation exposed him to a greater risk of contracting the disease than members of the public generally.

3. Master and Servant § 68— workers' compensation—occupational disease—no job site inspection—no findings on occupational aggravation

In a workers' compensation proceeding where plaintiff alleged that he suffered from chronic obstructive pulmonary disease caused by exposure to cotton dust while employed by defendant, there was no merit to plaintiff's contention that the Industrial Commission erred in denying his motion for a job site inspection and in failing to make adequate findings on the issue of occupational aggravation.

Judge BECTON dissenting.

APPEAL by plaintiff from the order of the Industrial Commission filed 21 November 1985. Heard in the Court of Appeals 24 September 1986.

This is a workers' compensation claim based on allegations of chronic obstructive pulmonary disease caused by exposure to cotton dust while plaintiff was employed by defendant Cone Mills Corporation. Plaintiff's claim was originally heard by Deputy Commissioner Ben A. Rich on 13 July 1981 and 2 December 1981. The deputy commissioner found that plaintiff had contracted chronic obstructive pulmonary disease but denied plaintiff's claim because plaintiff failed to prove that his disease was caused or contributed to by his employment, that his employment placed him at an increased risk of contracting the disease or that he was permanently or partially disabled from employment as a result of the disease.

Plaintiff appealed to the Full Commission which affirmed the deputy commissioner's decision and adopted as its own the deputy commissioner's opinion and award. On appeal to this Court we affirmed the Full Commission's denial of plaintiff's claim. *Dean v. Cone Mills Corp.*, 67 N.C. App. 237, 313 S.E. 2d 11 (1984). Pursuant to G.S. 7A-30(2) plaintiff appealed to the Supreme Court. In a *per curiam* opinion filed 4 December 1984 the Supreme Court vacated and remanded the case to the Industrial Commission for reconsideration in light of *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E. 2d 359 (1983). *Dean v. Cone Mills Corp.*, 312 N.C. 487, 322

S.E. 2d 771 (1984). On remand the Full Commission again denied plaintiff's claim and plaintiff appeals.

Charles R. Hassell, Jr. for plaintiff-appellant.

Maupin, Taylor, Ellis & Adams by Richard M. Lewis and Steven M. Rudisill for defendant-appellees.

EAGLES, Judge.

I

Plaintiff assigns error alleging that the Industrial Commission failed to follow the specific mandate of the Supreme Court to reconsider the evidence in light of *Rutledge v. Tultex Corporation*. Plaintiff contends that the Commission failed to reconsider any of the evidence in light of *Rutledge* because it simply readopted the 1981 decision of Deputy Commissioner Rich, added three findings of fact and three conclusions of law and then denied again plaintiff's claim. We disagree that the Commission failed to reconsider its decision. In the first paragraph of its second opinion and award the Commission states that it "reviewed the record in its entirety, carefully weighing the evidence in light of *Rutledge v. Tultex*, 308 N.C. 85 (1983)." This statement indicates to us that the Commission did in fact review the evidence in light of *Rutledge* as mandated by the Supreme Court. There is nothing in the record to indicate otherwise. Therefore, plaintiff's assignment is without merit and is overruled.

II

[1, 2] Plaintiff assigns error to the Commission's denial of his claim. Plaintiff contends that the Industrial Commission improperly denied his claim because there was no substantial competent evidence to support the denial. We disagree because there was competent evidence to support the denial.

Our review of the Commission's order is limited to determining (1) whether the Commission's findings of fact are supported by the evidence, and (2) whether the findings of fact justify the Commission's legal conclusions. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981). The findings of fact are conclusive on appeal if supported by competent evidence. This is so even though there is evidence which would support findings to the con-

trary. *Id.* The Workers' Compensation Act vests the Industrial Commission with full authority to find facts. The Commission is the sole judge of credibility and the weight to be given the witnesses' testimony. *Anderson v. Construction Co.*, 265 N.C. 431, 144 S.E. 2d 272 (1965). We may set aside findings of fact only on the ground that they lack evidentiary support. We cannot weigh the evidence but can only determine whether the record contains *any* competent evidence tending to support the findings. *Id.* The test is not, as plaintiff argues, whether the findings are supported by *substantial* evidence.

This case was remanded by the Supreme Court to the Industrial Commission for reconsideration in light of *Rutledge v. Tultex, supra.* In *Rutledge* the Court held that obstruction caused by chronic obstructive lung disease need not be apportioned between occupational and nonoccupational causes and that a claimant may recover for the entire disability resulting from the obstruction so long as the occupation-related cause was a significant causal factor in the disease's development. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 336 S.E. 2d 47 (1985).

> [C]hronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Rutledge, supra, 308 N.C. at 101, 301 S.E. 2d at 369-70.

On remand from the Supreme Court the Full Commission found as facts that:

> 10. Plaintiff's employment in the weave room and cloth room of defendant-employer's mill did not place him at an increased risk of contracting chronic obstructive pulmonary disease.
>
> 11. Plaintiff's lung condition was not caused, or significantly contributed to, by his exposure to cotton dust at defendant-employer's mill and he does not, therefore, have an occupational disease.

12. Plaintiff was not permanently or partially disabled as a result of his employment with defendant-employer.

These findings are consistent with the standard set forth in *Rutledge* and are conclusive on appeal if supported by any competent evidence of record. Dr. Hayes testified that in his opinion "it was medically unlikely that Mr. Dean's occupational exposure to cotton dust contributed to his obstructive lung disease." He also testified that in his opinion claimant's occupational exposure to cotton dust "perhaps placed him at slightly increased risk of developing obstructive lung disease. However, I do not consider the type of exposure that occurred through the vast majority of his mill employment to have placed him as an individual at much higher risk of developing obstructive lung disease." This evidence, if competent, supports the Commission's findings even though there may be overwhelming evidence to the contrary. Our standard of review only requires "any evidence tending to support the findings." *Anderson v. Construction Co.*, 265 N.C. at 434, 144 S.E. 2d at 274.

Plaintiff argues that Dr. Hayes' testimony is incompetent evidence because he was a non-examining physician. Plaintiff relies on *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 293 S.E. 2d 171 (1982) a case involving the denial of Medicaid disability benefits in which the Supreme Court stated that:

> [I]t has been held specifically that where the non-examining physician's opinion is the only evidence supporting a denial of disability benefits and is contrary to all the medical facts as well as the opinion of the treating physician, that opinion alone cannot constitute *substantial* evidence to support a conclusion relying solely on it.

Id. at 240, 293 S.E. 2d at 178 (emphasis added). The standard of review in cases involving the denial of Medicaid benefits is provided for in the review provisions of the Administrative Procedures Act, G.S. 150A-51, which allows a reviewing court to reverse an agency decision if a claimant's substantial rights are prejudiced by findings that are unsupported by *substantial* evidence in view of the entire record. This standard of review is known as the "whole record" test and requires the reviewing court to take into account both the evidence justifying and contra-

dicting the agency's decision. *Lackey v. Dept. of Human Resources, supra.*

In workers' compensation actions our standard of review is much more limited in that findings of fact supported by *any competent evidence* are conclusive and binding on appeal. However, the evidence relied upon must be legally competent. *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957). The fact that Dr. Hayes was not an examining physician does not make his testimony legally incompetent. The record reflects that Dr. Hayes is a licensed physician board certified in pulmonary and internal medicine. He serves on the Textile Occupational Lung Disease Panel for the Industrial Commission. While Dr. Hayes did not examine the plaintiff, he testified that he reviewed the plaintiff's testimony, the deposition of Dr. Kilpatrick (the examining physician) and plaintiff's medical records.

Plaintiff also argues that Dr. Hayes' testimony is incompetent evidence because he contradicts himself. Plaintiff relies on *Ballenger v. Burris Industries*, 66 N.C. App. 556, 311 S.E. 2d 881, *disc. rev. denied*, 310 N.C. 743, 315 S.E. 2d 700 (1984), where we held that an examining physician's totally contradictory testimony as to causation could not constitute any sufficient competent evidence on which to base denial of workers' compensation benefits. On the issue of whether plaintiff's cotton dust exposure caused his chronic obstructive pulmonary disease Dr. Hayes testified, in answer to a hypothetical question at the hearing, that "it was medically unlikely that Mr. Dean's occupational exposure to cotton dust contributed to his obstructive lung disease." However, in a letter dated 24 November 1981 Dr. Hayes wrote, "I do feel that his textile exposure likely contributed to or possibly aggravated his obstructive lung disease." Further, Dr. Hayes states in his letter that:

> To summarize, the magnitude of Mr. Dean's impairment is in question, but permanent. Those identified factors which likely contributed to that lung disease include his brief cigarette smoking, his cotton textile exposure, and unusual genetic susceptibility or other factors. No accurate way can be used to separate these variables. My personal opinion would be to weigh them equally as causative factors in the genesis of his lung disease.

We agree with plaintiff that Dr. Hayes does contradict himself on the issue of causation. It is unclear from reading Dr. Hayes' letter and his testimony just what his opinion is as to causation and for that reason we believe that plaintiff's argument has some merit. However, even though Dr. Hayes' testimony is contradictory on the issue of causation and could be considered incompetent evidence under *Ballenger, supra,* plaintiff has nevertheless failed to prove that he contracted an occupational disease.

In order for chronic obstructive pulmonary disease to constitute an occupational disease under *Rutledge* the plaintiff must also prove that his occupation exposed him to a greater risk of contracting the disease than members of the public generally. 308 N.C. at 101, 301 S.E. 2d at 369-70. The Industrial Commission found as fact that plaintiff failed to prove this and the Commission's finding is binding on appeal if supported by any competent evidence.

Dr. Hayes testified without contradiction that "the population of cloth room workers at large have a very, very unlikely possibility of developing obstructive lung disease from their occupational exposure." With respect to the plaintiff specifically, Dr. Hayes testified that in his opinion plaintiff's "occupational exposure to cotton dust, which included both weave and cloth room exposure, perhaps placed him at slightly increased risk of developing obstructive lung disease"; however, Dr. Hayes did not "consider the type of exposure that occurred through the vast majority of [plaintiff's] mill employment to have placed him as an individual at much higher risk of developing obstructive lung disease." In his letter Dr. Hayes wrote "I think the magnitude of risk occurring as a result of working in the cloth room must be very minute." This evidence constitutes competent evidence to support the Commission's finding that plaintiff failed to prove an increased risk of contracting obstructive lung disease. As a result the Commission's finding is conclusive and binding on appeal. Since plaintiff has failed to prove one of the crucial elements required in determining the existence of a compensable occupational disease, we must affirm the Commission's denial of benefits on the basis of *Rutledge v. Tultex Corp., supra.*

III

[3] Plaintiff argues that the Commission also erred in denying his motion for a job site inspection and in failing to make adequate findings on the issue of occupational aggravation. These issues were determined adverse to plaintiff in *Dean v. Cone Mills Corp.*, 67 N.C. App. 237, 313 S.E. 2d 11 (1984).

For the reasons stated the Industrial Commission's opinion and award denying workers' compensation benefits is

Affirmed.

Judge WEBB concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

I neither denigrate the presumption of regularity accorded the Opinions and Awards of the North Carolina Industrial Commission (Commission), nor, on the facts of this case, favor the "whole record" test over the "any competent evidence" test. I do champion, however, a procedure that will allow effective appellate review of agency decisions. Appellate courts should not accept cavalierly an agency's bare statement that it has "reviewed the record in its entirety, carefully weighing the evidence . . . ," *ante* p. 3, because saying it is so does not make it so.

In my view, this case should be reversed and remanded to the North Carolina Industrial Commission because:

(a) The three numbered findings of fact are laced with conclusions of law—e.g., "plaintiff's employment . . . did not place him at an increased risk of contracting chronic obstructive pulmonary disease"; "plaintiff . . . does not . . . have an occupational disease"; and "plaintiff was not permanently or partially disabled as a result of his employment with defendant employer";

(b) Dr. Hayes, a non-examining physician, who was provided no information about the level of cotton dust in the areas where the plaintiff worked, gave contradictory testimony on a crucial issue in this case, *ante* p. 8 (*see Ballenger v. Bur-*

ris Industries, Inc., 66 N.C. App. 556, 311 S.E. 2d 881, *disc. rev. denied*, 310 N.C. 743, 315 S.E. 2d 700 (1984)); and

(c) The Commission did not follow the dictates of *Rutledge*.

To prove causation in this case, plaintiff had to show, under *Rutledge*, that his occupation exposed him to a greater risk of contracting the disease than members of the public generally. Even Dr. Hayes testified that plaintiff's occupational exposure placed him at a "slightly increased," although not a "much higher" risk of developing obstructive lung disease. That, in my view, is all that *Rutledge* requires.

I vote to reverse and to remand this case to the North Carolina Industrial Commission.

CAMERON-BROWN COMPANY v. GENE A. DAVES

No. 8626SC486

(Filed 18 November 1986)

1. **Process § 14.3— nonresident defendant—insufficient contacts with North Carolina—no personal jurisdiction**

Defendant nonresident did not have sufficient minimum contacts with North Carolina to permit exercise of *in personam* jurisdiction over him where defendant's insured vehicles and equipment were all located in South Carolina; plaintiff solicited and initiated their business dealings; contract negotiations occurred in South Carolina; defendant owned no property in North Carolina and never traveled here to conduct business with plaintiff; and it appeared that defendant's only contact with North Carolina was the mailing of premium payments to plaintiff's Charlotte office pursuant to the insurance contracts.

2. **Process § 14.3— corporations operating in multiple jurisdictions—residences of customers as proper forum**

It is more fair as a general rule to require corporations which solicit and transact business in multiple jurisdictions to litigate their claims in the states of residence of their customers than to demand that nonresident customers with no other connection to North Carolina come to this forum.

3. **Process § 14.3— nonresident defendant—minimum contacts with North Carolina—applicability of requirement to actions quasi in rem**

In order for North Carolina to exercise jurisdiction over a nonresident defendant, due process requires that defendant have certain minimum contacts with this state, and this requirement applies with equal force to actions *quasi in rem* as to actions *in personam*.

APPEAL by plaintiff from *Chase B. Saunders, Judge.* Order entered 17 January 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1986.

Hamel, Helms, Cannon, Hamel & Pearce, P.A., by Hugo A. Pearce, III and James M. Gilbert, III, for plaintiff appellant.

Haynes, Baucom, Chandler, Claytor, Benton & Morgan, P.A., by Rex C. Morgan, for defendant appellee.

BECTON, Judge.

Cameron-Brown Company, a North Carolina corporation, filed this action against Gene A. Daves, a resident of South Carolina, for recovery of unpaid insurance premiums. Mr. Daves moved to dismiss pursuant to Rule 12(b) of the Rules of Civil Procedure for lack of personal jurisdiction. The trial court, after considering the arguments of counsel and affidavits submitted by the parties, concluded that Mr. Daves lacked the minimal contacts with North Carolina necessary to justify the assertion of jurisdiction over him. From the trial judge's order dismissing the action, Cameron-Brown appeals. We affirm.

I

From 1 January 1983 to 31 December 1984, Cameron-Brown contracted to provide insurance coverage for a number of motor vehicles owned and operated by Mr. Daves. Cameron-Brown's Complaint alleges that Mr. Daves is currently in default with respect to that insurance coverage in the amount of $32,659.78.

On the day the Complaint was filed, Cameron-Brown attached three checks totaling $23,675.71 payable to Mr. Daves from Atlas Underwriters, Inc. The parties disagree with regard to the location of the insured vehicles and with respect to the extent of Mr. Daves' contacts, if any, with the State of North Carolina. Mr. Daves supported his motion to dismiss with an affidavit in which he asserted the following.

Mr. Daves is a lifelong citizen and resident of York County, South Carolina. He owns no real or personal property located in North Carolina, and the equipment insured by the policies referred to in the Complaint had its situs in South Carolina. The business conducted by Mr. Daves with Cameron-Brown was solic-

ited by Cameron-Brown, with all contract negotiations taking place in South Carolina. At no relevant time did Mr. Daves travel to North Carolina to conduct business with Cameron-Brown; rather, when a meeting was necessary, a representative of Cameron-Brown would travel to South Carolina to meet with Mr. Daves.

In contrast, Cameron-Brown produced an affidavit of Mr. Thompson, one of its employees, whose assertions were based solely upon his review of the insurance company's books and records. Mr. Thompson stated that most of the insurance policies showed on their faces that they were written for equipment located in North Carolina. He further avowed that the policies were written in Cameron-Brown's Charlotte office and delivered to Mr. Daves in South Carolina, that bills were sent from Charlotte to Mr. Daves in South Carolina, and that payment was returned by Mr. Daves to the Charlotte office. Furthermore, almost all of the business between Cameron-Brown and Mr. Daves was conducted pursuant to telephoned requests to Charlotte from Mr. Daves for additional insurance coverage, and Mr. Daves occasionally travelled to Charlotte to transact business with the company.

II

Cameron-Brown maintains that Mr. Daves is subject to both *in personam* and *quasi in rem* jurisdiction. For the reasons discussed hereafter, we conclude that neither theory of jurisdiction is applicable in this case.

A

In Personam Jurisdiction

[1] A two-step test is utilized to resolve a question of *in personam* jurisdiction over a nonresident defendant: (1) Does a basis for jurisdiction exist under the North Carolina "long-arm" statute, N.C. Gen. Stat. Sec. 1-75.4 (1983); and (2) if so, will the exercise of this jurisdiction over the defendant comport with constitutional standards of due process? *E.g., Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977); *J. M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 324 S.E. 2d 909, *disc. rev. denied*, 313 N.C. 603, 330 S.E. 2d 611 (1985).

In answer to the first inquiry, Cameron-Brown asserts that the following statutory grounds justify assertion of jurisdiction

over Mr. Daves: (1) that the action arises out of a promise made to Cameron-Brown by Mr. Daves to pay for services to be performed in this State by the insurance company, G.S. Sec. 1-75.4 (5)(a); (2) that the action arises out of services actually performed by Cameron-Brown for Mr. Daves in this State, G.S. Sec. 1-75.4 (5)(b); (3) that the action arises out of a promise by Mr. Daves to deliver within this State things of value (insurance premiums), G.S. Sec. 1-75.4(5)(c); (4) that the action arises out of a contract of insurance and Cameron-Brown was a resident of this State when the "event" occurred out of which the claim arises, G.S. Sec. 1-75.4(10)(a); and (5) that Mr. Daves has been involved in "substantial activity" within this State, G.S. Sec. 1-75.4(1)(d). The ground for the trial court's ruling that jurisdiction over Mr. Daves does not exist was not lack of a statutory basis for jurisdiction, but lack of the necessary minimum contacts to satisfy due process. Moreover, Mr. Daves does not seriously contest the lack of a statutory basis. Therefore, we hold, without further discussion, that this action comes within the North Carolina jurisdictional statutes.

Despite the existence of a statutory basis for jurisdiction, due process prohibits our state courts from exercising that jurisdiction unless the defendant has had certain "minimum contacts" with the forum state such that "traditional notions of fair play and substantial justice" are not offended by maintenance of the suit. *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945). The existence of adequate minimum contacts is not to be determined by an application of mechanical or *per se* rules, but rather by a careful scrutiny of the particular facts of each case. *E.g., International Shoe Co.; Dillon v. Numismatic Funding Corp.; Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E. 2d 637 (1980). Some factors to be considered are: (1) quantity of the contacts between the defendant and the forum state, (2) quality and nature of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience of the parties. *E.g., Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300 (1985). Other factors are the location of critical witnesses and material evidence, and the existence of a contract which has a substantial connection with the forum state. *Georgia R.R. Bank & Trust Co. v. Eways*. Although the application of the "minimum contacts"

standard may vary with the facts of each case, it is essential that there be some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *Burger King Corp. v. Rudzewicz*, --- U.S. ---, 85 L.Ed. 2d 528, 542, 105 S.Ct. 2174, 2183 (1985); *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1239-40 (1958); *United Buying Group v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979).

Before applying the foregoing criteria to the instant case, we further review the standards by which we must weigh the record before us. Absent a request by one of the parties, the trial court is not required to make findings of fact when ruling on a motion. Instead, it will be presumed that the judge, upon proper evidence, found facts sufficient to support his ruling. *J. M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. at 424, 324 S.E. 2d at 912-13. If the presumed findings of fact are supported by competent evidence, they are conclusive on appeal despite evidence to the contrary. *Id. See also Fungaroli v. Fungaroli*, 51 N.C. App. 363, 276 S.E. 2d 521, *disc. rev. denied*, 303 N.C. 314, 281 S.E. 2d 651 (1981). Cameron-Brown did not request the trial court to make findings of fact. Thus, the issue before us is sufficiency of the evidence.

In the case *sub judice*, the parties presented affidavits which materially conflicted. The trial judge apparently believed the evidence of Mr. Daves and presumably found the facts to be as set forth and supported by his affidavit. Assuming as we must, therefore, that Mr. Daves' insured vehicles and equipment were all located in South Carolina, that Cameron-Brown solicited and initiated their business dealings, that contract negotiations occurred in South Carolina, that Mr. Daves owned no property in North Carolina nor ever travelled here to conduct business with Cameron-Brown, it appears that Mr. Daves' only contact with the state of North Carolina was the mailing of premium payments to Cameron-Brown's Charlotte office pursuant to the insurance contracts. We conclude that this, standing alone, is insufficient contact to justify requiring him to litigate here.

We are aware that in *Wohlfart v. Schneider*, 66 N.C. App. 691, 311 S.E. 2d 686 (1984), this Court held that a nonresident defendant who obligated himself to make payments pursuant to a

promissory note executed incident to the purchase of medical equipment from North Carolina plaintiffs was subject to the *in personam* jurisdiction of our courts. There we stated:

> Requiring the defendant to litigate his obligation under the note here seems entirely fair to us. He is the one that promised to make the note payments here, and in doing so he must have anticipated that here is where he would be sued if the payments were not made.

Id. at 694, 311 S.E. 2d at 688. However, in *United Buying Group, Inc. v. Coleman*, our Supreme Court overruled the *per se* rule adopted by this Court in *First Citizens Bank & Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E. 2d 556 (1973) that a guaranty by a nonresident of a debt owed to a North Carolina creditor constitutes a sufficient contact upon which this state may assert jurisdiction. The Court in *Coleman* stated that:

> The mere *act* of signing such a guaranty or endorsement does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident. Rather, the circumstances surrounding the signing of each obligation must be closely examined in each case to determine whether the quality and nature of defendant's contacts with North Carolina justify the assertion of personal jurisdiction over him in an action on the obligation.

296 N.C. at 518, 251 S.E. 2d at 616. We believe that we are bound by *Coleman* to require more contact by Mr. Daves than a mere contractual obligation to send payments to Charlotte.

There is no evidence before us regarding the actual quantity of contacts between the parties in either state, or the number of payments actually made to the Charlotte office during their two-year contractual relationship. As for the nature of the contacts, the mere act of entering a contract with a forum resident does not provide the necessary contacts when all elements of the defendant's performance are to occur outside the forum. *Phoenix American Corp. v. Brissey*, 46 N.C. App. 527, 265 S.E. 2d 476 (1980). Nor is the mere mailing of payments from outside the state pursuant to a contract made outside the state sufficient contact. *First National Bank of Shelby v. General Funding Corp.*, 30 N.C. App. 172, 226 S.E. 2d 527 (1976). No evidence in the record

shows where the contracts with Mr. Daves were actually consummated. Furthermore, the only performance required of Mr. Daves under the contracts was the writing and posting of checks from South Carolina. Mr. Daves' affidavit supports the trial court's presumed finding that the insured property was located in South Carolina. The only activity occurring in North Carolina relevant to the transactions—the "sole thread" linking Mr. Daves to this State—is the preparation of his insurance policies by the plaintiff in the Charlotte office. *See Phoenix American Corp. v. Brissey.* Hence, we conclude that the contracts have no substantial connection with this forum.

Most significantly, however, Cameron-Brown initiated the relationship with Mr. Daves. Admittedly, the cause of action is related to Mr. Daves' limited contact with the North Carolina company. However, in cases of contract disputes, "the touchstone in ascertaining the strength of the connection between the cause of action and the defendant's contacts is whether the cause of action arises out of attempts by the defendant to benefit from the laws of the forum state by entering the market in the forum state." *Phoenix American Corp. v. Brissey,* 46 N.C. App. at 532, 265 S.E. 2d at 480 (quoting *Fieldcrest Mills, Inc. v. Mohasco Corp.,* 442 F. Supp. 424 (M.D.N.C. 1977)). There is no evidence that Mr. Daves conducted business activities in North Carolina, attempted to enter the market here or otherwise sought to advance his position by contacts with this state such that he could claim the protection of our laws. To the contrary, all benefit to him arising from the insurance of his South Carolina property would occur in that state. We believe that responding to solicitation by a North Carolina insurance company by purchasing coverage for property located in another jurisdiction is not an act by which Mr. Daves has "purposefully availed" himself of the privilege of conducting activities within North Carolina.

[2] Consideration of the factors of interest of the forum state and convenience to the parties does not change our decision to decline jurisdiction. North Carolina's interest in providing a forum for its residents does not necessarily extend to the protection of those residents in all contractual relationships solicited outside its borders. Nor do we find any circumstances in this case which suggest that the inconvenience to Cameron-Brown of litigating in South Carolina is greater than the inconvenience to Mr.

Daves in coming to North Carolina. The existence of jurisdiction is ultimately a fairness determination. *J. M. Thompson Co. v. Doral Manufacturing Co.* We believe it is more fair as a general rule to require corporations which solicit and transact business in multiple jurisdictions to litigate their claims in the states of residence of their customers than to demand that nonresident customers with no other connection to North Carolina come to this forum.

B

Quasi in rem jurisdiction

[3] Cameron-Brown further contends that its attachment of three checks payable to Mr. Daves confers *quasi in rem* jurisdiction over him. We disagree. The due process requirement of "minimum contacts" discussed heretofore applies with equal force to actions *quasi in rem* as to actions *in personam. Shaffer v. Heitner,* 433 U.S. 186, 53 L.Ed. 2d 684, 97 S.Ct. 2569 (1977); *Georgia R.R. Bank & Trust Co. v. Eways.* The existence of attached property of the defendant within this state is merely another factor to be considered, and has little weight unless the property itself is the source of the controversy or it otherwise evidences an expectation of the defendant to benefit from the laws of this state.

Although Cameron-Brown contends that the checks result from claims by Mr. Daves under certain of the insurance policies purchased from Cameron-Brown and are thus "intimately related" to the subject matter of the lawsuit, the record does not disclose any such relationship. Neither does the fact that NCNB, a North Carolina bank, is another payee on the checks establish any contact between Mr. Daves and this state, there being no other evidence in the record to show what relationship, if any, Mr. Daves has with that bank in any state.

III

We conclude that the evidence supports the trial judge's finding of insufficient contacts by Mr. Daves to constitutionally justify the assertion of either *in personam* or *quasi in rem* jurisdiction. Accordingly, the trial court did not err in granting Mr. Daves' motion to dismiss.

Affirmed.

Judges WEBB and EAGLES concur.

JOHNETTA PEMBERTON, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CANNON, DECEASED v. RELIANCE INSURANCE COMPANY

No. 8614SC398

(Filed 18 November 1986)

1. **Insurance § 87— automobile liability insurance—permission for driver to drive**

Where plaintiff's intestate was injured in an automobile accident and obtained a judgment against the driver, but defendant, which insured the vehicle, denied liability on the ground that the driver had neither express nor implied permission to drive the vehicle, the trial judge properly denied defendant's motions for directed verdict, judgment n.o.v., and a new trial where the evidence was sufficient for the jury to find that the driver's brother was listed in the insurance policy as an operator of the insured vehicle and was therefore an original permittee; at the time of the accident the driver was driving home after being told by the brother that he "better take the car home" because he knew he wasn't supposed to be driving it; and the jury could reasonably infer from this evidence that the brother gave the driver the express permission to drive the vehicle to his home.

2. **Insurance § 87— automobile liability insurance—lawful possession of driver—physical handing over not required**

A literal physical handing over of a vehicle is not required before "lawful possession" may occur.

APPEAL by defendant from *Bowen, Judge*. Judgment entered 20 December 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 14 October 1986.

Neil M. O'Toole for plaintiff appellee.

Faison, Brown, Fletcher & Brough, by O. William Faison and Reginald B. Gillespie, Jr., for defendant appellant.

BECTON, Judge.

Plaintiff, as administratrix of the estate of John W. Cannon, filed this action against Reliance Insurance Company (Reliance) for satisfaction of a prior judgment entered against Douglas Holloway for injuries negligently inflicted upon John Cannon in

an automobile accident. Reliance denied liability, asserting that Douglas Holloway had neither express nor implied permission to drive Edward B. Holloway's insured vehicle and that, therefore, the liability insurance policy issued by Reliance to Edward Holloway did not afford coverage for payment of the judgment against Douglas Holloway under N.C. Gen. Stat. Sec. 20-279.21 (b)(2) (1983 & Cum. Supp. 1985). The sole issue presented to the jury, to which it responded in the affirmative, was whether Douglas Holloway was "in lawful possession" of the automobile at the time of the accident.

On appeal, Reliance assigns as error the trial court's denial of Reliance's (1) motion for directed verdict at the close of the plaintiff's evidence, (2) renewed motion for directed verdict at the close of all the evidence, (3) motion for judgment notwithstanding the verdict, and (4) alternative motion for a new trial. We conclude that the trial judge properly denied the motions, and therefore we affirm.

I

On 12 December 1981, a 1976 Buick Regal automobile driven by Douglas Holloway collided with another automobile which was parked alongside the curb of Glenbrook Avenue in Durham, North Carolina. John W. Cannon, who was seated in the parked automobile at the time of the collision, subsequently obtained a judgment against Douglas Holloway for injuries suffered in the accident. Mr. Cannon later died of causes unrelated to the accident.

At the time of the accident, Douglas Holloway lived with his mother, Wyvette Holloway, at her home on DaVinci Street in Durham. The Buick Regal automobile had been a gift to Wyvette Holloway from her son, Edward Holloway (Douglas's eldest brother). However, Edward remained record title owner of the car. The liability insurance policy covering the Regal, issued by Reliance to Edward Holloway, named Wyvette Holloway and Thomas Holloway (a third brother) as operators of the car.

In order to establish that Douglas Holloway was an impliedly permissive user of the Regal, the plaintiff offered at trial the testimony of Dennis Ellerbe, a friend and neighbor of Douglas Holloway at the time of the December 1981 accident. Mr. Ellerbe stated that he had gone riding with Douglas in the Regal nine or

ten times in the month and a half immediately preceding the accident, using the car for fishing expeditions or for picking up auto parts. On those occasions he and Douglas would meet at Douglas' home on DaVinci Street and depart from there with Douglas at the wheel. Mr. Ellerbe testified that, on at least one occasion, Wyvette Holloway saw them leave together in the Regal, that she never tried to stop Douglas from using the car, and that Douglas never made any attempt to conceal his use of the car from his mother. Mr. Ellerbe further stated that he had seen Douglas driving the Regal around the neighborhood on several other occasions during the month prior to the accident.

Reliance introduced evidence at trial that Edward Holloway never gave permission for Douglas to operate the car, that Wyvette Holloway had expressly denied Douglas permission to drive it, that Douglas's use of the vehicle was always without her knowledge or assent, and that Douglas made efforts to conceal his use of the Regal from his mother. In addition, cross examination of Douglas Holloway revealed that on 12 December 1981, at the time of the accident, Douglas was en route from the home of his brother, Thomas Holloway, to the house on DaVinci Street. On redirect examination, Douglas testified in pertinent part as follows:

> Q. So, you hid from Thomas the fact that you had the car?
>
> A. Yeah, because he knew I wasn't supposed to have it, too, and the day of the accident I went directly to his house and he told me I better take the car home because I knew I wasn't supposed to have it. That's what I was doing [when the accident occurred].

II

[1] The question presented by Reliance's motion for directed verdict is whether the evidence that Douglas Holloway was in lawful possession of the car at the time of the accident is sufficient to carry the case to the jury. *See Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). The plaintiff is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts must be resolved in her favor. *West v. Slick*, 313 N.C. 33, 326 S.E. 2d 601 (1985). A directed verdict is proper only when the plaintiff has

failed to show a right to recover upon *any* view of the facts which the evidence reasonably tends to establish. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E. 2d 678 (1977). Furthermore, a motion for judgment notwithstanding the verdict is essentially a renewal of the motion for directed verdict, and the same standard of sufficiency of the evidence applies to both motions. *Smith v. Price*, 74 N.C. App. 413, 328 S.E. 2d 811, *disc. rev. allowed*, 314 N.C. 332, 333 S.E. 2d 491 (1985).

The Motor Vehicle Financial Responsibility Act provides that an owner's policy of liability insurance

> [s]hall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, *or any other persons in lawful possession*, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle . . . .

N.C. Gen. Stat. Sec. 20-279.21(b)(2) (1983 & Cum. Supp. 1985) (emphasis added). This Court has interpreted the 1967 amendment to the statute, which added the language in italics, to signify that the legislature favors a liberal rule of construction in determining the scope of coverage under the omnibus clause of liability insurance. *Packer v. Travelers Insurance Co.*, 28 N.C. App. 365, 221 S.E. 2d 707 (1976); *Jernigan v. State Farm Mutual Automobile Insurance Co.*, 16 N.C. App. 46, 190 S.E. 2d 866 (1972). An analysis of the case law interpreting the reach of this statute reveals that at least three classes of persons using an insured automobile must be covered by the omnibus clause: (1) persons named in the insurance policy ("the person named therein"), (2) "original permittees"—persons using a vehicle with the express or implied permission of the named insured, and (3) other persons in lawful possession including "second permittees"—third parties using a vehicle with the permission of an "original permittee." *See Belasco v. Nationwide Mutual Insurance Co.*, 73 N.C. App. 413, 326 S.E. 2d 109, *disc. rev. denied*, 313 N.C. 596, 332 S.E. 2d 177 (1985) and cases cited therein. In *Belasco*, this Court stated that ". . . a person is in lawful possession of a vehicle under an omnibus clause if he is given possession of the automobile by the automobile's owner or owner's permittee under a good faith belief

that giving possession of the vehicle to the third party would not be in violation of any law or contractual obligation." *Id.* at 419, 326 S.E. 2d at 113.

Reliance first assigns as error the trial court's denial of its original motion for directed verdict made at the close of the plaintiff's evidence. Reliance argues that the plaintiff's evidence alone is insufficient to support the jury's finding that Douglas Holloway was in lawful possession of the automobile. However, Reliance is no longer entitled to a ruling based solely on the plaintiff's evidence. A defendant who introduces evidence in his own behalf, after his motion for directed verdict at the close of the plaintiff's evidence is denied, waives the right to assign error to the denial. *See Overman v. Gibson Products Co.*, 30 N.C. App. 516, 227 S.E. 2d 159 (1976); *Citrini v. Goodwin*, 68 N.C. App. 391, 315 S.E. 2d 354 (1984). In ruling on Reliance's renewed motion at the close of all the evidence and on the motion for judgment notwithstanding the verdict, Reliance's own evidence may be considered to the extent it is favorable to the plaintiff's case or not in conflict with the plaintiff's evidence. *See id. See also Tate v. Bryant*, 16 N.C. App. 132, 191 S.E. 2d 433 (1972).

It is clear from the record that Wyvette Holloway exercised the primary use and control of the insured vehicle with the permission of Edward, its owner, and was thus an "original permittee." The plaintiff maintains that sufficient evidence was presented from which the jury could find that Douglas Holloway drove the automobile with the acquiescence and implied permission of Wyvette and was thus "in lawful possession." The plaintiff further contends that the evidence supports a determination that Douglas, at the time of the accident, was driving with the express permission of Thomas Holloway, another "original permittee." Because we agree with the plaintiff's latter assertion we find it unnecessary to decide whether sufficient evidence existed that Douglas had Wyvette's implied permission to use the car.

First, the evidence shows that Thomas Holloway was listed in the insurance policy as an operator of the Buick Regal. Reliance contends that this is insufficient to establish that Thomas was an original permittee absent some further showing that Thomas used the car or was aware that he had the authority to use it. We reject that contention and hold that the naming of

Thomas in the policy as an operator of the vehicle is prima facie evidence from which the jury could infer that Thomas Holloway had the permission of Edward Holloway, the owner, to use the car.

Second, Douglas Holloway's own testimony revealed that at the time of the accident he was driving home after being told by Thomas that he "better take the car home" because he knew he wasn't supposed to be driving it. Reliance argues that this merely constitutes an affirmation by Thomas that Douglas was *not* permitted to drive the Regal. However, this testimony is susceptible of another interpretation—a jury could reasonably infer from it that Thomas gave Douglas the express permission to return the Regal to the DaVinci Street house.

[2] In concluding our discussion of "lawful possession," we find it necessary to clarify the definition of that term which this Court articulated in *Belasco v. Nationwide*. Reliance maintains that *Belasco* requires a driver to have been literally "*given* possession" of a vehicle in order to be "in lawful possession." It would follow that Thomas could not have given possession on the day of the accident because Douglas already had possession of the car, and therefore Thomas's directive to Douglas to take the car home could not suffice to establish "lawful possession." However, Reliance overemphasizes the literal language used in *Belasco*. It was not our intention to require a literal physical handing over of a vehicle before "lawful possession" may occur. To do so would be to impose a more strict standard than that applied in determining the existence of permission. Yet, this Court has held that parties seeking recovery under a theory of permission must meet a higher standard than those seeking recovery under a theory of mere lawful possession. *Carson v. Nationwide Insurance Co.*, 36 N.C. App. 173, 178, 243 S.E. 2d 429, 432 (1978).

In summary, we hold that there was adequate evidence tending to show that Thomas Holloway was an "original permittee" of Edward Holloway and that Thomas gave lawful possession of the Regal to Douglas Holloway within the meaning of *Belasco* and N.C. Gen. Stat. Sec. 20-279.21(b)(2). Therefore, the plaintiff was entitled to have the issue of lawful possession submitted to the jury.

III

In support of its alternative motion for a new trial, Reliance asserts that the evidence adduced in this case is inadequate to support the verdict; that hence, the verdict must be either the result of the jury's disregard for, or misunderstanding of, the court's instructions or the product of passion, prejudice, or sympathy.

Our scope of review of a trial judge's discretionary order granting or denying a new trial is extremely limited. Such an order may be reversed on appeal only in those "exceptional cases" in which a manifest abuse of discretion is clearly demonstrated by the record. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). We have already concluded that the evidence of "lawful possession" was adequate to support the jury's verdict. We find no abuse of discretion by the trial court in denying a new trial.

For the foregoing reasons, we hold that the trial court properly denied Reliance's motions for directed verdict, judgment notwithstanding the verdict, and new trial.

Affirmed.

Judges WEBB and EAGLES concur.

EVELYN H. POSTON AND JANICE E. POSTON v. ROY G. MORGAN

No. 8618SC452

(Filed 18 November 1986)

Rules of Civil Procedure § 60— attorneys' blunders—relief from order allowed—motion timely

Where, because of procedural blunders made by some of the attorneys representing plaintiffs, plaintiffs never had a full hearing on the merits of any of their claims with regard to ownership of their ancestral homeplace and its contents, the trial court abused its discretion in denying plaintiffs' motion to modify a prior court order which granted summary judgment for defendant on real property and slander claims and which permanently enjoined plaintiffs from instituting any more lawsuits against defendant based on events arising out of the original land transaction, except for a personal property case and an appeal which might be taken in a fraudulent conveyance case. Moreover, plain-

tiffs filed their motion to modify within a reasonable time within the meaning of N.C.G.S. § 1A-1, Rule 60(b) where the order in question was entered on 30 March 1984 and the motion to modify was filed on 1 April 1985; because of a weekend and a holiday, the motion was filed within one year of entry of the order; there was no one year requirement imposed pursuant to Rule 60(b)(5) and (6), the rule under which plaintiffs were entitled to relief; it was not until 26 November 1984 that plaintiffs' petitions for certiorari were denied and plaintiffs' avenues for any review were closed; and the period of time between 26 November 1984 and 1 April 1985 was not an unreasonable amount of time to elapse so as to preclude relief under Rule 60(b)(5) and (6).

APPEAL by plaintiffs from *Albright, Judge.* Order entered 28 January 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 22 August 1986.

William F. May for plaintiff appellants.

Graham, Miles & Bogan, by James W. Miles, Jr., for defendant appellee.

BECTON, Judge.

The defendant, Roy Morgan, has been named as a party in several lawsuits in which the plaintiffs, Evelyn Poston and Janice Poston, have sought to litigate the ownership of their 25-plus-acre ancestral homeplace in Jamestown, North Carolina.

In resolving this appeal, we have trekked through a ten-year procedural maze, reviewed the trial court's actions in at least four bitterly contested cases, and considered whether plaintiffs, who lost the right either to prosecute some of their claims at trial or to perfect some of their appeals due to attorney neglect, are entitled to the relief they seek. We conclude, based on the record before us and the applicable law, that the judgment of the trial court, which effectively prevented plaintiffs' further pursuit of any of their claims, should be reversed.

I

Procedural and Factual History

In the seminal case filed in 1976, plaintiff, Evelyn Poston, sought to reform a 1974 deed into a mortgage. Mrs. Poston contended that the paper she executed in favor of Morgan-Schultheiss, Inc., was a loan instead of a sale. This real property case was ultimately dismissed for failure to prosecute when Mrs. Pos-

ton's attorney failed to proceed with the trial. Mrs. Poston then unsuccessfully sought appellate review by the North Carolina and United States Supreme Courts.

In 1979, plaintiffs filed a personal property action to restrain Morgan from seizing personal property from their ancestral homeplace and to recover the personal property which had already been removed. Morgan's motion for summary judgment was eventually granted in 1984.

In 1980, plaintiffs filed a fraudulent conveyance action when some of the land in question was conveyed to Morgan by Morgan-Schultheiss, Inc. Later in 1980, plaintiffs also filed a slander suit, contending that Morgan defamed them by saying, among other things, that plaintiffs had Morgan's wife arrested for picking flowers and removing other items from the old Poston homeplace after being forbidden to do so. On 30 March 1984 the trial court granted Morgan's motions for summary judgment in the fraudulent conveyance case and the slander case. Further, the trial court entered an order permanently enjoining plaintiffs from instituting any more lawsuits against Morgan-Schultheiss, Inc. or the individual Morgans or reopening any old lawsuit based upon events arising out of the 1974 land transaction, excepting from inclusion therein the personal property case and any appeal which may be taken in the fraudulent conveyance case.

From the orders granting summary judgment in the personal property case, the fraudulent conveyance case, and the slander case, plaintiffs filed timely notices of appeal. Plaintiffs also timely appealed the denial of their Motion for Relief and Motion to Add Additional Parties in the real property case. Those motions had been filed on 28 May 1982 but were not ruled upon until 30 January 1984. Unfortunately, plaintiffs' new attorney on appeal, despite representations to the contrary, did not perfect plaintiffs' appeals. Those four appeals were dismissed in August 1984.

In their continuing effort to get some of their claims before a jury, plaintiffs on 1 April 1985 filed a Motion to Modify Order Granting Defendant's Motion for Summary Judgment. By that motion, plaintiffs sought to modify the 30 March 1984 injunction so they could file both a motion to rehear the Motion for Relief in the real property case and a motion to rehear the summary judgment motion in the personal property case. On 28 January 1986

the trial court denied plaintiffs' latest motion, and plaintiffs appealed to this Court.

II

Issues

Plaintiffs styled their two questions for review as follows:

1. DID THE TRIAL COURT ERR IN FINDING THAT THE PLAINTIFFS HAVE FILED AT LEAST TEN SEPARATE CIVIL ACTIONS AGAINST DEFENDANT ARISING OUT OF A CERTAIN TRACT OF LAND LOCATED IN JAMESTOWN, NORTH CAROLINA AND THAT ACTION NO. 76 CVS 1402 WAS ONE OF SUCH ACTIONS?

2. DID THE TRIAL COURT ERR IN CONCLUDING THAT PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE OF ANY REASONS FOR GRANTING RELIEF FROM JUDGMENT OR ORDER AS SET FORTH IN RULE 60(b) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE; IN CONCLUDING THAT PLAINTIFFS FAILED TO FILE MOTION TO MODIFY ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT WITHIN A REASONABLE TIME NOR WITHIN ONE YEAR AFTER JUDGMENT; AND IN DENYING PLAINTIFFS' MOTION TO MODIFY ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT?

III

Analysis

A. Suggesting that the trial court exercised no discretion, took "the easy way out," and failed to consider their claim adequately, plaintiffs first contend that the trial court erred in finding that they had filed ten separate civil actions against Morgan when, in fact, one of the ten civil actions in which the plaintiffs and Morgan were parties had been filed by High Point Bank and Trust Company. We summarily reject this argument. First, it is clear from the record that the trial court sought only to identify the number of actions relating to the 1974 land transaction to which the plaintiffs and defendants had been parties. Second, even if the trial court erred, plaintiffs have failed to show, and, indeed, have made no argument, that the trial court's finding denied them any right or that the result would have been different had this finding not been made. Based on our review of the record, we find no harmful or prejudicial error which amounts to a

denial of a substantial right. *See Whaley v. Washburn*, 262 N.C. 623, 138 S.E. 2d 291 (1964).

B. Based on seven numbered findings of fact which merely chronologize the procedural history of the case from 30 March 1984 to 11 April 1985 (i.e., Entry of Summary Judgment; Notice of Appeal; Extension of Time to Serve Proposed Record; Order Dismissing Appeal; Denial of Certiorari by Court of Appeals; Motion to Modify; and Denial of Certiorari by Supreme Court) and on an eighth finding that "plaintiffs have filed at least ten separate civil actions against the defendant," the trial court concluded:

. . .

> 3. The plaintiffs have failed to present sufficient evidence of any reasons for granting relief from Judgment or Order as set forth in Rule 60(b) of the North Carolina Rules of Civil Procedure.
>
> 4. The plaintiffs' Motion to Modify Order Granting Defendant's Motion for Summary Judgment was not filed or served within a reasonable time nor within one year after the judgment as required by Rule 60(b) of the North Carolina Rules of Civil Procedure.

. . .

Plaintiffs' Motion to Modify was made "pursuant any applicable provisions of Rules 59 or 60 of the North Carolina Rules of Civil Procedure and pursuant to the inherent power of the court to modify it's [sic] judgments." Plaintiffs have not pursued their claim for relief under Rule 59. Furthermore, plaintiffs did not allege mistake, inadvertence, surprise, excusable neglect, or fraud, and, therefore, Rule 60(b)(1), (2), and (3) are inapplicable. Nor did plaintiffs allege that the Order granting summary judgment was void, or had been satisfied, released or discharged as provided in Rule 60(b)(4) and (5). Instead, plaintiffs now rely on a portion of Rule 60(b)(5) which provides that a party may be relieved of a judgment if "it is no longer equitable that the judgment have prospective application," and on Rule 60(b)(6) which allows relief for "any other reason justifying relief from the operation of the judgment."

Unquestionably, North Carolina courts have the equitable powers to dissolve or modify, on the ground of change in circum-

stance, the type of injunction contained in the order granting defendant Morgan's Motion for Summary Judgment. *McGuinn v. High Point*, 219 N.C. 56, 135 S.E. 2d 48 (1941). *See also, United States v. Swift & Co.*, 286 U.S. 106, 114, 76 L.Ed. 999, 1001, 52 S.Ct. 460, 462 (1932). So we now review the evidence before the trial judge.

By 22 June 1984, plaintiffs had replaced their original attorney with another attorney, Mr. Lomas, to perfect the appeal in all four of their cases. Mr. Lomas failed to get the record settled in the real property case; failed to file the record in the slander and personal property cases; made false representations to plaintiffs that he was perfecting the appeals; and, when defendant's attorneys filed motions to dismiss the appeal, falsely represented that defendant's attorneys had agreed to withdraw their motions. He then left town the week that the motions were scheduled for hearing. As a result, plaintiffs' appeals in all four cases were dismissed in August 1984, and plaintiffs' petitions for writs of certiorari in all four cases were denied by this Court on 26 November 1984.

Because of procedural blunders made by some of the attorneys representing plaintiffs, plaintiffs have never had a full hearing on the merits of any of their claims. Following adverse rulings in the trial court, avenues of appeal were still available to plaintiffs. However, through gross neglect by their attorneys, and through no fault of their own, those avenues of appeal have been cut off. We agree with plaintiffs' statement in their brief that a "substantial change of facts and circumstances [exists] so as to make it appropriate that the plaintiffs be allowed to pursue motions for rehearing in the real property and personal property cases." In our view, plaintiffs have shown a basis for relief under Rule 60(b)(5) and (6). The trial court abused its discretion in denying plaintiffs' motion to modify a prior court order which, although finding that further suits by plaintiffs would be vexatious as a matter of law, excepted from inclusion within its ambit the personal property case.

We also conclude that plaintiffs filed their motion to modify within a reasonable time within the meaning of Rule 60(b). The order granting defendant's motions for summary judgment and enjoining plaintiffs from bringing certain lawsuits against defend-

ants was entered on 30 March 1984. Thirty March 1985 was a Saturday, and the next day that was not a Saturday, Sunday, or legal holiday, was Monday, 1 April 1985. Therefore, even if it were necessary for plaintiffs to have filed their motion to modify within one year of the 30 March 1984 order within the meaning of Rule 60(b)(1), (2) or (3), plaintiffs did so. More importantly, however, Rule 60(b)(5) and (6) does not have a "one year" requirement. It was not until 26 November 1984 that plaintiffs' petitions for writs of certiorari were denied by this Court. It was at that time that plaintiffs' hopes for getting the four appeals back on track were frustrated. On the facts of this case, we hold that the period of time between 26 November 1984 and 1 April 1985 is not an unreasonable amount of time to elapse so as to preclude relief under Rule 60(b)(5) and (6).

Based on the foregoing, the order entered 28 January 1986 by Judge Albright denying plaintiffs' motion to modify Judge Hairston's 30 March 1984 Order granting defendant's motion for summary judgment is reversed.

Reversed.

Judges JOHNSON and COZORT concur.

ORA E. CAROTHERS, EMPLOYEE, PLAINTIFF v. TI-CARO AND/OR PARKDALE MILLS, EMPLOYERS, AND LIBERTY MUTUAL AND/OR AETNA CASUALTY & SURETY CO., CARRIERS, DEFENDANTS

No. 8610IC364

(Filed 18 November 1986)

1. Master and Servant § 95.1— workers' compensation—appeal from opinion and award timely

There was no merit to defendants' contention that plaintiff's appeal should be dismissed because she did not take a timely appeal from a 20 February 1985 opinion and award, since plaintiff filed a motion for clarification of the 20 February 1985 order; that order was replaced by a 26 March 1985 "Order Amending Opinion and Award"; both parties took a timely appeal to the Industrial Commission from this order; the Commission entered its opinion and award on 4 October 1985, reinstating the 20 February 1985 opinion and award; from the 4 October 1985 opinion and award plaintiff gave notice of appeal within 30 days as required by N.C.G.S. § 97-86; and the Commission's "note"

in its 4 October 1985 opinion that no timely appeal was taken by any of the parties from the 20 February 1985 opinion did not constitute a finding of fact to which plaintiff must except or be bound by on appeal.

2. **Master and Servant §§ 68, 72— workers' compensation—occupational disease—finding of partial disability improper**

In a workers' compensation proceeding where plaintiff contended that she was disabled because of an occupational lung disease, the Industrial Commission erred by awarding compensation only for partial disability when it found as fact that plaintiff was incapable of earning wages in any employment for which she was qualified.

APPEAL by plaintiff from the North Carolina Industrial Commission opinion filed 4 October 1985. Heard in the Court of Appeals 22 August 1986.

This is a claim under the Workers' Compensation Act instituted 3 November 1982. Plaintiff alleged that she has an occupational lung disease which rendered her disabled. On 15 June 1983, Deputy Commissioner Brenda Becton conducted a hearing. At this hearing the parties stipulated that plaintiff was last employed by defendant Ti-Caro and that defendant Liberty Mutual was Ti-Caro's carrier. On 20 February 1985, an opinion was filed wherein it was found that plaintiff was "incapable of earning wages in any employment for which she is presently qualified." Plaintiff received an award pursuant to G.S. 97-30 for partial disability for a period of 300 weeks. On 13 March 1985 plaintiff filed a motion seeking an order "clarifying" the opinion and award filed 20 February 1985 to resolve what plaintiff perceived as an inconsistency between the factual finding of "incapability to earn wages" and the conclusion of law that plaintiff was entitled to an award for only partial disability. On the same date plaintiff filed a motion for an extension of time within which to appeal the 20 February 1985 order pending consideration of the motion to clarify that order. On 26 March 1985 Deputy Commissioner Becton filed an "Order Amending Opinion and Award." The amended opinion and award contained, *inter alia*, the following pertinent findings: that plaintiff is "totally disabled to be gainfully employed to earn the same wages that she was earning prior to her disability"; that "[p]laintiff's age and Dr. Owen's prognosis for improvement . . . do not support a finding that plaintiff was permanently and totally disabled at the time this matter was heard"; and that "some permanent impairment to her lung that is at-

tributable to her occupational disease . . . has rendered her permanently partially disabled to earn the same wages that she was earning prior to her disability." The amended opinion and award concluded with a "Comment" stating that plaintiff did not need to "show 'a change of condition' in order to successfully pursue a claim for . . . total disability benefits if . . . she remains unable to be gainfully employed as a result of her occupational disease."

Both parties appealed in a timely manner from the amended opinion and award to the Full Commission. In an opinion and award by Commissioner Charles A. Clay, with Chairman Brooks and Commissioner Stephenson concurring, the Full Commission struck the amended opinion and award because it is contrary to the law to allow one receiving benefits for partial disability to pursue benefits for total disability without a need to show a change of condition. The Commission noted that no timely appeal had been taken from the 20 February 1985 order. The Full Commission affirmed and adopted the opinion and award filed 20 February 1985 because it "is supported by the evidence and contains no error of law." Plaintiff appeals.

Charles R. Hassell, Jr., for plaintiff appellant.

Mullen, Holland & Cooper, P.A., by H. Julian Philpott, Jr., for defendant appellees.

JOHNSON, Judge.

[1] Defendants attempt at the outset to dispense with plaintiff's arguments by maintaining that plaintiff's appeal should be dismissed. Defendants may challenge the propriety of the judgment for the first time in their brief pursuant to the proviso under Rule 10(a), N.C. Rules App. P. Specifically, defendants contend that the appeal should be dismissed for the following reason: no timely appeal was taken by either party from the 20 February 1985 opinion and award as indicated by (1) the absence of a notice of appeal in the record on appeal and (2) the Full Commission's finding of fact in its 4 October 1985 opinion and award, conclusive on appeal, that no timely appeal had been taken. We disagree.

No notice of appeal from the 20 February 1985 order is necessary on these facts. Deputy Commissioner Becton granted plaintiff's motion for clarification of the 20 February 1985 order.

The 20 February 1985 order was replaced by the 26 March 1985 "Order Amending Opinion and Award." Both parties took a timely appeal to the Full Commission from this order. The Commission entered its opinion and award on 4 October 1985. From this opinion and award, plaintiff gave notice of appeal within thirty days as required by G.S. 97-86.

In its opinion and award the Commission stated that the amended opinion and award was contrary to the law, struck that order, reinstated the 20 February 1985 opinion and award, and commented as follows: "The Commission *notes* that no timely appeal to the Full Commission from the 20 February 1985 version of the Opinion and Award was taken by any of the parties." (Emphasis added.) This note does not constitute a finding of fact to which plaintiff must except or be bound by on appeal. For these reasons, we will address plaintiff's appeal on its merits.

[2] There is no dispute regarding plaintiff's entitlement to compensation for her disability resulting from an occupational lung disease. The only question raised by plaintiff is that the Commission erred as a matter of law by awarding compensation for partial disability when it found as fact that plaintiff was incapable of earning wages in any employment for which she is qualified.

The term "disability" means incapacity, because of an occupational disease, to earn the wages which the employee was receiving in the same or any other employment. G.S. 97-54; G.S. 97-2(9). The question here is what effect the disease has had upon the earning capacity of this particular plaintiff. *Mabe v. North Carolina Granite Corp.*, 15 N.C. App. 253, 255-56, 189 S.E. 2d 804, 806 (1972). Where a plaintiff, due to an occupational disease, is fully incapacitated to earn wages at employment which is the only work he is qualified to do by reason of such factors as age and education, he is totally incapacitated. *See id.* at 256, 189 S.E. 2d at 806-07.

In *Anderson v. A. M. Smyre Mfg. Co.*, 54 N.C. App. 337, 283 S.E. 2d 433 (1981), this Court held that evidence that a fifty-eight year old plaintiff with a compensable chronic lung disease had only a fifth grade education and no training to do any work other than textile work, that his lungs were impaired fifty to seventy percent (50-70%), and that he was totally disabled to perform his

former textile employment was evidence to support a finding of total disability.

The Commission is concerned with conditions as they exist prior to and at the time of the hearing. *Dail v. Kellex Corp.*, 233 N.C. 446, 449, 64 S.E. 2d 438, 440 (1951). The statute does not vest in the Commission the power to retain jurisdiction of a claim merely because some physical impairment suffered by the claimant may, at some time in the future, cause a loss of wages. *Id.*

Here, the Commission adopted and affirmed the 20 February 1985 opinion and award which contained pertinent Finding of Fact 15 as follows:

> 15. Plaintiff has lost 40% of her lung function by objective testing and has Class III impairment by AMA guides to respiratory impairment. In this category she has difficulty during exertion such as climbing stairs or walking rapidly. Because of her chronic obstructive pulmonary disease and airways hyper-reactivity, she is unable to return to her former employment in the cotton textile industry. She should not be exposed to any type of respirable dust or other irritants including strong odors or chemical fumes and cigarette smoke. Plaintiff has a 10th grade education and no training or experience at any employment other than her jobs as a maid and in the textile industry. *Her chronic obstructive pulmonary disease with airways hyper-reactivity and permanent obstruction to air flow, together with her lack of education, training for or experience in alternative employment, render plaintiff incapable of earning wages in any employment for which she is presently qualified.* As of December 18, 1980 plaintiff was and remains permanently partially disabled as a result of chronic obstructive pulmonary disease that is due to causes and conditions peculiar to her employment, i.e. exposure to cotton dust. Dr. Owens is of the opinion, however, that with regular medical treatment and continued absence from irritating environments, plaintiff's present level of pulmonary function should improve.

(Emphasis added.)

The evidence in the record supports the emphasized portion of Finding of Fact 15, which, in turn, necessarily leads to the con-

clusion of law that plaintiff, *at the time of hearing*, was totally disabled within the meaning of G.S. 97-29. The evidence here does not support a conclusion that plaintiff was partially disabled within the meaning of G.S. 97-30. G.S. 97-29 and G.S. 97-30 are mutually exclusive. A claimant cannot simultaneously be both totally and partially incapacitated. *Smith v. American and Efird Mills*, 51 N.C. App. 480, 488, 277 S.E. 2d 83, 88, *cert. denied and appeal dismissed*, 304 N.C. 197, 285 S.E. 2d 101, *petition for reh'g allowed and disc. rev. allowed*, 304 N.C. 589, 289 S.E. 2d 832 (1981), *modified and aff'd*, 305 N.C. 507, 290 S.E. 2d 634 (1982). The portion of Conclusion of Law 3 which concludes that plaintiff is permanently and partially disabled is not supported by the findings and is erroneous as a matter of law.

Moreover, a statement of a claimant's level of disability is properly a conclusion of law rather than a finding of fact. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 594-95, 290 S.E. 2d 682, 683 (1982). Accordingly, that part of Finding of Fact 15 which states, "As of December 18, 1980 plaintiff was and remains permanently partially disabled . . ." is really a conclusion of law. Because it is not supported by the findings of fact, it is in error as a matter of law.

It appears that both the Deputy Commissioner and the Full Commission were troubled by the statement of Dr. Owen, the panel physician, that plaintiff's condition should improve with regular medical treatment and absence from irritating environments. The Deputy Commissioner included this in the findings in the last sentence of Finding of Fact 15. As stated *supra*, the Commission must concern itself with the claimant's level of disability as it exists prior to and at the time of hearing. If a change occurs in the future rendering plaintiff capable of earning some wages, the statute affords defendants a remedy. G.S. 97-47; *Dail v. Kellex Corp.*, *supra*, at 449, 64 S.E. 2d at 440. Should plaintiff qualify as being partially disabled in the future, it is appropriate for defendants to seek a review due to a change of condition under G.S. 97-47. Nothing in the statute contemplates or authorizes an anticipatory finding by the Commission. *Id.*

For the reasons stated, based upon the Commission's finding and conclusion that plaintiff was totally disabled within the mean-

ing of G.S. 97-29, we remand this cause for entry of an appropriate Opinion and Award.

Remanded.

Judges EAGLES and COZORT concur.

PATSY G. FOUNTAIN v. V. E. FOUNTAIN, JR.

No. 8610SC225

(Filed 18 November 1986)

Husband and Wife § 12.1— separation agreement—provision for increase in alimony—issues as to oral agreement between parties and mutual mistake

In an action to enforce the provisions of a separation agreement where defendant alleged mutual mistake with regard to a provision allowing for adjustment of the amount of alimony and sought a reformation of the separation agreement to reflect the parties' oral agreement, the trial court erred in allowing summary judgment for plaintiff where there were two genuine issues of material facts: (1) whether the parties orally agreed to include in the separation agreement a provision for adjusting payments in accordance with actual increases in the cost of living rather than in accordance with the formula set out in the separation agreement, and (2) whether plaintiff was aware of defendant's mistaken belief that the formula in the separation agreement gave effect to the parties' oral agreement.

APPEAL by defendant from *Brewer, Judge*. Judgment entered 21 November 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 20 August 1986.

This is a civil action in which the plaintiff wife seeks to enforce against the defendant husband the provisions of a separation agreement executed on 19 September 1979. The agreement provides among other things that the defendant must supply the plaintiff a place to live and alimony in the amount of $1,000 per month during January through October and $1,500 per month during November and December. The defendant's evidence tends to show that the parties orally agreed to include in the separation agreement a provision for the annual adjustment of alimony and of the housing allowance to keep pace with the rate of inflation. Attorneys for the defendant drafted paragraph 7, which was ap-

proved by all parties and included in the separation agreement, to effectuate that oral agreement.

The defendant made payments consistent with the formula devised in paragraph 7 until June 1983 when the adjusted monthly alimony had reached $1,992.75. He then realized that under paragraph 7 alimony payments for 1989 would total $449,422.00 if inflation continued as it then existed. He informed the plaintiff by letter dated 28 April 1983 that the formula in paragraph 7 was the result of a mistake and that he intended to reduce his monthly alimony payment to reflect the parties' agreement to adjust alimony in accordance with changes in the cost of living. Since that time the defendant has made alimony payments in amounts ranging from $1,343.54 to $2,073.55.

The plaintiff instituted this action to compel the defendant to make alimony payments in accordance with the terms of the separation agreement and to recover damages for the intentional infliction of mental distress caused by the defendant's refusal to comply with their agreement. The defendant counterclaimed, alleging mutual mistake and seeking reformation of the separation agreement to reflect the parties' oral agreement and reimbursement of overpayments made pursuant to the formula in paragraph 7. The trial court allowed the plaintiff's motion and denied the defendant's motion for partial summary judgment on the issue of the defendant's liability under the separation agreement and denied the defendant's motion for summary judgment on his counterclaim. The defendant appealed.

Manning, Fulton & Skinner, by John B. McMillan and Charles E. Nichols, Jr., for plaintiff appellee.

Faison, Brown, Fletcher & Brough, by O. William Faison and Reginald B. Gillespie, Jr., for defendant appellant.

WEBB, Judge.

The defendant first argues that the trial court erred in denying his motion and in allowing the plaintiff's motion for summary judgment because the pleadings, affidavits and depositions establish the existence of a genuine issue of material fact regarding an error in drafting the formula included in paragraph 7.

In *McBride v. Johnson Oil and Tractor Co.*, 52 N.C. App. 513, 515, 279 S.E. 2d 117, 119 (1981), this Court stated:

> An instrument which fails to express the true intention of the parties may be reformed to express such intention when the failure is due to the mutual mistake of the parties, to the mistake of one party induced by fraud of the other, or to mistake of the draftsman. Such a mutual mistake of the parties may be one relating to the legal effect of the instrument. Where, by reason of an error of expression or mistake as to the force and effect of the language used, an instrument fails to express the intent of the parties, equity will afford relief. (Citations omitted.)

The defendant has presented uncontradicted evidence showing that he was mistaken as to the actual effect of paragraph 7 and that the failure of paragraph 7 to reflect his understanding of the parties' agreement was caused by a mistake of his attorney, the draftsman. This evidence includes the defendant's affidavit which states in part:

> 5. Mr. Horton [the defendant's attorney] stated that Mr. Howison [the plaintiff's attorney] had requested a cost of living adjustment, which would have the effect of maintaining the 1979 buying power of [$13,000.00]. . . . . This cost of living adjustment was to be based on the Consumer Price Index. Mr. Horton did not inform me, nor did I intend or understand that the cost of living adjustment requested by Mr. Howison to cause increase in payments to be made in any amount greater than actual increases in the cost of living, as measured by the Consumer Price Index.

In a letter to the plaintiff's attorney dated 9 February 1981 the defendant states that "[his] intent when negotiating the Separation Agreement, was to use a vehicle for increasing her cash alimony payments whereby she would not lose any purchasing power." Marvin V. Horton, who along with George Goodwyn represented the defendant during these negotiations, filed an affidavit stating that:

> At no time did Mr. Howison request or suggest that a provision be added to the proposed consent judgment, Paragraph

> 7 or any other portion of the Separation Agreement which would cause increases in payments to be made under Paragraph 7 in any amount greater than actual increases in the cost of living, as measured by the Consumer Price Index, nor did I at any time understand him as making any such request or suggestion. We therefore agreed, on behalf of our respective clients, to include a provision which would cause certain payments to be made under the proposed consent judgment and later under the Separation Agreement to be adjusted in accordance with the actual changes in the cost of living, ... We did not agree, nor was it our intention that the cost of living adjustment require increases in payments . . . in excess of actual increases in the cost of living, ... Based upon the purpose and intent of our agreement to include a cost of living adjustment in the proposed consent judgment, I made an original draft for inclusion therein and later in the Separation Agreement a provision which was intended to and I then understood to cause the payments to be made thereunder to be adjusted in accordance with actual changes in the cost of living, ... At no time did Mr. Howison inform me or suggest that this provision required increases in payments . . . in excess of actual increases in the cost of living . . . .

The defendant also presented the affidavit of Thomas Havrilesky, an expert in the field of estimation and forecasting of the buying power of the dollar and changes in the cost of living. Mr. Havrilesky stated that "[t]he formula called for in Paragraph 7 is neither a cost of living adjustment nor a mechanism to maintain the buying power of the dollar. Instead it operates to increase payments to which it applies in a fashion similar to a geometric progression." Finally, the result of the formula itself tends to show a drafting error. The separation agreement provides that the defendant shall pay to the plaintiff alimony totalling $13,000 per year. Assuming a 5% rate of inflation, which the defendant's expert witness believes to be lower than the actual projected rate of inflation, alimony payments for 1986 calculated to keep pace with the rate of inflation would total $19,682. Calculated according to the formula contained in paragraph 7 payments for the same year would total $106,994. In the year 2000, assuming the same inflation rate, actual cost of living increases would cause

the amount of alimony to increase to $28,782. Calculated according to paragraph 7, payments for that year reach $727,176,183.

The plaintiff argues that she has presented uncontradicted evidence that she and her attorney were aware of the effect of paragraph 7 at the time of execution and that the defendant has therefore failed to show a mutual mistake, which is necessary to his defense of mistake of the draftsman. Assuming for the sake of argument that the plaintiff is correct in her assertion that the defendant has presented no evidence of a mutual mistake, we are unable to agree that this failure would preclude the assertion of his defense.

> Reformation is also allowed when one party writes down the agreement in an erroneous way and the other party knows it. In such a case there is no mutual mistake at all in the layman's sense of the phrase, because only one party was mistaken. But here again, there was a previous agreement to which the writing can be reformed, and once again that is enough. In cases of this sort, courts often grant relief on the ground that there was a mistake on one side and fraud or inequitable conduct on the other.

D. Dobbs, *Handbook on the Law of Remedies* § 11.6 (1973).

> In some cases one who knows of another's mistake and says nothing will find himself bound by a contract that he did not intend to make. . . . The language of an agreement will be interpreted according to the meaning given to it by one party if the other had actual knowledge that such was the meaning so given. It is certain that such a bad actor will not be permitted to enforce the agreement according to its words in their usual meaning. The mistaken party is certainly entitled to recision; but he may, instead, get reformation and enforcement as reformed.

3 A. Corbin, *Contracts* § 610 (2d ed. 1960).

The plaintiff concedes that she and her attorney were aware of the effect of paragraph 7 prior to execution, leaving only two issues unresolved by the evidence. The first issue is whether the parties did orally agree to include in the separation agreement a provision for adjusting payments in accordance with actual increases in the cost of living rather than in accordance with the

schedule contained in paragraph 7. The defendant's and his attorney's affidavits contain evidence from which a jury could find that they did. The second remaining issue is whether the plaintiff was aware of the defendant's mistaken belief that the formula in paragraph 7 gave effect to that oral agreement. Evidence that the plaintiff and her attorney were aware of the effect of paragraph 7 would permit a jury to find that they were also aware of the defendant's mistaken belief. Therefore, the evidence presented at the hearing on the plaintiff's motion for partial summary judgment creates two genuine issues of material fact, rendering entry of summary judgment for either party inappropriate. If the jury should answer these issues favorably to the defendant he will be entitled to have the agreement reformed to express the true intent of the parties.

Reversed.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. PAUL TURNER ELDRIDGE, JR.

No. 8621SC151

(Filed 18 November 1986)

1. **Burglary and Unlawful Breakings § 5— no showing of force to gain entry—conviction for first degree burglary improper—verdict sufficient to sustain conviction for lesser offense**

Defendant could not be convicted of first degree burglary where the State offered no evidence to raise an inference that any force was employed to gain entry to the victim's apartment and evidence of a breaking, an essential element of burglary, was therefore missing; however, there was evidence that defendant entered the victim's apartment with the intent to commit an assault upon her, which was sufficient to support a conviction for felonious breaking or entering, and the jury's verdict of guilty of first degree burglary indicated that it found all facts necessary to a conviction for felonious breaking or entering.

2. **Larceny § 9— felonious larceny pursuant to burglary—sufficiency of verdict to support felonious larceny pursuant to breaking or entering**

The indictment charging felonious larceny committed pursuant to burglary was sufficient to charge defendant with felonious larceny committed pursuant to breaking or entering, and by its verdict of guilty of felonious

larceny pursuant to burglary the jury necessarily found facts to support a verdict of guilty of felonious larceny pursuant to breaking or entering.

3. **Criminal Law § 48— defendant's post-arrest silence—cross-examination of defendant—no plain error**

In a prosecution for rape, burglary and larceny, there was no merit to defendant's contention that the trial court committed plain error in allowing the State's attorney to cross-examine him regarding his post-arrest silence about a man who dropped the victim's telephone which was found in defendant's possession at the time of his arrest shortly after commission of the crime.

APPEAL by defendant from *Mills, Judge.* Judgments entered 9 October 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 18 August 1986.

The defendant was charged in proper bills of indictment with second degree rape, first degree burglary and felonious larceny. The State's evidence tends to show that on 4 June 1985 the victim, a seventy-three-year-old woman, went to sleep on the couch in her living room at approximately 9:30 or 10:00 p.m. Sometime in the early morning she was awakened by a man who grabbed her throat and said "I gotcha." He then raped her and stole her telephone, pliers, a pair of scissors and an envelope containing approximately ten quarters. The man ran out of the apartment and around a corner.

The victim was able to describe her assailant to police only as a "youngish" male, 5'8" to 5'10" tall and of slender build. She could not determine his race. Five minutes after Officer Bruce of the Winston-Salem Police Department heard this description over his car radio he saw the defendant walking two blocks from the victim's home. Bruce stopped and asked the defendant to speak with him. He saw that the defendant was carrying a telephone receiver in his coat pocket and a t-shirt containing some object. Bruce called to the defendant, who tossed the t-shirt and then the telephone receiver over a wall. When Bruce told the defendant to pick up the telephone, he saw the defendant place a .38 caliber revolver under a nearby tree. He then patted down the defendant and found a slingshot, pliers and scissors in the defendant's pockets. The defendant was arrested for carrying a concealed weapon. It was later determined that the victim's phone number matched the number on the phone in the defendant's possession.

No identifiable fingerprints were found inside the victim's apartment. A forensic serologist testified that sperm found in a

vaginal smear taken from the victim contained phosphoglucomutase (PGM) enzyme in form 2-1. The serologist concluded that the sperm must have come from a male with PGM group 2 or group 2-1. Thirty-nine percent of males have PGM group 2 or 2-1. The defendant has PGM group 2.

The defendant testified that he was out late on the night of 4 and 5 June, walking around to the homes of various friends and drinking beer with a cousin. While walking near the victim's home he saw a black male running around the corner of a building. When this man saw the defendant he stopped, put down a t-shirt and ran in the opposite direction. The defendant picked up the t-shirt, which contained a telephone, scissors and pliers. He continued walking. When he was approached by Officer Bruce he threw the telephone to distract Bruce's attention in the hope that Bruce would not realize the defendant was carrying a pistol in violation of the terms of his probation. The defendant said he did not tell the arresting officers about the man who dropped the telephone because of the officers' intimidating conversation.

The jury found the defendant guilty as charged. From judgments entered on those verdicts, the defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

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

WEBB, Judge.

[1] The defendant first assigns as error the trial court's denial of his motion to dismiss the charge of first degree burglary because there is no evidence from which the jury could find that the defendant had committed a breaking as required by G.S. 14-51. We believe this argument has merit.

The offense of first degree burglary requires proof that the defendant both broke and entered the dwelling house of another in the nighttime, intending to commit a felony within. A "breaking" is defined as any act of force, however slight, used to make an entrance "through any usual or unusual place of ingress, whether open, partly open, or closed." *State v. Jolly*, 297 N.C. 121, 127-128, 254 S.E. 2d 1, 5-6 (1979). Proof of such a breaking

usually requires testimony that prior to entry all doors and windows were closed. *State v. Alexander*, 18 N.C. App. 460, 197 S.E. 2d 272, *cert. denied*, 283 N.C. 666, 198 S.E. 2d 721 and *cert. denied*, 284 N.C. 255, 200 S.E. 2d 655 (1973).

In the present case the State offered no evidence to raise an inference that any force was employed to gain entry to the victim's apartment. The victim testified concerning the type of lock on the only door to the apartment but never stated that the door and two windows were closed when she went to sleep. There was no evidence of forced entry. Evidence of a breaking, an essential element of burglary, was therefore missing, and the defendant could not properly be convicted of that offense. There is evidence, however, that the defendant entered the victim's apartment with the intent to commit an assault upon her, which is sufficient to support a conviction for felonious breaking or entering. G.S. 14-54(a). Felonious breaking or entering is a lesser-included offense of first degree burglary, *State v. Jolly, supra*, and requires only evidence of breaking or entering but not of both. *State v. Barnett*, 41 N.C. App. 171, 254 S.E. 2d 199 (1979). The trial court's charge to the jury, which included only an instruction on burglary but not on its lesser-included offenses, was sufficient to support a conviction for felonious breaking or entering. *See State v. McCoy*, 79 N.C. App. 273, 339 S.E. 2d 419 (1986). By its verdict of guilty of first degree burglary the jury indicated that it found all facts necessary to a conviction for felonious breaking or entering. We therefore vacate the judgment on the charge of first degree burglary and remand with instructions to enter judgment as upon a conviction of felonious breaking or entering.

[2] The defendant next argues that the court erred in denying his motion to dismiss the charge of felonious larceny. He contends that because the evidence was insufficient to support a conviction for burglary and the court instructed only on the theory of felonious larceny committed pursuant to burglary this conviction must also be vacated. We cannot agree.

We held above that although in its jury charge on the offense of first degree burglary the court did not instruct the jury on the lesser-included offense of felonious breaking or entering, the indictment charging only burglary and the instructions were nonetheless sufficient to support a conviction for felonious breaking or

entering. We believe the same reasoning applies to the defendant's larceny conviction. The indictment charging felonious larceny committed pursuant to burglary is sufficient to charge the defendant with felonious larceny committed pursuant to breaking or entering. *State v. McCoy, supra.* G.S. 14-72(b)(2) makes it a felony to commit larceny pursuant to burglary or breaking or entering without regard to the value of the property taken. By its verdict of guilty of felonious larceny pursuant to burglary the jury necessarily found facts to support a verdict of guilty of felonious larceny pursuant to breaking or entering. We hold that the court's instruction on felonious larceny pursuant to burglary was sufficient to support the defendant's conviction of felonious larceny pursuant to breaking or entering.

[3] By his final assignment the defendant argues that the court erred in permitting the State's attorney to cross-examine him regarding his post-arrest silence about the man who dropped the telephone found in his possession. The defendant concedes he made no objection to this line of questioning at trial and that therefore review may be had only if the error rises to the level of "plain error."

In *State v. Odom*, 307 N.C. 655, 660, 300 S.E. 2d 375, 378 (1983), our Supreme Court adopted the "plain error" rule as stated in *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir.), *cert. denied*, 459 U.S. 1018, 103 S.Ct. 381, 74 L.Ed. 2d 513 (1982):

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

In the present case the following occurred on cross-examination of the defendant:

Q: Did you tell [Officer Bruce]—did you tell him about the man who dropped the phone and the t-shirt?

A: No, I didn't.

Q: And at any time that night, did you tell the officers about the man that dropped the phone?

A: No, I didn't.

Q: Anytime that night, did you tell the officer, look, officers, you got me under arrest for rape and burglary and I found these matters and let me describe this fellow to you and show you which way he ran so you can get a track on him, get the bloodhounds out? Did you tell them that at all?

A: If I could explain that.

Q: Sure.

. . . .

A: The reason why I didn't say anything, either they was playing it as a joke or whatever, I took it serious. Police Patrolman Bruce said that I could have blown his head off at that time. I said to myself, I'm not stupid. And at that time, said we ought to let him run and shoot him. I said I know I ain't saying nothing now. . . . .

We do not believe the error complained of rises to the level of "plain error" within the rule adopted in *State v. Odom, supra.*

Affirmed in part, vacated and remanded in part.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. DWIGHT BENJAMIN

No. 863SC469

(Filed 18 November 1986)

1. **Homicide § 15.4; Criminal Law § 57— firearm tests—expert's opinion admissible**

In a prosecution of defendant for involuntary manslaughter where the evidence tended to show that the victim died from a gunshot wound to the head, the trial court did not err in allowing an SBI lab technician who had performed "many thousands" of gunshot residue tests to testify that the accumulation of residue on the victim's hands was inconsistent with his having recently fired defendant's revolver, to testify how the residue could have gotten there, and to testify concerning his opinion that the failure of defendant's residue test to provide conclusive results could have been caused by the passage of three and one-half hours since the time of the shooting and by activity on the part of defendant during that period. N.C.G.S. § 8C-1, Rule 702.

2. **Criminal Law § 57— use of weapon—demonstration proper**

The trial court in an involuntary manslaughter prosecution did not err in allowing the medical examiner to demonstrate with the use of a .357 magnum that he, a man approximately the size of the victim, could not shoot himself in the head with the gun from the necessary distance of from 22 to 26 inches.

3. **Homicide § 21.9— shooting death—involuntary manslaughter—sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for involuntary manslaughter where it tended to show that defendant and the victim were alone in defendant's apartment drinking gin and watching TV when defendant brought out his .357 magnum to show the victim; the weapon was a single and double action revolver; four pounds of pressure were necessary to fire it single action and eleven pounds to fire it double action; an expert witness testified that the victim could not have shot himself with the firearm from the necessary distance; after the shooting the defendant continued to state "[i]t is only a game, it is only a game, he didn't know the gun was loaded"; and a forensic chemist testified that the concentrations of gunshot residue on the victim's hands were inconsistent with the victim's having fired defendant's gun recently and were more consistent with his having held his hand in a defensive position between the gun and his face.

APPEAL by defendant from *Pope, Judge.* Judgment entered 24 January 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 17 September 1986.

The defendant was charged in a proper bill of indictment with the 5 April 1985 murder of Seth Albert Wright. At trial the State presented evidence tending to show the following: Before 5

April 1985 the defendant and the victim, both Marines stationed at Cherry Point, North Carolina, were friends for several months. On the morning of 5 April the two men worked on the victim's car at the defendant's home. The victim brought a bottle of gin which the men later drank while watching television in the defendant's apartment. The defendant then brought out his .357 magnum revolver to show the victim. According to his statement to police, the defendant unloaded the gun, placed the bullets on the kitchen table and handed the gun to the victim. The victim and the defendant were sitting at opposite ends of the kitchen table. The defendant stated that he heard a loud noise and turned to see the victim lying on the floor with a gunshot wound to his head. The defendant then removed the spent shell and threw it out the back door. The defendant's neighbors called the police and rescue squad. A rescue squad member and Captain C. K. McKenzie both testified that the defendant repeatedly said, "[i]t's only a game, it's only a game, he didn't know the gun was loaded."

Dr. Charles Garrett, who performed the autopsy, testified that based upon various tests, in his opinion the gun was fired from a distance of between 22 and 26 inches from the victim's left temple. He also testified that in his opinion the victim could not have shot himself from that distance. Wipings taken from the victim's hands showed concentrations of gunshot residue too great to be consistent with the victim having fired the fatal shot. Wipings taken from the defendant's hands yielded inconclusive results. The State also presented evidence that while riding in a police patrol car the defendant stated "[w]hat if I tell you the truth about what happened? . . . Well, if I tell you the truth, I'll go to jail for sure then."

The defendant presented no evidence at trial. He was found guilty of involuntary manslaughter and from a judgment imposing a prison sentence of thirty months, he appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James B. Richmond, for the State.

John H. Harmon for defendant appellant.

WEBB, Judge.

[1] By his first assignment the defendant argues that the trial court committed reversible error by permitting a State Bureau of

Investigation laboratory technician to testify that the high level of gunshot residue found on the victim's hands could have been caused by the victim's bringing his hand up between his body and the gun in a defensive posture. He argues that this testimony was inadmissible because the SBI technician's "opinions were mere speculation and amounted to allowing the State's witness to impeach his own test results." We cannot agree.

G.S. 8C-1, Rule 702 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

The SBI technician in this case, who had performed "many thousands" of gunshot residue tests prior to trial, was accepted by the court as an expert in the field of forensic chemistry. He testified that in his opinion the accumulation of gunshot residue on the victim's hands was inconsistent with his having recently fired the defendant's .357 magnum revolver. Under these circumstances, the witness' opinion as to how the victim could have gotten this residue on his hands would assist the trier of fact to determine a fact in issue, whether the victim had intentionally or accidentally shot himself or whether he had been shot by the defendant.

The defendant also argues that the same witness was improperly permitted to testify concerning his opinion that the failure of the defendant's gunshot residue tests to provide conclusive results could have been caused by the passage of three and a half hours since the time of the shooting and by activity on the part of the defendant during that period. Again, we disagree. The witness testified that although there was gunshot residue on the defendant's left hand, the residue concentrations were not significant enough or consistent enough with the results of controlled tests to permit him to form an opinion of whether the defendant had recently fired his revolver. He then offered his opinion of what circumstances could affect these tests and lead to inconclusive results. We believe this testimony was properly admitted to assist the jury in understanding the inconclusive results of the defendant's gunshot residue tests.

[2] The defendant next assigns as error the court's permitting Dr. Garrett, the medical examiner, to demonstrate with the use of the .357 magnum that he, a man approximately the size of the victim, could not shoot himself in the head with the gun from the necessary distance of from 22 to 26 inches. The defendant argues that this demonstration should have been excluded because no foundation was laid that the conditions at the time of the demonstration were substantially similar to those existing at the time of the shooting. This question is controlled by *State v. Atwood*, 250 N.C. 141, 108 S.E. 2d 219 (1959) in which our Supreme Court, in a murder prosecution, held that an expert witness who had performed the autopsy upon the victim was properly permitted to demonstrate for the jury the difficulty which the victim would have encountered in attempting to shoot himself from the distance and at the angle from which the fatal shot was fired. This assignment of error is without merit.

[3] Finally, the defendant argues that the court erred in denying his motion to dismiss because there is insufficient evidence, as a matter of law, to show that the victim died from a gunshot fired by the defendant. Again, we disagree.

Involuntary manslaughter is the unlawful and unintentional killing of a human being without malice and which proximately results from the commission of an unlawful act not amounting to a felony or not naturally dangerous to human life, or from the commission of some act done in an unlawful or culpably negligent manner, or from the culpable omission to perform some legal duty. *State v. Everhart*, 291 N.C. 700, 231 S.E. 2d 604 (1977). "One who handles a firearm in a reckless or wanton manner and thereby unintentionally causes the death of another is guilty of involuntary manslaughter." *State v. Moore*, 275 N.C. 198, 212, 166 S.E. 2d 652, 662 (1969).

The evidence in this case tends to show that the defendant and the victim were alone in the defendant's apartment drinking gin and watching television when the defendant brought out his .357 magnum to show the victim. The weapon was a single and double action revolver. To fire it single action, it is necessary to exert four pounds of pressure upon the trigger. To fire it double action, one must apply eleven pounds of pressure. An expert witness testified that the victim could not have shot himself with

this firearm from the necessary distance. After the shooting the defendant continued to state "[i]t is only a game, it is only a game, he didn't know the gun was loaded." Finally, a forensic chemist testified that the concentrations of gunshot residue on the victim's hands were inconsistent with the victim's having fired the defendant's gun recently and were more consistent with his having held his hand in a defensive position between the gun and his face. We believe this evidence is sufficient to permit a reasonable jury to conclude that the victim died as a result of the defendant's culpably negligent handling of a loaded firearm.

The defendant, relying upon *State v. Hood*, 77 N.C. App. 170, 334 S.E. 2d 421, *review denied, writ denied*, 314 N.C. 671, 335 S.E. 2d 900 (1985), argues that the evidence is insufficient to support this conviction. The evidence in *Hood* tended to show that the victim was found dead from a gunshot wound. Sometime in the morning of the day the victim died his neighbor heard a car drive up, heard a man's voice calling the victim's name, and then heard a gunshot. Ten minutes later the neighbor saw the defendant driving away from the area of the victim's home. The victim's warm body was discovered at 8:30 p.m. that evening. The medical examiner was unable to estimate the time of death. Our Supreme Court held this evidence insufficient to support a homicide conviction. We believe *State v. Hood* is clearly distinguishable from the present case on the ground that in *Hood* there was no evidence placing the defendant at the site of the shooting at the time it took place, so that the State had failed to show that the defendant had an opportunity to commit the murder. In the present case all the evidence established that the defendant and the victim were alone in the defendant's home at the time of the shooting. In *Hood* the Court also held that evidence that the victim was killed by a .25 caliber bullet and that no .25 caliber pistol was found anywhere in the vicinity of the body, combined with evidence that four people were known to have been at the shooting site and could have removed a suicide weapon "directs the conclusion that the State failed to show that a crime had been committed." *Id.* at 172, 334 S.E. 2d at 422. In the present case there is evidence showing that the victim could not have fired the fatal shot. The trial court properly denied the defendant's motion to dismiss.

No error.

Judges BECTON and EAGLES concur.

STATE OF NORTH CAROLINA v. DAVID LEVERNE CALLAHAN

No. 8616SC665

(Filed 18 November 1986)

1. **Constitutional Law § 45— appearance pro se—inquiry required of defendant**

Defendant is entitled to a new trial where he proceeded to trial without counsel, and the record was silent with regard to the trial court's inquiry concerning his waiver of counsel. N.C.G.S. § 15A-1242.

2. **Larceny § 7.4— possession of recently stolen property—11-12 days between taking and possession**

In a prosecution of defendant for felonious larceny of commercial restaurant equipment, an 11-12 day period between the larceny and defendant's possession was not so long as to preclude application of the doctrine of possession of recently stolen property.

APPEAL by defendant from *Ellis (B. Craig), Judge*. Judgment entered 19 February 1986 in Superior Court, ROBESON County. Heard in the Court of Appeals 24 October 1986.

Defendant was properly indicted on one count of felonious breaking and entering and one count of felonious larceny. At his arraignment on 20 January 1986 defendant stated his intention to hire an attorney and signed a waiver of his right to court-appointed counsel. On 18 February 1986 defendant's case was called for trial. Defendant had no counsel. The presiding judge looked at the case file and asked defendant if he was ready to proceed. Defendant stated that he was. From the record before us, it appears that the presiding judge began the jury selection process and the trial without making further inquiry of defendant.

Defendant presented no evidence and was found not guilty of felonious breaking and entering, and guilty of felonious larceny. From judgment entered on the verdict, defendant appealed.

Attorney General Thornburg, by Assistant Attorney General Ellen Scouten, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for the defendant-appellant.

EAGLES, Judge.

[1] By assignments of error numbers 1 and 2, defendant contends that he is entitled to a new trial because the trial court required him to proceed *pro se* without clearly finding that defendant intended to proceed without the assistance of counsel.

G.S. 15A-1242, in full, provides as follows:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishment.

The statute's requirements are clear and unambiguous. The inquiry is mandatory and must be made in every case in which a defendant elects to proceed without counsel. *State v. Michael*, 74 N.C. App. 118, 327 S.E. 2d 263 (1985). The record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will. *State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312 (1981).

In this case, the State notes in its brief that the trial judge did in fact address defendant pursuant to G.S. 15A-1242 but that the proceedings were not recorded by the court reporter. Consequently, the record is silent as to what questions were asked of defendant and what his responses were. Absent a transcription of those proceedings, this Court cannot presume that defendant

knowingly and intelligently waived his right to counsel. Accordingly, defendant is entitled to a new trial.

Even though we have determined that the defendant is entitled to a new trial on procedural grounds, double jeopardy principles require us to consider another of defendant's contentions. Defendant contends that his larceny conviction must be reversed for insufficient evidence. The State may not retry the defendant if the evidence at the first trial was not legally sufficient to sustain the verdict. *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978). *See Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed. 2d 311 (1984) (Brennan, J., concurring) (quoting *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed. 2d 652 (1982) (White, J., dissenting)); *United States v. Bibbero*, 749 F. 2d 581 (9th Cir. 1984), *cert. denied*, --- U.S. ---, 105 S.Ct. 2330, 85 L.Ed. 2d 847 (1985); *United States v. Menesos-Davila*, 580 F. 2d 888 (5th Cir. 1978). *But see United States v. Mandel*, 591 F. 2d 1347 (4th Cir. 1979). Appellate reversal of a conviction on the basis of insufficiency has the same effect as a judgment of acquittal and the Double Jeopardy Clause precludes retrial. *United States v. Burks, supra.*

We note that defendant failed to move for dismissal at the close of the evidence. As a result, Rule 10(b)(3) of our Rules of Appellate Procedure precludes the defendant from challenging on appeal the sufficiency of the evidence. Since defendant appeared *pro se* and the record does not affirmatively show that he knowingly and intelligently waived his right to counsel, in our discretion, pursuant to Rule 2 of the Rules of Appellate Procedure, we will consider the sufficiency of the evidence question on its merits.

[2] The State produced no direct evidence of defendant's guilt. Instead, it relied entirely on the doctrine of possession of recently stolen property. The doctrine is a rule of law which allows the jury to presume that the possessor of stolen property is guilty of larceny. *State v. Williamson*, 74 N.C. App. 114, 327 S.E. 2d 319 (1985). The presumption can arise, however, only when the State proves three things beyond a reasonable doubt: (1) that the property described in the indictment was stolen; (2) that the defendant was found in possession of the stolen property; and (3) that the defendant's possession was recently after the larceny. *State v.*

Maines, 301 N.C. 669, 273 S.E. 2d 289 (1981). Here, the defendant disputes only the last element, claiming that the property was not found in his possession soon enough after it was stolen for the doctrine to apply. We disagree.

One of the State's witnesses, Mary Anderson, testified that she saw the property in defendant's possession on either the first or second Thursday in September. Earlier, the owner of the property testified that he last saw it around the first of September. From this evidence then, the break-in and larceny must have occurred sometime between the 1st and 12th of September 1985. Since a jury is not allowed to speculate on the evidence, *State v. Moore*, 312 N.C. 607, 324 S.E. 2d 229 (1985), we must assume that defendant was first found in possession of the stolen property 11-12 days after the property was stolen.

While 11-12 days is not a short period of time, whether the time elapsed between the larceny and defendant's possession of the stolen property is too great for the doctrine to apply depends on the facts and circumstances of each case. *State v. Blackmon*, 6 N.C. App. 66, 169 S.E. 2d 472 (1969). A necessary factor in the determination is the nature of the property stolen. *State v. Hamlet*, 316 N.C. 41, 340 S.E. 2d 418 (1986). Where the stolen property is of a type not normally or frequently traded through lawful channels, the inference of guilt will survive a longer time interval, since, under those circumstances, it is more likely that the defendant acquired the property by his own acts and to the exclusion of the intervening agency of others. *See State v. Hamlet, supra* and *State v. Blackmon, supra.* The property stolen here was commercial restaurant equipment. We do not believe that kind of property is a kind which is usually or frequently traded through lawful retail channels. Therefore, an 11-12 day period between the larceny and defendant's possession is not so long as to preclude the doctrine's application.

Defendant, however, takes issue with testimony of Mary Anderson. He claims that the other evidence adduced at trial shows that the time period between the theft and his possession of the property was over 30 days and that Mary Anderson's testimony is not credible. In an appeal challenging the sufficiency of the evidence, we must view the evidence in the light most favorable to the State and give the State the benefit of every reasona-

ble inference. *State v. Forney*, 310 N.C. 126, 310 S.E. 2d 20 (1984). When so viewed, if there is any competent evidence to support the verdict, it must be sustained. *State v. Sweezy*, 291 N.C. 366, 230 S.E. 2d 524 (1976). Although the testimony of the State's witnesses contain contradictions regarding the date defendant was first seen in possession of the stolen property, those contradictions must be disregarded here. *State v. Williams*, 31 N.C. App. 588, 229 S.E. 2d 839 (1976), *disc. review denied*, 303 N.C. 712, 285 S.E. 2d 138 (1981), and the question was for the jury as to the credibility of the witnesses and the weight of the evidence. *State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975), *vacated in part*, 428 U.S. 904, 96 S.Ct. 3211, 49 L.Ed. 2d 1211 (1976). We find that defendant's argument on the sufficiency of the evidence is without merit.

We conclude that the evidence sufficiently supports defendant's conviction and he is not entitled to a reversal on the ground of insufficient evidence. Defendant is entitled to a new trial on the basis of procedural error.

New trial.

Judges BECTON and PHILLIPS concur.

J. F. NEWBER v. THE CITY OF WILMINGTON, NORTH CAROLINA

No. 865DC261

(Filed 18 November 1986)

Municipal Corporations § 9.1— police officers—no stand-by or on-call pay—policy not approved by city council

Plaintiff policeman was not entitled to stand-by or on-call duty pay where there was no showing that defendant's city council ever specifically approved the stand-by pay policy or that the police department ever sought or obtained approval from the city manager or city council, and the city manager could not unilaterally adopt a policy establishing the funding for stand-by and on-call duty for any city department; furthermore, plaintiff was not entitled to counsel fees pursuant to N.C.G.S. § 95-25.22(d), since the statute explicitly exempts the State and any municipality from its application. N.C.G.S. § 160A-162; N.C.G.S. § 160A-148.

Newber v. City of Wilmington

APPEAL by defendant from *Tucker, Judge.* Judgment entered 20 January 1986 in District Court, NEW HANOVER County. Heard in the Court of Appeals 20 August 1986.

This is an action filed by plaintiff, a member of the Wilmington Police Department since 3 October 1966, to compel defendant City of Wilmington to pay him for stand-by duty worked between 26 September 1977 and 1 February 1983 while a member of the Technical Services Section of the Wilmington Police Department. Plaintiff's claim is based on Administrative Policy P/P 6-77 which was issued by the office of defendant's City Manager, with an effective date of 26 September 1977. This policy provided that in emergencies and when other necessary work conditions occur, employees of the City during other than normal work hours may be called in for duty or placed on stand-by duty. Compensation for such duties was to be received at the rate of "one hours pay for each normal work day and two hours additional pay for each day of the week-end or holidays. In addition, . . . to compensation for actual time worked in accordance with the city's overtime pay policy." The policy further provided that "stand-by and on-call duty systems shall either be approved through the City's budget process or specifically approved by the City Manager when necessitated by emergencies or other conditions." At no time prior to or following 26 September 1977 did the Wilmington City Council ever expressly approve or disapprove the policy.

Following institution of this policy, the Director of Public Works of the City of Wilmington made budget requests which were approved and authorized by the city council for the payment of stand-by wages to Public Works employees. No such requests were ever made by or on behalf of the Chief of Police nor were any wages paid to police officers pursuant to said policy.

Plaintiff was assigned stand-by duty after transfer to the Technical Services Section on 4 November 1976 and on several occasions was actually called in to work while on such stand-by. Plaintiff was compensated at the standard hourly pay set for overtime hours worked. Plaintiff did not receive any reimbursement for transportation expense incurred in reporting for duty when called, nor did he receive any other compensation for stand-by duty other than the aforementioned pay for hours actually worked.

Plaintiff was unaware of Administrative Policy P/P 6-77 until 30 September 1982 at which time he filed a grievance with the Police Department claiming that such policy applied to him. After failing to obtain additional compensation through the grievance process plaintiff filed this lawsuit on 7 June 1983. After a hearing without a jury the court awarded plaintiff compensation in stand-by pay for time worked under the terms of Administrative Policy P/P 6-77 and in addition plaintiff was allowed to recover of the defendant attorney's fees for said action. From this judgment defendant City of Wilmington appealed.

Yow, Yow, Culbreth & Fox, by Stephen E. Culbreth, for plaintiff appellee.

Office of City Attorney for Wilmington, North Carolina, by Thomas C. Pollard, for defendant appellant.

WEBB, Judge.

The defendant assigns error to the trial court's conclusion that Administrative Policy P/P 6-77 did not establish a "schedule of pay" as defined in G.S. 160A-162. We agree. G.S. 160A-162 provides in pertinent part: "(a) The city council shall fix or approve the schedule of pay, expense allowances, and other compensation of all city employees."

Administrative Policy P/P 6-77 appears clear and unambiguous on its face and thus will be given its plain meaning as to application. The policy indicates in its initial sentence its purposes, "to establish conditions for authorizing stand-by and on-call duty, to define them and to *set rates for compensation.*" (Emphasis added.) The policy further states:

> Employees assigned to such stand-by duty shall receive an additional one hours pay for each normal work day and two hours additional pay for each day of the week-end and holidays. In addition, employees will be compensated for actual time worked in accordance with the City's overtime pay policy.

The policy is clear. It sets forth rates of pay for stand-by and on-call duty and thus must fall within the purview of G.S. 160A-162 and its mandate as to "schedule of pay." G.S. § 160A-162 (1982 Replacement).

The effect of application of G.S. 160A-162 to this case is to make ineffective any policy as to payment of city employees without the approval of the Wilmington City Council. This conclusion is supported clearly in G.S. 160A-162 which states: "In cities with the council-manager form of government, the manager shall be responsible for preparing position classification and pay plans for submission to council, and after such plans have been *adopted by council*, shall administer them." (Emphasis added.)

From a review of the record we can find no express approval by the Wilmington City Council as to authorization of a stand-by pay policy for the Wilmington Police Department, nor can we find from our review of statutory and case law any support for unilateral adoption of such pay policies by the city manager. G.S. 160A-148 states that "the city manager's personnel actions are to be in accordance with such general personnel rules, regulations, and policy as the city council may adopt." We hold that G.S. 160A-148(1) prohibits the city manager from unilateral adoption of a policy establishing the funding for stand-by and on-call duty for any city department. The manager's role is limited to recommending position classification and pay plans to the city council for their ultimate approval. G.S. 160A-164 (1982 Replacement).

Further support for our view in defining the authority of the city manager is stated in the Wilmington City Charter provisions in effect at the time Administrative Policy P/P 6-77 was issued. This Charter mandates that the city council "*approve* a general plan for employees to be *administered* by the city manager." (Emphasis added.) 1977 N.C. Sess. Laws c. 495, s. 9.1. We hold that the policies of the municipality are the decisions of the council alone, and the duties of the city manager are to act as a conduit through which policy is implemented.

Administrative Policy P/P 6-77 is very clear as to its requirements: application of stand-by and on-call pay policy to departments within the Wilmington City government requires specific action on the part of the respective departmental heads. A request must be made, and the specific approval of the City Manager or the City Council must be obtained. The Wilmington Police Department never sought nor obtained either the council or manager's approval such that stand-by and on-call pay would become applicable to their employees. Policy P/P 6-77 permits

only those employees who follow this aforementioned procedure to be eligible for stand-by and on-call pay, all other employees including plaintiff in this instance simply do not come within the terms of the policy.

We believe the statutory mandates of G.S. 160A-162 and the requisite action and authorization required by both the Wilmington City Charter and the Administrative Policy P/P 6-77 itself are such that plaintiff has no entitlement to stand-by or on-call pay based on said policy. 1977 N.C. Sess. Laws c. 495 s. 9.

Defendant also assigns as error the trial court's conclusion that plaintiff is entitled to recover attorney's fees pursuant to G.S. 95-25.22(d). We agree. The plaintiff asserted and the trial court agreed that via G.S. 95-25.22(d) attorney's fees were appropriate in this instance. However, G.S. 95-25.14 explicitly exempts "the State of North Carolina, any city, town, or municipality" from application of Article 2A of Chapter 95 of which G.S. 95-25.22 is a part. Thus, G.S. 95-25.22(d) has no application to this appellant at trial and the trial court was in error in awarding such fees. We reverse.

We reverse and remand with an order that the plaintiff's claim be dismissed.

Reversed and remanded.

Chief Judge HEDRICK and Judge WELLS concur.

SYLVIA MANN v. LARRY E. KNIGHT AND FARRIS MOTORS, INC., A NORTH CAROLINA CORPORATION

No. 867SC548

(Filed 18 November 1986)

Automobiles § 68.1— brake failure—no negligence—no recovery by plaintiff

In an action to recover for personal injuries sustained in an automobile accident, the trial court properly directed verdict for defendant where plaintiff's own evidence tended to show that the collision between the two cars was caused by the sudden unexpected failure of the brakes on defendant's car, a failure which could not have been foreseen by defendants, and where plaintiff

failed to show that defendants were negligent in failing to discover a defect in the brakes.

APPEAL by plaintiff from *Llewellyn, Judge*. Judgment entered 6 August 1985 in NASH County Superior Court. Heard in the Court of Appeals on 22 October 1986.

Plaintiff filed this action alleging negligence on the part of defendant Knight and defendant Farris Motors, Inc. and seeking personal injury and property damages. Defendants denied the allegations, and the case went to trial. At the close of the plaintiff's evidence, defendants moved for a directed verdict.

Plaintiff's evidence tended to show the following events and circumstances. Plaintiff was stopped at a traffic light at the corner of Grace Street and Sunset Avenue in Rocky Mount when her car was struck from the rear by a car owned by defendant Farris Motors and being driven by defendant Knight. Defendant Knight was employed in the maintenance department of Farris Motors. On 28 January 1982 at approximately 9:00 a.m., Knight drove a 1982 AMC Eagle demonstrator car to pick up some biscuits for himself and other employees of Farris Motors. First, however, he stopped at a service station to get some gas. At that time there were no difficulties with the brakes. He then proceeded to the Country Kitchen Restaurant to get the biscuits. Still experiencing no problems with the brakes, he parked the car in front of the restaurant and went inside. Approximately fifteen minutes later he got back in the car and drove across the parking lot. When Knight slowed to pull onto Grace Street, the brakes still operated well. He proceeded down Grace Street at a speed of between 25 and 30 miles per hour. Nearing the intersection, he tried to slow down; he was between 65 and 75 feet away when he realized he had no braking power at all. Plaintiff's car was stopped at the stop light in Knight's lane of travel, and he hit her car from the rear. Knight testified that there was no time to pull his emergency brake and that the other lane was also blocked.

Rocky Mount Police Officer Donald B. Winstead investigated the accident. He found a puddle of brake fluid beneath the left tire. He also conducted the examination of the car and found that it "did not have any brakes." The trial court granted defendants' motion for a directed verdict, and plaintiff appealed.

Hopkins and Allen, by Jesse Matthewson Baker, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Sumner, for defendant-appellees.

WELLS, Judge.

Plaintiff contends that the trial court erred in granting a directed verdict for the defendants. We disagree.

A directed verdict for the defendant will not be allowed unless "it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982). In reaching its decision, the trial court must consider the plaintiff's evidence in the light most favorable to the plaintiff and give the plaintiff the benefit of every reasonable inference to be drawn therefrom. *Id.*

In her complaint, plaintiff alleged that defendant Knight failed to keep his vehicle under proper control and that defendant Farris Motors failed to maintain the brakes on its car in good working order in violation of N.C. Gen. Stat. § 20-124 (1983). While G.S. § 20-124 requires motorists to maintain brakes in good working order, and failure to do so is negligence *per se*, the mere fact that one's brakes failed is not enough to establish a breach of the duty of due care. Where a brake failure is sudden and unexpected and could not have been discovered even with reasonable inspection, the motorist will not be held liable. *Stephen v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39 (1963); *Indiana Lumbermen's Mutual Ins. Co. v. Champion*, 80 N.C. App. 370, 343 S.E. 2d 15 (1986); *see also Wilcox v. Motors Co.*, 269 N.C. 473, 153 S.E. 2d 76 (1967). The burden was on the plaintiff to show that the defendants knew or in the exercise of reasonable care should have known that the brakes were defective. *Id.* She failed to carry this burden.

In the case at bar, plaintiff's evidence showed that the defendants were unaware that the brakes were defective. The defendant driver testified that he drove from Farris Motors to the gas station and from there to the restaurant without experiencing any problems; when he slowed to turn from the restaurant's parking lot onto the road just seconds before the accident, the brakes

still "worked fine." In addition, the investigating officer found that there was a puddle of brake fluid underneath the car and that the vehicle had no brakes at all. Even taken in the light most favorable to her, plaintiff's own evidence showed that the collision between the two cars was caused by the sudden, unexpected failure of the brakes on defendants' car, a failure which could not have been foreseen by defendants.

The next question is whether the defendants were negligent in failing to discover a defect in the brakes. In *Hudson v. Drive-It-Yourself, Inc.*, 236 N.C. 503, 73 S.E. 2d 4 (1952), our Supreme Court decided a similar case. R. B. Freeman, a defendant himself until the case against him was voluntarily nonsuited, leased a car from defendant car rental company. Plaintiffs alleged that Drive-It-Yourself, Inc. had been negligent in delivering the car to Mr. Freeman in a defective condition, with the result that his brakes failed and he collided with the plaintiffs' car. The jury reached a verdict for the plaintiffs. Defendant appealed, assigning error to the trial court's denial of its motion for judgment of nonsuit. Chief Justice Devin wrote for a unanimous Court:

> Plaintiffs' witness . . . testified the automobile, a recent model, was driven out from its place of storage, stopped and delivered to him in the customary manner, with nothing to suggest in the manner of operation that the brakes were defective. The witness Freeman then drove the automobile 5½ miles through the streets and environs of Charlotte, and, according to his testimony, had not detected anything wrong with the brakes until just before the collision with plaintiffs' car. The witness' theory was that the fluid for the hydraulic braking system was "low" so that the driver had to "pump" to make the brakes operate properly. But it is not perceived how the defendant should be charged with knowledge of this fact when the witness had driven the automobile 5½ miles, during a period of 45 minutes, before he detected the faulty functioning of the brakes.
>
> We reach the conclusion that the evidence offered was insufficient to show a negligent breach of duty on the part of the defendant, and that the motion for judgment of nonsuit should have been allowed.

Id. In the case *sub judice*, the defendant Knight also drove the car for a number of miles with several successfully-completed

stops before the brakes failed unexpectedly. Plaintiff, however, cites as evidence of negligence the fact that the brakes were not inspected on the morning of the accident despite what she contends was a company policy to check the brakes of the demonstrator car each time it went out. While the defendant Farris Motors may have established for itself a high standard of care for its customers, failure to inspect the brakes prior to the trip by defendant Knight did not constitute a breach of any duty owed to plaintiff. No other evidence of negligence appearing, the order of the trial court is

Affirmed.

Judges BECTON and ORR concur.

JOE T. LANGLEY, BRENDA O. LANGLEY AND SUSAN A. LANGLEY, A MINOR, BY HER GUARDIAN AD LITEM, JOE T. LANGLEY v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL AND PUBLIC SAFETY

No. 8610IC528

(Filed 18 November 1986)

Automobiles §§ 57.1, 72; State § 8.1— rear end collision with State Trooper—sudden emergency—no recovery under State Tort Claims Act

In an action under the State Tort Claims Act to recover personal injuries sustained by plaintiffs when their car was struck from behind by a highway patrol car, the Industrial Commission properly held that the driver of the patrol car was not negligent and that the sole proximate cause of plaintiffs' damages was the negligence of their driver where the evidence tended to show that plaintiffs were travelling on the servient highway and the trooper on the dominant highway; the undisputed location of the collision was just 30 feet after the front end of plaintiffs' vehicle entered the path of defendant's oncoming vehicle; and the trooper was thus presented with a sudden emergency and acted reasonably under the circumstances in trying to avoid it by veering his car to the left.

APPEAL by plaintiffs from the decision and award of the North Carolina Industrial Commission filed 10 January 1986. Heard in the Court of Appeals 21 October 1986.

Young, Moore, Henderson & Alvis, by John A. Michaels, for plaintiff appellants.

Attorney General Thornburg, by Assistant Attorney General George W. Lennon, for defendant appellee.

PHILLIPS, Judge.

These personal injury claims were filed under the State Tort Claims Act, G.S. 143-291, *et seq.* Plaintiffs were passengers in an automobile that was struck from behind by a State Highway Patrol car driven by Trooper Billy Carr Jones and they allege that his negligence caused the collision and their resulting damages. After hearing the evidence of the parties Deputy Commissioner Sellers entered decision for the defendant based upon findings of fact and conclusions of law that Trooper Jones was not negligent, and that the sole proximate cause of plaintiffs' damages was the negligence of their driver. Upon appeal the decision was affirmed by the Full Commission. We also affirm.

By seven different assignments of error plaintiffs contend that the essential findings of fact upon which the decision rests are not supported by competent evidence, and that the findings do not support the conclusions of law drawn therefrom. In arguing these contentions they stress bits and pieces of the evidence that are favorable to them and fail to fully take into account evidence favorable to the defendant. All the arguments are answered by the other evidence presented, which tends to show, as the Commission found and concluded, that plaintiffs' driver negligently caused the collision with no help from defendant's driver. The evidence which supports the Commission's findings of fact and make them conclusive, *Jones v. Service Roofing & Sheet Metal Co.*, 63 N.C. App. 772, 306 S.E. 2d 460 (1983), was to the following effect: The accident happened about 5 o'clock on the morning of 6 June 1981 at the intersection of U.S. Highway 17 and N.C. Highway 211 in Brunswick County. *At that particular place*, though not generally, Highway 17 runs east and west and has two lanes and Highway 211 runs north and south. For the last hundred feet or so before reaching the intersection Highway 211 has two branches for southbound traffic, the left branch for vehicles crossing U.S. 17, the right for vehicles turning right onto the westbound lane of Highway 17. Highway 17 is the dominant

highway and stop signs face vehicles traveling on both branches of Highway 211. Immediately before the accident developed Trooper Jones' patrol car was traveling in the westbound lane of Highway 17 toward the intersection; the car in which plaintiffs rode was situated on the right branch of Highway 211 preparatory to entering the westbound lane of Highway 17; a pick-up truck towing a boat and trailer was stopped on the shoulder of the left branch of Highway 211 just short of the intersection. It was dark, all the vehicles had their headlights on and the approaching patrol car could be seen 1,000 feet from the intersection. When the patrol car came into view of the intersection it was traveling at the lawful speed of 55 miles per hour or less and as it traveled along Trooper Jones took his foot off the accelerator when he saw the pick-up truck and boat stopped adjacent to the branch of Highway 211 for straight ahead traffic, but when he got close enough to see that some men were around the truck and boat and that it was not about to enter the highway, he resumed his speed as before. He did not then see plaintiffs' car because the truck and boat on the other branch of Highway 211 blocked his view and he first saw plaintiffs' car when it suddenly pulled onto the west lane of Highway 17 directly ahead of him going between 3 and 5 miles an hour. The patrol car was then only 30 feet or so away from plaintiffs' vehicle and the only thing that Trooper Jones had time to do in an effort to avoid a collision was to try and veer the car to the left; but before the car could be veered into the other lane its right front struck the left rear end of plaintiffs' car. From the time the front of plaintiffs' car first encroached on Highway 17 it traveled but 30 feet in the westbound lane before it was hit. The weather was clear, the roads were dry, and the driver of plaintiffs' vehicle was heard to say that he did not stop before entering Highway 17 and did not see the patrol car before the collision.

Obviously, the foregoing evidence tends to show, as the Commission found and concluded, that the unexpected driving of plaintiffs' car into the path of the oncoming patrol car confronted Trooper Jones with a sudden emergency and that he acted reasonably under the circumstances in trying to avoid it. Since the weight and credibility of conflicting evidence is for the Commission to determine, not us, *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E. 2d 865 (1963), that evidence was also presented tending

to show that the patrol car was speeding and that the trooper was inattentive undermines the decision made not a whit.

Of the several other contentions that plaintiffs make, none of which have merit, we mention only one: that testimony from an engineer as to the *angle* of the collision between the two vehicles was improperly received. This contention, as the others made, is unavailing, because even if the evidence was inadmissible, and we do not hold that it was, it was harmless. This is because the *angle* of the collision between the two cars was not a decisive or even a material factor in the case; the decisive factor in the case was the undisputed *location* of the collision—just 30 feet after the front end of plaintiffs' vehicle entered the path of defendant's oncoming vehicle—which certainly warranted, if not required, the Commission finding that the negligence of plaintiffs' driver was the sole proximate cause of the collision.

Affirmed.

Judges WEBB and JOHNSON concur.

STATE OF NORTH CAROLINA v. ORAL EUBANKS

No. 8629SC543

(Filed 18 November 1986)

Arson § 4.1— second degree arson—sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a prosecution for second degree arson where it tended to show that the house belonged to a named person who lived there, but it was unoccupied at the time of the burning; the fire was the result of an incendiary act; and defendant told an occupant of the house that he should remove his personal belongings because the house was going to be set on fire, warned the occupant on the day of the fire, and reported how the burning had gone after the deed was done.

APPEAL by defendant from *Allen (C. Walter), Judge*. Judgment entered 15 November 1985 in Superior Court, HENDERSON County. Heard in the Court of Appeals 29 October 1986.

Defendant was charged in a proper bill of indictment with second degree arson, in violation of G.S. 14-58. He was found

guilty as charged. From a judgment imposing a prison sentence of twelve years, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General James A. Wellons, for the State.

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

HEDRICK, Chief Judge.

The only assignment of error defendant argues in his brief is that the evidence is insufficient to support the conviction for second degree arson. Arson is defined at the common law as the willful and malicious burning of the dwelling house of another person. Under G.S. 14-58, if the dwelling burned was unoccupied at the time of the burning, the offense is arson in the second degree.

For a burning to be "willful and malicious" in the law of arson, it must simply be done voluntarily and without excuse or justification and without any bona fide claim of right. An intent or animus against either the property itself or its owner is not required. *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976).

The "burning" element requires that some portion of the dwelling itself be burned. *State v. Oxendine*, 305 N.C. 126, 286 S.E. 2d 546 (1982). The house is a "dwelling house" if someone lives there. *State v. Vickers*, 306 N.C. 90, 291 S.E. 2d 599 (1982). It is the dwelling house "of another" if someone other than the defendant lives there. *State v. Shaw*, 305 N.C. 327, 289 S.E. 2d 325 (1982).

In the present case, evidence was presented tending to show the following: The house belonged to Cynthia Williams, who lived there. The house was burned. The fire was the result of an incendiary act, and not an accidental cause, according to the testimony of a State Bureau of Investigation arson investigator. Defendant had told Jim Smith, who also lived there, that he had to get his "clothes and stuff out" and "find a place to stay" because "it was going to be set afire." Defendant told Mr. Smith on the day of the fire, "we're going to do it tonight." Later that night, after the house had burned, Mr. Smith asked defendant, "How did it go?" referring to the fire. Defendant answered "K-WOOOSH." The

house was unoccupied at the time of the burning. We hold that the State introduced sufficient evidence of each element of second degree arson to support the conviction.

No error.

Judges MARTIN and COZORT concur.

GEORGE H. WELBORN AND WIFE, FRANCES W. WELBORN v. LINNIE LINVILLE ROBERTS

No. 8623DC451

(Filed 18 November 1986)

Boundaries § 10.1— lay witnesses and experts—opinion testimony admissible

The trial court in a boundary dispute did not err in allowing plaintiffs' witnesses, both lay persons and experts, to testify as to the location of the boundary in question. N.C.G.S. § 8C-1, Rule 704.

APPEAL by defendant from *Gregory, Judge.* Judgment entered 27 December 1985 in District Court, WILKES County. Heard in the Court of Appeals 24 September 1986.

Ferree, Cunningham & Gray, P.A., by George G. Cunningham, for plaintiff appellees.

Franklin Smith for defendant appellant.

BECTON, Judge.

Plaintiffs, George H. and Frances W. Welborn, brought action to settle a boundary dispute with defendant, Linnie Linville Roberts.

In addition to their own testimony regarding the location of their boundary, the Welborns presented corroborative evidence from neighbors, other family members, their predecessors in title, an independent contractor who had done some work on their property, and a surveyor who conducted a survey in conjunction with the litigation. Roberts presented evidence tending to show that the boundary was elsewhere. The jury found in favor of the Welborns. Roberts appeals. We find no error.

Mr. Roberts raises two issues on appeal: (1) whether the trial court erred in allowing the Welborns' witnesses to testify regarding where each believed the boundary was located; and (2) whether the trial court erred in denying Mr. Roberts' motions for a directed verdict and judgment notwithstanding the verdict.

All of the Welborns' witnesses, both lay persons and experts, testified that the boundary to the property was as they had described. "Before the Rules of Evidence were enacted the rule had long been that a surveyor could not state his opinion as to the location of a boundary. *See, e.g., Combs v. Woodie*, 53 N.C. App. 789, 281 S.E. 2d 705 (1981). The rationale for the rule was that the expert was invading the province of the jury as fact finder." *Livermon v. Bridgett*, 77 N.C. App. 533, 538, 335 S.E. 2d 753, 756 (1985). In *Livermon v. Bridgett*, however, we recognized that Rule 704 of the North Carolina Rules of Evidence allows testimony on ultimate issues. The challenged testimony of the witnesses in the case *sub judice* is not objectionable because it relates to an ultimate issue in the case.

Mr. Roberts contends that the surveyor was not qualified as an expert and, therefore, his testimony should not have been admitted. We find no indication in the record that Mr. Roberts objected to the Welborns' use of its surveyor as an expert. He will not now be allowed to do so.

We summarily reject Mr. Roberts' further contentions (1) that all of the witnesses' testimony was objectionable on the general grounds that the lay witnesses lacked firsthand knowledge of the matters to which they testified under Rule 701 of the North Carolina Rules of Evidence; and (2) that the expert's opinion was not limited to ideas rationally based on his own perception and helpful to a clear understanding of his own testimony or the determination of a fact in issue under Rule 702 of the North Carolina Rules of Evidence.

Finally, viewing the evidence in the light most favorable to the Welborns, we conclude that adequate competent evidence supports the jury's verdict in favor of the Welborns. We find

No error.

Judges WEBB and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 NOVEMBER 1986

CULPEPPER v. DAVIS No. 861DC275	Pasquotank (84CVD29)	Affirmed
FIRST AMERICAN SAVINGS BANK, F.S.B. v. HOBBS No. 8618DC510	Guilford (85CVD6558)	Affirmed
GUNN v. SCHULTZ No. 8617SC305	Rockingham (84CVS1233)	Affirmed
IN RE BARCO No. 8610DC639	Camden (85J4)	No Error
IN RE WILL OF HANKS No. 8623SC432	Wilkes (84CVS877)	No Error
KIMREY v. KIMREY No. 8619DC417	Randolph (86CVD2)	Affirmed
STATE v. BRYANT No. 8626SC507	Mecklenburg (85CRS23991)	No Error
STATE v. COLLINS No. 8617SC574	Stokes (85CRS2524)	No Error
STATE v. GARMON No. 8619SC493	Cabarrus (85CRS12524) (85CRS12525)	No Error
STATE v. GIBBS No. 861SC519	Pasquotank (80CRS1134)	No Error
STATE v. HARRISON No. 862SC190	Martin (85CRS1288)	No Error
STATE v. HOPKINS No. 8626SC644	Mecklenburg (85CRS84870)	No Error
STATE v. LOCKLEAR No. 864SC553	Onslow (85CRS9840)	No Error
STATE v. MASON No. 8622SC429	Iredell (85CRS3204) (85CRS3205) (85CRS3206) (85CRS3207)	No Error
STATE v. PEKEROL No. 8610SC570	Wake (83CRS23598)	Affirmed
STATE v. SHAVERS No. 866SC488	Halifax (85CRS8958)	No Error

STATE v. SUTTON No. 868SC551	Lenoir (85CRS9051)	No Error
STATE v. WRIGHT No. 8612SC412	Cumberland (84CRS49652)	No Error
SULLIVAN v. SULLIVAN No. 864DC544	Onslow (85CVD1241)	Affirmed
VICK v. MAULDIN No. 8611SC445	Lee (85CVS784)	Reversed
WARD v. PITT COUNTY MEM. HOSP., INC. No. 863SC482	Pitt (83CVS1070)	Affirmed

FILED 18 NOVEMBER 1986

CALLOWAY v. PATTERSON No. 8628SC671	Buncombe (85CVS2273)	Vacated and Remanded
CHOCANO v. CHOCANO No. 868DC478	Wayne (85CVD1612)	Affirmed
DAVIS v. STATE FARM FIRE AND CASUALTY CO. No. 8629SC411	McDowell (83CVS126)	Affirmed
EVELAND v. HARRINGTON No. 8628SC762	Buncombe (86CVS0429)	Affirmed
HORNADAY v. HORNADAY No. 8615DC379	Alamance (83CVD1272)	Affirmed
HYSINGER v. SIMMONS No. 8619SC301	Cabarrus (84CVS503)	Affirmed
POTEAT v. JONES No. 8629DC679	McDowell (85CVD481)	Affirmed
SASSE v. CUNNINGHAM No. 8620SC530	Moore (84CVS779)	Affirmed
STATE v. ABNEY No. 8526SC881	Mecklenburg (80CRS102232)	Affirmed
STATE v. BRIDGES No. 8629SC798	Rutherford (83CRS2826)	Affirmed
STATE v. HAMMONDS No. 8514SC1341	Durham (85CRS588) (85CRS589)	No Error
STATE v. JOHNSON No. 8628SC506	Buncombe (85CRS12811)	Affirmed

STATE v. LOMBARDO No. 862SC414	Hyde (79CRS109)	Affirmed
STATE v. McCARVER No. 865SC449	New Hanover (85CRS11637) (85CRS11638)	No Error
STATE v. SHUTT No. 8618SC637	Guilford (85CRS9808) (85CRS9809)	No Error
STATE v. THOMPSON No. 8614SC191	Durham (85CRS13242) (85CRS13243) (85CRS13244) (85CRS13245) (85CRS13246) (85CRS13247) (85CRS13248) (85CRS13249) (85CRS13250) (85CRS13251) (85CRS13252) (85CRS13253) (85CRS13254) (85CRS13255) (85CRS13256)	Remanded for Resentencing
STATE v. TROUTMAN No. 8628SC557	Buncombe (85CRS24029) (85CRS24030)	No Error
WADDELL v. SPA LADY, INC. No. 8627SC552	Gaston (84CVS2791)	New Trial

TREANTS ENTERPRISES, INC. v. ONSLOW COUNTY, THE SHERIFF OF ONSLOW COUNTY IN HIS OFFICIAL CAPACITY; AND THE ONSLOW COUNTY TAX COLLECTOR IN HIS OFFICIAL CAPACITY

No. 864SC312

(Filed 25 November 1986)

1. **Constitutional Law § 4— Movie Mates—ordinance—constitutionality—standing of business to raise**

Petitioner had standing to contest the constitutionality of an ordinance regulating businesses providing male or female companionship where petitioner alleged that it operated business establishments called Movie Mates in which patrons could have a person watch a movie with them for a fee; defendants admitted in their answer that the ordinance would apply to Movie Mates businesses; and the purpose of the drafters of the ordinance was to severely regulate the very type of business establishments operated by petitioners.

2. **Constitutional Law § 4— Movie Mates ordinance—invasion of privacy of employees and patrons—standing of business to raise**

Petitioner, the owner of Movie Mates businesses, had standing to contest the constitutionality of an ordinance regulating such businesses based on invasion of the privacy of employees and customers where neither the employees nor the patrons would be subject to prosecution for violation of the ordinance, but their access to employment or to the businesses' services would be restricted without a forum for the assertion of their rights.

3. **Constitutional Law § 14— Movie Mates ordinance—overbroad—violation of state constitution**

An Onslow County ordinance which was aimed at Movie Mates businesses violated Article I, §§ 1 and 19 of the North Carolina Constitution because it purported to regulate every business that provided companionship, not merely Movie Mates businesses, and to that extent was not rationally related to any legitimate governmental objective.

4. **Constitutional Law § 14— Movie Mates ordinance—overbroad—severability clause ineffective**

There were no provisions which could be given effect in an unconstitutional Onslow County ordinance regulating businesses which provided companions, despite a severability clause, because all parts of the ordinance were related to the unconstitutional purpose.

5. **Constitutional Law § 17— Movie Mates ordinance—invasion of privacy**

An Onslow County ordinance which regulated businesses providing companionship violated the right to privacy of patrons under both the federal and state constitutions due to the extensiveness of the data to be recorded, the requirement that the records be permanent, and the lack of any protections against unwarranted disclosure or limits upon use of the records.

APPEAL by defendants from *John B. Lewis, Jr., Judge.* Order entered 31 October 1985 in Superior Court, ONSLOW County. Heard in the Court of Appeals 16 September 1986.

Jeffrey S. Miller for plaintiff appellee.

Roger A. Moore for defendant appellant.

BECTON, Judge.

Treants Enterprises, Inc. (Treants), the operator of three business establishments in Onslow County known locally as "Movie Mates," brought this action to enjoin the enforcement of a county ordinance subjecting businesses which provide male or female "companionship" to various licensing requirements. By an order entered 29 October 1985, Superior Court Judge John B. Lewis, Jr. permanently enjoined the defendants, Onslow County, the Sheriff of Onslow County, and the Onslow County Tax Collector (Defendants), from enforcing the ordinance. From that judgment, Defendants appeal. We affirm.

This appeal primarily concerns the constitutionality of the challenged ordinance. Other issues on appeal relate to Treants' standing to challenge the ordinance, preemption by state law, the imposition of an illegal tax, and severability.

I

A. The Ordinance: Its Scope and Coverage

On 19 June 1985, Onslow County enacted "An Ordinance Regulating Businesses Providing Male or Female Companionship." Summarized briefly, the ordinance provides: No person, partnership, corporation, or association may operate "a business providing or selling male or female companionship" without first obtaining a license from the Onslow County Tax Collector. A male or female companionship business is defined as "any person, firm, corporation, or association engaged in the business of providing or selling male or female companionship in exchange for money or other valuable consideration." A separate license is required for each location or premises used for the purpose of providing companionship, and such business may not be conducted in any place other than that designated by the license. Every applicant for a license must be photographed and fingerprinted and must, in addi-

tion, supply to the Onslow County Sheriff's Department certain personal data "to assist in an investigation of his criminal record and character." The foregoing requirements must be met by all persons owning any interest if the applicant is a partnership or association, and by each shareholder owning ten percent or more of the common stock if the applicant is a corporation. The application will be denied if any person required to be investigated has been convicted of a felony or of a crime involving prostitution or related offense within the preceding five years, and a like conviction thereafter constitutes grounds for immediate revocation of an issued license.

Furthermore, every employee of a companionship business must be registered by name and address with the Sheriff's department and be fingerprinted and photographed. A licensee may not knowingly hire a new employee who has been convicted of a felony within three years or of prostitution, assignation, or a related offense within two years, or is a felon whose citizenship has not been restored. Nor may a licensee continue to employ an existing employee who is convicted of like offenses after the effective date of the ordinance. Noncompliance with these provisions is grounds for revocation of the license.

A $25.00 fine is imposed for each license. An additional $25.00 "nonrefundable administrative fee" is charged for each applicant and employee who is required to be fingerprinted and photographed. Licensees must keep, available for inspection by "any law enforcement officer," a permanent legible record of every transaction with a client or customer showing the date of the transaction, the patron's name, address, date of birth, general physical description (including hair color, height and weight), the amount of money involved, and two forms of positive identification or one government-issued photo identification. A full and accurate copy of these records must also be filed with the Sheriff's department "within forty-eight hours of the transaction." A licensee or employee may not "have any male or female companionship business transactions" with any person who is under the age of eighteen.

Finally, by express provision, massage parlors and massage-related businesses are exempt from the ordinance because such operations are subject to another county ordinance. The ordi-

nance further states that it "is not intended to apply to persons performing babysitting or to persons engaged in housekeeping or related services." Violation of any provision of the ordinance constitutes a misdemeanor punishable by fine or imprisonment in addition to providing grounds for license revocation.

B. Factual and Procedural History

The ordinance was to have become effective 1 August 1985. On 20 June 1985 Treants filed a complaint challenging the validity of the ordinance and seeking declaratory and injunctive relief. Hearings were held at the 9 September and 28 October 1985 sessions of Onslow County Civil Superior Court.

Testimony presented by Defendants tended to show the following facts: In Onslow County there are in operation six or seven businesses known as "Movie Mates." In these businesses, a patron may, for a fee, have another person watch a movie or video tape with him in a private room. The testimony of Captain Kenneth Cooper supported the Court's findings that prostitution and crimes against nature have been practiced in some of these businesses and that controlled substances have been used by some patrons in Movie Mates establishments. Because of instructions for detecting undercover officers given Movie Mates employees by their employers, Onslow County law enforcement officials have been unsuccessful in preventing these practices.

The evidence further showed that since the 17 July 1978 enactment of the "Onslow County Ordinance Regulating Massage Parlors," there have been no massage parlors operating in the county. Finally, evidence was presented that the Movie Mates establishments are "off limits" to military personnel stationed at Camp Lejeune Marine Base in Onslow County.

Treants presented no evidence at the hearings. Based upon Defendants' evidence, arguments of counsel, and briefs submitted by the parties, the trial court made numerous findings of fact, concluding that the ordinance is contrary to the federal and state constitutions.

II

A. *Standing*: Treants

[1] At the outset, Defendants contend that Treants lacks standing to challenge the ordinance. The Defendants initially raised the standing issue by motions filed 14 August and 10 October 1985 pursuant to Rules 12(b)(6) and 12(f) of the North Carolina Rules of Civil Procedure, and resubmitted the issue in a memorandum of law on 18 September 1985. However, the case below was heard primarily upon the facial validity of the ordinance. The standing question was not argued, and the trial court never ruled on the motions. At the 28 October hearing, counsel for Defendants requested that if the court entered a preliminary injunction, that the court also enter a permanent injunction. Counsel for Treants consented to this procedure. Arguably, Defendants thus abandoned their motions in the court below. In any event, we hold that Treants has standing to litigate this cause.

Standing exists in the state courts of North Carolina whenever the validity of state or local legislative action is challenged by a plaintiff who "is directly and adversely affected thereby," *Taylor v. City of Raleigh*, 290 N.C. 608, 620, 227 S.E. 2d 576, 583 (1976), or who "is in immediate danger of sustaining a direct injury" from an ordinance's enforcement. *Nicholson v. Education Assistance Authority*, 275 N.C. 439, 447, 168 S.E. 2d 401, 406 (1969).

Treants has alleged that it operates business establishments providing a service whereby for a fee a patron may have a person watch a movie with them. Furthermore, Defendants have admitted in their Answer that, in their opinion, the ordinance would apply to "Movie Mates" businesses. Unquestionably, the purpose of the drafters was to severely regulate the very type of business establishments operated by Treants; the ordinance's enforcement would directly and adversely affect Treants' business; and Treants thus has a substantial personal stake in having it declared invalid.

B. *Standing*: Employees and Patrons

[2] Defendants have also responded to an allegation in Treants' Complaint that the ordinance "impermissibly invades the privacy of the plaintiff's employees and customers" by challenging

Treants' standing to assert the privacy rights of its patrons. Although both state and federal courts ordinarily prohibit the vicarious assertion of the constitutional rights of third parties, the United States Supreme Court has recognized an exception when "individuals not parties to a particular suit stand to lose by its outcome and yet have no effective avenue of preserving their rights themselves." *Broadrick v. Oklahoma*, 413 U.S. 601, 611, 37 L.Ed. 2d 830, 839, 93 S.Ct. 2908, 2915 (1973). *See also Eisenstadt v. Baird*, 405 U.S. 438, 31 L.Ed. 2d 349, 92 S.Ct. 1029 (1972); *NAACP v. Alabama*, 357 U.S. 449, 2 L.Ed. 2d 1488, 78 S.Ct. 1163 (1958). This exception is applicable in this case. Neither employees nor would-be patrons are themselves subject to prosecution for failure to comply with the ordinance although their access to employment or to the services provided by the targeted businesses is restricted to the extent they, for privacy reasons, refuse to disclose the required information. To that extent they are denied a forum for assertion of their own rights. *See Eisenstadt.* The regulation's very existence may thus cause others not before the court to refrain from constitutionally protected activities. *See IDK, Inc. v. Clark County*, 599 F. Supp. 1402 (1984). Hence, we conclude that the issue of privacy rights of patrons and employees is properly before the Court.

III

Due Process

[3] Among the conclusions of the trial judge were: (1) the ordinance "lacks a rational basis and affect[s] [sic] the fundamental rights of persons to engage in legitimate businesses," (2) the ordinance "unreasonably burdens the right of persons to engage in legitimate businesses," (e) "a large number of people would be affected by the ordinance whose companionship services are necessary, desirable, and unquestionably moral," and (4) the ordinance "imposes unreasonable burdens on the foregoing businesses." Treants contends: (2) that the ordinance infringes upon the fundamental constitutional rights of privacy and freedom of association and must therefore be strictly scrutinized in the context of the Fourteenth Amendment to the United States Constitution as well as Article I, Sections 19 and 35 of the North Carolina Constitution, and (2) that the ordinance lacks a rational basis. On the other hand, Defendants maintain, in part, that: (1) there is no

"fundamental" constitutionally guaranteed right to engage in a legitimate business, (2) Neither the constitutional right to privacy nor the First Amendment right of association is implicated in this controversy, (3) the ordinance is therefore not subject to strict scrutiny, and (4) there exist several rational basis for the ordinance.

A

Initially, we summarize and distinguish the frameworks for substantive due process analysis under the federal and state constitutions. Federal courts, in interpreting the "Due Process" clause of the Fourteenth Amendment, measure the validity of legislative enactments by employing two distinct tests or levels of scrutiny. The United States Supreme Court has repeatedly stated that substantive Due Process will no longer be used to invalidate state *economic* legislation. *See, e.g., Ferguson v. Skrupa,* 372 U.S. 726, 10 L.Ed. 2d 93, 83 S.Ct. 1028 (1963). Unless legislation involves a suspect classification or impinges upon fundamental personal rights, it is presumed constitutional and need only be rationally related to a legitimate state interest. *See, e.g. New Orleans v. Dukes,* 427 U.S. 297, 49 L.Ed. 2d 511, 96 S.Ct. 2513 (1976) (per curiam); *Pollard v. Cockrell,* 578 F. 2d 1002 (5th Cir. 1978); *Kennedy v. Hughes,* 596 F. Supp. 1487 (1984). This minimal rationality standard of review is satisfied if an ordinance or statute has any conceivable rational basis. *Id.* On the other hand, a law which burdens certain explicit or implied "fundamental" rights must be strictly scrutinized. It may be justified only by a "compelling state interest," and must be narrowly drawn to express only the legitimate interests at stake. *E.g., Roe v. Wade,* 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705 (1973); *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed. 2d 600, 89 S.Ct. 1322 (1969); *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed. 2d 510, 85 S.Ct. 1678 (1965).

Article I, Section 19 of the Constitution of North Carolina provides that "[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land." Although the "law of the land" is sometimes considered synonymous with Fourteenth Amendment "due process of law," *e.g., A-S-P Associates v. City of Raleigh,* 298 N.C. 207, 258 S.E. 2d 444 (1979), our state Supreme Court has reserved the right to grant relief against unreasonable, arbitrary, or capricious legislation under our state constitution in

circumstances under which no relief might be granted by federal court interpretations of due process. *See Lowe v. Tarble*, 313 N.C. 460, 329 S.E. 2d 648 (1985); *Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 206 S.E. 2d 141 (1974). A single standard has traditionally determined whether legislation constitutes an improper exercise of the police power so as to violate the "law of the land" clause: the law must have a rational, real and substantial relation to a valid governmental objective (i.e., the protection of the public health, morals, order, safety, or general welfare). *In re Aston Park Hospital*, 282 N.C. 542, 193 S.E. 2d 729 (1973); *see also State v. Joyner*, 286 N.C. 366, 211 S.E. 2d 320, *appeal dismissed*, 422 U.S. 1002, 45 L.Ed. 2d 666, 95 S.Ct. 2618 (1975). The inquiry is thus two-fold: (1) Does the regulation have a legitimate objective? and (2) If so, are the means chosen to implement that objective reasonable? *See A-S-P Associates v. Raleigh.*

B

Treants may be correct in its contention that the "companionship" ordinance burdens fundamental rights of association and privacy protected by the federal constitution so as to demand a heightened level of scrutiny. *See Wilson v. Taylor*, 733 F. 2d 1539 (11th Cir. 1984) (First Amendment freedom of association extends to purely social and personal associations); *Whalen v. Roe*, 429 U.S. 589, 51 L.Ed. 2d 64, 97 S.Ct. 869 (1977) (extensive records of personal data implicitly threaten privacy). *But see IDK, Inc. v. Clark County* (right of association does not extend to purely commercial relationships); *People v. Katrinak*, 136 Cal. App. 3d 145, 185 Cal. Rptr. 869 (1982) (same—privacy). On the other hand, the Supreme Court's reluctance to invalidate economic legislation suggests that the right to engage in legitimate business is not "fundamental" for purposes of federal due process analysis. *See Harper v. Lindsay*, 616 F. 2d 849 (5th Cir. 1980); *but see Corey v. City of Dallas*, 352 F. Supp. 977 (N.D. Tex. 1972), *rev'd on other grounds* 492 F. 2d 496 (5th Cir. 1974). We need not decide either of these questions. Indeed, for many of the reasons discussed hereafter, it is our opinion that the challenged ordinance must fail even the minimal rationality test applicable to regulations that involve no fundamental rights. Nevertheless, we base our decision to affirm the order permanently enjoining its enforcement upon state constitutional grounds.

C

The critical fatal flaw in the ordinance is that, on its face, it purports to regulate, not merely Movie Mates businesses, but every business that provides "companionship." Apparently, a great deal of discussion occurred in the court below regarding the intended scope of the ordinance, and the meaning of the provision that "it is not intended to apply to persons performing babysitting or to persons engaged in housekeeping or related services." Although this section may have successfully exempted babysitters and housekeepers,[1] the plain and ordinary meaning of "companionship" obviously encompasses any number of other lawful, necessary, and unquestionably moral activities (including nursing and rest homes, legitimate dating and escort services, companions for the elderly, support groups, etc.) and to that extent the ordinance is not rationally related to any legitimate governmental objective. Insofar as the phrase "other related services" was intended to exclude all of these legitimate occupations, we conclude that the ordinance is impermissibly vague in that people of common intelligence must necessarily guess at its meaning and differ as to whether "other related services" applies to a particular activity, *see State v. Vestal*, 281 N.C. 517, 189 S.E. 2d 152 (1972), and further, that it encourages arbitrary and discriminatory enforcement by imposing an inappropriate degree of discretion upon governmental officials charged with its enforcement.

Clearly, state or local governments may lawfully regulate commercial enterprises in the public interest. However, this regulation must be based upon some distinguishing feature in the business itself or exist because the probable consequence of the manner in which the business is ordinarily conducted is substantial injury to the public health, safety, morals, or welfare. *State v. Harris*, 216 N.C. 746, 758-59, 6 S.E. 2d 854, 863 (1940). *See also Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968). Defendants hurt their own cause by contending that the ordinance regulates only businesses providing "pure companionship" or "companionship for companionship's sake" and not businesses

1. Because the mere provision of "companionship" is the distinguishing feature upon which businesses are regulated, the ordinance, by virtue of these exemptions, *may* discriminate unlawfully against persons and establishments of the same kind in violation of the state and federal constitutions' "equal protection" provisions. *See Cheek v. City of Charlotte*, 273 N.C. 293, 160 S.E. 2d 18 (1968).

which provide services to which companionship is merely incidental. We agree with Treants that the right to "companionship" or the formation of social associations is inherent in the concept of individual "freedom" protected by our state charter. Moreover, there are many citizens to whom companionship must necessarily come by way of a business arrangement, and the mere existence of a commercial context does not automatically remove all constitutional safeguards from an otherwise protected association. Hence, "companionship" is an inappropriate "distinguishing feature" upon which to base regulation.

It has become axiomatic that "[a] State cannot under the guise of protecting the public arbitrarily interfere with private businesses or prohibit lawful occupations or impose unreasonable and unnecessary restrictions on them." *Hartford Accident & Indemnity Co. v. Ingram, Com'r of Insurance*, 290 N.C. 457, 471, 226 S.E. 2d 498, 507 (1976); *Roller v. Allen*, 245 N.C. 516, 525, 96 S.E. 2d 851, 859 (1957). *See also In re Aston Park Hospital*, 282 N.C. at 550-51, 193 S.E. 2d at 735. Article I, Section 1 of our state constitution declares that among the inalienable rights of the people are life, liberty, the *enjoyment of the fruits of their own labor*, and the pursuit of happiness. This provision creates a right to conduct a lawful business or to earn a livelihood that is "fundamental" for purposes of state constitutional analysis. *See Roller v. Allen* at 518-19, 96 S.E. 2d at 854; *McCormick v. Proctor*, 217 N.C. 23, 6 S.E. 2d 870 (1940) (Stacy, J., concurring). Traditionally our courts, when assessing the propriety of legislation regulating trades and businesses, have distinguished those occupations which require special knowledge and skill or threaten particular harm from ordinary, harmless occupations for which burdensome regulations are inappropriate, *see State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949); *State v. Harris*; *Cheek v. City of Charlotte*, and have not hesitated to strike down regulatory legislation as repugnant to the state constitution when it is irrational and arbitrary. *See, e.g., Roller v. Allen* (tile contractors); *State v. Ballance* (photography); *State v. Harris* (dry cleaning). *See also In re Aston Park Hospital; Real Estate Licensing Board v. Aikens*, 31 N.C. App. 8, 228 S.E. 2d 493 (1976).

Defendants assert the following "rational bases" as particular support for the ordinance's record-keeping requirements: (1) preventing minors from visiting companionship businesses, (2) in-

hibiting patrons from soliciting proscribed sexual acts, (3) preventing U.S. Marine Corps personnel from frequenting establishments which are off-limits to them, (4) inhibiting the spread of the AIDS virus in a commercial setting, and (5) controlling excessive sums of money which are collected at certain companionship businesses. From the evidence presented to the trial court and the arguments made there by the Defendants, it is clear that the county's primary goal, in addition to these enumerated purposes for the ordinance, was to discourage the practice of prostitution in Movie Mates establishments.

The prevention or hindrance of organized prostitution in the guise of Movie Mates is unquestionably a valid objective of local government. In Onslow County, prostitution, which was traditionally associated with massage parlors, has apparently in recent years become associated with Movie Mates due to the strict regulation of massage parlors. Because of this association, it may be that Movie Mates are particularly suited, like massage parlors, to strict regulation under the local police power. *See IDK, Inc. v. Clark County; Cheek v. City of Charlotte.* However, while regulation of businesses known to be associated with prostitution may reasonably be expected to deter that activity, the breadth of the "companionship" ordinance goes far beyond what is necessary to accomplish that objective. For example, the administrative and license fees, photographing, fingerprinting, and detailed record-keeping requirements place onerous burdens upon legitimate businesses. A person who provides companionship to elderly or sick people must presumably limit their services to licensed premises, and a patron could not hire an escort to accompany him to a public but unlicensed place. The denial or burdening of innocent persons' rights to practice lawful occupations because some other businesses which provide companionship are a subterfuge for illegal activity is capricious and irrational.

In the same vein, we reject the Defendants' five stated purposes for the ordinance. First, we summarily conclude that Onslow County has no legitimate interest in assisting the enforcement of regulations of the United States Marine Corps regarding establishments off-limits to its personnel. Second, assuming without deciding that the county's police power extends to prevention of minors from frequenting Movie Mates or other businesses where prostitution is known to occur, *see Pollard v. Cockrell,* 578

F. 2d at 1015, Onslow County nevertheless has no legitimate governmental interest in prohibiting minors from enjoying the company of a hired companion in other innocent contexts. Third, although the county's interest in preventing prostitution may reasonably include discouraging business patrons from soliciting sex acts, the placing of extraordinary burdens upon lawful and necessary businesses which have not been demonstrated to have any connection to that activity does not rationally further that interest. Fourth, though the police power extends to any reasonable health measure calculated to inhibit the spread of AIDS, the challenged ordinance is not rationally related to that objective. Evidence presented by Defendants that acts of sodomy (associated with the spread of AIDS) occur in Movie Mates businesses does not justify imposition of restrictions upon businesses which do not provide companionship in a context likely to result in sexual conduct. Finally, Defendants' evidence that "excessive" sums of money are collected at certain Movie Mates establishments likewise does not justify regulation of other businesses. We recognize that there is nothing "peculiarly sacrosanct" about the price a person charges for what he sells and that when the economic welfare of the public so requires, government may regulate prices charged by businesses. *Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. at 478, 206 S.E. 2d at 149. However, this ordinance is not reasonably designed to control the price of services rendered by companionship businesses. It does not establish maximum prices nor provide any other standard by which a law enforcement official might determine whether the amounts of money spent there are "excessive."

Defendants rely heavily upon the general rule that legislation is presumed constitutional and that the burden is upon the complaining party to show its invalidity, *see e.g., Currituck County v. Wiley*, 46 N.C. App. 835, 266 S.E. 2d 52, *cert. denied*, 301 N.C. 234, 283 S.E. 2d 131 (1980), and argue that Treants failed to meet that burden by failing to present any evidence. The burden of proving a negative which defendants would place upon Treants (i.e., the nonexistence of any conceivable basis for the ordinance) would be insurmountable. We thus conclude that Treants has met any burden it has by presenting arguments which aptly demonstrate the facial invalidity of the ordinance. As our Supreme Court stated in *State v. Harris*,

> In this situation there does not seem to be much room for a discussion as to the rules under which the Court approaches its duty of applying the constitutional test to this act of the [county]. Any presumptions or burdens which may exist are satisfied when the facts are laid bare to the Court and the situation is found to be wanting in those conditions and those circumstances upon which alone the power of the [county] in its exercise of the police power must depend.

Id. at 764, 6 S.E. 2d at 866.

For the foregoing reasons, we conclude that the ordinance lacks any rational, real and substantial relation to any valid objective of Onslow County and that it thus offends Article I, Secs. 1 and 19 of the Constitution of North Carolina.

IV

Severability

[4] The ordinance contains a severability clause which provides that a court's holding that any provision of the regulation is invalid or unconstitutional shall not affect the validity of any other provision. However, the purpose and effect of the ordinance is to impose onerous licensing requirements on all businesses which provide "companionship." All parts of the ordinance are related to that unconstitutional purpose and there are no provisions which may validly be given effect. Thus the entire ordinance must fall, and we need not rule upon the hypothetical validity of similar provisions in a more narrowly drawn ordinance.

V

[5] Nevertheless, for the sake of thoroughness, we do address specifically the ordinance's record-keeping provisions inasmuch as Treants' contention that these provisions violate constitutional rights of privacy constitutes a primary ground for its attack on the ordinance and raises an immensely important issue. Defendants inappropriately cite as authority for the validity of these sections *Pollard v. Cockrell*, 578 F. 2d 1002 (5th Cir. 1978) which in turn relies upon *Whalen v. Roe*, 429 U.S. 589, 51 L.Ed. 2d 64, 97 S.Ct. 869 (1977). *Pollard* involved an ordinance regulating massage parlors whose record-keeping provisions required only that the name, address, and age of patrons be recorded and kept for one

year beyond the permit year. Likewise, *Whalen v. Roe*, involving a New York statute aimed at controlling the illegal availability of prescription drugs, required that records of certain prescriptions containing patient's name, address, and age, physician's name, and pharmacy, be kept for five years and then destroyed. In contrast, the Onslow County ordinance mandates a *permanent* record and requires the inclusion of more extensive personal data regarding patrons of companionship businesses.

In *Whalen v. Roe*, the United States Supreme Court said:

> We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. The collection of taxes, the distribution of welfare and social security benefits, the supervision of public health, the direction of our Armed Forces, and the enforcement of the criminal laws all require the orderly preservation of great quantities of information, much of which is personal in character and potentially embarrassing or harmful if disclosed. *The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures.* Recognizing that in some circumstances that duty arguably has its roots in the Constitution, nevertheless New York's statutory scheme, and its implementing administration procedures, evidence a proper concern with, and protection of, the individual's interest in privacy. We therefore need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data—whether intentional or unintentional—*or by a system that did not contain comparable security provisions.* (Emphasis added.)

429 U.S. at 605, 51 L.Ed. 2d at 77, 97 S.Ct. at 879.

The New York prescription records were secured in a vault protected by a wire fence and alarm system; a limited number of people had access to the records; and the statute expressly prohibited public disclosure of the information. The Onslow County ordinance contains no comparable security provisions and grants authority to *any* law enforcement officer to inspect the records.

The ordinance's records requirement implicates a valid individual interest in avoiding disclosure of personal matters. Based upon the extensiveness of the data to be recorded, the requirement that the record be permanent, and the lack of any protections against unwarranted disclosure of limits upon the records' use, we conclude that the provision violates the right to privacy of patrons of companionship businesses under both the federal and state constitutions.

VI

In addition to the foregoing, Treants contends: (1) that the ordinance is preempted by state law insofar as it attempts to prohibit prostitution and crimes against nature, and (2) that the administrative and license fees constitute an illegal tax not authorized by statute. Having determined that the ordinance in its entirety exceeds the authority of the County under the North Carolina Constitution, we do not reach either of these questions.

In conclusion, we acknowledge the solemn admonition of our Constitution that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." Art. I, Sec. 35. Obedience to that directive leads us to hold that the trial court did not err in its determination that the Onslow County ordinance is unconstitutional. Therefore, we affirm the court's order permanently enjoining its enforcement.

Affirmed.

Judges WEBB and EAGLES concur.

IN RE: THE ESTATE OF JAMES LEO ENGLISH; DATE OF DEATH: JUNE 6, 1981

No. 865SC443

(Filed 25 November 1986)

1. Clerks of Court § 4— reopened estate—motion to set aside order—jurisdiction

The Clerk of Superior Court had the authority to hear a motion to set aside an order granted by an Assistant Clerk to reopen an estate, even though the motion was made under an inappropriate rule, where the face of the motion revealed and the Clerk and the parties clearly understood the relief

sought and the grounds asserted therefor. Moreover, the broad grant of authority in N.C.G.S. § 7A-103(9) (1981) includes the power to correct orders entered erroneously.

2. Executors and Administrators § 19.1— closed estate—claim of quantum meruit —time barred

The Clerk of Superior Court did not err by determining that an estate should remain closed where the decedent died on 6 June 1981, the estate was closed on 7 July 1983, and petitioner alleged on 14 June 1985 that she had promised to perform certain services for decedent during his lifetime in exchange for the right to occupy property for the remainder of her life. N.C.G.S. § 28A-23-5 (1984) expressly states that claims which are already barred may not be asserted in a reopened administration and petitioner's claim was barred by both N.C.G.S. § 1-52 and N.C.G.S. § 28A-19-3(b)(2) (1984). Petitioner could not bypass the time bar by contending that the heirs were equitably estopped to plead either statute of limitation because a new administrator would not be estopped by any acts of the heirs and because there was no abuse of discretion in the Clerk's determination of whether there was proper cause for reopening the estate.

APPEAL by petitioner from *Hairston, Judge.* Order entered 29 October 1985 *nunc pro tunc* 6 November 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 14 October 1986.

Block and Trask, by Franklin L. Block, for petitioner appellant.

Newton, Harris & Shanklin, by Kenneth A. Shanklin, for appellee James T. English.

Yow, Yow, Culbreth and Fox, by Ralph S. Pennington, for respondent appellees Beulah Mae English, Richard T. English, Ruby E. Carroll, and Brenda Gail E. James.

BECTON, Judge.

This action was brought by the petitioner, Argle W. Chapman, to reopen the estate of James Leo English. Petitioner sought to sue the estate in *quantum meruit* for the value of services she allegedly rendered to Mr. English, the deceased, prior to his death, pursuant to an oral contract. After an ex parte hearing on Ms. Chapman's petition, the Assistant Clerk of Superior Court of New Hanover County ordered the estate of James Leo English reopened. Thereafter, the matter was reheard upon a motion by the heirs of James Leo English, and the Clerk concluded that the

estate had been reopened erroneously and ordered it closed, *nunc pro tunc*. On appeal to the Superior Court, the trial court affirmed the Clerk's order that the estate remain closed. From this order petitioner appeals. We affirm.

The issues on appeal relate to (1) the authority of the Clerk of Superior Court to reopen an estate in order to allow a suit which is barred by the applicable general statute of limitations as well as the special six-month statute of limitations established by N.C. Gen. Stat. Sec. 28A-19-3 (1984) for asserting claims against an estate, (2) the applicability of the doctrine of equitable estoppel to overcome the statute of limitations in a petition to reopen an estate, and (3) the authority of the Clerk to rehear a petition to reopen an estate and to reverse her prior order that the estate be reopened.

I

Factual and Procedural Background

James Leo English died intestate on 6 June 1981. On 7 July 1983 the estate was closed and the administrator was discharged. On 12 April 1985 an action was instituted against the petitioner, Argle W. Chapman, by four heirs of James Leo English, seeking to eject Ms. Chapman from a tract of land owned by English at the time of his death and upon which the petitioner had resided with the consent of English.

In response to the ejectment suit, on 14 June 1985 Petitioner filed the petition which is the subject of this suit. The petition alleged, in part, that (1) Ms. Chapman occupied the land pursuant to a prior agreement between English and herself whereby she would perform certain services for English during his lifetime in exchange for the right to occupy the property for the remainder of her life; (2) that no claims were brought against Petitioner regarding her occupancy of the land during the pendency of the estate administration; (3) that until 15 April 1985, Petitioner had no reason to assert any claim against the estate because she believed the heirs were complying with the agreement; (4) that she intended to file a suit based on *quantum meruit* against the estate for services rendered by her to Mr. English; and (5) that if she were removed from the land, she would have a valid claim for betterments.

In the 28 June 1985 order reopening the estate, the Clerk made findings of fact which essentially restated the allegations of the petition. The heirs were not present or represented at the hearing; and although Petitioner's brief states that they were notified, there is no Certificate of Service or other evidence of this in the record.

On 2 August 1985, the heirs filed a RESPONSE TO PETITION TO REOPEN ESTATE AND MOTION TO SET ASIDE ORDER TO REOPEN ESTATE "pursuant to Rule 60(b)(1) and (6) of the Rules of Civil Procedure." In support of their motion to set aside the previous order, the heirs alleged that Petitioner had no interest in the estate as required by N.C. Gen. Stat. Sec. 28A-23-5 and that her claim was barred by her failure to pursue it within the statutory six-month period for presenting claims against the estate. After hearing testimony and the arguments of counsel for both the heirs and the Petitioner, the Clerk, on 29 August 1983, without making findings of fact, reversed her earlier order and reclosed the estate, *nunc pro tunc.*

On 12 September 1985, after appealing the order reclosing the estate to the Superior Court, Petitioner initiated a second action directly against the heirs for betterments based on improvements she made to the property, and for the value of her services to the deceased. At the 28 October hearing on the appeal, the Superior Court judge had before him the Complaint and Affidavit filed by Petitioner in the second suit as well as the file in her original action to open the estate. In that Complaint and Affidavit, Petitioner alleged that, in failing to assert her legal claim to the property sooner, she had relied not only upon the failure of the heirs or administrator to attempt to remove her from the land but also upon certain "misleading assurances" given to her by the heirs that she would not be "thrown off the property." Although in January of 1984 Petitioner received a letter from an attorney representing the heirs which requested her to vacate the property, Petitioner stated that one of the heirs told her to ignore the letter. No further efforts were made to remove her from the property until the 12 April 1985 ejectment suit was filed. Upon this evidence and the arguments of counsel and without making findings of fact, the Superior Court affirmed the Clerk's order, *nunc pro tunc.*

II

A

[1] We first address the procedural question raised by the petitioner's contention that the Clerk erred in rehearing the petition to reopen the estate after an order to reopen the estate had been entered. Petitioner argues that the proper procedure for challenging the order was by way of appeal to the Superior Court, and that, because the motion of the heirs was made pursuant to Rule 60(b) which does not apply to interlocutory orders, the Clerk lacked authority to entertain the heirs' motion and to vacate her prior order. We disagree and conclude that the order entered by the Clerk was within her authority.

First, in *McGinnis v. Robinson*, 43 N.C. App. 1, 9, 258 S.E. 2d 84, 89 (1979), this Court held a movant's failure to state *any* rule number as basis for his motions as required by Rule 6 of the General Rules of Practice for the Superior and District Courts was not a fatal error when "[t]he substantive grounds and relief desired [w]as [sic] manifest on the face of the motions as required by Rule 7(b)(1) of the N.C. Rules of Civil Procedure." *See also Wood v. Wood*, 297 N.C. 1, 252 S.E. 2d 799 (1979); *Taylor v. Triangle Porsche-Audi, Inc.*, 27 N.C. App. 711, 220 S.E. 2d 806 (1975), *disc. rev. denied*, 289 N.C. 619, 223 S.E. 2d 396 (1976). Similarly, reliance upon an inappropriate rule is not fatal in this case when the face of the motion revealed, and the Clerk and the parties clearly understood, the relief sought and the grounds asserted therefor, and when the Petitioner, as opponent of the motion, was not prejudiced by the error.

Moreover, the Clerk is authorized by statute to "[o]pen, vacate, modify, set aside, or enter as of a former time, decrees or orders of his court." N.C. Gen. Stat. Sec. 7A-103(9) (1981). This broad grant includes the power to correct orders entered erroneously, *In re Watson*, 70 N.C. App. 120, 122, 318 S.E. 2d 544, 546 (1984), *disc. rev. denied*, 313 N.C. 330, 327 S.E. 2d 900 (1985), whenever the Clerk's attention is directed to the error by motion or *by other means. See Taylor v. Triangle Porsche-Audi* (even under Rule 60 which expressly states that the court is to act "on motion," the court has power to act in the interest of justice when its attention is brought to the necessity for relief by means other than a motion).

B

[2] We next determine whether the Clerk erred in concluding that the estate should remain closed.

N.C. Gen. Stat. Sec. 28A-23-5 (1984) provides:

> If, after an estate has been settled and the personal representative discharged, other property of the estate shall be discovered, or if it shall appear that any necessary act remains unperformed on the part of the personal representative, *or for any other proper cause*, the clerk of superior court, upon the petition of any person interested in the estate . . . may order that said estate be reopened. . . . Unless the clerk of superior court shall otherwise order, the provisions of this Chapter as to an original administration shall apply to the proceedings had in the reopened administration; *but no claim which is already barred can be asserted in the reopened administration.* (Emphasis added.)

The issue before the Clerk in this case was whether "other proper cause" existed for reopening the estate. The Petitioner contends that she has a valid cause of action against the estate founded in *quantum meruit* and that this constitutes "proper cause." We agree that the existence of a valid claim against an estate *which is not time-barred* may, in an appropriate case, constitute "proper cause" to reopen a closed estate in order to assert the claim. *See Force v. Sanderson*, 56 N.C. App. 423, 289 S.E. 2d 56, *cert. denied*, 306 N.C. 383, 294 S.E. 2d 207 (1982). However, the statute expressly states that claims which are already barred may not be asserted in a reopened administration. Thus, without more, a claim which is barred by the statute of limitations may not constitute proper cause to reopen administration of a closed estate.

Petitioner's claim upon *quantum meruit* is subject to two statutes of limitations. First, *quantum meruit* claims for services rendered pursuant to a contract to devise are controlled by a three-year statute of limitations. N.C. Gen. Stat. Sec. 1-52(1) (1983); *Dunn v. Brewer*, 228 N.C. 43, 44 S.E. 2d 353 (1947). When the agreed upon compensation is to be provided in the will of the recipient of the services, the cause of action accrues when the recipient dies without having made the agreed testamentary pro-

vision. *Johnson v. Sanders*, 260 N.C. 291, 132 S.E. 2d 582 (1963); *Hicks v. Hicks*, 13 N.C. App. 347, 185 S.E. 2d 430 (1971). The Petitioner alleged that English promised to compensate her for her services to him by devising to her a life estate in the contested property. Therefore, her cause of action accrued when English died on 6 June 1981, and she was barred from making a claim against the estate by N.C. Gen. Stat. Sec. 1-52 on 6 June 1984. For this reason, the heirs claim that Petitioner is not a "person interested in the estate" with a right to petition for its reopening.

In addition, Chapter 28A of the General Statutes, which regulates the administration of estates, contains special periods of limitation for claims against an estate. Claims, such as that of the petitioner in the present case, which arise at the death of the decedent, are "forever barred . . . unless presented to the personal representative or collector . . . within six months after the date on which the claim arises." N.C. Gen. Stat. Sec. 28A-19-3(b)(2) (1984). Taken alone, this statute establishes an absolute bar to all claims or actions that are not presented within the six-month limitation period. *Thorpe v. Wilson*, 58 N.C. App. 292, 293 S.E. 2d 675 (1982). *See also Baer v. Davis*, 47 N.C. App. 581, 267 S.E. 2d 581, *disc. rev. denied*, 301 N.C. 85, 273 S.E. 2d 296 (1980). The special shortened period for actions against decedents' estates is apparently designed to encourage speedy presentation of claims and to expedite the administration, and ultimately, the closing, of estates. Furthermore, we believe that the provision in G.S. Sec. 28A-23-5 prohibiting any claim which is already barred from being asserted in the reopened estate primarily refers to the G.S. Sec. 28A-19-3 limitations on presentation of claims. Thus, an estate may not ordinarily be reopened for litigation of claims not brought within the six-month period, even in the absence of a bar by some other statute of limitations.

The Petitioner seeks to by-pass the time bar by contending that the heirs are equitably estopped to plead either statute of limitations in bar of her claims against the estate. We conclude, however, that the question of equitable estoppel does not control the resolution of Petitioner's effort to reopen the administration. First, in the event the Clerk *had* reopened the estate, it would have been necessary pursuant to G.S. Sec. 28A-23-5, to reappoint the administrator or appoint a new administrator to perform the acts necessary to the defense of the estate, and that administra-

tor would not be estopped by any acts of the heirs from raising the limitation period as a bar to the Petitioner's claim. (We note that Petitioner's second action directly against the heirs is still pending, and we express no opinion regarding the merits of her equitable estoppel claim as it relates to that suit.)

More importantly, however, the Clerk of Court is not bound, in making a discretionary determination of whether "proper cause" exists for reopening an estate, by any estoppel theory based upon acts of the heirs. We reiterate that the existence of "proper cause" was the ultimate issue for the Clerk on hearing Ms. Chapman's petition. The Clerk, in the exercise of her probate jurisdiction, is properly guided by Chapter 28A of the General Statutes including the six-month limitation on presentation of claims. In light of the public policy in favor of expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of Chapter 28A, the Petitioner had, in our opinion, a heavy burden of justifying her failure to bring her suit within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. We find no error in the Clerk's determination that this burden was not met.

Petitioner alleged that English promised to devise a life estate to her. When English died without having done so, Petitioner was on immediate notice that she had a claim against the estate. If the Clerk, in the role of factfinder, believed that the Petitioner was actively misled or dissuaded by the heirs or anyone else from pursuing her claim while it was timely, she might, in her discretion, find that the Petitioner's claim was justified. We do not have the benefit of any findings of fact in the record in order to determine why the Clerk decided otherwise. However, in the absence of a request by a party, the Clerk was not required to make findings of fact. *See J. M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 324 S.E. 2d 909, *disc. rev. denied*, 313 N.C. 603, 330 S.E. 2d 611 (1985); N.C. Gen. Stat. Sec. 1A-1, Rule 52(a)(2) (1983). Instead, we must presume, upon proper evidence, that she found sufficient facts to support her ruling. *Id.* Furthermore, the record does not disclose what evidence was presented before the Clerk other than Ms Chapman's petition and the heirs' response. Under these circum-

stances, we rely upon a presumption that the order entered was proper and we decline to find an abuse of authority by the Clerk.

C

Petitioner's third assignment of error is to the superior court judge's affirmation of the Clerk's order. The jurisdiction of the superior court judge in this case was that of an appellate court, *In re Estate of Adamee*, 291 N.C. 386, 230 S.E. 2d 541 (1976); *In re Estate of Longest*, 74 N.C. App. 386, 328 S.E. 2d 804, *disc. rev. denied*, 314 N.C. 330, 333 S.E. 2d 488 (1985), and the Petitioner's general exception to the entry of the Clerk's order presented only the question whether the Clerk's presumed findings of fact supported her conclusion. *See In re Estate of Lowther*, 271 N.C. 345, 156 S.E. 2d 693 (1967); *J. M. Thompson Co. v. Doral Manufacturing Co.* The hearing should have been on the record only and not *de novo*, and the judge was confined to correcting errors of law. *See Lowther.* Nevertheless, we have carefully reviewed the additional evidence considered by the Court (Petitioner's Complaint and Affidavit) and find nothing therein which changes our conclusion. For the reasons discussed in the preceding section, we hold that the court did not err in affirming the Clerk's order.

III

For the foregoing reasons, we conclude that the Clerk of Court, and the Superior Court Judge properly ordered that the estate of James Leo English remain closed. The order appealed from is therefore

Affirmed.

Judges WEBB and EAGLES concur.

HARRY M. LEE, INDIVIDUALLY, AND AS EXECUTOR OF THE ESTATE OF TAFT M. BASS, AND LAWYERS MUTUAL LIABILITY INSURANCE COMPANY OF NORTH CAROLINA v. ARCHIE H. BARKSDALE AND CLIFFORD B. BARKSDALE

No. 854SC852

(Filed 25 November 1986)

1. **Executors and Administrators § 32— action to recover assets wrongfully paid out—summary judgment proper**

The trial court did not err by granting plaintiffs' motion for summary judgment in an action to recover from the beneficiaries of an estate amounts improperly paid to them where an error in the method of calculation caused the executor to make an erroneous disbursement under the will.

2. **Executors and Administrators § 32— action to recover assets wrongfully paid out—equitable defenses not available**

In an action to recover from two of three beneficiaries of an estate amounts improperly paid to them, the defenses of settlement, waiver, release, ratification, and estoppel were unavailing because each defense required some showing that the person against whom it was asserted had knowledge of the true facts underlying the claim and there was no forecast of evidence that the third beneficiary knew of her claim for additional funds or intended to abandon or relinquish such a claim.

3. **Executors and Administrators § 32— recovery of assets erroneously paid out—mistake of fact, not law**

The trial court did not err in an action to recover from two beneficiaries of a will amounts improperly paid to them by denying their motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6). The mistake in calculation was one of fact rather than one of law, and the executor clearly stated a cause of action upon which relief could be granted; further, the motion was converted to one for summary judgment when matters outside the pleadings were considered. N.C.G.S. § 1A-1, Rule 56.

4. **Executors and Administrators § 32— recovery of assets erroneously paid out—proper parties**

Lawyers Mutual Liability Insurance Company and the executor of an estate as an individual lacked standing and were not the proper parties to bring an action against beneficiaries who benefited from a wrongful or incorrect disbursement under a will; however, there was no prejudice because the judge correctly ordered that the excess disbursements be returned to plaintiff as the executor and that those monies be properly distributed by him. N.C.G.S. § 28A-22-1.

APPEAL by defendants from *Smith, Judge*. Judgment entered 13 May 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 10 February 1986.

This is a civil action, filed 23 October 1984, to recover from the beneficiaries of an estate amounts improperly paid to them in the distribution of the assets of the estate pursuant to the testator's will.

Article Two of Taft M. Bass' will left the house and personal effects to his wife Nellie Cofield Bass if she survived him. The residuary clause read in pertinent part as follows:

ARTICLE THREE

I will, devise and bequeath all the rest and residue of my property, both real and personal wheresoever situate not hereinbefore disposed of (but including that passing to my wife, Nellie Cofield Bass under Article Two should she predecease me) to my Executor and direct my Executor to convert the same into cash as soon as practical after my death. In this connection, I hereby specifically authorize, direct and empower my Executor to sell my said property at either public or private sale and at such price as he in his sole discretion shall determine to be for the best interest of my estate. After converting all my property to cash as above set forth, I direct my Executor to administer and dispose of the same, together with all other property such as cash on hand or on deposit belonging to my estate as follows:

1. First, my Executor shall pay all my debts, taxes and all costs of administration of my estate as directed in Article One hereof.

2. Second, my Executor shall pay the sum of Ten Thousand ($10,000.00) in cash to Dale Barksdale Cooper, daughter of Major Pryor Barksdale Cooper, daughter of Major Pryor Barksdale, deceased.

3. Third, after complying with all prior provisions hereof, my Executor shall distribute the remaining funds belonging to my estate as follows:

(a) One-third (1/3) to my wife, Nellie Cofield Bass, *less* the value (to be determined as hereinafter set forth) of the *real estate* passing to her under the provisions of Article Two hereof. I hereby provide and so direct that this portion of my wife's share shall not be reduced by the value of any

personalty passing to her under the terms of Article Two hereof, nor by the amount of any proceeds from life insurance on my life paid to her by reason of my death.

I further provide that in arriving at the value of the real estate passing to my wife under the provisions of Article Two, my Executor shall, in his sole discretion select a competent and experienced appraiser to appraise said real estate and said appraisal shall be binding upon all parties concerned. The cost of said appraisal is hereby directed to be charged to the general cost of the administration of my estate.

I still further provide that if my wife, Nellie Cofield Bass shall not survive me, then this portion of her share of my estate that would have gone to her had she been living shall lapse and shall be distributed by my Executor in equal shares to Archie Hill Barksdale and Clifford Bailey Barksdale.

(b) One-third (1/3) to Achie Hill Barksdale; and

(c) One-third (1/3) to Clifford Bailey Barksdale.

The appraised value of the real estate passing to testator's widow, Nellie Cofield Bass (McCollum), under Article Two was Sixty-eight Thousand Dollars ($68,000.00). After liquidation of the residuary estate and payment of costs, taxes and debts as provided in the will, the residue for distribution was $278,308.67.

On 3 August 1983, the three principal beneficiaries under the will met for approximately three hours with an accountant of the firm of Squires, Ezzell and Waters, P.A., to review and approve the Final Account of the Bass estate prepared by plaintiff Lee as Executor. The distribution of the residuary estate under the Final Account is shown by the following table:

Total Amount to be Distributed	$278,308.67	
To Dale Barksdale Cooper, per will .	$ 10,000.00	
To Nellie C. Bass (McCollum) Insurance	$ 22,031.97	
		$ 32,031.97
BALANCE LEFT FOR DISTRIBUTION	$246,276.70	

SHARE OF NELLIE C. BASS (MCCOLLUM) from balance left for distribution		
One-third of $246,276.70	$ 82,092.24	
Less value of dwelling	68,000.00	
		$ 14,092.24
SHARE OF ARCHIE H. BARKSDALE from balance left for distribution		
One-third of $246,276.70	$ 82,092.23	
Plus one-half value of dwelling	34,000.00	
		$116,092.23
SHARE OF CLIFFORD B. BARKSDALE from balance left for distribution		
One-third of $246,276.70	$ 82,902.23	
Plus one-half value of dwelling	34,000.00	
		$116,092.23
TOTAL AMOUNT DISTRIBUTED		$278,308.67

At the conclusion of this meeting, all three beneficiaries accepted his or her share in accordance with the Final Account and each signed the following "Receipt and Approval":

> The undersigned, Nellie C. Bass McCollom [sic], Archie H. Barksdale and Clifford B. Barksdale, being the beneficiaries under the Last Will and Testament of Taft Marcus Bass, deceased, do hereby jointly and severally acknowledge:
>
> (1) That the foregoing Final Account of Harry M. Lee, Executor of Taft Marcus Bass, deceased is a true and correct representation of the administration of said estate and the same is hereby approved and confirmed in every respect;
>
> (2) The receipt of each share of funds distributed as set forth in said Final Account; and
>
> (3) That a division of all personal property belonging to said estate was made in a manner acceptable to each and each hereby acknowledges the receipt of his or her share in full.

On 18 August 1983, Mrs. McCollum, through her attorney, made demand against the Estate of Taft M. Bass for a deficiency due her under Article Three of the Will. As a consequence of this demand, plaintiff Lee recomputed the distribution of the residuary estate as follows:

Total Amount to be Distributed	$278,308.67	
To Dale Barksdale Cooper per will .	10,000.00	
To Nellie C. Bass (McCollum)	22,031.97	
Remaining Cash Funds	$246,276.70	
SHARE OF NELLIE C. BASS (MCCOLLUM):		
One-third of $246,276.70	$ 82,092.23	
Less Value of Dwelling	68,000.00	
Net	$ 14,092.23	
Plus One-Third Value of Dwelling ($68,000.00)	22,666.67	
		$ 36,758.90
SHARE OF ARCHIE H. BARKSDALE:		
One-Third of $246,276.70	$ 82,092.23	
Plus One-Third Value of Dwelling ($68,000.00)	22,666.67	
		$104,758.90
SHARE OF CLIFFORD B. BARKSDALE:		
One-Third of $246,276.70	$ 82,092.23	
Plus One-Third Value of Dwelling ($68,000.00)	22,666.67	
		$104,758.90
TOTAL AMOUNT DISTRIBUTED		$278,308.67

On 14 June 1984, plaintiff Lawyers Mutual Liability Insurance Company of North Carolina and Nellie Bass McCollum entered into a consent agreement under which plaintiff paid to Mrs. McCollum the sum of $24,439.38 in full satisfaction, compromise and discharge of any claim she had or may have had against the plaintiffs for her deficient payment under the Will. In the consent agreement, Mrs. McCollum also assigned to plaintiff Insurance

Company all right, title and interest in any recovery against defendants to the extent of its payment to Mrs. McCollum.

In response to the complaint, defendants filed a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), and plaintiffs filed a motion for summary judgment. Attached to the motion for summary judgment was an affidavit prepared by plaintiff Lee which stated in pertinent part:

> 6. The Final Account which I prepared as Executor of the estate does not carry out Mr. Bass' intention as expressed to me, nor my intention in drafting the Will that Nellie Cofield Bass and Archie and Clifford Barksdale share equally in the estate.
>
> 7. Through mathematical error, I neglected to add the value of the homeplace ($68,000) to the residue of the estate before deducting that amount from Nellie Cofield Bass' share. Before I recognized this error, I had already disbursed the funds under the Final Account.

Defendant Clifford Barksdale filed an Affidavit which stated that prior to the 3 August 1983 meeting, "I had a number of discussions with Harry M. Lee, the Executor of the Estate, concerning the manner in which the assets of the Estate would be disbursed. It was my understanding based on these discussions with him, that the Estate would be disbursed in exactly the manner set forth in the Final Account . . . ."

Both motions came on for hearing before the Honorable Donald L. Smith. Judge Smith granted plaintiffs' motion for summary judgment and entered the "following findings or conclusions, to wit":

> The Last Will and Testament of Taft M. Bass is interpreted to mean that the residuary estate of the testator in the sum of $246,276.70 was intended by the testator to be distributed one third each to Nellie C. Bass McCullom [sic], Archie H. Barksdale, and Clifford B. Barksdale, (i.e., the sum of $82,092.23 each, that testator's wife Nellie C. Bass McCullom [sic] was to receive her one-third interest "*less* the value" of said house ($68,000.00) or $14,092.23; that the *value* of the house should be added to the residuary estate and distributed one-third each to said beneficiaries or a total of

$22,666.67 each for a total residuary distribution to Nellie C. Bass McCullom [sic] of $36,758.90; and the Court further concluding that in no event was either defendant entitled to more than one-third of the value of the residuary estate—a maximum of $104,758.90 to defendant Clifford B. Barksdale and $104,758.90 to Archie H. Barksdale and $104,758.90 to Nellie C. Bass McCullom [sic] (i.e., the $68,000.00 house plus said $36,758.90 cash for a total also of $104,758.90); and it further appearing that the Executor of the Estate of Taft M. Bass by improper and erroneous mathematical computation paid to defendant Clifford B. Barksdale the sum of $116,092.23 and erroneously paid to defendant Archie H. Barksdale the sum of $116,092.23; and the Court concluding that the intent of any testator, including Taft M. Bass, cannot and should not be subverted or changed by error, mutual mistake; or agreement of the personal representative and the beneficiaries; or otherwise;

It is hereby ORDERED, ADJUDGED and DECREED that defendant Clifford B. Barksdale and the defendant Archie H. Barksdale return forthwith to Harry M. Lee as Executor of the Estate of Taft M. Bass the sum of $11,333.34 each and that said monies so received by said Executor be properly distributed by him according to the Last Will and Testament of Taft M. Bass as interpreted herein by this Court; and that plaintiff have and recover of defendant Clifford B. Barksdale the sum of $11,333.34 and that plaintiff have and recover of the defendant Archie H. Barksdale the sum of $11,333.34; and it is further ordered that this Judgment be cancelled of record upon receipt by said Executor of the total sum of $22,666.68 by voluntary payment by defendants or upon satisfaction by execution upon the property of defendants . . . .

From the entry of this judgment, defendants appealed.

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

Manning, Fulton and Skinner by Charles E. Nichols, Jr., and Emmett Boney Haywood for defendants-appellants.

PARKER, Judge.

Defendants contend the trial court erred in granting plaintiffs' motion for summary judgment and in denying defendants' motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6). We disagree.

[1] On a motion for summary judgment, the moving party has the burden of showing (i) the lack of a triable issue of fact and (ii) that he is entitled to judgment as a matter of law. *Moore v. Crumpton*, 306 N.C. 618, 295 S.E. 2d 436 (1982). The record discloses that the essential facts in this case are not in dispute. The question before the trial court was whether plaintiff Lee, as Executor, properly distributed the residuary estate under the Will of Taft M. Bass.

The primary object in interpreting a will is to give effect to the intention of the testator. *Misenheimer v. Misenheimer*, 312 N.C. 692, 325 S.E. 2d 195 (1985). This intention will be given effect unless it violates some rule of law or is contrary to public policy. *Pittman v. Thomas*, 307 N.C. 485, 299 S.E. 2d 207 (1983). This intent is to be gathered from a consideration of the will from its four corners. Where the intent of the testator is clearly expressed in plain and unambiguous language, there is no need to resort to the general rules of construction for an interpretation; rather, the will is to be given effect according to its obvious intent. *Price v. Price*, 11 N.C. App. 657, 182 S.E. 2d 217 (1971).

The interpretation of a will's language is a matter of law. *Wachovia v. Wolfe*, 243 N.C. 469, 91 S.E. 2d 246 (1956).

In this case, the language used by the testator manifests his intention to divide the residuary estate into three equal shares with the widow's cash distribution to be offset by the value of the marital home. We agree with Judge Smith's conclusion "that in no event was either defendant entitled to more than one-third of the value of the residuary estate . . . ."

The only way to effect the distribution intended by the testator is to add the value of the homeplace to the residuary estate before deducting that value from Mrs. McCollum's share. Utilizing this method, each defendant would receive $104,758.90 cash, and Mrs. McCollum would receive $36,758.90 cash plus the value of the $68,000.00 house for a total of $104,758.90. In this

manner, each beneficiary would receive exactly one-third of the value of the residuary estate. Although the house clearly did not pass under the residuary estate, the value of the house is an essential component of the equation to balance the actual distribution of the residuary estate. Under the method by which Executor Lee distributed the estate, each defendant received an amount well in excess of his one-third of the residuary estate. The intent of a testator should not be circumvented by error in mathematical computations. Therefore, we hold plaintiff's motion for summary judgment was properly granted where they showed a lack of a triable issue of fact and that an error in the method of calculation caused the Executor to make an erroneous disbursement under the will.

[2] Defendants further contend that plaintiffs are barred under theories of settlement, waiver, release, ratification and estoppel. Each of these defenses requires some showing that the person against whom they are asserted had knowledge of the true facts underlying the claim. Defendants offered no affidavits or forecast of evidence suggesting that on 3 August 1983, Mrs. McCollum knew of her claim to additional funds or intended to abandon or relinquish such a claim. Because the record is void of any evidence that Mrs. McCollum knew at the time of distribution that the method of calculation did not comport with the terms of the testator's will, all these defenses are unavailing to defendants.

[3] Defendants' contention that the trial court erred in denying their motion to dismiss filed pursuant to G.S. 1A-1, Rule 12(b)(6) is premised on the theory that the mistake was one of law rather than of fact and that defendants would be prejudiced by failing to return the money. In our view, the mistake in calculation was one of fact, not of law, and plaintiff executor clearly stated a cause of action upon which relief could be granted. *See Bank v. McManus*, 29 N.C. App. 65, 223 S.E. 2d 554 (1976); *Lyle v. Siler*, 103 N.C. 261, 9 S.E. 491 (1889). Further, when matters outside the pleadings are considered on a motion to dismiss, the motion is converted to one for summary judgment and is disposed of in the manner stated in Rule 56. *Fowler v. Williamson*, 39 N.C. App. 715, 251 S.E. 2d 889 (1979).

[4] Although not raised in the briefs, we note that plaintiff Lee individually and Lawyers Mutual Liability Insurance Company

lack standing and are not proper parties to bring an action against beneficiaries who have benefited from a wrongful or incorrect disbursement under a will. When the estate is open, an action to recover assets of an estate is properly prosecuted by the personal representative as the fiduciary responsible for the assets of the estate. A devisee is liable to refund money which has been paid to him by the executor under a mistake of fact, and repayment of the amount wrongfully paid may be enforced against him in a suit by the executor. 31 Am. Jur. 2d *Executors and Administrators* §§ 587-588 (1967). Once the estate has collected any wrongful disbursements, the executor must properly distribute these proceeds. G.S. 28A-22-1. Because Judge Smith correctly ordered that the excess disbursements be "return[ed] forthwith to Harry M. Lee *as Executor* of the Estate of Taft M. Bass . . . and that said monies so received by said Executor be properly distributed by him," the presence of Lawyers Mutual in this case was not prejudicial to the successful prosecution of this action.

The judgment appealed from is

Affirmed.

Chief Judge HEDRICK and Judge WEBB concur.

CARL E. BRICKMAN AND ROSEMARY BRICKMAN v. ANTHONY F. CODELLA AND MARGARET CODELLA

No. 8621SC497

(Filed 25 November 1986)

1. Constitutional Law § 24.7; Process § 9.1— president of foreign corporation— acts on behalf of corporation—personal jurisdiction

The acts of defendant as president of a corporation could be imputed to him individually for the purpose of determining whether he had sufficient contacts with North Carolina for the exercise of *in personam* jurisdiction where defendant transacted business in North Carolina as principal agent for the company of which he was president; defendant clearly contemplated commercial benefits to himself from the transaction; and defendant failed to plainly demarcate acts and communications accomplished in his corporate capacity from those done in his individual capacity.

2. Process § 9.1; Constitutional Law § 24.7— foreign corporation—sufficient minimum contacts

A contract to sell and lease back a houseboat and defendant's concomitant guaranty were sufficiently connected with North Carolina to justify the exercise of jurisdiction where defendant sought out plaintiffs and initiated the contacts in North Carolina from which the claim arose; defendant made one telephone call to plaintiffs in North Carolina, two mailings to plaintiffs regarding the business proposal, and mailed four monthly payments on behalf of his company to plaintiffs; the lease contract was consummated by plaintiff's signature in North Carolina and the guaranty, although signed in New York, was essentially a part of the same transaction; a promise to pay the debt of another which is owed to a North Carolina creditor is a contract to be performed in North Carolina; the contract contemplated repetitive activity directed toward North Carolina; North Carolina has a legitimate interest in protecting its residents in the making of contracts with nonresidents who solicit business within North Carolina; there was no evidence that requiring defendant to defend in this forum would place him at a severe disadvantage or subject him to greater inconvenience than requiring plaintiffs to litigate their claim in New York; and there was no indication that material witnesses or evidence were available only in New York.

APPEAL by defendant Anthony Codella from *James M. Long, Judge.* Order entered 18 March 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 October 1986.

Pfefferkorn, Pishko & Elliott, P.A., by David C. Pishko, for plaintiff appellee.

Wilson and Small, by Christopher J. Small, for defendant appellant.

BECTON, Judge.

Carl E. Brickman and his wife, Rosemary Brickman, North Carolina residents, brought this action against Anthony and Margaret Codella, residents of New York, to recover on a note under which Anthony Codella guaranteed payment of the indebtedness of Poseidon Industries, Inc. (Poseidon), a New York corporation of which Mr. Codella is president. The defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 12(b) (1983) for lack of personal jurisdiction. After considering the pleadings, affidavits, and arguments of counsel, the trial court granted Margaret Codella's motion to dismiss due to the insufficiency of her contacts with the state of North Carolina, but denied the motion of Anthony Codella. Mr. Codella appeals.

We agree with the trial judge that the evidence shows sufficient minimum contacts between Mr. Codella and this state to satisfy the requirements of due process and to justify the assertion of *in personam* jurisdiction against him. Accordingly, we affirm.

I

The uncontradicted allegations of Mr. Brickman's complaint and affidavit establish the following facts. On 9 December 1982 the defendant, Mr. Codella, called Mr. Brickman at his home in Clemmons, North Carolina to propose a business transaction. Mr. Codella is president of Poseidon Industries, Inc., a corporation engaged in the sale of houseboats in New York City. He proposed that Mr. Brickman purchase a houseboat from Poseidon and then lease the houseboat back to Poseidon for use as a display model. The investment would benefit the Brickmans by providing a tax shelter for them. Mr. Brickman apparently expressed some interest in the deal, and the following day Mr. Codella mailed to Mr. Brickman a letter and other materials pertaining to the proposal. Included in the package was a contract for purchase of the houseboat which was already signed by Mr. Codella.

On 15 December 1982 Mr. and Mrs. Brickman purchased a houseboat from Poseidon. The houseboat was to be manufactured in Maryland and then delivered to Poseidon's place of business in New York. The United States Coast Guard documentation pertaining to the houseboat named North Carolina as the vessel's home port.

About 18 December 1982 Mr. Codella mailed a revised lease agreement signed by Mr. Codella to Mr. Brickman in Clemmons, North Carolina. On the same date, Mr. Codella signed and mailed to Mr. Brickman a document personally guaranteeing payment of Poseidon's obligations under the lease if Poseidon defaulted in its lease payments to the Brickmans. Mr. Brickman signed the lease agreement in Clemmons and mailed it back to New York.

Mr. and Mrs. Brickman allege in the Complaint that Poseidon made four rental payments under the lease and then defaulted. They now seek enforcement of the guaranty against Mr. Codella.

The affidavit offered by Mr. Codella in support of his motion to dismiss asserts merely that he is a resident of New York, that

he has never been a resident of North Carolina, that he has never owned any property in North Carolina, and that he has never visited North Carolina to transact business. In his brief, Mr. Codella also asserts that his only contact with North Carolina while acting in his individual capacity was the mailing of the 18 December 1982 letter guaranteeing payment under the lease contract.

II

In order to determine whether the trial court acquired jurisdiction over Mr. Codella, we apply the two-step analysis set forth in *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). The first step requires a determination of whether statutory authority exists for the exercise of jurisdiction. The North Carolina "long-arm" statute provides for *in personam* jurisdiction to the full extent permitted by the United States Constitution. *See Dillon; Ash v. Burnham Corp.*, 80 N.C. App. 459, 343 S.E. 2d 2 (1986). The trial judge found, and Mr. Codella does not contest, that N.C. Gen. Stat. Sec. 1-75.4(5) (1983) confers jurisdiction upon the North Carolina courts in this action. Therefore, we proceed directly to the second and critical inquiry: Will the exercise of jurisdiction violate constitutional standards of due process?

Due process of law is offended only when a nonresident defendant lacks sufficient "minimum contacts" with the forum state to make that state's assertion of jurisdiction fair and reasonable. *See International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945); *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974). The existence of adequate contacts is not determined by the application of mechanical rules but rather by careful consideration of the particular facts of each case in order to ascertain what is just under the circumstances. *See Dillon v. Numismatic Funding Corp.; Georgia R.R. Bank & Trust Co. v. Eways*, 46 N.C. App. 466, 265 S.E. 2d 637 (1980). Some factors commonly considered are: (1) quantity of the contacts between the defendant and the forum state, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. *Marion v. Long*, 72 N.C. App. 585, 325 S.E. 2d 300, *disc. rev. denied*, 313 N.C. 604, 330 S.E. 2d 612 (1985). Above all, it is essential "that there be some act by which the defendant pur-

posefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L.Ed. 2d 1283, 1298, 78 S.Ct. 1228, 1240 (1958) (quoted in *Chadbourn, Inc. v. Katz; J. M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 324 S.E. 2d 909, *disc. rev. denied*, 313 N.C. 603, 330 S.E. 2d 611 (1985)).

[1] Before applying the foregoing standards to the instant case, we must initially determine whether the acts of Mr. Codella as president of Poseidon may be imputed to him individually for the purpose of determining whether he had sufficient contacts with North Carolina. In answering that inquiry we are guided by our Supreme Court's analysis in *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E. 2d 610 (1979). In that case, the defendants—two brothers and nonresidents—guaranteed the debt of a Virginia corporation to a North Carolina creditor. The court concluded that one brother, Morton Coleman, who owned no shares or other interest in the defaulting corporation, was not required to defend in this state because his sole contact with North Carolina was the signing in New York of a note payable here, resulting in the acquisition of "a potential liability to a North Carolina corporation with no attending commercial benefits to himself enforceable in the courts of North Carolina." *Id.* at 517, 251 S.E. 2d at 615. Lawrence Coleman, however, was president and principal shareholder of the corporation whose debt he guaranteed, and he conducted business in North Carolina as principal agent for the corporation. As a result, the court held that his corporate acts could be attributed to him for the purpose of assessing the strength of his contacts with this state.

Like Lawrence Coleman, Anthony Codella has transacted business in North Carolina as principal agent for the company of which he is president. Moreover, the record indicates that Mr. Codella had a significant interest in Poseidon. Carl Brickman's affidavit states, and Mr. Codella has not denied, that Mr. Codella owns Poseidon. Furthermore, the initial letter to Mr. Brickman from Mr. Codella regarding the sale and lease-back transaction reveals that Mr. Codella was launching a new business venture, that he was personally requesting the aid of a family member, that the sale to the Brickmans would be his first houseboat sale, and that he considered this first sale to be critical to the success

of the entire venture. Clearly Mr. Codella contemplated "attending commercial benefits" to himself from the transaction. In addition, he failed to plainly demarcate acts and communications accomplished in his corporate capacity from those done in his individual capacity. Thus we consider all of Mr. Codella's actions pertaining to the sale and lease of the houseboat, from his initial telephone conversation with Mr. Brickman through his mailing of rental payments to the Brickmans, in assessing the adequacy of his contacts with North Carolina.

We acknowledge that the mere guaranty by a nonresident of a debt owed to a North Carolina corporation does not *per se* constitute a sufficient minimal contact upon which this state may assert personal jurisdiction. *See United Buying Group, Inc. v. Coleman.* However, as discussed hereafter, the circumstances surrounding Mr. Codella's guaranty of Poseidon's obligations lead us to conclude that his contacts with North Carolina justify the assertion of jurisdiction.

[2] As to the *quantity* of contacts between Mr. Codella and North Carolina, the record shows that Mr. Codella made a minimum of one phone call and two mailings to Mr. Brickman regarding his business proposal. Furthermore, he mailed four monthly payments due under the lease to the Brickmans on behalf of Poseidon.

Admittedly, the contract between Mr. Codella and Mr. Brickman was an isolated business transaction and there is no evidence that Mr. Codella conducted any other business in North Carolina. However, not only the quantity but also the *nature* of Mr. Codella's contacts with the state must be considered. The absence of actual physical contacts with the state is not of controlling weight but is merely one factor to consider. *Burger King v. Rudzewicz*, --- U.S. ---, 85 L.Ed. 2d 528, 105 S.Ct. 2174 (1985); *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 334 S.E. 2d 91 (1985). A single contract made in North Carolina can be sufficient to subject a nonresident defendant to suit here. *See McGee v. International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199 (1957); *Telerent Leasing Corp. v. Equity Associates, Inc.*, 36 N.C. App. 713, 245 S.E. 2d 229 (1978). The lease contract was consummated by Mr. Brickman's signature in North Carolina. The contract was thus made here, and the guaranty, although signed

in New York, was essentially a part of the same transaction. In addition, a promise to pay the debt of another which is owed to a North Carolina creditor is a contract to be *performed* in North Carolina. *First Citizens Bank and Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E. 2d 556 (1973), *overruled on other grounds, United Buying Group v. Coleman. See also Koppers Co. v. Kaiser Aluminum and Chemical Corp.*, 9 N.C. App. 118, 175 S.E. 2d 761 (1970) (in absence of agreement to contrary, debt is payable where creditor resides).

As a result of the agreement, Mr. Codella was allegedly indebted to Mr. Brickman for nearly $40,000, and the contract contemplated repetitive activity (the making of lease payments) directed toward North Carolina for a period of four years. Furthermore, North Carolina law would govern should any dispute arise regarding the lease, and Mr. Codella could clearly have enforced his "attending commercial benefits" under the agreement in the courts of North Carolina. Finally, the threshold for sufficiency of contacts is lowered when the cause of action derives directly from those contacts. *See Ash v. Burnham.* Taking all of these factors into consideration, the contract to sell and lease back the houseboat and Mr. Codella's concomitant guaranty were sufficiently connected to North Carolina to justify the exercise of jurisdiction in this suit which arises directly out of those contracts.

Equally significant, Mr. Codella *sought out* Mr. Brickman and initiated the contacts with North Carolina from which this claim arises. In *J. M. Thompson Co. v. Doral Manufacturing Co.* this Court stated:

> What contacts with the forum state constitute minimum contacts for jurisdictional purposes is ultimately a fairness determination: the defendant's conduct and connection with the forum state must be such that it "reasonably anticipate[s] being haled into court there." (Citation omitted.)

Id. at 425, 324 S.E. 2d at 913. According to the United States Supreme Court, due process requires that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King v. Rudzewicz*, --- U.S. ---, 85 L.Ed. 2d at 540, 105 S.Ct. at --- (1985) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 53 L.Ed. 2d 683, 97 S.Ct. 2569 (1977)

(Stevens, J., concurring)). The "'fair warning' requirement is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum (citation omitted), and the litigation results from alleged injuries that 'arise out of or relate to' those activities (citation omitted)." *Id.* at ---, 85 L.Ed. 2d at 541, 105 S.Ct. at ---. Mr. Codella's contacts with North Carolina were not random, casual, or fortuitous, but were "purposefully directed" toward Mr. Brickman in order to obtain his financial assistance with a new business venture whereby Mr. Codella sought personal commercial benefit. Thus, he should reasonably have anticipated that he might be required to litigate in North Carolina any suit arising from his solicitation of business here.

Finally, we consider the factors of convenience to the parties and the state's interest. Without question, North Carolina has a legitimate interest in protecting its residents in the making of contracts with nonresidents who solicit business within its borders. Moreover, there is no evidence that requiring Mr. Codella to defend in this forum will place him at a severe disadvantage or subject him to greater inconvenience than the inconvenience to the Brickmans of litigating their claim in New York. Nor is there any indication that material witnesses or evidence are available only in New York.

When an individual "who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King v. Rudzewicz*, --- U.S. at ---, 85 L.Ed. 2d at 544, 105 S.Ct. at ---. This Mr. Codella has failed to do.

For the foregoing reasons, we conclude that it is just and reasonable to subject Mr. Codella to the jurisdiction of North Carolina for the litigation of his obligations to Mr. and Mrs. Brickman pursuant to his guaranty.

Affirmed.

Judges WEBB and EAGLES concur.

JAMES TAYLOR v. MARGARET R. PARDEE MEMORIAL HOSPITAL AND LIBERTY MUTUAL INSURANCE COMPANY

No. 8610IC533

(Filed 25 November 1986)

1. **Master and Servant § 65.2— workers' compensation—back injury—finding not supported by evidence—no prejudice**

The Industrial Commission erred in a workers' compensation case by finding that a CAT scan revealed a five millimeter protrusion at the L5-S1 disc space where plaintiff's expert witness obviously misread the examining radiologist's report; however, there was no prejudice because there was uncontroverted evidence that a second CAT scan revealed a three or four millimeter protrusion and there was expert testimony that a three to four millimeter protrusion could cause the type of pain complained of by plaintiff.

2. **Master and Servant § 65.2— workers' compensation—back injury—findings supported by evidence**

There was sufficient competent evidence to support the Commission's finding that plaintiff had sustained a minimal compression fracture in his back in a fall, even though there was evidence which could support a finding to the contrary.

3. **Master and Servant § 65.2— workers' compensation—back injury—total and permanent disability—evidence sufficient**

The evidence in a workers' compensation case supported the Industrial Commission's finding that plaintiff was permanently disabled and entitled to compensation under N.C.G.S. § 97-29 where both of plaintiff's expert witnesses rated him as 100 percent disabled; plaintiff was sixty-two years old; plaintiff had attended college but never received a degree; had worked as a registered nurse for twenty-four years; experienced after his fall continuous pain radiating across his left hip and down his left leg; could not walk without crutches; had to be careful when bending; could not stoop or twist and had to sit on a stool in order to pick up anything from the floor; had to lie down frequently; and could sit for no longer than fifteen minutes before experiencing pain.

4. **Master and Servant § 69— workers' compensation—back injury—total and permanent disability—benefits**

Plaintiff was not limited to recovery under N.C.G.S. § 97-31 for a back injury and an award under N.C.G.S. § 97-29 for permanent total disability was proper where plaintiff's evidence supported the Industrial Commission's finding that plaintiff was unable to work as a nurse or at any other employment and that his incapacity to work was caused by his work-related injuries.

APPEAL by defendants from the opinion and award of the Industrial Commission filed 23 January 1986. Heard in the Court of Appeals 28 October 1986.

Taylor v. Pardee Hospital

This is a workers' compensation case. On 30 April 1981 plaintiff injured his back while working as a staff nurse for defendant hospital. The deputy commissioner concluded that plaintiff was totally and permanently disabled and awarded compensation pursuant to G.S. 97-29. The Full Commission adopted as its own the opinion and award of the hearing commissioner and affirmed relying on *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985).

The deputy commissioner's findings, adopted by the Full Commission, may be summarized as follows: Plaintiff is a 62 year old registered nurse who worked for defendant hospital for approximately 15 years. His job duties included administering shots, giving intravenous solutions, making rounds with the doctors and generally caring for and attending to patient needs. On any given work day plaintiff spent most of the time on his feet. In 1977 plaintiff fell and hit the right side of his back causing muscle spasms. He recovered from this injury. In 1979 plaintiff broke his ankle. As a result of this injury, plaintiff had a 35 percent permanent partial disability to the left leg. Plaintiff's injury in this litigation occurred when he slipped on a pen and fell to the floor, injuring his lower back, left hip and left leg. The deputy commissioner found that plaintiff "had a minimal compression fracture at T3 and T4 and acute lumbar strain which did not resolve. Although a myelogram was negative, a CAT scan performed in February 1982, showed a five millimeter protrusion at the L5, S1 level." Since his April 1981 accident, plaintiff has experienced continuous pain in his lower back, radiating to his left hip and leg. Plaintiff reached maximum medical improvement in March 1982, but has a permanent partial impairment of his back of 20 percent.

From an award of medical expenses and compensation at a weekly rate of $184.43 for the remainder of plaintiff's life, defendants appeal.

Jackson & Jackson by Frank B. Jackson and Charles Russell Burrell for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis by Marla Tugwell for defendant-appellants.

EAGLES, Judge.

Our review of an Industrial Commission award is limited to two questions: (1) whether there is competent evidence before the Commission to support its findings, and (2) whether the findings support its legal conclusions. *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E. 2d 101 (1981).

I

[1] Defendants first assign error to the Commission's finding that a February 1982 CAT scan revealed a five millimeter protrusion at the L5-S1 disc space. This finding is in error. While Dr. McConnachie, plaintiff's expert witness, did testify that the February 1982 CAT scan revealed a five millimeter protrusion at the L5-S1 level, the report of the examining radiologist states that "[f]ive millimeter contiguous axial slices were taken" and that there is a "moderate, central, symmetric protrusion at the L5-S1 disc space." In reviewing the report, Dr. McConnachie obviously misread the "five millimeter contiguous axial slices" to be a "five millimeter protrusion."

To warrant reversal, the Industrial Commission's error must be material and prejudicial. *Vaughn v. Dept. of Human Resources*, 37 N.C. App. 86, 245 S.E. 2d 892 (1978), *aff'd*, 296 N.C. 683, 252 S.E. 2d 792 (1979). The Commission's finding that the February 1982 CAT scan revealed a five millimeter protrusion at the L5-S1 disc space level, while erroneous, is not prejudicial under the facts of this case. There was uncontroverted evidence before the Commission that a second CAT scan was ordered by Dr. McConnachie in April 1983. This CAT scan revealed a three to four millimeter protrusion at the L5-S1 disc space. Both Dr. McConnachie and Dr. McGhee, one of defendants' expert witnesses, testified that a three to five millimeter protrusion is medically significant and could cause the type of pain complained of by the plaintiff.

We must determine whether the evidence is sufficient to support the critical findings necessary to permit an award of compensation. *Keller v. Wiring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963). The Commission erred in finding the extent of the protrusion to be five millimeters instead of three to four millimeters. However, the actual length of the protrusion is relevant only as to the cause

of plaintiff's pain. The evidence is clear from both Dr. McConnachie and Dr. McGhee that a three to four millimeter protrusion at the L5-S1 disc space could cause plaintiff's pain. This evidence is sufficient to support the critical finding that there existed a protrusion at the L5-S1 disc space medically significant enough to cause plaintiff's pain. The fact that the Commission erred when stating the extent of the protrusion is not prejudicial. This assignment of error is overruled.

II

[2] Defendants also assign error to the Commission's finding that plaintiff "had a minimal compression fracture at T3 and T4." Defendants contend that the medical evidence presented does not support a finding that the compression fracture was caused by plaintiff's fall in April 1981. We disagree.

X-rays were taken of plaintiff's thoracic spine following his fall in 1981. Dr. Montgomery's notes state that the x-rays reveal a 15 percent wedge of T3 and possibly a 10 percent wedge of T4 and that plaintiff "apparently sustained a slight compression fracture at about T3 and T4, with his fall of April 1981." Dr. McConnachie also examined plaintiff's x-rays and noted "some wedging of T3"; however, Dr. McConnachie could not say that the fracture was caused by plaintiff's fall in April 1981. Dr. McConnachie opined that the fracture might have been caused by plaintiff's fall in 1977.

We believe there is sufficient competent evidence to support the Commission's finding that plaintiff "had a minimal compression fracture at T3 and T4." Findings of fact supported by competent evidence are conclusive on appeal, even though there is evidence which could support a finding to the contrary. *Hansel v. Sherman Textiles, supra.* This assignment of error is overruled.

III

[3] Defendants assign error to the Commission's conclusion that plaintiff is permanently and totally disabled and entitled to compensation under G.S. 97-29. Defendants argue that the evidence does not support a finding that plaintiff is permanently and totally disabled. Whether a disability exists is a conclusion of law which must be based on findings of fact supported by competent evidence. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d

682 (1982). G.S. 97-2(9) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

Our Supreme Court has stated that in order to support a conclusion of disability, the Commission must find: (1) that plaintiff after his injury was incapable of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that plaintiff's incapacity to earn was caused by his injury. *Hilliard v. Apex Cabinet Co., supra.* If the plaintiff is unable to work and earn *any* wages he is totally disabled. If he is able to work and earn *some* wages, but less than he was receiving at the time of his injury, he is partially disabled. *Robinson v. J. P. Stevens*, 57 N.C. App. 619, 292 S.E. 2d 144 (1982).

The Commission found as fact that because of plaintiff's "age, education, training, physical limitations, including back and left leg pain, resulting from his April 1981 injury by accident, plaintiff has been and is totally incapable of earning any wages either as a nurse or as an employee at any other occupation." This finding satisfies the three part test for disability set out in *Hilliard v. Apex Cabinet Co., supra.* This finding is conclusive on appeal if supported by competent evidence. The plaintiff has the burden of proving both the existence of his disability and its degree. *Hall v. Chevrolet Co.*, 263 N.C. 569, 139 S.E. 2d 857 (1965).

Both of plaintiff's expert witnesses, Drs. McConnachie and Eaton, rated plaintiff as 100 percent disabled. Dr. McConnachie testified that because of plaintiff's injuries he would not be able to work again as a nurse and further Dr. McConnachie stated that "to the best of [his] knowledge" he could not think of any work that plaintiff could do. Dr. Eaton testified that plaintiff could no longer work as a nurse. As to any other type of employment, Dr. Eaton stated:

> I mean, you know, he could answer the phone at home, or, you know, soliciting on the phone or something like that, you know, where he didn't have to get up and walk around.
>
> . . .

> He can't sit for prolonged periods of time. He can't lift overhead. I mean, it's not just moving patients that he can't do. He can't walk around. Couldn't be an effective store clerk. He couldn't run a convenience store. He couldn't pump gas. He couldn't, you know, work at General Electric making light bulbs.

Plaintiff testified that he is 62 years old, that he has a high school education and attended college but never received a degree. At the time of his accident in 1981 he had worked as a registered nurse for 24 years. Plaintiff testified that since his fall in April 1981 he has experienced continuous pain radiating across his left hip and down his left leg. He cannot walk without crutches. He must be very careful when bending. He cannot stoop or twist and he must sit on a stool in order to pick up something from the floor. He must frequently lie down, as much as 12 hours a day. He can sit no longer than 15 minutes before experiencing pain.

Plaintiff's evidence supports the Commission's finding that because of plaintiff's "age, education, training, physical limitations, including his back and left leg pain, resulting from his April 1981 injury by accident, plaintiff has been and is totally incapable of earning any wages either as a nurse or as an employee at any other occupation." The finding is conclusive and binding on appeal.

[4] Defendants also argue that it was error for the Commission to award compensation under G.S. 97-29 because all of plaintiff's injuries are compensable under G.S. 97-31. The Commission found that plaintiff has "a permanent partial impairment to his back of 20%." Defendants, relying on *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), argue that plaintiff's exclusive remedy is under G.S. 97-31 for permanent partial disability to the back. In *Perry* the employee suffered a work-related injury to his back. The medical experts agreed that he lost between 25 and 75 percent of the use of his back and that he was unable to engage in gainful employment. The Industrial Commission awarded compensation under G.S. 97-31(23). The employee appealed arguing that he was entitled to compensation for permanent total disability under G.S. 97-29. The Supreme Court disagreed and held that G.S. 97-31 was the exclusive remedy. The Court quoting G.S. 97-31 and emphasizing the phrase "in lieu of all other compensation" held that:

> The language of G.S. 97-31 . . . compels the conclusion that if by reason of a compensable injury an employee is unable to work and earn *any* wages he is totally disabled, G.S. 97-2(9), and entitled to compensation for permanent total disability under G.S. 97-29 *unless all his injuries are included in the schedule set out in G.S. 97-31.* In that event the injured employee is entitled to compensation exclusively under G.S. 97-31 regardless of his ability or inability to earn wages in the same or any other employment.

Id. at 93-94, 249 S.E. 2d at 401.

More recently in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986), our Supreme Court revisited and reconsidered the interpretation given to the "in lieu of" clause in G.S. 97-31 by *Perry*. In *Whitley* the Court held that the clause "does not prevent a worker who qualifies from recovering lifetime benefits under [G.S. 97-29] and *Perry*, to the extent it holds otherwise, should be overruled." *Id.* at 96, 348 S.E. 2d at 340. The Court interpreted the "in lieu of" clause to prevent an employee from receiving compensation under both G.S. 97-29 and 97-31. "Section 29 is an alternate source of compensation for an employee who suffers an injury which is also included in the schedule [under G.S. 97-31]. The injured worker is allowed to select the more favorable remedy, but he cannot recover compensation under both sections because section 31 is 'in lieu of all other compensation.' " *Id.* at 96, 348 S.E. 2d at 340.

Following *Whitley*, we hold that plaintiff is not limited to recovery under G.S. 97-31. Plaintiff's evidence supports the Commission's finding that plaintiff is unable to work as a nurse or at any other employment and that plaintiff's incapacity to work is caused by his work-related injuries. This finding supports the conclusion that plaintiff is totally and permanently disabled. The award under G.S. 97-29 is proper.

Affirmed.

Judges ARNOLD and JOHNSON concur.

INVESTORS TITLE INSURANCE COMPANY v. DAVID F. HERZIG, JERRY S. CHESSON, SOUTHEASTERN SHELTER CORPORATION, LEE L. CORUM, AND EVERETT, CREECH, HANCOCK & HERZIG, A PARTNERSHIP

No. 8614SC500

(Filed 25 November 1986)

Insurance § 148; Partnership § 5— certification of own title by attorney—partnership not liable

Summary judgment was properly granted for a law partnership in an action by a title insurance company arising from the certification of his own title by a firm member where it was clear from defendant's evidence that Herzig certified title to his own property to obtain a personal loan and not to further any partnership business; the only connection between Herzig's actions and the partnership was the way he signed the title certificate; the firm received no compensation for the title certificate, no benefits from the loan, and had no knowledge that Herzig had certified title to his own property in the name of the partnership; and the title certificate showed on its face that Herzig owned the property individually. An ordinarily prudent person in plaintiff's position as a title insurance company would have been put on notice that Herzig was acting on his own account and not within the scope of his apparent authority; the test is not whether plaintiff had notice that the alleged agent's acts were wrongful, but whether plaintiff had notice that the alleged agent's acts were on his own account in his individual capacity and not in furtherance of the partnership business.

APPEAL by plaintiff from *Herring, Judge*. Judgment entered 30 January 1986 in Superior Court, DURHAM County. Heard in the Court of Appeals 15 October 1986.

This is an action for fraud, conspiracy, and unfair and deceptive trade practices in violation of G.S. 75-1.1 against defendant Herzig, individually, and for negligence and breach of warranty against defendants Herzig and Everett, Creech, Hancock & Herzig, a law partnership.

The essential facts are:

On 15 April 1981, defendant David F. Herzig, a licensed attorney, certified title to plaintiff to real property located in Vance County in which Herzig was the owner and mortgagor. The real property in question was pledged as security for a $30,000 loan to Herzig by Planters National Bank and Trust Company. The attorney's final title certificate submitted by Herzig to plaintiff stated that there were certain reversionary clauses affecting the

property but that none were violated. The title certificate was signed by Herzig beneath the words "Everett, Creech, Hancock & Herzig," beside the word "By" and above the words "Member of the Firm."

After submission of the title certificate, plaintiff issued title insurance policy number 3367-D insuring Planters National Bank and Trust Company in the amount of $30,000. The policy insured that a violation of the restrictions on record would not result in a reversion or forfeiture of title to the property. In fact, there were violations of restrictions contained in the chain of title, and certain of these violations resulted in a right of reversion to the City of Henderson. Defendant Herzig subsequently defaulted on his indebtedness to Planters National Bank.

In its amended complaint, plaintiff alleged that Herzig was an agent for the defendant partnership Everett, Creech, Hancock & Herzig and had acted as the partnership's agent when he certified title. Plaintiff amended its complaint to include two additional causes of action against the partnership for negligence and breach of warranty under the title certificate.

Prior to answering, the defendant partnership moved for summary judgment as to both causes of action. The trial court granted the partnership's motion and denied plaintiff's motion for summary judgment. Plaintiff appeals.

Mount, White, Hutson & Carden by James H. Hughes and Stephanie C. Powell for plaintiff-appellant.

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

EAGLES, Judge.

Plaintiff's claims against the defendant partnership are based on the premise that defendant Herzig was acting as an agent of the partnership when he certified title to the plaintiff. Specifically, plaintiff contends that Herzig executed the title certificate in the name of the partnership "for apparently carrying on in the usual way the business of the partnership" and had apparent authority to bind the partnership under G.S. 59-39(a). Plaintiff also contends that because Herzig acted within "the ordinary course

of the business of the partnership," the partnership is liable in tort under G.S. 59-43 for Herzig's wrongful acts.

G.S. 59-39(a) provides that every partner is the agent of the partnership "for the purpose of its business," and that:

> [T]he act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

G.S. 59-39(b) states that if the partner's act is not for apparently carrying on the business of the partnership in the usual way, it does not bind the partnership unless authorized by the other partners. G.S. 59-39(b). As to partnership tort liability, G.S. 59-43 provides:

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

Here, plaintiff does not claim that the partnership authorized Herzig to act as he did. Plaintiff contends that defendant Herzig had apparent authority to bind the partnership. Assuming *arguendo* that Herzig's actions were fraudulent, negligent and in breach of the warranties and representations made in the title certificate, the crucial consideration in determining the partnership's liability under the statutes is whether Herzig's actions were "for apparently carrying on in the usual way the business of the partnership" (G.S. 59-39(a)) or were within "the ordinary course of the business of the partnership" (G.S. 59-43). In the absence of authority expressly conferred, the statutes make it clear that a partner's authority to bind his firm is restricted to things done by him within the scope of partnership business.

The apparent scope of partnership business depends upon the conduct of the partnership and its partners and what, by that con-

duct, they cause third persons to believe about the authority of the partners. *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). That an act is within the scope of the partnership business is presumed "where the business done by the supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and where, as to the transaction in question, the third party was justified in believing that an agency existed." *Id.* at 35, 209 S.E. 2d at 802 (quoting *Blackmon v. Hale*, 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P. 2d 418). If, however, the third party has knowledge of the fact that he is dealing with a partner acting in his individual capacity, the partnership will not be bound. *Id. See 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).

The existence or non-existence of apparent authority is determined from the standpoint of the third person. The principal's liability must be determined by "what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent." *Zimmerman v. Hogg & Allen*, 286 N.C. at 31, 209 S.E. 2d at 799. If the facts and circumstances reveal that an ordinarily prudent person in the plaintiff's position would have been put on notice that the alleged agent was not acting within the apparent scope of his authority then the principal is not bound. *Id.* It makes no difference that the alleged agent was acting on his own behalf (and not on behalf of the partnership) when the wrongful acts were committed *unless* the third party dealing with him had notice of that fact. *Parsons v. Bailey, supra.*

> It would seem to be clear that if the agent is purporting to act as an agent and doing the things which such agents normally do, and the third person has no reason to know that the agent is acting on his own account, the principal should be liable because he has invited third persons to deal with the agent within the limits of what, to such third persons, would seem to be the agent's authority. To go beyond this, however, and to permit the third persons to recover in every case where the agent takes advantage of the standing and position of his principal to perpetuate a fraud would seem to be going too far.

30 N.C. App. at 502, 227 S.E. 2d at 168-69 (quoting Restatement (Second) of Agency Section 261, Reporters Notes).

Applying these principles, it is clear from defendant's evidence that Herzig certified title to his own property to obtain a personal loan and not to further any partnership business. The only connection between Herzig's actions and the partnership is the manner in which Herzig signed the title certificate. The affidavits from other members of the partnership reveal that the firm received no compensation for the title certification performed by Herzig, received none of the proceeds or any other benefit from the underlying loan transaction and had no knowledge that Herzig had certified title to his own property in the name of the partnership. More importantly though, the title certificate showed on its face that Herzig owned the property individually. No client of the firm appeared in the transaction. The title insurance policy states that a deed of trust from "David F. Herzig (single)" secures the sum of $30,000.00. The purpose of the transaction was personal, on David Herzig's own account and not for the purpose of furthering any business of the partnership.

We believe that defendant met its summary judgment burden by showing that no genuine issue of material fact existed for trial because Herzig's acts were not "for apparently carrying on in the usual way the business of the partnership" and were not "within the ordinary course of the business of the partnership." Further, we believe that under these facts and circumstances an ordinarily prudent person in plaintiff's position as a title insurance company would have been put on notice that Herzig was acting on his own account, in his individual capacity and for his own benefit and hence not within the scope of his apparent authority. *See Zimmerman v. Hogg & Allen, supra; Parsons v. Bailey, supra,* and *Rowe v. Franklin County,* 318 N.C. 344, 349 S.E. 2d 65 (1986).

Plaintiff argues that notice on the face of the title certificate that Herzig was owner and mortgagor of the property was not notice that Herzig was acting in his individual capacity. Plaintiff relies on Ethical Opinion, C.P.R. 254, dated 18 January 1980, effective at the time of the actions complained of, which permitted a lawyer to issue a title opinion regarding real property that he owned if he fully disclosed his beneficial interest. Plaintiff argues that because attorneys were allowed to certify title to their own

property that "plaintiff could not have known from the face of the title certificate that Herzig's actions were wrongful and without authority." Plaintiff's argument misses the point. Under the appropriate principles of agency law and apparent authority, the test is not whether plaintiff had notice that the alleged agent's acts were wrongful but whether plaintiff had notice that the alleged agent's acts were on his own account, in his individual capacity and not in furtherance of partnership business.

Once defendant met its summary judgment burden, the burden shifted to plaintiff to show that a genuine issue of material fact existed for trial or to provide an excuse for not doing so. *Zimmerman v. Hogg & Allen, supra.* By proving no more than the manner of Herzig's signature, plaintiff failed to meet its burden. Summary judgment for defendant partnership was proper.

Affirmed.

Judges WEBB and BECTON concur.

STATE OF NORTH CAROLINA v. WILLIE GENE McLEAN, JR.

No. 8620SC595

(Filed 25 November 1986)

1. Criminal Law § 66.9— photographic identification—array unduly suggestive—no substantial likelihood of misidentification

A photographic array used to identify defendant as an armed robber was suggestive where the robber was described by the witness as a black man with a light complexion and defendant was the only light complexioned black in the array, a feature which was emphasized by the overexposure of defendant's photograph. However, there was not a substantial likelihood of misidentification because defendant was in the motel lobby where the robbery occurred for about a minute; he had draped a yellow sweatshirt over his head, but hurriedly, so that it did not completely obscure his facial features; the lobby was well lit by bright fluorescent lighting; the witness looked intently at the robber because he could not understand what the robber was saying and was trying to read his lips; the witness accurately described defendant, except for his height, which the witness said was five feet four inches to five feet six inches, while defendant is closer to five feet; and the witness demonstrated ninety percent certainty of his identification at the photographic array.

2. **Criminal Law § 66.16— suggestive photographic identification—independent in-court identification**

An in-court identification of defendant as an armed robber was not tainted by suggestive photographic identification procedures.

3. **Criminal Law § 134.4— pending charges—committed youthful offender status denied—error**

Defendant was granted a new sentencing hearing for an armed robbery conviction where a comment by the judge suggested that defendant was denied committed youthful offender status based on pending charges for armed robbery and assault with a deadly weapon inflicting serious injury. N.C.G.S. § 148-49.14.

APPEAL by defendant from *Williams (Fred J.), Judge.* Judgment entered 24 July 1985 in Superior Court, MOORE County. Heard in the Court of Appeals 18 November 1986.

Defendant was convicted of armed robbery and sentenced to the mandatory minimum of fourteen years imprisonment. This Court granted defendant's petition for certiorari on 21 February 1986 to consider defendant's contentions related to the pre-trial identification procedures and to his sentencing.

On 13 December 1984, the EconoLodge Motel in Aberdeen was robbed by two men armed with handguns. The first man came in, brandished his gun and ordered the clerk, Kevin Kinlaw, to "open the drawer." As Kinlaw was getting cash out of the drawer, the second man came in. This man, also carrying a gun, had thrown a sweatshirt over his head in an attempt to cover his face. The second man ordered Kinlaw to open the safe. Kinlaw complied, handing the second man three bags of money from the safe. The two men then fled. The entire robbery lasted about ninety seconds, according to Kinlaw, and the second man was in the motel lobby for about forty-five seconds to a minute.

The police were called and Kinlaw described the robbers to them. He described the second man as a black man of light complexion and no facial hair. This man was short, approximately five feet, four to six inches tall, and he was wearing a yellow sweatshirt thrown over his head which hung down over his face and obscured his features. A few weeks after the robbery, Kinlaw picked defendant's picture out of an array of photographs and, two weeks after that, picked defendant at a live line-up, identifying him as the second robber.

At trial, defense counsel moved to suppress the evidence of the photographic array and the physical line-up, contending both were unnecessarily and impermissibly suggestive. Defense counsel also sought to prohibit any in-court identification of defendant by Kinlaw as being irreparably tainted by these suggestive procedures.

After a lengthy *voir dire*, the trial court granted defendant's motion to suppress the evidence of the physical line-up. As to the photographic array and the in-court identification, the motions were denied. Kinlaw was permitted to testify about the photo line-up and to make an in-court identification. On the strength of this evidence, defendant was convicted of robbery with a dangerous weapon.

At sentencing, the judge denied a motion by defense counsel to have defendant sentenced as a Committed Youthful Offender. Apparently, the basis for this denial was that defendant had charges pending against him for another armed robbery.

This Court granted defendant's petition for writ of certiorari on 21 February 1986 to consider the questions raised by the admission of evidence concerning the photographic array, the in-court identification and the denial of CYO status for defendant.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General Guy A. Hamlin for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt for defendant-appellant.

PARKER, Judge.

[1] Defendant first contends that the trial court erred in allowing the robbery victim, Kevin Kinlaw, and a police officer to testify concerning the identification by Kinlaw of defendant from a photographic line-up. Defendant argues that the photographic array was impermissibly suggestive, resulting in a "substantial likelihood of misidentification." *State v. Hannah*, 312 N.C. 286, 290, 322 S.E. 2d 148, 151 (1984). Impermissibly suggestive line-up procedures violate the due process rights of a defendant, and the usual remedy is to suppress the evidence of the array, and possibly to prohibit the witness from making an in-court identifica-

tion of the defendant. *See State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978).

In analyzing claims of impermissibly suggestive pre-trial identification procedures, our courts apply a two-step process. *See Hannah, supra.* The first step is to determine whether the pre-trial identification procedure was, in fact, "suggestive." Only if the conclusion is that the procedure was tainted do we proceed to the second step. *State v. Leggett*, 305 N.C. 213, 287 S.E. 2d 832 (1982). The second question is whether, under all the circumstances, the tainted procedures "give rise to a very substantial likelihood of irreparable misidentification." *State v. Grimes*, 309 N.C. 606, 609, 308 S.E. 2d 293, 294 (1983).

When considering the first question, that is, whether the pre-trial identification procedures utilized were suggestive, the determinative inquiry is whether, under all the circumstances, the procedures were "so unnecessarily suggestive and conducive to irreparable mistaken identity as to offend fundamental standards of decency and justice." *Hannah* at 290, 332 S.E. 2d at 151. The trial court concluded that the physical line-up was impermissibly suggestive and the State has not appealed this ruling. Therefore, we need only consider the circumstances of the photographic array.

The witness, Kinlaw, was asked to come to the police station on or about 11 January 1985, nearly a month after the robbery, to view a photographic line-up of eight pictures. Each of the pictures was of a black man taken of only the upper torso and face. The most distinguishing characteristic of defendant—his height—was not discernible from the photograph. However, Kinlaw had described the second robber as having a light complexion. Defendant was the only noticeably light-complexioned black in the array. This feature was emphasized by the overexposure of defendant's photo.

Despite this, the trial court concluded that the photographic array did not violate defendant's due process rights. The court found as fact that the photos "are not clear with respect to whether there is one or more individuals who is of a light complexion . . . ." If supported by competent evidence, the trial court's findings of fact are binding on appeal. *State v. Corbett*, 309 N.C. 382, 307 S.E. 2d 139 (1983). However, a review of the transcript of the *voir dire* shows that the two witnesses who

testified about the photos noticed a clear difference in complexion of the men in the photos. The array itself was included in the record on appeal and reviewing it reveals that defendant stands out as clearly the man with the lightest complexion of the group. The trial court's finding to the contrary is, in our opinion, erroneous and should be set aside.

Based upon the record, we believe that the photographic array of 11 January 1985 was suggestive. Having made this determination, we must next review whether, under all the circumstances, the suggestive procedure gave rise to a "very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 164, 301 S.E. 2d 91, 95 (1983). The factors used by our courts in making this determination were outlined in *State v. Wilson*, 313 N.C. 516, 330 S.E. 2d 450 (1985):

> (1) the opportunity of the witness to view the individual at the time of the event; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the individual; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the event and the confrontation.

Id. at 529, 330 S.E. 2d at 460.

Applying the facts of this case to the factors listed above, we conclude that there was not a "very substantial likelihood of misidentification." *Harris, supra.* The witness, Kinlaw, testified that the second robber, allegedly the defendant, was in the motel lobby for about a minute. He had draped a yellow sweatshirt over his head, but hurriedly, so that it did not completely obscure his facial features. The lobby of the motel was well lighted by bright fluorescent lighting. Kinlaw testified that he looked intently at the second robber because he could not understand what the robber was saying and was trying to read his lips. Kinlaw's description of the robber accurately described the defendant except for defendant's height, which Kinlaw said was five-four to five-six, while defendant is closer to five feet tall. Kinlaw demonstrated "ninety per-cent" certainty of his identification of defendant at the photographic array. Although the identification procedures took place a month or more after the robbery, and Kinlaw incorrectly gauged defendant's height, we conclude that the facts support the trial court's findings of fact and conclusions of law that

the photographic array did not lead to a "very substantial likelihood of irreparable mistaken identification." Evidence of the photographic array was properly admitted.

[2] Defendant next contends that the in-court identification of him by Kinlaw violated his due process rights as it had been tainted by the suggestive identification procedures utilized by the police. We disagree. The in-court identification of defendant was of origin independent of the pre-trial procedures. The factors outlined above used in determining the likelihood of misidentification from a suggestive identification procedure are the same factors used to determine whether an in-court identification was of "independent origin." *Wilson, supra.* Applying those same factors, we conclude that the in-court identification was of "independent origin" and was properly allowed.

[3] Finally, defendant contends that he was improperly denied status as a Committed Youthful Offender under G.S. 148-49.14, as the trial court improperly considered unresolved charges pending against defendant in sentencing defendant as an adult offender. Defendant was nineteen years old at the time of sentencing, but the trial court made a finding that defendant would not benefit as a Committed Youthful Offender, pursuant to the requirements of G.S. 148-49.14.

Normally, such a finding is made in the discretion of the trial judge and is reviewable on appeal only for an abuse of that discretion. *State v. Harris*, 67 N.C. App. 97, 312 S.E. 2d 541, *appeal dismissed and cert. denied*, 311 N.C. 307, 317 S.E. 2d 905 (1984). However, the trial court must base its exercise of discretion on evidence presented at trial and at the sentencing hearing. *State v. Lewis*, 38 N.C. App. 108, 247 S.E. 2d 282 (1978). Charges pending against a defendant are purely hearsay and not admissible as evidence. *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). Therefore, if the trial court based its "no benefit" finding on the pending charges, that was error and a new sentencing hearing would be required.

During the sentencing hearing, the State introduced an exhibit which was a certified list of defendant's prior convictions and pending charges. The two prior convictions were both misdemeanors, but the pending charges were another armed robbery and assault with a deadly weapon inflicting serious injury. During

the arguments of counsel on sentencing, the trial judge said to defense counsel, "I have one concern, more than any other. . . . I am concerned with the nature of those charges. . . . How would you justify . . . Committed Youthful Offender status in light of the other pending charges?" This comment suggests that the trial judge denied defendant CYO status based on incompetent evidence. We cannot speculate as to what the trial judge might have ruled had the incompetent evidence not been tendered. Therefore, there must be a new sentencing hearing.

No error in the trial.

Remanded for resentencing.

Judges WEBB and EAGLES concur.

MICHAEL DOUGLAS FOWLER v. DALENDAR SYLVESTER GRAVES AND ANGELA COBB GRAVES

No. 8617SC124

(Filed 25 November 1986)

1. **Automobiles and Other Vehicles § 83.2— pedestrian struck by automobile—contributory negligence—properly submitted to jury**

In an action arising from an accident in which an automobile struck a pedestrian, the trial judge did not err by denying defendant driver's motions for a directed verdict and for a judgment n.o.v. based on plaintiff pedestrian's contributory negligence where, in the light most favorable to plaintiff, the evidence showed that plaintiff saw defendant approaching on the wrong side of the road; plaintiff assumed defendant would return to his side of the road; plaintiff went to the door on the driver's side of his automobile, which was in the path of the oncoming vehicle; defendant did not return to his side of the road; and plaintiff was struck. The jury could have found contributory negligence, but it was not the only conclusion they could have drawn.

2. **Automobiles and Other Vehicles § 45.8— automobile accident—exclusion of testimony that plaintiff drinking—harmless error**

In an action arising from an accident in which plaintiff pedestrian was struck by defendant's automobile, defendant was not prejudiced by the exclusion of testimony from a nurse-anesthetist that plaintiff's mother and wife had told her that plaintiff had been drinking all day because plaintiff's mother was not with plaintiff for several hours before the accident and defendant elicited testimony from people who were with plaintiff that he had been drinking beer.

3. **Automobiles and Other Vehicles § 46— highway patrolman's opinion as to speed—based on skid marks—admission erroneous**

There was prejudicial error in an action arising from an accident in which a pedestrian was struck by an automobile in the admission of a highway patrolman's estimate of defendant's speed based on his observation of skid marks.

4. **Automobiles and Other Vehicles § 83.2— pedestrian struck by automobile—contributory negligence—instructions—no error**

In an action by a pedestrian who was struck by an automobile, the court did not err by refusing to instruct the jury that they must find that there was contributory negligence if they determined that plaintiff had violated N.C.G.S. § 14-444.

5. **Automobiles and Other Vehicles § 46.1— automobile accident—opinion of physician—similarity of head injury symptoms to intoxication—admissible**

The trial court did not err in an action by a pedestrian who had been struck by an automobile by admitting the opinion of plaintiff's physician on the similarity between the symptoms of a person suffering a head injury and those typically associated with intoxication.

APPEAL by defendant from *Wood, Judge.* Judgment entered 7 October 1985 in Superior Court, CASWELL County. Heard in the Court of Appeals 18 August 1986.

This is an action for personal injury in which the plaintiff has alleged that he was injured by the defendant's negligent operation of an automobile. The plaintiff's evidence tends to show that on 24 October 1981 he and several friends drove to an area in Caswell County known as "the pavement" to socialize, drink beer and await the arrival of the defendant, another of the plaintiff's friends. "The pavement" is a several mile dead-end road, at one time part of Highway 86 but now closed off from the main highway. There is little traffic in the area other than local people who gather there on weekends.

When the plaintiff arrived at "the pavement" he parked his car on the shoulder approximately ninety feet east of a bridge with two feet of the car extending into the westbound lane of travel. The defendant approached in the eastbound lane. When he arrived at the bridge the defendant pulled his car toward the middle of the bridge, straddling the center line. The plaintiff testified that the defendant accelerated as he crossed the bridge. At this point the plaintiff and his companions were standing behind his parked car. Realizing that the defendant had not returned to his

proper lane the plaintiff nonetheless walked from behind his car toward the door on the driver's side. It then became apparent that the defendant would continue to drive along the center line and the plaintiff attempted to dive across the hood of his car. He testified that he walked into the road to get into his car because he thought the defendant would "whip over into his lane." The plaintiff was struck by the defendant's car and sustained injuries necessitating surgery and a lengthy hospital stay.

The defendant presented testimony from the investigating officer that when he arrived at the accident scene the plaintiff's car was parked squarely in the center of the westbound lane of travel. The defendant also testified that at the time of the accident the plaintiff's car was parked in the center of the lane and that in order for the plaintiff to approach the driver's side door he necessarily stepped into the defendant's proper lane of travel. After crossing the bridge the defendant returned to his proper lane. As he approached the area where the plaintiff's car was parked the plaintiff jumped out from behind his car and directly into the defendant's path giving the defendant no opportunity to avoid an accident.

The jury returned a verdict for the plaintiff in the amount of $50,000.00. From a judgment entered on that verdict the defendant appealed.

George B. Daniel for plaintiff appellee.

Tuggle, Guggins, Meschan & Elrod, P.A., by Fredrick K. Sharpless, for defendant appellant.

WEBB, Judge.

[1] The defendant first assigns error to the denial of his motion for a directed verdict and his motion for judgment notwithstanding the verdict. He argues that all the evidence shows the plaintiff was contributorily negligent as a matter of law. If all the evidence so clearly established the contributory negligence of the plaintiff as one of the proximate causes of the injury, that no other reasonable conclusion is possible, it was error not to allow the defendant's motion for directed verdict and his motion for judgment notwithstanding the verdict. *See Ragland v. Moore*, 299 N.C. 360, 261 S.E. 2d 666 (1980).

In the light most favorable to the plaintiff, the evidence shows in this case that the plaintiff saw the defendant approaching on the wrong side of the road as the defendant crossed the bridge. The plaintiff assumed the defendant would return to his side of the road after he crossed the bridge. The plaintiff then went to the door on the driver's side of his automobile which was in the path of the oncoming vehicle. The defendant did not return to his side of the road and the plaintiff was struck. This is evidence from which the jury could find contributory negligence but we do not believe it is the only conclusion they could draw. The jury could find that the plaintiff was doing what a reasonable man would do when he assumed the defendant would return to his side of the road and avoid striking the plaintiff. It was not error to submit the contributory negligence issue to the jury.

We do not believe *Meadows v. Lawrence*, 75 N.C. App. 86, 330 S.E. 2d 47 (1985), *aff'd per curiam*, 315 N.C. 383, 337 S.E. 2d 851 (1986) and *Hughes v. Gragg*, 62 N.C. App. 116, 302 S.E. 2d 304 (1983), which are relied on by the defendant are helpful to him. In *Hughes*, the evidence showed the deceased stepped in front of an oncoming vehicle in such a way that the driver of the vehicle could not avoid striking him. In this case, the plaintiff's evidence showed that the defendant could have avoided striking the plaintiff. In *Meadows*, all the evidence showed the plaintiff was standing in the path of the defendant's oncoming vehicle and when the defendant turned toward the middle of the road to avoid the plaintiff, the plaintiff moved into the defendant's vehicle. The defendant in that case could not have avoided the plaintiff.

[2] In his second assignment of error the defendant contends the court erred in refusing to allow Susan Bennett, certified nurse-anesthetist, to testify that on the day of the accident the plaintiff's mother and wife told her that the plaintiff had been drinking all day. The plaintiff had been taken to the hospital and the nurse was treating him when his mother allegedly made this statement. The defendant does not argue that this testimony was admissible under G.S. 8C-1, Rule 803(4) which creates an exception to the hearsay rule for statements made for purposes of medical diagnosis or treatment. He argues that it was offered and was admissible to impeach the testimony of the plaintiff's mother that the plaintiff had nothing to drink on the day of the accident. The plaintiff's mother was not with the plaintiff for several hours

before the accident. The jury should have known she did not know whether the plaintiff had been drinking. The defendant elicited testimony from the people who were with the plaintiff that the plaintiff had been drinking beer. The defendant should not have been prejudiced by the exclusion of the testimony of the nurse anesthetist.

[3] The defendant next assigns error to the admission of testimony by the highway patrolman based on his observation of the skidmarks that in his opinion the defendant's vehicle was traveling at a speed of 40 miles per hour. It was held in *Tyndall v. Harvey C. Hines Co.*, 226 N.C. 620, 39 S.E. 2d 828 (1946), that it is error to let a highway patrolman give his opinion as to the speed of a motor vehicle based on his observation of the skidmarks. In that case, the court held that it was prejudicial error because the testimony was material to the issue being tried. The court said excessive speed was a primary act of negligence upon which the plaintiff relied. There was an allegation of excessive speed in the complaint and the court charged on excessive speed. In this case, there was an allegation of excessive speed in the complaint and the court charged on excessive speed as an act of negligence. We believe we are bound to hold under *Tyndall v. Harvey C. Hines Co., supra*, that it was prejudicial error to admit the testimony of the highway patrolman as to his opinion of the speed of the vehicle.

[4] The defendant next assigns error to the court's refusal to instruct the jury that they must find there was contributory negligence if they determined the plaintiff had violated G.S. 14-444. We hold the court made a proper charge on this feature of the case.

[5] By his fifth assignment of error the defendant argues that the court improperly admitted into evidence the opinion of Dr. Musgrave, the plaintiff's physician, concerning the similarity between the symptoms caused by a head injury and those typically associated with intoxication. He argues that this was error because there is no indication in the record that the witness's opinion was based upon reasonable scientific certainty or probability rather than upon "mere speculation or possibility." The record indicates that on cross-examination the witness, qualified as an expert in the field of orthopedic surgery, stated that the plaintiff

experienced inability to answer questions normally, restlessness and disorientation after the accident. On redirect examination the witness stated that those symptoms would be caused by a head injury of the type suffered by the plaintiff. He then stated that this type of head injury could cause an individual to have characteristics similar to those of a person who is intoxicated. We believe the fact that the witness was qualified as a medical expert and had earlier stated that a head injury would cause symptoms of the type suffered by the plaintiff establishes a sufficient foundation to take the witness's opinion out of the realm of mere speculation or possibility.

We do not discuss the defendant's last assignment of error as the question it poses may not arise at a new trial.

New trial.

Chief Judge HEDRICK and Judge WELLS concur.

RANDALL K. ROSE v. THE CURRITUCK COUNTY BOARD OF EDUCATION

No. 861SC626

(Filed 25 November 1986)

1. **Schools § 13.2— probationary principal—resignation—career teacher status retained**

A career teacher assigned duties as a probationary principal may resign those duties and claim rights as a career teacher. N.C.G.S. § 115C-325(d)(2), N.C.G.S. § 115C-325(e).

2. **Schools § 13.2— action by career teacher—applicable statute of limitations**

The applicable statute of limitations for an action against a school board by a career teacher who had been a probationary principal was N.C.G.S. § 1-52(2), for liability created by statute, not N.C.G.S. § 1-53(1), which applies to an action upon contract against a local unit of government.

3. **Schools § 13.2— resignation of probationary principal—issue of fact as to whether plaintiff resigned as career teacher—summary judgment improper**

The trial judge did not err by denying plaintiff's motion for summary judgment in an action under the Teacher Tenure Act where there was a genuine issue of fact as to whether plaintiff intended to resign as a career teacher or whether he intended to resign only as a principal.

Rose v. Currituck County Bd. of Education

APPEAL by plaintiff from *Brown, Judge.* Judgment entered 20 February 1986 in Superior Court, CURRITUCK County. Heard in the Court of Appeals 18 November 1986.

This is a civil action in which plaintiff seeks reinstatement as a classroom teacher in defendant's school system, back pay and other benefits arising out of defendant's alleged violation of the Teacher Tenure Act codified as G.S. 115C-325. In its answer, defendant admitted plaintiff was a career teacher who could not be demoted or dismissed without compliance with the Tenure Act, but asserted that plaintiff had not been dismissed but had resigned and was, therefore, not covered by the Act.

Both parties moved for summary judgment and materials submitted at the hearing established the following:

Plaintiff was first employed as a teacher in 1971 and obtained career status at the beginning of the 1975-1976 school year pursuant to G.S. 115C-325(a)(6) and (c)(1). Thereafter, plaintiff was assigned duties as principal for the school years 1980-1981, 1981-1982 and had been employed as a probationary principal for 1982-1983. Plaintiff was not offered nor did he sign any principal's contract for any of these years, but he was paid a principal's salary.

Plaintiff wrote a number of letters to School Superintendent Jeanne Meiggs, which are attached as exhibits to her affidavit. One letter, dated 18 May 1982, asks for a letter of recommendation so that plaintiff can consider other employment possibilities both in and out of education and expresses the hope that he will be remembered for his positive contributions, not his failures, to the system. Another letter dated July 1982 expresses plaintiff's disappointment and distress at being humiliated before the Board of Education and his fellow workers, states that he wants to leave Currituck quietly and with no harsh feelings and again asks for a letter of recommendation so that he can get a fresh start in another area.

A third letter, dated 16 July 1982, and delivered by plaintiff to Superintendent Meiggs read in part:

Dear Board Members,

I hereby resign my duties and responsibilities as principal of J. P. Knapp Jr. High School effective Friday, August 20, 1982. . . .

I would be willing to consider accepting a regular teaching position here in the county and don't intend to give up my status as a tenured teacher. If you are unwilling to honor my career status as a tenured teacher then I am willing to accept a monetary settlement in lieu of my tenure. If you do not intend to offer me either a position or a monetary settlement then I will seek relief through the court system.

Plaintiff received a response dated 16 July 1982 from Superintendent Meiggs which read in its entirety:

Your letter of resignation dated July 16, 1982 effective August 20, 1982 is hereby accepted.

Please be advised that effective, August 20, 1982 you are hereby released from all obligations of your contract of employment with the Currituck County Board of Education.

In his affidavit plaintiff stated:

8. That in the spring of 1982, I informed Superintendent Meiggs that as she was unsatisfied with my performance in the principal's position that I wished to return to a teaching position.

In her affidavit in response, Superintendent Meiggs denied this assertion and further stated:

10. Subsequent to July 16, 1982 I never received any communications of any nature whatsoever from Mr. Rose that he was interested in employment with the Currituck County Schools, the 1983 school year began without Mr. Rose having ever made any inquiry of his assignments, if any, and, on the basis of his previous correspondence to me and the contents of his letter of July 16, 1982 it was my understanding that he had resigned his position with the Currituck County Schools and that I, in accord with the appropriate section of G.S. 115C-325 had released him from his contractual obligations to the school to enable him to pursue other

endeavors as he had indicated to me he wished to do in previous correspondence.

11. Mr. Rose never contacted me about the contents of my July 16, 1982 letter to him accepting his resignation nor, to the best of my knowledge did he ever contact any school official about the same to in any way indicate that there was any misunderstanding.

. . .

14. At the time of Mr. Rose's resignation on July 16, 1982 there were no teaching positions available in Currituck County for which he was certified that had not been filled at the time of his resignation.

Based on the materials submitted, defendant's motion for summary judgment was granted and plaintiff appealed.

Ferguson, Stein, Watt, Wallas and Adkins, P.A., by John W. Gresham for plaintiff-appellant.

White, Hall, Mullen, Brumsey and Small by William Brumsey, III, for defendant-appellee.

PARKER, Judge.

[1] Plaintiff assigns error to the trial court's granting of summary judgment for defendant. In deciding whether this assignment of error is meritorious, we must resolve the underlying question whether, as a matter of law, under the Teacher Tenure Act, a career teacher assigned duties as a probationary principal can resign those duties and claim rights as a career teacher.

We note at the outset that G.S. 115C-325 (formerly G.S. 115-142) does not address this specific question. In construing the statute, we must endeavor to ascertain the legislative intent from the language of the statute and its purpose. The recognized purpose of the Teacher Tenure Act is to provide greater job security for career public school teachers by granting tenure to educators who successfully complete a probationary status. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

As originally drafted, the statute did not contain the second paragraph of G.S. 115C-325(d)(2). This paragraph was added by the

1983 amendment enacted in Chapter 770 of the 1983 Session Laws and entitled "An Act to Clarify the Provisions of the Fair Employment and Dismissal Act." Under this provision, a person retains his or her status as a career teacher during the probationary period as a principal. G.S. 115C-325(d)(2). Therefore, in the instant case, the school board could not have refused to renew plaintiff's principal's contract and dismissed him from employment without satisfying the procedural requirements set forth in G.S. 115C-325(e) for a career teacher.

Defendant argues that because plaintiff resigned he automatically forfeited his rights as a career teacher and the dismissal procedures for career teachers are inapplicable. We do not agree. To hold that a probationary principal cannot resign as a principal and assert his or her rights as a career teacher, in our judgment, would discourage career teachers from seeking to become career principals. Experience teaches that some people who are excellent teachers may discover after a year or two years that they are not suited either by reason of ability or personal preference to administrative duties. For such a person to be forced to sacrifice everything he has earned as a career teacher in order to extricate himself from an administrative position during the probationary period is not in keeping with either the intent or spirit of the Teacher Tenure Act. On the other hand, public policy protecting the best interests of the students and the educational system dictates that the Board of Education and the superintendent should not be permitted to circumvent the statutory requirements respecting a career teacher by letting an unsatisfactory situation continue. We hold, therefore, that plaintiff as a probationary principal had a statutorily protected right in his job as a career teacher and that, absent plaintiff's resignation as a career teacher, defendant could not take this right away without affording him the statutorily mandated procedures of notice and hearing.

[2] Defendant also argues that plaintiff's action filed 25 March 1985 was barred by the two year statute of limitations set out in G.S. 1-53(1), which applies to an action upon a contract against a local unit of government. We do not agree. In our view, the applicable statute of limitations is the three year statute in G.S. 1-52(2) "upon a liability created by statute," and plaintiff's action is not barred.

Since defendant has not shown entitlement to summary judgment as a matter of law, it was error for the trial court to enter summary judgment for defendant. G.S. 1A-1, Rule 56.

[3] Next, we must determine whether the trial court should have granted plaintiff's motion for summary judgment. We hold that the trial court did not err in denying plaintiff's motion. A motion for summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Zimmerman v. Hogg and Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). Considering the affidavits of both parties, including the exhibits attached thereto, we hold there exists a genuine issue of fact as to whether plaintiff intended to resign as a career teacher or whether he intended to resign only as a principal.

In making its determination, the jury is entitled to consider all evidence bearing on the circumstances surrounding plaintiff's resignation including, but not limited to, evidence, if any, of discussions with the superintendent and members of the Board of Education in the spring of 1982 concerning a teaching position, correspondence and conferences between plaintiff and the superintendent and plaintiff's conduct subsequent to the 16 July 1982 letters.

If the jury should determine that plaintiff intended to resign only from his position as a principal, and not as a teacher, then plaintiff would be entitled to a salary adjustment to compensate him for loss of salary and benefits which he suffered because of his improper dismissal. *See Faison v. New Hanover Co. Board of Education*, 75 N.C. App. 334, 330 S.E. 2d 511 (1985).

The order appealed from is reversed and this cause is remanded for a full trial on the merits.

Reversed and remanded.

Judges WEBB and EAGLES concur.

Kerhulas v. Trakas

PAN P. KERHULAS, CO-EXECUTOR AND BENEFICIARY OF THE ESTATE OF MARIE M. PETCHIOS v. GEORGE ANDREW TRAKAS, CO-EXECUTOR OF THE ESTATE OF MARIE M. PETCHIOS, NICHOLAS GEORGE MENTAVLOS, BENEFICIARY AND CO-TRUSTEE UNDER THE WILL OF MARIE M. PETCHIOS, TULA M. COLLIAS, CO-TRUSTEE UNDER THE WILL OF MARIE M. PETCHIOS, AND JEAN P. MENTAVLOS, BENEFICIARY UNDER THE ESTATE OF MARIE M. PETCHIOS

No. 8627SC539

(Filed 25 November 1986)

1. **Wills § 57— bequest of corporate shares or equivalent—notes not included**

Although the issue was not directly contested on appeal, notes of a partnership to the deceased were not part of the concern's capital structure and thus were not left to the trustees under a will provision regarding corporate shares or the equivalent if there was a change in the structure of the corporation which preceded the partnership. In the absence of special provisions so indicating, a bequest of corporate stock does not carry with it debts that the corporation owes a particular stockholder.

2. **Executors and Administrators § 32— corporate shares and notes—interested co-executor—authority to distribute**

In an action arising from a will provision dealing with distribution of equivalent shares should the capital structure of a corporation change, the trial court did not err by failing to remove plaintiff as co-executor because her interest in the distribution of the stock conflicted with that of her sister, did not err by failing to dismiss the action because plaintiff had stipulated that the co-executors could exercise discretionary powers granted in a codicil, and did not err by failing to determine that a codicil gave the co-executors discretionary authority to distribute notes as part of the specific bequest made for a sister.

APPEAL by defendants from *Ferrell, Judge*. Judgment entered 31 January 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 21 October 1986.

This declaratory judgment action was brought to determine the rights and duties of the parties under the last will and testament of Marie M. Petchios, who died 23 May 1982. The testamentary papers consist of a will executed on 19 February 1974 and a codicil executed on 3 July 1975. Marie M. Petchios had two daughters, Pan P. Kerhulas and Jean P. Mentavlos, and a provision of the will, not amended by the codicil, left the residuary of her estate to them in equal amounts—Pan P. Kerhulas' share going direct, that of Jean P. Mentavlos going to trustees for her benefit. The meaning of the residuary clause and the rest of the original

will is plain; what is alleged to be obscure and in need of judicial determination is the scope and meaning of a specific bequest for the benefit of Jean P. Mentavlos that was made in the codicil. The bequest was shares of stock in LPT Company, a North Carolina corporation that was later succeeded by a partnership in which Mrs. Petchios was a partner when she died. When the will was executed she owned 1,130 shares of the corporate stock; but a year later, in January, 1975, she gave half of her stock or 565 shares to her daughter Pan P. Kerhulas. A few months later, when the codicil was executed, the other half of her LPT Company shares was devised to the co-trustees for Jean P. Mentavlos, as follows:

> . . . Five Hundred Sixty-five (565) shares of the common stock of LPT Company together with all dividends, rights and benefits declared thereon subsequent to the time of my death and all rights and benefits thereof. If there should be any change in capital structure of the said LPT Company after the date of this Will, I bequeath to the said Nicholas George Mentavlos and Tula M. Collias, as Co-Trustees of the Jean P. Mentavlos Trust, *such number of my shares of the stock of said company or of its successor* (whether by change of name, consolidation or merger) *as shall in the sole judgment of my Executors be the equivalent of 565 shares of such stock owned by me at the time of the execution of this Will* including but not by way of limitation any stock dividends or splits attributable thereto, any stock purchased by me in the exercise of rights thereon or any stock issued to me in exchange therefor. (Emphasis supplied.)

Five years later, on 7 July 1980 the corporation LPT Company was liquidated into LPT Enterprises, a limited partnership, and each shareholder, including Marie M. Petchios and Pan P. Kerhulas, received an interest in that partnership proportionate to the corporate stock then held. This proportionate partnership interest, held by Marie M. Petchios at her death and valued at $136,814 on the estate inventory, passed to the co-trustees for Jean P. Mentavlos under the above bequest without dispute. In September, 1980 the partnership borrowed $600,000 from a bank and made a proportionate capital distribution to its partners; by that distribution Pan P. Kerhulas and Marie M. Petchios each received $56,500. On 1 November 1980 Marie M. Petchios loaned the

partnership $46,500 at 9.5% interest and on 1 February 1981 she loaned it another $18,000 at 10% interest. Each loan was evidenced by a demand note and the balance due on both notes when the testatrix died was $60,000. The partnership distributed income to the partners twice while the testatrix was still living; in February, 1981 the testatrix and Pan Kerhulas each received $8,633 and in January, 1982 each received $4,316.50.

In the trial court the only dispute as to the will's meaning was whether the above quoted provision either left the aforesaid notes of LPT Enterprises to the trustees for Jean P. Mentavlos or gave the co-executors the discretion to so distribute them. The trial court ruled that the provision did not leave the notes to the trustees for Jean P. Mentavlos as a specific bequest, that it did not authorize the co-executors to distribute the notes in their discretion, and that they must be distributed under the residuary clause. In entering judgment the court also overruled motions by the defendants to remove plaintiff as co-executor because her interest under the will conflicts with that of Jean M. Mentavlos, and to dismiss the declaratory judgment action because plaintiff had stipulated that the defendant co-executor could exercise the discretionary powers devised to them by the aforesaid provision and that in exercising those powers he had distributed the notes to the trustees for Jean M. Mentavlos.

Stott, Hollowell, Palmer & Windham, by Douglas P. Arthurs, for plaintiff appellee.

Boyle, Alexander, Hord and Smith, by Norman A. Smith, for defendant appellants.

PHILLIPS, Judge.

[1] The defendants' appeal does not directly contest the main thing decided by the trial judge—that the notes of LPT Enterprises were not part of that concern's capital structure and thus were not left to trustees for Jean M. Mentavlos by the above provision. Thus, that part of the judgment appealed from is presumed to be correct, *London v. London*, 271 N.C. 568, 157 S.E. 2d 90 (1967); it is also correct both in fact and law. The notes do not represent anything that the partnership owned and could distribute to the partners; they only represent a debt that the partnership owed the testatrix and is obligated to pay, independent of its

obligations to hold, manage and distribute upon liquidation the capital contributed by the partners. In the absence of special provisions so indicating, a bequest of corporate stock does not carry with it debts that the corporation owes a particular stockholder, 96 C.J.S. *Wills* Sec. 780, p. 192 (1957); and nothing in the provision involved suggests that the bequest of stock included the notes involved. Other courts have held to the same effect under similar circumstances. *Balzebre v. The First National Bank of Miami*, 222 So. 2d 49 (Fla. 1969); *Major v. Major*, 106 Ind. App. 90, 15 N.E. 2d 754 (1938).

[2] What the defendants assign as error are (1) the court's failure to remove the plaintiff as co-executor because her interest in the specific bequest of LPT stock conflicted with that of Jean M. Mentavlos; (2) the court's failure to dismiss the action because the plaintiff had stipulated that the defendant co-executor could exercise the discretionary powers devised in the codicil; and (3) the court's failure to determine that the codicil gave the co-executors the discretionary authority to distribute the notes as part of the specific bequest made for the benefit of Jean P. Mentavlos. None of these contentions have merit. Any interested party under a will may petition for a declaratory judgment as to its meaning and effect, G.S. 1-254, and that Pan P. Kerhulas' interest is adverse to that of her sister does not deprive her of the right to have the will's meaning judicially determined. Furthermore, the plaintiff's conflicting interest has done no harm to the defendants because instead of determining as a co-executor that the notes are not covered by the special bequest she stood aside and stipulated that the discretionary powers granted by that provision could be exercised by the defendant co-executor. But contrary to the defendants' argument the stipulation was not unconditional. By its express terms the stipulation extends only to the extent that discretion legally exists and the court correctly ruled that the discretion granted by the codicil to the co-executors does not extend to the notes involved. Though both parties cite many court decisions on the discretionary powers of executors and trustees it is sufficient to note that the testamentary provision involved expressly limits the discretion of the co-executors to determining and distributing the "*number of my shares of the stock of said company or of its successor . . .* [that are] the equivalent of 565 shares of such stock owned" (emphasis

supplied) when the will was written. Where the words employed by a testator are plain they must be taken to mean what they say. *Elmore v. Austin*, 232 N.C. 13, 59 S.E. 2d 205 (1950). The testator granted no discretion to distribute notes, cash, or other articles of value to the trustees for Jean P. Mentavlos under any circumstances. The discretionary grant extended only to shares of stock in the specific corporation named or in the enterprise that succeeded it, and all the shares or interest that the testatrix had in either enterprise at her death has admittedly passed to the trustees already.

Affirmed.

Judges WEBB and JOHNSON concur.

BETTY J. ADDISON, PLAINTIFF v. SIDNEY BRITT, INDIVIDUALLY AND (D/B/A BLADEN MOTOR SALES) DEFENDANT

No. 8612DC624

(Filed 25 November 1986)

Consumer Credit § 1— Truth in Lending— no annual percentage rate—no recovery—erroneous

The trial court erred in a Truth in Lending action by finding that defendant had disclosed all of the information required by the Truth in Lending Act and concluding that plaintiff should have no recovery where several of the required terms did not appear on the sales contract; there was no evidence in the record to indicate defendant's compliance with those provisions; other documents which defendant contended were involved were not produced at trial and there was no testimony that they met the disclosure requirements; defendant admitted his failure to meet the statutory regulations; and defendant failed to express the finance charge as an annual percentage rate. Although the trial court believed it was inequitable for plaintiff to recover an award having suffered no actual damages, the award of damages under section 1640 of the Act is not discretionary.

APPEAL by plaintiff from *Cherry, Judge.* Judgment entered 10 March 1986 in District Court, CUMBERLAND County. Heard in the Court of Appeals 18 November 1986.

This is an action for statutory damages under the Truth in Lending Act, 15 U.S.C. Section 1601 *et seq.* (1982) (Act) and Regulation Z, 12 C.F.R. Part 226 (1986). Plaintiff had purchased a used

car from defendant. The sale was evidenced by a credit installment sales contract. Because of problems with the car, defendant allowed plaintiff to exchange it for another model, and the contract was changed accordingly. Plaintiff made only the first of the fourteen scheduled monthly payments. Accordingly, defendant repossessed the car eight months later. Shortly thereafter, plaintiff brought this action.

At trial, only plaintiff presented evidence. That evidence showed that the sales contract had failed to properly disclose, among other things, the amount financed, the annual percentage rate, the sum of the amount financed and the finance charge as the total of payments, and the fact that defendant was taking a security interest in the car. The evidence also showed that defendant had failed to comply with two provisions of Chapter 25A of the North Carolina General Statutes.

The trial court concluded that while the sales contract did not contain the exact statutory langauge required, it did contain all of the required information. The court concluded that plaintiff understood the terms of the contract. Because the plaintiff sustained no damage from defendant's violations, the court concluded that plaintiff should have no recovery. Plaintiff appeals.

Lumbee River Legal Services, Inc., by T. Diane Phillips, for the plaintiff-appellant.

Downing, David & Maxwell, by Harold D. Downing, for the defendant-appellee.

EAGLES, Judge.

Plaintiff argues that the trial court erred in finding that defendant disclosed all of the required information and that the court should have awarded her the statutory damages irrespective of the fact that she suffered no actual damages. Based on the controlling legislation, we agree and reverse the judgment of the trial court.

The trial court's finding that defendant had disclosed all of the information required by the Truth in Lending Act is unsupported by any competent evidence. Several of the terms which 15 U.S.C. Section 1638 (1982) states that the creditor "shall" disclose to the debtor simply do not appear on the sales contract. More-

over, there is no evidence in the record to indicate defendant's compliance with those provisions. Defendant contends that other documents were involved in the transaction. Those documents, however, were not produced at trial and there is no testimony that they met the disclosure requirements. In fact, defendant has admitted his failure to meet the applicable statutory requirements. Further, the trial court found that, at least technically, the disclosures were inadequate.

The crux of defendant's argument is that, in substance, he disclosed the relevant credit information and that the violations were merely "technical." Section 1640(a)(2) allows a debtor to recover statutory damages, in addition to any actual damages, from a creditor who fails to comply with certain requirements of section 1638. Whether liability attaches to creditors for technical or minor violations of the Act is subject to some dispute among the various jurisdictions. *See Dixey v. Idaho First Nat. Bank*, 677 F. 2d 749, 751-52 (9th Cir. 1982). We need not decide the question of whether "technical" violations of the actionable provisions of section 1638 give rise to creditor liability since, in any event, the particular violation we address here is not technical in nature.

In fact, defendant's failure to express the finance charge as an "annual percentage rate" in the sales contract is one of the most material violations that a creditor can commit. Disclosure of the "annual percentage rate" is required by section 1638(a)(4) and its omission is one of the violations for which a debtor may recover statutory damages under section 1640(a). The importance of the "annual percentage rate" disclosure requirement is underlined by Regulation Z, 12 C.F.R. Section 226.5(a)(2) (1986), which requires that the term be printed more conspicuously on the document than the other required terminology. Moreover, this requirement has been characterized as one of the most important disclosures required by the Act. *See Krenisky v. Rollins Protective Services Co.*, 728 F. 2d 64 (2nd Cir. 1984) and *Dixey v. Idaho First Nat. Bank, supra.* Consequently, the "annual percentage rate" requirement has been strictly construed. *See also Shroder v. Suburban Coastal Corp.*, 729 F. 2d 1371 (11th Cir. 1984); *Nash v. First Financial Sav. & Loan Ass'n.*, 703 F. 2d 233 (7th Cir. 1983). Certainly, defendant's failure to disclose the term at all constitutes a clear violation of the Act. Since this disposes of the issue of defendant's liability to the plaintiff under section 1640,

we need not address the issue of whether the defendant would be liable for statutory damages for his other violations.

Once a violation of an actionable portion of the Act is established, the debtor is entitled to recover statutory damages. In the case of an individual, section 1640(a)(2)(A)(i) awards the debtor damages equal to twice the amount of the finance charge up to a maximum of $1,000. Because the purpose of that section is to encourage private enforcement of the Act, proof of actual damages is unnecessary. *Lowery v. Finance America Corp.*, 32 N.C. App. 174, 231 S.E. 2d 904 (1977). There is no requirement that the debtors have been misled or deceived in any way. *Brown v. Marquette Sav. & Loan Ass'n.*, 686 F. 2d 608 (7th Cir. 1982); *Smith v. Chapman*, 614 F. 2d 968 (5th Cir. 1980). The statutorily prescribed damages flow to the debtor as a matter of right. *Grant v. Imperial Motors*, 539 F. 2d 506 (5th Cir. 1976). In addition, section 1640(3) provides that a debtor who brings a successful action is also entitled to recover the costs of the action and reasonable attorneys fees.

The record indicates that the trial court believed that it was inequitable for plaintiff, having suffered no actual damages, to recover an award. As we have already noted, the award of damages pursuant to section 1640 is not discretionary, even when based on the trial court's assessment of the equities. *Williams v. Public Finance Corp.*, 598 F. 2d 349 (5th Cir. 1979). Defendant, relying on dicta to the contrary in *Dzadovsky v. Lyons Ford Sales, Inc.*, 452 F. Supp. 606 (W.D. Pa. 1978), *affirmed*, 593 F. 2d 538 (3rd Cir. 1979), argues that the trial judge correctly applied equitable principles. The language used by the court in *Dzadovsky*, however, was specifically repudiated upon affirmance by the Third Circuit United States Court of Appeals and runs contrary with what we have already stated the law to be.

Accordingly, plaintiff is entitled to recover damages equal to twice the finance charge of $219 plus costs and reasonable attorneys fees. Plaintiff has not argued for, nor do we see the applicability of, a remedy for defendant's violations of Chapter 25A of the North Carolina General Statutes. Consequently, on this record she is not entitled to an additional award for those violations.

Reversed and remanded.

Judges WEBB and PARKER concur.

NORTH STATE SAVINGS & LOAN CORPORATION, PLAINTIFF v. CARTER DEVELOPMENT COMPANY, INC., JAMES D. CARTER, SANDRA F. CARTER, G. HOWARD SATTERFIELD AND JOYCE SATTERFIELD, DEFENDANT AND R. J. ROBBINS, INTERVENOR

No. 863SC495

(Filed 25 November 1986)

Clerks of Court § 1; UCC § 45— sale of attached property halted—authority of Clerk

N.C.G.S. § 1-440.9 gave the Clerk of Court sufficient authority to stop the sale of an attached aircraft which had been used as security for a note where the sheriff's announcement at the sale that the aircraft would be sold free of the plaintiff's lien was at variance with the notice that defendant's interest would be sold. N.C.G.S. § 1-440.44.

Judge BECTON concurs in the result.

APPEAL by defendant from *Reid, Judge*. Order entered 10 January 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 15 October 1986.

R. J. Robbins, the intervenor in this proceeding, appeals from an order of the superior court for the sale of attached property. The following evidence is not in dispute. The plaintiff instituted this action to recover on a note which was in default. The loan was secured by a security interest in a Mitsubishi MU-2B-35 aircraft. The Clerk of Superior Court of Craven County issued an order of attachment on the aircraft and it was seized by the Sheriff of Mecklenburg County pursuant to the order.

The Sheriff of Mecklenburg County applied to sell the aircraft pursuant to G.S. 1-440.44 on the ground that it would materially deteriorate in value during the litigation of the action. On 17 October 1985 the Clerk of Superior Court of Craven County signed an order authorizing the Sheriff to sell the aircraft. The Sheriff advertised the sale by a notice which said that "all rights, title, and interests which the above named Defendant (Carter

Development) have in and to the . . . property" would be sold at public auction for cash.

On 4 November 1985 Major Bankhead of the Mecklenburg County Sheriff's Department conducted a sale of the property at the Douglas International Airport. Among those present at the sale were Mike Flanagan, an attorney representing the plaintiff, R. J. Robbins and Kurt Lewin. Major Bankhead announced that the property would be sold "free and clear of any security interests including that of the plaintiff North State." Mr. Flanagan stated that North State's lien would remain on the property after the sale. Mr. Robbins bid $600 for the aircraft which was the high bid at the sale.

On 4 November 1985 the Clerk of Superior Court of Craven County signed an order continuing the sale and ordering the Sheriff of Mecklenburg County not to deliver a bill of sale to Mr. Robbins. On 5 November 1985 Mr. Robbins tendered a certified check to Major Bankhead in payment for the aircraft.

R. J. Robbins was allowed to intervene in the proceeding and he made a motion that the Sheriff of Mecklenburg County be ordered to deliver to him the aircraft. The court ordered that the aircraft be resold which was done. North State bid $94,000 for the aircraft at the next sale and received a bill of sale for the aircraft. R. J. Robbins appealed from the order that the aircraft be resold.

Petree, Stockton & Robinson, by J. Neil Robinson, for intervenor appellant.

Ward & Smith, by Michael P. Flanagan, for defendant appellees.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General David S. Crump, amicus curiae for R. J. Robbins.

WEBB, Judge.

The sale in this case was conducted pursuant to G.S. 1-440.44 which provides in part:

> (a) The sheriff shall apply to the clerk or the judge for authority to sell property, or any share or interest therein, seized pursuant to an order of attachment,

(1) If the property is perishable, or

(2) If the property is not perishable, but

a. Will materially deteriorate in value pending litigation.

Neither party questions the propriety of ordering a sale pursuant to this section. G.S. 1-440.9 provides:

> The Court of proper jurisdiction, before which any matter is pending under the provisions of this Article, shall have authority to fix and determine all necessary procedural details in all instances in which the statute fails to make definite provision as to such procedure.

We believe that G.S. 1-440.9 gives the clerk sufficient authority to stop the sale as she did in this case. The sheriff's announcement at the sale that the aircraft would be sold free of the plaintiff's lien was at variance with the notice that Carter Development's interest would be sold. We can take notice of the fact that the aircraft brought at the first sale only a small fraction of its value. With these factors in mind the clerk had sufficient supervisory powers under the statute to order a new sale.

The appellant has assigned error to the findings of fact and the failure to find certain facts which he says are shown by uncontradicted evidence. We do not believe the answers to these assignments of error are determinative of the case. The facts upon which the case turns are not in dispute. The court found sufficient facts based on the evidence for us to decide this appeal.

Affirmed.

Judge EAGLES concurs.

Judge BECTON concurs in the result.

STATE OF NORTH CAROLINA v. MARK TIMOTHY ROARK

No. 8625SC584

(Filed 25 November 1986)

1. **Searches and Seizures § 26— search warrant—bare bones affidavit—evidence not admissible**

Evidence seized under a search warrant issued pursuant to a "bare bones" affidavit which said only that a reliable and confidential informant personally contacted the applicant with the information was not admissible.

2. **Searches and Seizures § 19— invalid warrant—bare bones affidavit—no good faith exception**

Evidence seized pursuant to a search warrant based on a "bare bones" affidavit was not admissible under an exception to the exclusionary rule for search warrants issued by a detached and neutral magistrate.

APPEAL by defendant from *Lewis (John B., Jr.), Judge*. Judgment entered 22 January 1986 in Superior Court, CALDWELL County. Heard in the Court of Appeals 18 November 1986.

The defendant was tried for breaking or entering, felonious larceny and possession of stolen property. The defendant made a motion that certain evidence seized during searches of his premises be suppressed. The evidence at the voir dire hearing showed that on 31 January 1985 an officer made an application for a search warrant to a magistrate in Caldwell County. The affidavit in support of the application for the search warrant said:

> That sometime between January, [sic] 25th 1985, and January, [sic] 31, 1985 the Caldwell Christian [S]chool in Hudson was broken into and 2 microscopes (one wolf Bran [sic] and one-ideal Bran [sic] taken.[)] That sometime prior to this application a reliable and confidential informant personally contacted the applicant with the information that the stolen microscopes are in the above described residence of Mark [T]imothy Roark.

The magistrate issued a search warrant based on this affidavit. A search of the defendant's residence was made and the officers found one Ideal microscope. On 4 February the officer applied for a second search warrant for the defendant's premises. On the affidavit he used identical language as in the first search warrant except he said there were two basic dissecting kits on the defend-

ant's premises. The defendant's premises were searched a second time and five dissecting kits were found which were identified as having been stolen from the Caldwell Christian School. The court made findings of fact based on this evidence and held that the search warrants were properly issued. The evidence found as a result of the two searches was admitted.

The defendant was convicted and appealed from the imposition of a prison sentence.

Attorney General Lacy H. Thornburg, by Associate Attorney General Mabel Y. Bullock, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Leland Q. Towns, for defendant appellant.

WEBB, Judge.

The defendant assigns error to the admission of the evidence seized as a result of the searches pursuant to the two warrants. We believe this assignment of error has merit.

[1] Prior to *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed. 2d 1453 (1983) the evidence would clearly have to be excluded. The affidavits in support of the search warrants are inadequate under *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.ED. 2d 637 (1969). There is nothing in the affidavit which shows the information given by the informant is reliable. *Gates* relaxed the two-pronged test that grew from *Aguilar* and *Spinelli*, i.e., that the affidavit must show both the basis of the informant's knowledge and that he is reliable. It adopted a "totality of circumstances" test, i.e., "whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. at 238, 103 S.Ct. at 2332, 76 L.Ed. 2d at 548. The Supreme Court made it clear that what it called a "bare bones" affidavit, one which says only that the affiant has received reliable information from a credible person and does believe, is not sufficient for a magistrate to find probable cause for a search.

Our Supreme Court adopted the totality of circumstances test in *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984). In this case we believe that we are bound by the cases cited above from the United States Supreme Court and the Supreme Court of North Carolina to hold that it was error for the magistrate to issue search warrants based on affidavits which only said a "reliable and confidential informant personally contacted the applicant with the information" that stolen property was on the premises of defendant.

[2] In *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed. 2d 677, *reh. denied*, 468 U.S. 1250, 105 S.Ct. 52, 82 L.Ed. 2d 942 (1984), the United States Supreme Court held that not all evidence obtained by the use of an invalid search warrant should be excluded from evidence. It held that when an officer reasonably relies on a search warrant issued by a detached and neutral magistrate, evidence seized during the search is admissible although the warrant is later determined to be invalid. The Supreme Court said that one instance in which the exception does not apply is when the warrant is based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923, 104 S.Ct. at 3421-3422, 82 L.Ed. 2d at 699, quoting *Brown v. Illinois*, 422 U.S. at 610-611, 95 S.Ct. 2254, 45 L.Ed. 2d 416. We believe a reading of the United States Supreme Court cases shows that they consider a "bare bones" allegation such as we have in this case to be so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. For that reason this case would not be an exception to the exclusionary rule. It was error to admit the evidence seized in the searches.

We do not discuss the defendant's other assignment of error because the question it poses may not arise at a new trial.

New trial.

Judges EAGLES and PARKER concur.

ANITA BUCHANAN v. ROBERT BUCHANAN, D/B/A BUCHANAN IMPORT & DOMESTIC AUTO SALES, AND THE TRAVELERS INDEMNITY COMPANY

No. 8624SC355

(Filed 25 November 1986)

Torts § 7.2— automobile accident—release—derivative liability

Summary judgment was properly granted for defendant insurance company in an action arising from an automobile accident where plaintiff had signed a release but had intended to release only the driver of the other car, the owner of the other car, the policyholder, and their insurance company; the release document discharged "all persons, firms or corporations liable or who might be liable"; and plaintiff brought an action against her husband under the uninsured motorist provision of his policy. Defendant insurance company's liability was derivative and there was no basis of liability once the owner, the driver, and the policyholder of the other car had been released.

APPEAL by plaintiff from *Gray, Judge*. Judgment entered 24 January 1986 in Superior Court, MITCHELL County. Heard in the Court of Appeals 17 September 1986.

On 15 May 1983, while riding in an automobile driven by her husband, plaintiff Anita Buchanan was injured when another automobile struck the Buchanan car. Both David Wayne Givens, the driver, and Jimmy Joe O'Connor, the owner of the car, were covered by a State Farm insurance policy purchased by Thomas O'Connor. The Buchanans were insured by the Travelers Indemnity Company.

Plaintiff and her husband accepted $25,000.00 from State Farm in full and final settlement of their claim. A release was signed by plaintiff and her husband on 28 March 1984 discharging and releasing all "persons, firms or corporations liable or who might be claimed to be liable . . . ." Plaintiff filed suit on 14 August 1985 against her husband and the Travelers Indemnity Company to recover damages under the uninsured motorist protection provision of her husband's policy.

On 20 November 1985, the defendant insurance company moved for summary judgment based on the signed release, contending that such a release constituted a material breach of the insurance contract and thus a complete defense to plaintiff's action. Affidavits were submitted by both sides. In her affidavit, plaintiff admitted that she released David Givens and Thomas and

Jimmy Joe O'Connor, but she claimed that she mistakenly believed that the signed release form would not discharge any other party. The court granted defendant's motion for summary judgment on 24 January 1986. From this judgment, plaintiff appeals.

Hal G. Harrison for plaintiff appellant.

Roberts, Cogburn, McClure & Williams, by Steven D. Cogburn and Glenn S. Gentry, for defendant appellees.

ARNOLD, Judge.

Plaintiff contends that the trial court erred in granting summary judgment for the defendant. Specifically, plaintiff argues that the affidavits offered by plaintiff and the State Farm insurance adjuster who was involved in the signing of the release form indicate that the release was executed without any intention to excuse any other persons or firms. Plaintiff, citing *Cunningham v. Brown*, 51 N.C. App. 264, 276 S.E. 2d 718 (1981), contends that the failure to accomplish this result constituted a mutual mistake of fact which required denial of defendant's motion for summary judgment. We disagree.

The *Cunningham* case is not dispositive on the issue involved in the case *sub judice*. In *Cunningham*, the plaintiff was a passenger on a motorcycle driven by her husband when they were struck by a tractor-trailer. For consideration, the plaintiff signed a release concerning any claim which she might have had against her husband and his insurance company. As a result of this signing she also released from liability "any other person, firm or corporation charged or chargeable with responsibility or liability," which included the driver of the other vehicle. *Id.* at 269, 276 S.E. 2d at 723.

In *Cunningham*, the plaintiff claimed that before she signed the release the insurance adjuster assured her that no other claims would be affected. In that case, the court held that the plaintiff could avoid the effect of the signed release by showing that it was procured by fraud or through mutual mistake of fact. *Id.*

In the case *sub judice*, such avoidance is not possible because the defendant insurance company's liability is derivative in nature. *See Durham v. Creech*, 32 N.C. App. 55, 231 S.E. 2d 163

(1977). The policy states that the Travelers Indemnity Company is liable to plaintiff only if the insured is "legally entitled to recover" from the owner or driver of the uninsured motor vehicle. Having settled and signed a release, neither plaintiff nor her husband can recover further damages from the parties covered by State Farm. Both plaintiff and her husband fully intended to release David Givens and Thomas and Jimmy Joe O'Connor, and they are now no longer "legally entitled to recover" from such parties. When the release was signed, the Travelers Indemnity Company was also released as a matter of law because of the derivative nature of the insurance company's liability. Once the plaintiff released all claims against Givens and the O'Connors, there is no basis of liability on which the defendant insurance company can be held responsible under the terms of the policy. We, therefore, hold that the defendant was entitled to summary judgment as a matter of law. The judgment of the trial court is

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

LAWRENCE E. WATKINS, ADMINISTRATOR OF THE ESTATE OF MELISSA GRAY WATKINS v. LISA SUSANNE HELLINGS

No. 8610SC540

(Filed 2 December 1986)

1. **Negligence § 23— contributory negligence—pleading sufficient**

In a wrongful death action arising from an automobile accident in which both the driver and the deceased had been drinking, defendant's answer sufficiently alleged contributory negligence where defendant specifically alleged contributory negligence and referred to the actions which constituted the alleged contributory negligence. N.C.G.S. § 1A-1, Rule 8(c).

2. **Automobiles and Other Vehicles § 74.1— intoxicated driver—contributory negligence of passenger—evidence sufficient**

In a wrongful death action arising from an automobile accident in which both defendant driver and the deceased passenger had been drinking, defendant's evidence of contributory negligence by the passenger was sufficient to support a verdict for defendant where the consumption of alcohol took place during the drive itself; decedent was certainly aware that she had poured the driver at least half a bottle of wine; the attending physician, the police officer,

and her parents all testified that it was obvious to them that the alcohol had affected the driver; and an expert testified that someone with a blood alcohol level of .10%, as the driver had, would have dulled senses, altered judgment, slowed response to stimuli, depressed nerves, and an impaired ability to drive a car.

3. **Negligence § 38— automobile accident—intoxicated driver—contributory negligence of passenger—instructions erroneous**

In a wrongful death action arising from an automobile accident in which both the passenger and the driver had been drinking, the court erred in its instructions on contributory negligence by instructing the jury that decedent contributed to her own death if she was negligent in any one of three ways: knowingly and voluntarily riding with a driver under the influence, or knowingly and voluntarily riding with a driver with a blood alcohol level of .10 or more, or furnishing the driver with such a quantity of alcohol that she should have known that the driver could or might have become impaired. Under ordinary circumstances, a passenger could not know the blood alcohol level of a driver, and the test is not whether the driver could have become impaired, but whether the passenger knew or reasonably should have known that the driver was impaired.

4. **Rules of Civil Procedure § 37— failure to admit—sanctions—Shuford approach adopted**

An order requiring plaintiff to reimburse defendant for expenses incurred as a result of plaintiff's failure to admit requests concerning defendant's blood alcohol test was vacated and remanded where the court's order was not supported by findings of fact and conclusions of law. The Court adopted the Shuford approach, requiring negative findings with respect to the four exceptions set out in N.C.G.S. § 1A-1, Rule 37(c).

APPEAL by plaintiff from *Barnette, Judge.* Judgment entered 12 November 1985 in WAKE County Superior Court. Heard in the Court of Appeals 22 October 1986.

Plaintiff brought this action to recover for the wrongful death of his daughter Melissa Watkins. At trial, the evidence tended to show the following pertinent events and circumstances.

Melissa Watkins and defendant Lisa Hellings were freshman roommates at the University of North Carolina at Wilmington. On Saturday, 9 April 1983, the two girls and another roommate were sitting in the apartment talking. Melissa was drinking wine; Lisa drank only cola. At about 8:00 p.m., Melissa and Lisa began discussing their plans for the evening. Melissa suggested that they go to a nightclub in Raleigh. Lisa agreed to go. Melissa was the only one who had a car, but since she had been drinking and Lisa had not, she asked Lisa to drive.

Before leaving Wilmington, they stopped at a convenience store to buy gas. As Lisa went in to pay, Melissa asked her to get some wine. She bought a fifth of a gallon bottle of wine containing 12% alcohol. The girls had brought along their glasses—Melissa had a wine glass and Lisa had been drinking her cola out of a larger goblet. Melissa poured each of them wine as they drove. Lisa testified that the only time Melissa commented on the speed or safety of her driving was to tell her, "Let's get there; hurry up, we need to get there."

After they reached Clinton, Melissa had to direct Lisa where to turn since she was unfamiliar with the stretch of road between Clinton and Raleigh. By this time it had begun to rain very hard. Sometime after 10:30 p.m., the girls finished the wine. Lisa drank half of the bottle of wine—two or three glasses. Lisa handed her empty glass to Melissa, who then tossed it into the back seat where it hit the empty wine bottle. This startled Lisa; she told Melissa she thought the glass had broken and began feeling for the overhead light switch. At this time they were approaching a curve. Lisa started to turn but did not turn enough; she ran off the road and then turned the wheel too hard as she tried to get back on. The car skidded back across the rain-soaked road and ran into the opposite ditch. Melissa was fatally injured in the accident. Both girls were taken to a Dunn hospital. At the hospital, Lisa was observed by Terry Stroud, the investigating highway patrolman; Dr. James Anchors, the emergency room physician; and both of her parents. A sample of Lisa's blood was taken soon after her arrival at the hospital, which revealed a blood alcohol level of .10 percent. To those witnesses who observed Lisa at the hospital, she showed signs of intoxication.

The court denied plaintiff's motion for a directed verdict and submitted the issues of negligence, contributory negligence and damages to the jury. The jury found the defendant negligent but found that plaintiff was contributorily negligent. Plaintiff appealed.

Henson, Fuerst & Willey, P.A., by Ralph G. Willey, III and Thomas W. Henson, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Sanford W. Thompson IV, for defendant-appellee.

WELLS, Judge.

[1] Plaintiff first contends that the defendant's answer was insufficient to allege contributory negligence under North Carolina law, and that the court therefore erred in submitting the issue of contributory negligence to the jury. We disagree.

Plaintiff argues that defendant failed to specifically allege in her complaint that plaintiff's decedent "had actual knowledge that the defendant's mental and physical faculties were appreciably impaired at the time of the driving." In support of his position, plaintiff cites two cases: *Maynor v. Pressley*, 256 N.C. 483, 124 S.E. 2d 162 (1962) and *Lawson v. Benton*, 272 N.C. 627, 158 S.E. 2d 805 (1968). However, in 1972 this State abandoned Code pleadings in favor of notice pleadings. The purpose was to liberalize the old, detailed rules while still ensuring that the opposing party would have adequate notice of issues in order to prepare for trial. Current requirements for the pleading of contributory negligence are set out in N.C. Gen. Stat. § 1A-1, Rule 8(c) of the N.C. Rules of Civil Procedure:

> In pleading to a preceding pleading, a party shall set forth affirmatively . . . contributory negligence . . . . Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved.

Thus, the question in the case at bar is whether the defendant's pleadings were sufficient to give plaintiff notice of what the defense intended to prove.

Defendant's answer contained the following allegation:

> G. If Lisa Suzanne Hellings was guilty of any negligent conduct in the operation of the 1980 Plymouth automobile as alleged in the complaint, all of which is again expressly denied, then and in such event: Melissa Gray Watkins negligently, carelessly, recklessly and in willful and wanton disregard for her own rights and safety, poured and furnished alcoholic beverages to Lisa Suzanne Hellings during their trip from Wilmington; Melissa Gray Watkins voluntarily entered and continued to ride in the motor vehicle being

> operated by Lisa Suzanne Hellings at a time when Melissa Gray Watkins knew that the ability of Lisa Suzanne Hellings to safely operate the vehicle was becoming impaired by the fact that she was consuming the alcoholic beverages being poured and furnished to her by Melissa Gray Watkins to the extent that her mental or physical faculties or both, might or could have been impaired; Melissa Gray Watkins was contributorily negligent in assuming the risk of harm to her person in furnishing the alcoholic beverages and riding in the vehicle under these circumstances which a reasonable and prudent person would have recognized as a foreseeable risk of harm.

In this excerpt, defendant specifically alleged contributory negligence and referred to the actions which constituted the alleged contributory negligence. Plaintiff was therefore put on notice that defendant would try to prove that plaintiff could not recover on those grounds.

[2] Plaintiff next contends that defendant's evidence of contributory negligence was insufficient as a matter of law to support a verdict for the defendant. In order to establish a passenger's contributory negligence in riding with an intoxicated driver, a defendant in North Carolina must offer evidence of the following:

> (1) the driver was under the influence of alcohol;
>
> (2) the passenger knew or should have known that the driver was under the influence;
>
> (3) the passenger voluntarily rode with the driver despite his actual or constructive knowledge that the driver was under the influence.

Dinkins v. Carlton, 255 N.C. 137, 120 S.E. 2d 543 (1961). Plaintiff in the case at bar argues that defendant failed to prove that the plaintiff's decedent was aware or should have been aware that defendant was impaired. We disagree.

In deciding whether the evidence of contributory negligence was insufficient to support the jury's verdict, we must view the evidence in the light most favorable to defendant. *Boyd v. Wilson*, 269 N.C. 728, 153 S.E. 2d 484 (1967). If different conclusions could

be drawn from that evidence, then the question was properly one for the jury. *Id.* As long as there is more than a scintilla of evidence to support the jury's verdict, that verdict must be upheld. *Howell v. Lawless*, 260 N.C. 670, 133 S.E. 2d 508 (1963). This court has, however, held as a matter of law that a plaintiff was not contributorily negligent in riding with an intoxicated driver. In *Harris v. Bridges*, 46 N.C. App. 207, 264 S.E. 2d 804, *disc. rev. denied*, 300 N.C. 556, 270 S.E. 2d 107 (1980), the plaintiff was riding home late one night with the defendant. The two had been drinking; plaintiff testified that he had consumed five beers but had seen defendant drink only one. Plaintiff did not remember the manner in which defendant was driving before the accident, but he did recall that it was "not very fast." The trial court refused to submit the issue of contributory negligence to the jury, and plaintiff appealed. Judge Arnold, writing for this court, found that even if the defendant were under the influence of alcohol, there was no evidence to impute knowledge of that fact to the plaintiff and the issue was properly withheld from the jury.

In *Crowder v. N.C. Farm Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E. 2d 127, *disc. rev. denied*, 316 N.C. 731 (1986), we also concluded that there was no permissible inference that the plaintiff was contributorily negligent. In that case, there was evidence that the defendant driver was drinking and riding horses between 9:00 a.m. and 12:00 noon; the accident occurred sometime after 4:00 p.m. There was no evidence that there was any alcohol in his system at that time, nor had he driven erratically before the accident. We held that the only evidence of the defendant's intoxication was too remote as a matter of law to allow the issue to reach the jury.

These cases are distinguishable from the one at bar. In *Crowder*, the plaintiff knew only that the defendant driver had been drinking some four hours before the wreck; here, the consumption took place during the drive itself. In *Harris*, the evidence indicated only that the plaintiff knew that the defendant had consumed one beer. In the case at bar, the plaintiff's decedent was certainly aware that she had poured Lisa at least half of a bottle of wine. Our courts have held that the amount of alcohol consumed may be evidence of knowledge of impairment just as driving erratically and otherwise "acting drunk" may be evidence of such impairment. *See, e.g., Bank v. Lindsey*, 264 N.C. 585, 142

S.E. 2d 357 (1965); *Wardrick v. Davis*, 15 N.C. App. 261, 189 S.E. 2d 746 (1972). Plaintiff emphasizes that defendant testified that her driving had been safe and prudent up to the time of the accident and concludes that there was nothing to put Lisa on notice that her friend was impaired. However, the attending physician, the police officer and her parents all testified that it was obvious to them that the alcohol had affected her. In addition, an expert testified that someone with a blood-alcohol content of .10% would have dulled senses, altered judgment, slowed response to stimuli, depressed nerves and an impaired ability to drive a car. Thus, there was ample evidence from which the jury could find that Lisa Hellings was driving while under the influence of alcohol; that Melissa Watkins was aware or should have been aware that the defendant was under the influence; and that Melissa continued to ride with her in spite of that knowledge.

[3] Plaintiff's next assignment of error is more problematic. It concerns the trial court's jury instruction on the issue of contributory negligence. Although the court mentions the elements of contributory negligence at other times, the final mandate to the jury is representative. The court instructed the jury that Melissa Watkins contributed to her own death

> . . . if the defendant has proved by the greater weight of the evidence that at the time of the accident that Melissa Watkins was negligent in any one of the following respects:
>
> (1) that she knowingly and voluntarily rode with Lisa Hellings when Lisa Hellings was under the influence of an intoxicating beverage, or
>
> (2) that she knowingly and voluntarily rode with Lisa Hellings when Lisa Hellings had a blood alcohol level of .10 percent or more by weight while she was driving, or
>
> (3) that she furnished Lisa Hellings such a quantity of alcohol while she was driving that she should have known that this could or might cause Lisa Hellings to become under the influence of alcohol. . . .

(Numerals added.) Although the first statement is proper, the phrasing of the introductory remarks allowed the jury to base its decision entirely on either of the remaining prongs. The second prong of the court's above-quoted instruction was clearly wrong

on the vital question of knowledge of the driver's impairment. It is obvious that under ordinary circumstances a passenger could not know the blood alcohol level of a driver. Certainly Melissa Watkins did not know the blood alcohol level of Lisa Hellings.

The third prong of the court's instructions is also in error. While the furnishing of alcohol to a driver by a passenger is unwise (and apparently now unlawful), the test to be applied in cases such as the one before us is not whether the passenger should have known that the alcohol furnished could or might have caused the driver to become impaired (under the influence), but whether as a result of the alcohol furnished, the passenger knew or reasonably should have known that the driver was impaired. These errors require a new trial.

[4] Plaintiff's final assignment of error concerns sanctions imposed on plaintiff pursuant to N.C. Gen. Stat. § 1A-1, Rules 36 and 37(c) of the N.C. Rules of Civil Procedure. The sanctions were imposed because of plaintiff's refusal to admit certain requests for admissions concerning defendant's blood-alcohol test. In his brief, plaintiff contends that his failure to admit was justified because there was some evidence of a mixup in the blood samples. The court ordered plaintiff to reimburse defendant for $5,316.28 in expenses incurred as a result of the failure to admit.

Plaintiff first contends that, since the court's order was not supported by findings of fact and conclusions of law, the issue should be remanded for further findings. Rule 37(c) is as follows:

> (c) *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

While the rule itself does not require the trial court to make negative findings with respect to the four exceptions set out in the rule, one recognized authority has stated that it is the better practice to do so. *See* Shuford, N.C. Civ. Prac. and Pro. (2nd ed.), § 37-13. Another recognized authority suggests that the denial of a Rule 37(c) motion for sanctions should be accompanied by findings "pursuant to the rule." *See* 1A-Pt 2 Moore's Federal Practice § 37.04. Because of the risk to litigants of substantial monetary awards against them in the application of the Rule, as reflected by the trial court's order in this case, we adopt the Shuford "better practice" approach as a requirement in such cases, and accordingly order that on retrial, the trial court make such findings in disposing of defendant's motion for expenses. Accordingly, we vacate the trial court's order and remand defendant's motion for further consideration.

Vacated and remanded in part;

New trial.

Judges BECTON and ORR concur.

SYLVIA G. LEWIS v. FLOYD C. LEWIS

No. 864DC186

(Filed 2 December 1986)

Divorce and Alimony § 30— equitable distribution—military pension—no error

The trial court did not err in an equitable distribution action by finding that 70% of defendant's military retirement pay was marital property and awarding plaintiff one-half of that amount, limited to 50% of his disposable retired or retainer pay. Defendant had been in Marine Corps during the marriage for twenty-one years at the time the parties separated; defendant had been in Marine Corps for thirty years at the time of the equitable distribution hearing and had thus achieved the maximum retirement pay regardless of the number of years served; the trial court calculated that the amount of retirement pay attributable to the marriage was 21/30, or 70%; the court determined that an equal division was equitable; and the limitation to 50% of disposable retired or retainer pay was consistent with the requirements of N.C.G.S. § 50-20(b)(3). N.C.G.S. § 50-20(a); N.C.G.S. § 50-20(b)(1).

APPEAL by defendant from *Cameron, Judge.* Judgment entered 18 March 1985 in District Court, ONSLOW County. Heard in the Court of Appeals 12 June 1986.

Charles William Kafer for plaintiff appellee.

Bell and Collins by Hiram C. Bell, Jr., and George L. Collins for defendant appellant.

COZORT, Judge.

Appellant's assignments of error raise the question of whether the trial court properly calculated and awarded to the wife a percentage of the husband's military pension in this equitable distribution action. We affirm the trial court's award to the wife of a sum equal to 35 percent of the gross amount of the defendant's military retirement pay, not to exceed 50% of the defendant's disposable retired or retainer pay, payable in monthly installments upon defendant's retirement from the Marine Corps.

The parties were married on 17 April 1962 and separated from each other on 31 January 1983. On 1 February 1984 plaintiff filed this action seeking an absolute divorce and an equitable distribution of the marital property, including one-half of the defendant's military retirement. A judgment of absolute divorce and equitably distributing the marital property was entered on 18 March 1985.

The defendant joined the United States Marine Corps on 1 October 1954; and at the time the parties separated, he had been in the United States Marine Corps for twenty-eight years, having risen during that time to the rank of Colonel. At the time of the equitable distribution judgment, defendant had been in the United States Marine Corps for over thirty years.

At the equitable distribution hearing, the parties stipulated and agreed to what was marital property and to the real and personal marital property's value, with the exception of the defendant's retirement income from the United States Marine Corps. In finding of fact number 27 of the equitable distribution judgment, the district court found that seventy percent (70%) of the defendant's military retirement is marital property:

> 27. When the defendant does retire from the Marine Corps, he will retire based upon 30 years of service in the

> Marine Corps. The defendant's retirement does not increase with the service of more than 30 years an [*sic*] an officer. The plaintiff and the defendant lived together as man and wife for 21 of those 30 years. Accordingly, 70 percent of the defendant's military service was accomplished during the time the parties were married and lived together. This 70 percent of the defendant's military retirement is marital property.

Defendant excepts to this finding. The district court concluded, without exception from the defendant, that an equal division of the marital property is equitable, and divided the marital property, with the exception of the defendant's military retirement pay, per the parties' stipulation. In its conclusions of law numbers 4 and 5, to which defendant excepts, the district court concluded the following:

> 4. Seventy percent of the defendant's military retirement should be considered as marital property pursuant to the provisions of North Carolina General Statute 50-20(b)(1) and (3)c.
>
> 5. Pursuant to the provisions of North Carolina General Statute 50-20(b)(3)c, the plaintiff is entitled to receive 35 percent of the defendant's military retirement as a prorated portion of the benefits paid to the defendant by the United States Marine Corps at the time the defendant retires from the Marine Corps.

Accordingly, the district court ordered that:

> 9. Upon the retirement of the defendant from the United States Marine Corps, the defendant shall pay, except as herein stated, to the plaintiff from his military retirement a sum equal to 35 percent of the gross amount of the defendant's military retirement pay. This payment shall be made monthly by the defendant to the plaintiff beginning on the 5th day of the first month following the defendant's retirement from military service. Except as herein stated, payments shall continue in an amount equal to 35 percent of the gross amount of this military retirement pay until the plaintiff dies or the defendant dies, whichever event first occurs. . . .
>
> * * * *

Except as herein indicated, the plaintiff's share of the defendant's military retirement shall always be 35 percent of the gross amount of that retirement regardless of what the total amount of the defendant's retirement pay is due to him by virtue of his retirement from the United States Marine Corps.

PROVIDED, HOWEVER, in no event shall the 35 percent of the gross amount of the defendant's military retirement exceed 50 percent of the "disposable retired or retainer pay" as that term is defined in 10 United States Code Section 1408 (a)(4). Therefore, in the event 35 percent of the gross amount of the defendant's military retirement exceeds 50 percent of the disposable retired or retainer pay due to the defendant as a result of his retirement from the Marine Corps, then the *maximum sum* that shall be paid to the plaintiff shall be 50 percent of this disposable retired or retainer pay. However, in the event the 35 percent of the gross amount of the defendant's military retirement does not exceed 50 percent of the disposable retired or retainer pay, then the defendant shall pay to the plaintiff the full 35 percent of the gross amount of his retired or retainer pay. . . .

. . . Even though the plaintiff has been awarded 35 percent of the gross amount of the defendant's military retirement, a ceiling of 50 percent of the defendant's disposable retired or retainer pay is placed by law upon the award herein made to the plaintiff. Accordingly, the defendant shall not take any steps designed to diminish or in any way reduce the amount of disposable retired or retainer pay that he is entitled to receive by virtue of his military service to the end that the plaintiff's portion of his retirement is reduced.

From this award to the wife of one-half of that portion (70%) of the defendant's gross military retirement pay which the district court found to be marital property, not to exceed fifty percent (50%) of the husband's disposable retired or retainer pay, the husband appeals.

The husband's appeal is apparently based on his contentions that (1) the trial court improperly based the award to the wife of 35% of his gross military retirement pay upon the amount of military retirement pay to which he would be entitled upon the date

of his retirement, rather than upon the date of separation; and (2) the trial court should have awarded the wife a percentage of his disposable retired or retainer pay rather than a percentage of his gross military retired pay. We find the trial court's distribution of the husband's military retired pay proper in all respects.

G.S. 50-20(b)(1) (1984) defines "marital property" as including "all vested pension and retirement rights, including military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act." In *Morton v. Morton*, 76 N.C. App. 295, 297, 332 S.E. 2d 736, 737, *disc. review denied*, 314 N.C. 667, 337 S.E. 2d 582 (1985), we held that " 'military pensions eligible under the federal Uniformed Services Former Spouses' Protection Act' [USFSPA] are subject to equitable distribution, G.S. Secs. 50-20(a) and (b)(1) (1984), if the action for absolute divorce was filed on or after 1 August 1983." We further held in *Morton v. Morton, supra*, that

> USFSPA authorizes state courts to treat "*disposable* retired . . . pay payable to a member [of an armed force] for pay periods beginning after 25 June 1981" as marital or separate property, depending on the local law. 10 USCA Sec. 1408(c)(1) (1983) (emphasis added). [Footnote omitted.] "Disposable retired . . . pay" is the total monthly military pension less federal, state, and local income tax, any other debts to the federal government, and any court-ordered annuities paid to a spouse or former spouse. 10 USCA Sec. 1408(a)(4) (1983).

Id. 332 S.E. 2d at 737-38. Plaintiff filed her action for absolute divorce on 1 February 1984. Thus, defendant's military pension is subject to equitable distribution.

Since the parties were divorced on the ground of one year separation, the district court must value the pension, as marital property, as of the date of separation. G.S. 50-21(b). G.S. 50-20(b)(3) (1984) prescribes, in effect, how the retirement benefits as marital property are to be valued as of the date of separation: "The award shall be based upon the proportion of the amount of time the marriage existed simultaneously with the employment which earned the vested pension or retirement rights to the total amount of time of employment." This prescribed valuation method can be expressed as a fraction. The numerator of the fraction is the total period of time the marriage existed (up to the date of

separation) simultaneously with the employment which earned the vested pension or retirement rights; the denominator is the total amount of time the employee spouse is employed in the job which earned the vested pension or retirement rights. *See Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E. 2d 504 (1986). This statutorily prescribed fraction automatically provides the method by which to value the pension or retirement pay, as marital property, as of the date of separation by requiring the numerator to be the amount of time up to the date of separation that the employment which earns the retirement pay exists simultaneously with the marriage period.

G.S. 50-20(b)(3) also provides that "[s]aid award shall not be based on contributions made after the separation, but shall include any growth on the amount of the pension or retirement account vested at the time of the separation." In *Seifert v. Seifert, supra*, we held that "[t]his requirement is fulfilled by determining the nonemployee spouse's fixed percentage as of the date of separation." *Id.* at 337, 346 S.E. 2d at 508. We recognize that in some cases the denominator cannot be determined until the employee spouse retires because the employee has not worked long enough to fix that part of the fraction at the date of separation. For example, if the defendant in the case *sub judice* had been in the Marine Corps only 23 years at the date of the equitable distribution hearing, it could not be known whether he would serve the 30 years necessary to achieve the maximum retirement benefits. *See infra*. Finally, G.S. 50-20(b)(3) requires that "[n]o award shall exceed fifty percent (50%) of the cash benefits by the party against whom the award is made is entitled to receive.

We find that the trial court complied with all of the prerequisites of G.S. 50-20(b)(3). At the time the parties separated defendant had been in the Marine Corps during the marriage for twenty-one years. At the time of the equitable distribution hearing, defendant had been in the Marine Corps thirty years and thus had achieved the maximum amount of retirement pay permitted regardless of the number of years served. *See Seifert v. Seifert, supra*. Therefore, the trial court calculated that the amount of military retirement pay attributable to the marriage is 21/30 or 70%. *See* G.S. 50-20(b)(3). Since the trial court determined that an equal division was equitable, it awarded the wife one-half of this 70%, or 35%, of the defendant's gross military retirement

pay. The trial court's limitation on this award to 50% of the defendant's disposable retired or retainer pay is consistent with the requirement of G.S. 50-20(b)(3) that "[n]o award shall exceed fifty percent (50%) of the cash benefits by the party against whom the award is made is entitled to receive."

The district court's award of 35% of defendant's gross military pay, not to exceed 50% of defendant's disposable retired or retainer pay is the same as saying plaintiff is entitled to receive "whatever percentage of the husband's 'disposable' military pension yields 35% of his gross military pension," *Morton v. Morton, supra*, 76 N.C. App. at 296, 332 S.E. 2d at 737, provided such amount does not exceed 50% of his disposable retired pay. In *Morton*, we upheld such an award.

The trial court's judgment of equitable distribution is

Affirmed.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. VANESSA ANGELENE DAYE

No. 8615SC487

(Filed 2 December 1986)

1. **Criminal Law § 71— concealing merchandise—shorthand statement admissible**

The trial court did not err in a prosecution for willfully concealing merchandise by allowing a witness to characterize defendant's activities in the store as "concealing" merchandise where the term "concealed" was used merely as a shorthand description of defendant's actions. N.C.G.S. § 8C-1, Rule 701.

2. **Shoplifting § 1— willful concealment—evidence sufficient**

The trial court correctly denied defendant's motion to dismiss a charge of willfully concealing merchandise where, although there was contradictory evidence, there was testimony that defendant had taken three shirts from their hangers; rolled them up; placed them in her pocketbook, which was on the floor; and pulled them from the handbag when confronted.

3. **Criminal Law § 116— failure of defendant to testify—corrected instruction—no prejudice**

Defendant in a wilful concealment case failed to show prejudicial error in the trial judge's corrected instruction on her decision not to testify. N.C.G.S. § 15A-1443(a) (1983).

State v. Daye

APPEAL by defendant from *McLelland, Judge*. Judgment entered 20 February 1986 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 13 October 1986.

Defendant Vanessa Angelene Daye was convicted of one count of willfully concealing merchandise belonging to Maxway and received a six months active sentence. From this conviction, defendant appeals.

Attorney General Thornburg, by Assistant Attorney General Augusta B. Turner, for the State.

Jacobs & Livesay, by William L. Livesay, for defendant appellant.

ORR, Judge.

There are three issues in this case: (1) Whether the trial court committed reversible error by overruling defendant's objections and motions to strike testimony that defendant "concealed" items in the store; (2) Whether the evidence presented at trial was sufficient to deny defendant's motion to dismiss; and (3) Whether the trial court committed reversible error by giving additional instructions on defendant's decision not to testify. We find no error, and therefore, affirm the decision of the court below.

Defendant was charged and tried under N.C. Gen. Stat. 14-72.1(a) (1986) which states:

> Whosoever, without authority, willfully conceals the goods or merchandise of any store, not theretofore purchased by such person, while still upon the premise of the store, shall be guilty of a misdemeanor . . . .

In other words, this statute makes willful concealment of merchandise an essential element of the offense created. *See State v. Hales*, 256 N.C. 27, 33, 122 S.E. 2d 768, 773 (1976).

[1] At trial, the State presented three witnesses who testified that the defendant placed merchandise belonging to Maxway in or on her purse. The State's second witness, Barbara Wentler, was allowed, over objection, to characterize defendant's activities in the store as "concealing" merchandise. Defendant argues that

Wentler's reference to "concealing" constituted an impermissible opinion on the ultimate issue to be decided by the jury.

In a similar case, *State v. Chambers*, 52 N.C. App. 713, 718, 280 S.E. 2d 175, 178 (1981), defendant objected to a witness' description of his work duties " 'at the time when the breaking and entering started.' " As in the case at bar, the defendant in *Chambers* contended that the witness' statement constituted an impermissible opinion on the ultimate issue of the case. This Court held in *Chambers* that the "witness' use of the term 'breaking and entering' was clearly a convenient shorthand term to describe what he was doing at the time defendant was found . . . and was not meant to constitute an opinion on a question of law." *Id.*

Likewise, Ms. Wentler was using the term "concealed" merely to describe, in a shorthand form, the actions she observed defendant make. On cross-examination Ms. Wentler admitted that by using the term "concealing," she meant that she observed defendant putting items in her pocketbook. Thus, we find the *Chambers* case persuasive in the case *sub judice* and hold that no error was committed. *See* N.C. Gen. Stat. Sec. 8C-1, Rule 701, Official Commentary (Supp. 1985) ("Nothing in [Rule 701] would bar evidence that is commonly referred to as a shorthand statement of fact."). *See also State v. Smith*, 300 N.C. 71, 77, 265 S.E. 2d 164, 168 (1980).

[2] There are four elements to the offense created by G.S. 14-72.1. To be guilty, it must be proven that: (1) a person without authority, (2) willfully concealed store merchandise, (3) not purchased by that person, (4) while still upon the premises. *State v. Hales*, 256 N.C. at 33, 122 S.E. 2d at 773; *State v. Watts*, 31 N.C. App. 513, 513-14, 229 S.E. 2d 715, 716 (1976). Defendant contends that there was insufficient evidence to show concealment, and therefore, the trial court improperly denied defendant's motion to dismiss. We disagree.

In ruling on a sufficiency of the evidence question, the evidence is to be considered in the light most favorable to the State. *State v. Smith*, 300 N.C. at 78, 265 S.E. 2d at 169. This means that the State is entitled to every reasonable inference to be drawn from the evidence. Any contradictions or discrepancies are to be resolved in favor of the State and do not warrant dis-

missal. *Id.* To withstand the motion to dismiss, substantial evidence of all material elements of the offense must be present. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 78-79, 265 S.E. 2d at 169.

Defendant argues that neither of the Maxway clerks testified that defendant's purse was closed or that the shirts were hidden from view at all times. Further, the arresting officer testified that defendant's purse was not closed and that the shirts "were just sat down on top" of it. Thus, according to defendant, the element of concealment was not established.

While the arresting officer did testify that the shirts were "sat down on top," he also testified that the defendant, in his presence, pulled three shirts out of a large purse. He further testified that the shirts were rolled up inside the purse. Ms. Wentler specifically testified that the defendant, when confronted by the officer, opened her handbag and took out three shirts. Both Ms. Jones and Ms. Wentler had testified that they observed the defendant take the shirts from their hangers, roll them up, and place them in her pocketbook which was positioned on the floor. Therefore, the arresting officer's testimony, that the shirts "were just sat down on top," is at most a contradiction or discrepancy to be resolved ultimately by the jury. The trial court's denial of defendant's motion to dismiss was, therefore, correct. *See State v. Watts*, 31 N.C. App. at 515, 299 S.E. 2d at 717 (upholding trial court's denial of motion to dismiss where there was contradictory evidence on the issue of concealment).

[3] The final issue in the case at bar is whether the trial court properly brought the jury back in to give complete instructions on defendant's decision not to testify. The defendant essentially concedes in her brief that the language of the trial judge's corrected charge was accurate but maintains that the manner and context in which it was given was objectionable. After a thorough review of the record, we find that defendant failed to meet her burden of showing prejudicial error as required by N.C. Gen. Stat. Sec. 15A-1443(a) (1983).

For the reasons set forth above, defendant's conviction is affirmed.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

MORGAN REED CATES, ET ALS v. STANLEY C. WILSON, ET ALS

No. 8618SC392

(Filed 16 December 1986)

1. **Damages § 10— medical malpractice—collateral source rule**

The trial court erred in a medical malpractice action by a mother and a child born with cerebral palsy and mental retardation against the mother's physician by admitting evidence of receipt of benefits by plaintiffs from collateral sources, including Medicaid payments and benefits provided gratuitously for care of the child by the government and the child's grandmother. There was prejudice despite the fact that the jury never reached the damages issue because the collateral source evidence could have served to confuse and mislead the jury on the issue of defendants' liability and allowed defendants to suggest that plaintiffs were already fully compensated and were trying to obtain a double recovery. N.C.G.S. § 108A-59.

2. **Physicians, Surgeons and Allied Professions § 16.1— medical malpractice—erroneous evidence of damages—directed verdict improper**

The trial court erred by granting defendants' motion for a directed verdict against the mother in her action for failure to diagnose a pregnancy where the court expressly based its ruling on insufficient evidence of damages, but improperly excluded evidence of medical expenses because they had been satisfied from collateral sources.

3. **Physicians, Surgeons and Allied Professions § 15; Evidence § 22.1— medical malpractice—former action against different defendant from same subject matter—dismissed—irrelevant**

In a medical malpractice action for failure to diagnose a pregnancy, the testimony of the doctor who eventually delivered the child that plaintiffs had sued him and that the suit had been dismissed was irrelevant. N.C.G.S. § 8C-1, Rule 402.

4. **Physicians, Surgeons and Allied Professions § 15.2; Evidence § 14.1— medical malpractice—opinions on liability by treating physicians**

On remand in a medical malpractice action, the trial court should exclude all opinion testimony on liability offered by defendants against plaintiffs from plaintiffs' treating physicians unless the court finds in the exercise of its discretion that such testimony is necessary to the proper administration of justice. N.C.G.S. § 8-53.

Cates v. Wilson

APPEAL by plaintiffs from *Walker, Judge*. Judgments entered 14 August 1985 in GUILFORD County Superior Court. Heard in the Court of Appeals 20 October 1986.

Joyce Reed Cates (plaintiff-mother) first visited Dr. Stanley C. Wilson (defendant) on 9 January 1978 for the express purpose of losing weight. At the time she was approximately 5'8" tall and weighed 241 pounds. Joyce Cates regularly saw Dr. Wilson, a specialist in family practice medicine, over the course of the next year. Initially, Dr. Wilson placed Ms. Cates on a 1,000 calorie diet.

In late April or early May of 1978, Ms. Cates engaged in a single act of sexual intercourse with a male friend. She was unmarried at the time.

On 13 June 1978, Dr. Wilson treated Ms. Cates for a urinary tract infection. On 6 July he treated her for a yeast infection. On 29 August 1978, Ms. Cates complained to Dr. Wilson of numbness in her hands. Dr. Wilson referred her to a neurologist who diagnosed her as suffering from carpal tunnel syndrome. Ms. Cates underwent surgery to correct this condition on 12 September 1978. Dr. Wilson treated Ms. Cates on 30 November 1978 for urinary complaints. Ms. Cates testified that she told Dr. Wilson on 30 November that she felt some movement in her stomach and that Dr. Wilson explained this movement as the result of a Y-shaped nerve which was left dangling after her gall bladder was removed and which was now hitting against her muscles and causing muscle spasms. Dr. Wilson, by contrast, testified that Ms. Cates did not complain of movement in her stomach and that he did not give her any explanation for movement in her stomach on 30 November 1978.

On 25 February 1979, Ms. Cates began experiencing periods of sharp back pain and an earache. On 26 February, Ms. Cates' mother made an appointment for her to see Dr. Wilson at 10:00 a.m. on 27 February. While showering on the morning of 27 February, Ms. Cates noticed a "horrible green discharge" pouring from her vaginal area. She went to her appointment at Dr. Wilson's office and saw him at approximately 10:00 a.m.

At this stage the facts are in dispute. According to Ms. Cates' version, Dr. Wilson examined her and told her that he thought she was pregnant. He ordered a pregnancy test for her.

She tested positive, but, since the test was not 100% accurate, he wanted her to obtain a sonogram to be sure that she was pregnant. Dr. Wilson told her that he had made an appointment for her with Dr. Doyle, a radiologist, for 2:00 p.m. that day. He instructed her to return home and then proceed to Dr. Doyle's office at 2:00 p.m.

Ms. Cates followed these instructions. She arrived at Dr. Doyle's office at 2:00 p.m. and Dr. Doyle performed a sonogram examination which revealed that she was pregnant and that the baby was in the birth canal ready to be born. She was sent from the sonogram examination back to Dr. Wilson's office, where she waited in his reception room from 2:45 p.m. to 4:15 p.m., when Dr. Wilson saw her. Dr. Wilson told her that she was pregnant and instructed her to go to the office of Dr. Lomax, an obstetrician-gynecologist.

Ms. Cates arrived at Dr. Lomax' office around 4:45 p.m. where she was examined by Dr. Wein, Dr. Lomax' associate, and was sent to Moses H. Cone Hospital Emergency Room. Ms. Cates gave birth early that evening to Morgan Cates (minor-plaintiff), who was born with cerebral palsy and mental retardation.

According to Dr. Wilson's version, he examined Ms. Cates on the morning of 27 February, and he could tell immediately that she was pregnant. He told her that she was pregnant. Dr. Wilson contacted Dr. Lomax, and the two agreed that Ms. Cates should undergo a sonogram examination. Dr. Wilson then sent her to Dr. Doyle's office. Dr. Wilson learned the results of the sonogram from Dr. Doyle between 12:00 noon and 1:30 p.m. and instructed Ms. Cates at this time to go to Dr. Lomax' office. Dr. Wilson next heard from Dr. Wein that Ms. Cates had arrived at their office.

Plaintiffs brought this action against Dr. Wilson and his medical partnership to recover damages allegedly caused by Dr. Wilson's negligence in failing to diagnose Joyce Cates' pregnancy prior to 27 February and in allowing many hours to pass after diagnosing her as pregnant before placing her "into the hands of a specialist in obstetrics" on 27 February. Plaintiffs alleged that "[t]he injuries due to perinatal asphyxia suffered by the minor plaintiff followed proximately from defendant Wilson's failure to diagnose pregnancy and to take steps to assure her prenatal care . . . on the morning of February 27, 1979." Plaintiff Morgan Cates

sought damages for pain and suffering and permanent injury, while his mother sought damages for lost services and earnings of Morgan during his minority and medical expenses which she has incurred and which she will incur on his behalf during his minority.

At trial, the court permitted defendants to introduce evidence of collateral source benefits for plaintiff Morgan Cates. At the same time, the court excluded evidence of plaintiffs' medical expenses on the ground that Medicaid had paid them. The court also permitted Dr. Wein, during his testimony, to refer to a separate lawsuit which plaintiffs had brought against him. In addition, Dr. Wein and several other treating physicians testified against plaintiffs by giving expert opinion testimony as witnesses for defendants.

The court granted defendants' motion for directed verdict against Joyce Cates at the close of all the evidence. The jury found that Morgan Cates was not injured or damaged by the negligence of Dr. Wilson and thus did not reach the issue of damages. Accordingly, the court entered judgments for defendants against each plaintiff respectively. Plaintiffs appealed.

Clark & Wharton, by David M. Clark and John R. Erwin; and Colson, Hicks & Eidson, by Mike Eidson, for plaintiffs.

Henson, Henson, Bayliss & Coates, by Perry C. Henson, Jack B. Bayliss, Jr. and J. Victor Bowman, for defendants.

WELLS, Judge.

[1] Plaintiffs contend the court erred in admitting evidence of receipt of benefits to plaintiffs from collateral sources. We agree.

Plaintiffs called Julia Cates, Morgan's grandmother, as a witness. She testified on direct examination about the circumstances surrounding Morgan's birth and his condition. Defendants were permitted to elicit the following information from her on cross-examination: all of plaintiffs' medical bills had been paid by Social Services (Medicaid); Morgan's attendance at Gateway Education Center (a cerebral palsy school) is free; Joyce Cates receives monthly welfare checks for the benefit of Morgan; Morgan's father pays $30 per week in child support; and Julia Cates allows Morgan and his mother to live with her rent-free,

helps pay for their food, and provides an automobile for transporting Morgan to and from school.

Dr. Paul Deutsch, an expert in research and evaluation of habilitation needs of handicapped persons, testified for plaintiffs concerning the needs and costs for Morgan's current and future care. Throughout Dr. Deutsch's cross-examination, defendants attempted to show the availability of gratuitous government-funded sources of funding for Morgan's current and future care. In particular, defendants were allowed to elicit from Dr. Deutsch that government-funded care facilities were available for mentally retarded persons such as Morgan throughout their lifetime and that these facilities were available free of charge in many instances.

It is well established in this jurisdiction that evidence of a plaintiff's receipt of benefits for his or her injury or disability from sources collateral to defendant generally is not admissible. This principle is known as the collateral source rule. Our courts have invoked this doctrine to exclude evidence of workers' compensation benefits, *Spivey v. Wilcox Company*, 264 N.C. 387, 141 S.E. 2d 808 (1965); evidence that plaintiff's medical expenses had been paid by his employer as the result of hospital insurance carried for the benefit of its employees; *Young v. R.R.*, 266 N.C. 458, 146 S.E. 2d 441 (1966); and evidence that plaintiff received sick leave pay, *Fisher v. Thompson*, 50 N.C. App. 724, 275 S.E. 2d 507 (1981); *Marley v. Gantt*, 72 N.C. App. 200, 323 S.E. 2d 725 (1984); *Andrews v. Peters*, 75 N.C. App. 252, 330 S.E. 2d 638, *disc. rev. denied*, 315 N.C. 182, 337 S.E. 2d 65 (1985).

This evidence "is inadmissible because it is not only irrelevant but also incompetent." *Spivey, supra.* "A tort-feasor should not be permitted to reduce his own liability for damages by the amount of compensation the injured party receives from an independent source." *Fisher, supra.*

Defendants contend that the collateral source rule should not apply to exclude evidence of gratuitous benefits such as Medicaid received by plaintiffs from governmental sources. However, the prevailing view in jurisdictions which have considered this question is that the collateral source rule does apply to benefits which are provided gratuitously by the government. *Johnson v. Baker*, 11 Kan. App. 2d 274, 719 P. 2d 752 (1986). *See, generally, Annot.*

77 A.L.R. 3d 366. In *Werner v. Lane*, 393 A. 2d 1329 (Me. 1978) the Court held that the collateral source rule applied to care and treatment furnished to plaintiff at a mental health institute pursuant to a free state program. The Court explained:

> The overwhelming weight of authority in the country is to the effect that the fact necessary medical and nursing services are rendered gratuitously to one who is injured as a result of the negligence of another should not preclude the injured party from recovering the reasonable value of those services as part of his compensatory damages in an action against the tortfeasor. This is known as the collateral source rule. Stated otherwise, it means that, if a plaintiff is compensated in whole or in part for his damages by some source independent of the tortfeasor, he is still permitted to have full recovery against him.
>
> . . .
>
> The rule has been extended to cases where the gratuitous services were furnished by a state supported agency or public charity.

In *Bennett v. Haley*, 132 Ga. App. 512, 208 S.E. 2d 302 (1974), the Court specifically held that the collateral source rule applied to Medicaid payments. The Court stated in this regard that: "The Medicaid program is social legislation; it is the equivalent of health insurance for the needy; and, just as any other insurance form, it is an acceptable collateral source."

Defendants contend that "[t]he application and operation of [N.C. Gen. Stat.] § 108A-59 clearly shows that Medicaid benefits are assigned directly and specifically to the State and are not a source for the plaintiffs to obtain a double recovery by invoking the application of a collateral source rule." G.S. § 108A-59 provides, in pertinent part, that by accepting medical assistance from the State, the recipient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which he may be entitled.

We hold that G.S. § 108A-59(a) does not remove Medicaid benefits from the protection of the collateral source rule. Plaintiffs are entitled to have the issue of Dr. Wilson's liability determined without evidence of benefits from collateral sources like

Medicaid included for the jury's consideration notwithstanding the State's right to reimbursement for benefits pursuant to G.S. § 108A-59. To hold otherwise would serve to transfer responsibility for malfeasance from the tortfeasor to the victim and the State. Availability of public assistance should not operate to reduce a tortfeasor's legal liability. *See Fisher, supra.*

In light of the foregoing, we hold that the collateral source rule applies to plaintiffs' Medicaid benefits. The court thus erred in admitting evidence of these payments by Medicaid. We further hold that the court, pursuant to the collateral source rule, should have excluded the evidence regarding free schooling, welfare, child support, gratuitous contributions by plaintiff's grandmother and the availability of free future care at public expense. We now consider whether these errors are sufficiently prejudicial to require a new trial.

Defendants contend that any error regarding the admission of collateral source evidence was not prejudicial. Specifically, defendants maintain that the collateral source evidence only pertained to the issue of damages and not the threshold issue of liability. Because the jury never reached the damages issue by reason of its conclusion that Dr. Wilson was not negligent, defendants contend that this evidence, even if improperly admitted, could not have prejudiced plaintiffs' case because it related to an issue which the jury did not reach. We disagree.

In *Fisher, supra*, we held that the improper admission of collateral source evidence was not prejudicial error. After determining that the trial court improperly admitted evidence of plaintiff's sick pay, the Court further held that the error was not prejudicial since the evidence concerned the issue of damages and the jury did not reach this issue by reason of its conclusion that plaintiff was contributorily negligent. *Id.* However, the *Fisher* decision assumes that the improperly admitted collateral source evidence did not affect the liability issue without elaborating on this point. Further, *Fisher* examined the prejudicial impact of evidence from one collateral source rather than the cumulative effect of evidence from many collateral sources, which is the question now presented for our review in the case *sub judice*. Accordingly, *Fisher* does not control the result here.

In *Spivey, supra*, the Court compared the impropriety of references to collateral sources of benefits for a plaintiff to the impropriety of references to the presence or absence of liability insurance for a defendant. Regarding reference to liability insurance, our Supreme Court has stated:

> The existence of insurance covering defendant's liability in a negligence case is irrelevant to the issues involved. It has no tendency to prove negligence or the *quantum* of damages. It suggests to the jury that the outcome of the case is immaterial to defendant and the insurer is the real defendant and will have to pay the judgment. It withdraws the real defendant from the case and leads the jury "to regard carelessly the legal rights" of the real defendant.
>
> "No circumstance, a court has said, is more surely calculated to cause a jury to render a verdict against a defendant, without regard to the sufficiency (weight) of the evidence, than proof that the person against whom such verdict is sought is amply protected by indemnity insurance." 56 A.L.R. 1422.

Fincher v. Rhyne, 266 N.C. 64, 145 S.E. 2d 316 (1965). The Court further noted: "Where testimony is given, or reference is made, indicating directly and as an independent fact that defendant has liability insurance, *it is prejudicial* (emphasis supplied), and the court should, upon motion therefor aptly made, . . . order a mistrial." *Id.*

Similarly, in the instant case, the collateral source evidence admitted could have served to confuse and mislead the jury on the issue of defendants' liability. Defendants' ability to emphasize repeatedly during the cross-examination of Julia Cates and Dr. Deutsch that numerous gratuitous avenues of compensation existed for plaintiffs' benefit substantially eroded plaintiffs' verdict-worthiness by suggesting to the jury that plaintiffs were already fully compensated and were trying to obtain a double recovery.

In *Cook v. Eney*, 277 So. 2d 848, *cert. denied*, 285 So. 2d 414 (Fla. App. 1973), plaintiff appealed from a judgment entered pursuant to a jury verdict which found that defendant was not liable for medical malpractice. The Court held that the trial court erred in permitting plaintiff to be cross-examined regarding his receipt

of workmen's compensation and social security benefits. *Id.* The Court then held that this error was sufficiently prejudicial to warrant a new trial. *Id.* The Court reasoned:

> The only question before the jury was whether the appellant's injuries resulted from the appellee's negligence. Appellee's suggestion that evidence of receipt of collateral benefits would be restricted to the issue of damages, and would not affect the determination of liability, ignores that the evidence was presumably considered without qualification as bearing on a basic fact essential to liability. It cannot be said with any degree of certainty that the jury did not determine that since the appellant was otherwise being taken care of, there should be no recovery against appellee in tort. The admission of evidence of receipt of other benefits may indeed have led the jury to believe that appellant was trying to obtain a double or triple payment for one injury.

Id. See also Williams v. Pincombe, 309 So. 2d 10 (Fla. App. 1975).

Following the reasoning of *Fincher, supra* and *Cook, supra*, we hold that plaintiffs are entitled to a new trial "free from the error of admitting testimony or evidence concerning the receipt of benefits by [plaintiffs] from collateral sources." *Cook, supra.*

[2] Plaintiff-mother contends that the court erred in granting defendants' motion for a directed verdict against her at the close of all the evidence. We agree.

In general,

> [i]n considering any motion for directed verdict [under N.C. Gen. Stat. 1A-1, Rule 50], the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant v. Nationwide Mutual Fire Insurance, 313 N.C. 362, 329 S.E. 2d 333 (1985). The court may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

Our Supreme Court has stated that two claims for relief may arise when an unemancipated minor child is injured by the negligence of another: (1) the claim on behalf of the child to recover for his losses caused by the injury, and (2) a claim by the parent for parental losses caused by (a) loss of services during the child's minority, and (b) medical expenses reasonably necessary for treating the injury. *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E. 2d 482 (1980). *See also* 3 N.C. Family Law Sec. 241 (4th ed. 1981) where it is stated that:

> Two causes of action may immediately spring into existence when any unemancipated minor suffers personal injuries by reason of the tortious conduct of another: (1) the right of the child to recover for his mental and physical pain and suffering, and the impairment of earning capacity after attaining majority; and (2) the right of the parent to recover for loss of services of the child during minority, and other pecuniary expenses incurred or likely to be incurred by the parent as a consequence of the injury, including expenses of medical treatment.

The trial court expressly based its directed verdict on the insufficiency of the evidence on the issue of damages, not on the issue of negligence. Plaintiffs attempted to introduce the medical bills associated with the care of Morgan following his birth. The court excluded this evidence on the ground that Medicaid had paid these bills. Plaintiffs have placed these bills in the record on appeal for our review.

We hold that the court improperly excluded evidence of Morgan's medical expenses and that this evidence, taken with the testimony of Dr. Deutsch pertaining to the cost of care for Morgan during his minority, when viewed in the light most favorable to plaintiff-mother, was sufficient to justify a jury award for Morgan's medical expenses and other care necessitated by his injury. As emphasized, *supra*, plaintiffs were entitled to present their case free from any references to collateral sources of benefits for plaintiff-minor. Similarly, plaintiffs were also entitled to present all relevant evidence on the issue of damages without exclusion of evidence of expenses satisfied from collateral sources. Accordingly, we hold that the court improperly granted defendants' motion for directed verdict against plaintiff-mother.

We note, however, that, despite plaintiff-mother's contention to the contrary, it appears that plaintiffs did not present sufficient evidence of the value of the child's services during minority to justify a verdict for these damages.

We now address plaintiffs' remaining contentions which are likely to arise on remand.

[3] Plaintiffs contend the court erred in permitting Dr. Wein, the doctor who delivered Morgan, to refer to a separate lawsuit which plaintiffs had brought against him. In particular, Dr. Wein was permitted to testify that plaintiffs had sued him on 25 February 1982 and that the suit had been dismissed on 25 July 1984.

We hold that evidence of plaintiffs' separate lawsuit against Dr. Wein was irrelevant under N.C. Gen. Stat. § 8C-1, Rule 402 of the North Carolina Rules of Evidence, and that its admission contravenes the strong public policy favoring settlement of controversies out of court. *See* Commentary to N.C. Gen. Stat. § 8C-1, Rule 408; *Ramsey v. Camp*, 254 N.C. 443, 119 S.E. 2d 209 (1961); *Dixie Lines v. Grannick*, 238 N.C. 552, 78 S.E. 2d 410 (1953). Defendants have not asserted, nor do we see, any grounds for admitting this evidence. Accordingly, we hold that on remand the court must exclude all references to plaintiffs' lawsuit against Dr. Wein, assuming plaintiffs make timely objection to the admission of this evidence.

[4] Plaintiffs contend the court erred in permitting their treating physicians to testify against them by giving expert opinion testimony as witnesses for defendants. As one example, plaintiffs cite Dr. Wein, who testified that, based upon his examination and treatment of Joyce Cates in both his office and at the hospital on the day of birth, it was his opinion that the events of 27 February made no difference "as to the outcome of Morgan Cates' present condition."

In general, a confidential or fiduciary relationship exists between patient and treating physician. *See Black v. Littlejohn*, 312 N.C. 626, 325 S.E. 2d 469 (1985). *See also Hewett v. Bullard*, 258 N.C. 347, 128 S.E. 2d 411 (1962). This relationship is one of trust and confidence in which the utmost good faith must be exercised. 70 C.J.S. Physicians & Surgeons § 36; *Black, supra.*

N.C. Gen. Stat. § 8-53 establishes a physician-patient privilege. The statute provides, in pertinent part, that:

> No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice.

The purpose of the statute is "to create a privileged relationship between physician and patient[,]" *Lockwood v. McCaskill*, 261 N.C. 754, 136 S.E. 2d 67 (1964), and, in particular, "to induce the patient to make full disclosure that proper treatment may be given, to prevent public disclosure of socially stigmatized diseases, and in some instances to protect patients from self-incrimination[,]" *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962).

The privilege established by G.S. § 8-53 is not absolute, but qualified. *Sims, supra.* Specifically, the trial court

> may compel the physician or surgeon to disclose communications and information obtained by him "if in his (the judge's) opinion the same is necessary to a proper administration of justice." In such case the judge shall enter upon the record his finding that the testimony is necessary to a proper administration of justice. [Citations omitted.]

Id. "The statute affords the trial [judge] wide discretion in determining what is necessary for a proper administration of justice." *State v. Efird*, 309 N.C. 802, 309 S.E. 2d 228 (1983). Further, a patient may waive the privilege. *Capps v. Lynch*, 253 N.C. 18, 116 S.E. 2d 137 (1960). The waiver may be express or implied. *Id.*

> The privilege is waived by implication where the patient calls the physician as a witness and examines him as to patient's physical condition, where patient fails to object when the opposing party causes the physician to testify, or where the patient testifies to the communication between himself and physician.

Id.

Plaintiffs do not contend that it was improper for their treating physicians to testify as "fact" witnesses regarding their treatment and diagnosis of plaintiffs. Plaintiffs thus implicitly concede that they have waived the statutory protection afforded by G.S. § 8-53 regarding "*information*" obtained by their treating physicians in the course of treatment and diagnosis. It does not necessarily follow, however, that an implied waiver as to factual or informational evidence should be extended to include opinion testimony on the issue of liability, and because G.S. § 8-53 enunciates a strong public policy to protect the confidentiality of the physician-patient relationship we are not persuaded that implied waiver should be so extended. We therefore hold that unless there has been an express waiver, such opinion testimony should not be allowed absent a finding by the trial court that such testimony is necessary to the proper administration of justice.

As under the qualified statutory protection established by G.S. § 8-53 for confidential information, the trial court should be able to permit plaintiffs' treating physicians to give expert opinion testimony on liability if it finds in the exercise of its discretion that such testimony is necessary to a proper administration of justice. Accordingly, we hold that, on remand, the trial court should exclude all opinion testimony on liability offered by defendants against plaintiffs from plaintiffs' treating physicians unless it finds in the exercise of its discretion that such testimony is necessary to a proper administration of justice.

Plaintiffs contend that the court improperly instructed the jury. Specifically, plaintiffs contend that (1) the court should have instructed the jury that defendants would be liable if Dr. Wilson's negligence aggravated a pre-existing condition; (2) the instructions violate the requirements established in *Wall v. Stout*, 310 N.C. 184, 311 S.E. 2d 571 (1984); (3) the court should have instructed that the fault of the mother, if any, should not be considered

regarding Morgan Cates' right to recover; and (4) the court should have instructed the jury that expert testimony is not necessary to establish medical negligence if what was done in the treatment of a patient is within common knowledge. We have reviewed these contentions and hold that, if any errors did occur in instructing the jury, such errors are not likely to recur on retrial. We also do not reach plaintiffs' remaining argument as the issue it addresses is not likely to arise on remand.

For the reasons stated, the verdict and judgment covering plaintiff Morgan Cates and the judgment covering plaintiff Joyce Cates are vacated and the cause is remanded for a new trial for both plaintiffs on the issues of liability and damages.

New trial.

Judges BECTON and ORR concur.

LEO TABORN v. CLEVELAND HAMMONDS AS SUPERINTENDENT OF THE DURHAM CITY SCHOOLS AND DURHAM CITY BOARD OF EDUCATION

No. 8614SC328

(Filed 16 December 1986)

1. **Schools § 13.2— teacher dismissal—reduction in force—following of board's policy and state law—insufficient findings**

Findings by a city board of education were insufficient to support its conclusion that the board's reduction in force policy and state law were followed in the mid-year dismissal of plaintiff as a probationary teacher of emotionally handicapped students because of a decrease in funding for the Exceptional Children Program.

2. **Schools § 13.2— teacher dismissal—previous vote to dismiss plaintiff—fair hearing**

Plaintiff teacher was not denied a fair hearing before a city board of education in a dismissal proceeding because the board had previously voted to terminate him where the board rescinded that decision and afforded plaintiff an opportunity to be heard.

3. **Schools § 13.2— teacher dismissal—departure of board member during hearing—no violation of due process**

Plaintiff teacher was not denied due process in a dismissal proceeding because a member of the board of education departed during the hearing and was absent during the board's deliberation.

Taborn v. Hammonds

APPEAL by plaintiff from *Ellis, Judge.* Judgment entered 12 November 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 28 August 1986.

This is an appeal from an administrative decision by the Durham City Board of Education to discharge plaintiff, Leo Taborn, during the middle of a school year. The defendants in this action are the Superintendent of the Durham City Schools, Dr. Cleveland Hammonds (hereinafter the Superintendent), and the Durham City Board of Education (hereinafter the Board).

Plaintiff is certified to teach emotionally handicapped students. On 16 August 1984, plaintiff entered into a contract for professional service with the Board. The Superintendent assigned plaintiff to teach a class of emotionally handicapped students in a self-contained classroom at E. K. Powe Elementary School. In a letter from an assistant superintendent dated 11 December 1984, plaintiff was notified that due to a recent analysis of the Exceptional Children Program, the Board, on 10 December 1984, had approved the termination of his teaching position at the close of the school day on 18 January 1985. By letter dated 7 January 1985, plaintiff notified the Board of his opinion that his discharge was wrongful and requested a hearing on the matter. Thereafter, on advice of counsel, the Superintendent recommended to the Board that plaintiff's termination be rescinded. The Board voted to rescind the termination of plaintiff. In a letter dated 10 January 1985, the Superintendent informed plaintiff that due to a decrease in funding resulting from a teacher audit by the North Carolina Department of Instruction, it was his decision to recommend to the Board that plaintiff be dismissed from his teaching position. The Superintendent's letter also informed plaintiff that he could make a request within fifteen days of receipt of the letter for a hearing on the Superintendent's recommendation and that thereafter the Board would review the recommendation for his termination. Plaintiff timely requested a hearing.

On 30 January 1985, a hearing was held by the Board to review the Superintendent's recommendations that plaintiff and two other teachers be discharged. Five board members attended the hearing, but board member Ms. Copeland, for unexplained reasons, departed during the proceedings.

The Superintendent primarily presented documentary and testimonial evidence that chronicled the reduction of funds allotted by the state and the subsequent reduction in force. At the hearing it was established that an audit by the Division of Teacher Allotments/Student Accounting for the State Board of Education revealed that, *inter alia*, the Durham City School System had duplicated headcounts of students in the Exceptional Children Program. The auditor testified that the "Duke Hospital Program" ("Duke Hospital Program is under the fiscal control of the Durham City Schools") reported all students in the average daily membership in the Exceptional Children Program 1 June 1984 headcount; that there are ten categories in the Exceptional Children Program; that a headcount is submitted to the State Board for each category; that the Durham City School System correctly reported sixty-two (62) students in the emotionally handicapped category; and that the state's audit figure also showed sixty-two (62) students. The auditor testified further that the count of sixty-two (62) emotionally handicapped students served as a basis for funding allotments for the 1984-1985 school year. The audited figure for the category of learning disabilities was thirty (30) less than the figure reported by the Durham City Schools. It was further established at the hearing that as a result of duplication of headcounts in the Exceptional Children Program and the declassification of children reported by the "Duke Hospital Program," the audit report recommended that: "This office require the Durham City Schools to refund funds for the 285 handicapped students reported in excess for which they are entitled."

On 31 August 1984, the Superintendent was officially informed by letter that his school system would have $211,150.72 cut from state allocations and $58,560.00 cut from federal funds. The Superintendent requested that budget cuts be spread over a two year period, but declined to go publicly before the State Board of Education on the issue of duplication of headcounts and the reported procedural irregularities with the "Duke Hospital Program." Thereafter, at the direction of the Superintendent, a committee of three people was instructed to formulate a list of teachers to be recommended for discharge. The committee included plaintiff's name in the list of five teachers to be recommended for discharge. Plaintiff testified that the mid-year replacement of

him by another teacher would be detrimental to the class of emotionally handicapped students and that they would suffer a loss of one year in progress.

In a decision dated 4 February 1985, the Board terminated plaintiff's employment. Plaintiff appealed to Superior Court. A hearing was held at the 15 August 1985 session of Superior Court in Durham County to review the Board's decision. On 12 November 1985, the court affirmed the Board's decision. Plaintiff appeals.

Glenn and Bentley, P.A., by Stewart W. Fisher, for plaintiff appellant.

Spears, Barnes, Baker, Hoof & Waino, by Marshall T. Spears, Jr. and Gary M. Whaley, for defendant appellees.

JOHNSON, Judge.

[1] Plaintiff's first argument is that there is not substantial evidence to support the Board's finding that he was discharged in accordance with the Board's reduction in force policy. The General Assembly has statutorily prescribed our scope of review as follows:

> Sec. 150A-51 Scope of review; power of court in disposing of case.
>
> 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.

G.S. 150A-51. The standard of review stated in subsection (5) is known as the "whole record" test. *See generally Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977). The Court in *Thompson, supra*, explained the "whole record" test as follows:

> The 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo, Universal Camera Corp., supra.* On the other hand, the 'whole record' rule requires the court, in determing the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson, supra, at 410, 233 S.E. 2d at 541.

In *Abell v. Nash County Board of Education*, 71 N.C. App. 48, 321 S.E. 2d 502 (1984), *disc. rev. denied*, 313 N.C. 506, 329 S.E. 2d 389 (1985), this Court reversed a summary judgment that a trial court entered for Nash County Board of Education. The decision in *Abell, supra*, was based on the fact that no rational reason appeared conclusively for a decision not to renew the contracts of two probationary teachers. This Court in *Abell, supra*, specifically clarified the decision in *Hasty v. Bellamy*, 44 N.C. App. 15, 260 S.E. 2d 135 (1979), and followed the "general rule that 'arbitrary' or 'capricious' reasons are those without any rational basis in the record, such that a decision made thereon amounts to an abuse of discretion." *Abell, supra*, at 52-53, 321 S.E. 2d at 506. It is significant to note that the decision to not renew the contract of a probationary teacher invokes less statutory procedural protections than a decision to recommend that a probationary teacher be discharged at mid-year when there appears to be a lack of funding. *See* G.S. 115C-325(m)(1). *See also*, G.S. 115C-325(e). A probationary teacher may not be dismissed at mid-year except for reasons that a career teacher may be dismissed such as lack of funding, *see*

G.S. 115C-325(e)(1)1, and may only be dismissed according to the procedures applicable to mid-year or discharge of a career teacher, *see* G.S. 115C-325(m)(1). Thus, the statutory protections are greater for probationary teachers sought to be discharged at mid-year. In *Abell, supra*, this Court decided that in the case of a non-renewal, it is not required that a Board of Education make exhaustive inquiries or formal findings. *Abell, supra*, at 53, 321 S.E. 2d 507. However, relying upon the landmark case of *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 28 L.Ed. 2d 136, 91 S.Ct. 814 (1971), this Court ruled that a reviewing court must be able to determine what factors were used to reach an administrative decision as well as whether said decision was arbitrary, capricious, an abuse of discretion, or not in accordance with law. *Abell, supra*, at 53, 321 S.E. 2d at 507. We have surmised that the General Assembly has expressly intended to provide teachers in programs of special education and related services protection from a reduction in funding. *See generally* G.S. 115C-142. This Court has construed the purpose of G.S. 115C-142 as follows:

> The manifest purpose of G.S. 115[C]-142 was to provide teachers of proven ability for the children of this state by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons.

Taylor v. Crisp, 286 N.C. 488, 496, 212 S.E. 2d 381, 386 (1975).

In the case *sub judice*, the Board of Education with respect to the termination of plaintiff, found the following, to which plaintiff excepts:

> 5. That because of the aforementioned loss of funds, the Exceptional Children Program, which had been staffed in reliance upon the initial proposed allotments, did not have sufficient funds for personnel expenses to pay all the professional and para-professional persons who had originally been assigned to said Program for the 1984-85 school year.
>
> 6. That at the request of the superintendent and in accordance with Board policy, the Director of Exceptional Children reviewed the qualifications, certification, evaluations and experience of all of the professional staff in those areas of the Exceptional Children Program in which professional staff re-

ductions were necessary to begin to bring personnel in line with the annualized funding available for said Program.

7. That the respondents were properly included within that group of professional staff which were designated by the administration for termination of employment as part of the Exceptional Children Program due to a reduction in force because of the decrease in funding.

(Exceptions omitted).

Our primary task is to apply the "whole record" test and determine if the foregoing findings support the following conclusion made by the Board:

3. That Board policy and state law were followed in making the selection of which members of the professional staff were to be recommended for dismissal.

The Board's policy regarding reduction in instructional personnel is as follows:

POLICY REGARDING REDUCTION IN INSTRUCTIONAL PERSONNEL

When it has been decided that there shall be a reduction in the number of teachers or principals employed in the system, the following criteria shall be used in determining which individuals shall be dropped from employment:

(a) To the extent possible, the decrease shall be met by normal attrition such as retirement, resignation, leave of absence, etc.

(b) The requirements of the system to provide the most meaningful educational program to its pupils.

(c) The qualifications and experience of the individuals being reviewed in relation to the position(s) to be filled.

(d) The previous evaluations which have been made concerning the individuals being reviewed.

(e) If other considerations are substantially similar, a career teacher shall be given preference in retention over a probationary teacher.

Finding of fact number six (6) is conclusory and substantially similar to the conclusion made by the Board as set forth hereinabove. We are advertent to the fact that the selection and retention of program personnel is within the Board's expertise and express no inclination nor ability to endeavor to substitute or interpose our judgment for that of the Board. However, the blanket statement made in finding number six (6) that the selection process was carried out "in accordance with Board policy" does not afford us a basis to genuinely review the Board's conclusion stated in Finding of Fact seven (7) that plaintiff was "properly included within [the] group of professional staff designated . . . for termination of employment." There is nothing in the Board's decision with respect to subsections (b) and (d) of its policy which makes it impossible for us to determine if these criteria were used as the policy mandates that they "shall be used."

The Board's decision makes a general reference to "those areas of the Exceptional Children Program in which professional staff reductions were necessary . . .," but does not state what those areas are, and the basis for the reduction of force in them. The findings do not state what area plaintiff is considered to be in. There was considerable testimony and documentary evidence with respect to the duplication of headcounts in certain areas of the Exceptional Children Program. Plaintiff testified that he was certified to teach emotionally handicapped students and that he was a teacher of emotionally handicapped students in a self-contained classroom at E. K. Powe Elementary School. During cross-examination Dr. Warlick, Supervisor of Exceptional Children with the Durham City Board of Education, testified as follows:

> Q. Is it correct you are not reducing the number of teachers who are teaching emotionally handicapped students for 1984 and '85 in the Durham City School System?
>
> A. The number of positions, no.

Dr. McCallister, Assistant Superintendent of Personnel for the Durham City School System, testified that there were categories of teachers who were probationary, but were not affected by a reduction in staff because they were working in areas that are "not overstaffed due to the fact that students promote teaching positions." When Dr. McCallister was asked whether a person who has been certified to teach emotionally handicapped students

is the person who should be teaching emotionally handicapped students, his response was "absolutely." The auditor for the Division of Teacher Allotments/Student Accounting for the State Board of Education testified as follows:

> Q. Could you tell us were the Durham City Schools within their cap [allowable percentage average with reduction in funding] for emotionally handicapped students in the 1984-85 school year?
>
> A. Yes.
>
> Q. So, they were not reduced any funds for emotionally handicapped students?
>
> A. Not per cap, no.
>
> Q. And, they were also accurately counted in the 1984-85 school year?
>
> A. That's correct.

The absence of findings regarding the relationship of headcounts in areas of the Exceptional Children Program to the termination of plaintiff, as well as other deficiencies in the Board's findings, prevents us from discerning a substantive reason for the decision to terminate plaintiff.

Further, the transcript of the hearing reveals inconsistent and contradictory testimony by witnesses as to the weight each criterion in the Board's policy is to be given and as to how they were relied on in the case *sub judice*. For example, Dr. Warlick, under cross-examination, testified as follows:

> Q. Okay. For—clarification, then, could you tell us specifically what the weighting—what weighting was given to each given category; i.e., certificate level, certification, years of experience, career status, et cetera, in the order of priority—in rank order of priority?
>
> A. Well, the first issue—but, of course, this is looking at the entire program—would have been the issue of career status, or not having career status.
>
> A major factor also is the area of needs within the school system.

> Then, qualifications and experience of the teachers, I suppose.

This testimony by Dr. Warlick contradicts the priorities established by the policy that are supposed to be carried out. Subsection (e) of the policy states that career status is a consideration "[i]f other considerations are substantially similar." Dr. Warlick's testimony smacks of a last hired first fired approach to the termination of teachers. Dr. Warlick in later testimony reversed the prioritization of the criteria which should be considered in the decision making process:

> Q. But, there again, is my question with regard to your quantitative analysis.
>
> If you say your first issue part and parcel division occurs at career status—
>
> A. (Interposing) Let me correct my previous statement.
>
> Our first issue is the quality of service for the students. That is the first issue.
>
> Q. And, second, then you would say is career status?
>
> In other words, you shift that emphasis?
>
> A. It's really very hard to distinguish, you know, when you get to career status versus experience. It really is.

However, Dr. Warlick, when asked to comment upon the reasoning for recommending that plaintiff be terminated, testified that "Mr. Taborn is most recently employed within the system. Has the least amount of experience." If, according to the Board's policy, this may be the only basis to terminate plaintiff's employment there was nothing in the Board's decision to the effect that plaintiff was terminated because he was the most recently employed and had the least amount of experience. We deem it significant to note that there was testimony which would greatly detract from such a finding. From the evidence adduced at the hearing it appears that the list of teachers within the Exceptional Children Program that were to be considered for termination was incomplete. The names of two teachers were omitted from the list. One teacher, Cathy Chapman, was in her first year of employment with a beginning date of employment of 20 August 1984,

which is subsequent to plaintiff's date of employment. There was testimony that Ms. Chapman was specifically hired to teach in the area of her certification, learning disabilities. However, the majority of testimony elicited on behalf of the Superintendent was that teachers were hired subject to subsequent assignment. The Board's findings do not resolve this area of conflict in the testimony given at the hearing. Moreover, we note that there were no findings made with respect to whether learning disabilities was one of the categories, for funding purposes, in which there was a miscount of students. We recognize that program decisions are entirely within the expertise of the Durham City Board of Education, and we do not seek to nor deem it wise or allowable under the law of this state for us to interpose our judgment in these matters. However, in order for this Court to grant a meaningful review, we find it necessary to vacate the Board's decision and remand the case for a new hearing.

[2] In light of our decision to remand for a new hearing, we consider plaintiff's remaining Assignment of Error challenging the Board's decision to hold a hearing on the Superintendent's recommendation for his termination after the Board had previously voted to accept the Superintendent's recommendation. In this regard, plaintiff argues that the Board denied him a fair and impartial hearing. We disagree.

Plaintiff contends that the Board was not capable of providing him a fair and meaningful hearing after it had earlier voted to terminate him and then voted to rescind that termination. There is no legal basis for plaintiff's assertion that the Board's familiarity with the facts preclude a fair and impartial hearing. In *Thompson v. Wake County Board of Education*, 31 N.C. App. 401, 230 S.E. 2d 164 (1976), *reversed on other grounds*, 292 N.C. 406, 233 S.E. 2d 538 (1977), this Court disagreed with the argument pressed that a Board is necessarily biased when that board is in effect required to make the same finding twice. There was a fact in *Thompson, supra*, which plaintiff argues is distinguishable from the case *sub judice*, to wit: the Board in *Thompson, supra*, in the first instance acted as an investigative body and later was called upon to render a decision on the merits. However, the fact remains that the Board serves an administrative function and the procedures for reviewing its decisions are established by statute. The General Assembly has not provided for any other body, ad-

ministrative or otherwise, to render a decision on the termination of a teacher if the Board is familiar with the facts of the case. Since the General Assembly has designated the Board to serve this function and judges often hear cases more than once we see no reason to impose stronger constitutional compulsions on an administrative hearing body than on a court. *See generally FTC v. Cement Institute*, 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1947). In the case *sub judice*, the Superintendent realized that proper procedures had not been followed and that plaintiff had a right to notice and to be heard with respect to the pending recommendation of discharge. The Board rescinded its decision to terminate plaintiff and afforded him an opportunity to be heard. Due process requires no more for an impartial hearing. Analagously, as a consequence of our decision the Board will have to notify defendant of the reasons for the decision to discharge him as discussed *supra*, and hear the case, yet again. The principle is the same when we remand cases such as the case *sub judice*, we remand with the "presumption of honesty and integrity in those serving as adjudicator." *Withrow v. Larkin*, 421 U.S. 35, 47, 43 L.Ed. 2d 712, 724, 95 S.Ct. 1456, 1464 (1975).

[3] Plaintiff also argues that the departure of a board member during the hearing and her absence during the Board's deliberation denied him his due process right to a fair tribunal. It is true that the Board's adherence to established procedure in the case *sub judice* was less than exemplary. There is nothing in the record on appeal that would justify the departure of Ms. Copeland, but we find no authority which would justify our holding said departure to be a violation of plaintiff's due process rights. In *Sigmon v. Poe*, 391 F. Supp. 430 (W.D.N.C.), *affirmed*, 528 F. 2d 311 (1975), it was contended that the inattentiveness of a board member who did embroidery during the entire hearing constituted a violation of the right to be fairly heard. The Court in *Sigmon, supra*, expressed a sentiment which we share: "[t]his, again, while not inspiring confidence in attentiveness or impartiality, falls somewhat short of the fundamental unfairness which due process is designed to avoid." *Sigmon, supra*, at 433. Plaintiff's remaining Assignments of Error are not likely to recur during further proceedings to be held consistent with this opinion; therefore, we need not address them.

Vacated and remanded for further proceedings not inconsistent with this opinion.

Judges BECTON and COZORT concur.

STATE OF NORTH CAROLINA v. JOSEPH MARIO TARANTINO

No. 8624SC693

(Filed 16 December 1986)

Searches and Seizures § 6— manufacturing marijuana—illegal search—reasonable expectation of privacy

In a prosecution for manufacturing marijuana, the trial court correctly suppressed evidence seized during a search of defendant's building because the information which furnished probable cause for issuance of the search warrant was obtained as a result of a constitutionally impermissible search. Defendant had a reasonable expectation of privacy with respect to his activities and property within his building where the doors to the building were secured and the windows covered; the building was located on a lightly traveled road in a sparsely populated area; and, in order to view the interior of the building, the detective had to bend and look through a crack about three feet from the floor of a roofed and partially enclosed porch at the rear of the building, use his flashlight, and place his eye within a foot of the opening.

APPEAL by the State from *Gray, Judge.* Order entered 24 April 1986; amended order entered 2 June 1986 in Superior Court, AVERY County. Heard in the Court of Appeals 30 October 1986.

On 31 August 1985, Detective B. R. Baker, Jr. of the Avery County Sheriff's Department obtained a search warrant from a magistrate and conducted a search of an old store building owned by defendant. As a result of the search, defendant was charged in an indictment returned by a federal grand jury with manufacturing marijuana in violation of the federal statute. Defendant moved, in the United States District Court for the Western District of North Carolina, to suppress evidence seized in the course of the search. His motion was allowed by United States District Judge D. B. Sentelle and, consequently, the U. S. Attorney chose not to proceed with the prosecution.

Thereafter, defendant was indicted by the Avery County grand jury upon charges of manufacturing marijuana by growing

47 marijuana plants in pots in violation of N.C.G.S. 90-95(a)(1). He moved, in the Superior Court, to suppress evidence seized during the search of his building on the grounds that the information which provided probable cause for the issuance of the search warrant had been obtained in violation of the Fourth Amendment. From an order granting the motion, the State appealed. Defendant also moved to suppress the evidence on the grounds that Judge Sentelle's order was entitled to full faith and credit in the North Carolina courts and that the State was collaterally estopped from relitigating the issue. The trial court denied the latter motion, to which ruling the defendant excepted and made cross-assignments of error.

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

Beskind and Rudolf, P.A., by Thomas K. Maher and David S. Rudolf; Loflin and Loflin, by Thomas F. Loflin, III, for defendant appellant.

MARTIN, Judge.

The State appeals, pursuant to G.S. 15A-979(c) and G.S. 15A-1445(b), from the order of the Superior Court suppressing evidence seized when defendant's building was searched by law enforcement officers having a search warrant in their possession. We conclude, as did the trial court, that the information which furnished probable cause for the issuance of the search warrant was itself obtained as a result of a constitutionally impermissible search of defendant's premises and we affirm the trial court's order.

Ordinarily, the scope of appellate review of an order suppressing evidence would require consideration of two questions: (1) whether the trial court's findings of fact are supported by competent evidence, and (2) whether those findings support the court's legal conclusions. *State v. Cooke*, 306 N.C. 132, 291 S.E. 2d 618 (1982). In the present case, however, the State has not excepted to any of the trial court's findings of fact, thereby raising a presumption that they are supported by competent evidence and rendering such findings conclusive on appeal. Even so, we have reviewed the testimony and other materials presented at the suppression hearing and conclude that the trial court's find-

ings completely and succinctly summarize the relatively uncomplicated facts of this case. Those findings were as follows:

> 1) On the date of August 30, 1985, Detective B. R. Baker, Jr. received a telephone call from a citizen, whose name, Detective Baker has stated must be kept confidential for his protection. This caller stated that he had observed within the "Old Aldridge Store Building" marijuana plants growing and that these could be seen by looking through the exterior sheathing on the back wall and that the caller had made this observation himself. Baker was familiar with the building and knew it himself to be called by the name "Old Aldridge Store Building." This caller has given information on other occasions which could not be verified, so that on this instance, Detective Baker did not consider that he had probable cause to obtain a search warrant.
>
> 2) Acting upon information supplied by the informant, Detective Baker proceeded to the Aldridge Store Building during the nighttime, without a search warrant, to investigate the information furnished by the informant.
>
> 3) The building is located on N.C. Highway 194 in Avery County between Elk Park and Banner Elk. This road is a winding mountain road in a rural sparcely (sic) populated area of Avery County. Traffic conditions are light on this road. The building appears to be an old building and it was during this time in an apparent poor state of repair. It is a frame two story building and it was mostly covered with a brick design external wall covering, although in its rear, this siding was removed in several areas. The building was constructed on the bank of a hill so that as one walked the ground from front to rear, the ground elevated and at the rear one would be at the second floor level and the rear doors opened directly into the second floor. The building has a front door which opens into the bottom floor. This door was solid wood and there were two front windows opening into the bottom floor. The front door was padlocked. Two windows opening into the second floor were totally covered by wood on the inside. On each side of the building was located one small window which opened into the second floor. Those windows had been covered from the outside with wooden boards.

4) The rear of the building had two doors, one of which was solid wood and the other had an opening for a glass pane which had been covered entirely by wood. Both doors opened directly into the second floor. At the rear of the building was a floor which would be on the approximate same level as the interior second floor of the building. This floor was the same width as the rear of the building. On one side of this floor was located a solid wall and in the rear was a wall of the building with an open hole and on the other side was located a wide passage. This passage had no door and its dimensions were wider than standard doors. Over the top of this floor was a roof slanting downward from the main portion of the building. The roof of the main portion of the building was at a triangle. On the interior wall of the rear part of the structure was a small enclosed area which was located on the inside of the fully enclosed wall. The large opening into the porch or room which was enclosed on three sides was on the same side of the building as a small parking area. The passage into the back porch or room was not obstructed in any way on August 30, 1985.

5) The parking lot is a small graveled area and there was a noticeable but not well-worn path leading from it to the passage onto the rear porch on August 30, 1985.

6) In an effort to investigate this call, Mr. Baker went to the building which has been described earlier in these findings, and arrived there at 11:00 o'clock P.M. on a dark night. Mr. Baker parked his automobile on the gravel parking lot near the building, he knocked on the front door, and by the use of a flashlight, walked along the side of the building to the rear area which was on the opposite side from the road. Mr. Baker then walked on to the porch or the additional room, knocked on the door, heard no response and saw no indication of any activity anywhere about the building. Mr. Baker then found a section of the wall where the boards did not join which were not externally covered and by holding the flashlight over his head and bending his body, he shined his light through the cracks, which in his opinion were as wide as one-quarter of an inch. When Mr. Baker shined his flashlight inside the building through the cracks, he was able to illuminate a small part of the interior of the building and

could see plants growing which he recognized as being marijuana. At that time, Mr. Baker could identify that there were several separate plants on the interior of the building. Subsequently, on his second visit to the building, with a warrant, he found that the two rear doors to the building were nailed shut from the inside.

7) After his examination of the premises, Detective Baker proceeded to the Sheriff's Department of Avery County, executed an affidavit and obtained a search warrant from a magistrate, returned to the premises in question, and seized the marijuana and certain other items incident to their growth named in the warrant.

Although there was no specific finding with respect to ownership of the building, neither the State nor the defendant has raised any issue as to that fact and all of the evidence indicates that defendant owned the building. Based upon its findings, the trial court made the following legal conclusions and ordered suppression of the challenged evidence:

1. The first inspection of the property by Detective Baker on August 30, 1985, constituted a warrantless search of the premises in question.

2. The Defendant had a reasonable expectation of privacy that was invaded by the search.

3. The marijuana seen by Detective Baker on his first visit to the premises in question was not located in an open fields area.

4. The warrantless search of Defendant's premises by Detective Baker does not fall within the "plain view" exception nor any other exception to the requirement for a valid search warrant.

5. The initial inspection of the Defendant's premises by Detective Baker was violative of the Fourth Amendment to the U. S. Constitution as a matter of law.

The State contends that the trial court erred by concluding that Detective Baker's initial inspection of the premises constituted a warrantless search in violation of the Fourth Amendment.

A search, within the meaning of the Fourth Amendment, "occurs when 'an expectation of privacy that society is prepared to consider reasonable is infringed.' " *Maryland v. Macon*, 472 U.S. 463, ---, 86 L.Ed. 2d 370, 376, 105 S.Ct. 2778, 2782 (1985), *quoting United States v. Jacobsen*, 466 U.S. 109, 80 L.Ed. 2d 85, 104 S.Ct. 1652 (1984). Whether or not a person who invokes the protection of the Fourth Amendment may claim a "reasonable expectation of privacy" depends upon 1) whether, by his conduct the person has "exhibited an actual (subjective) expectation of privacy," and 2) whether that subjective expectation of privacy is "one that society is prepared to recognize as reasonable." *Smith v. Maryland*, 442 U.S. 735, 740, 61 L.Ed. 2d 220, 226-27, 99 S.Ct. 2577, 2580 (1979), *citing Katz v. United States*, 389 U.S. 347, 19 L.Ed. 2d 576, 88 S.Ct. 507 (1967) (Harland, J. concurring).

Initially, the State contends that although defendant's building was secured from physical intrusion, defendant could not have had an actual expectation of privacy from visual intrusion by a "curious onlooker" such as the informant or Detective Baker. The State further contends that even if defendant had such an expectation, it was not one which society would recognize as reasonable. The argument is based upon the existence of some quarter-inch cracks in a section of the rear wall of the building, through which Detective Baker made his initial observation. The State argues that because the contents of the building were exposed to the public by means of these cracks, Fourth Amendment protections do not apply.

It is now well established that a person cannot have a reasonable expectation of privacy, protected by the Fourth Amendment, in things or activities which are generally visible from some public vantage point. *Katz, supra; California v. Ciraolo*, --- U.S. ---, 90 L.Ed. 2d 210, 106 S.Ct. 1809 (1986). Thus, a governmental observation of that object or activity does not amount to a search. In the present case, however, the trial court's findings support its conclusion that defendant had a reasonable expectation of privacy with respect to his activities and property within his building. The secured doors and covered windows of the building, as well as its location on a lightly traveled road in a sparsely populated area, are evidence of defendant's actual or subjective expectation of privacy. These findings support, as well, the trial court's conclusion that defendant's expectation of privacy

was objectively reasonable when viewed under the second test articulated in *Smith*. The contents of the building were not, as the State contends, exposed to public view. To the contrary, in order to view the interior of the building, Detective Baker testified that he had to bend his body to look through a crack about three feet from the porch floor, using his flashlight and placing his eye within a foot of the opening.

The State argues, however, that due to the nature of the building, an old store, and its generally run down appearance, it had all the indicia of an abandoned building and any expectation of privacy with respect to its contents was unreasonable. This argument has no merit. As noted earlier, the building had been physically secured. The door was padlocked and the windows were covered, providing at least some objective indication that the occupant intended and expected the interior to be private. There is no abandonment if the owner or occupant of property intends to retain a privacy interest in the property. *See United States v. Burnette*, 698 F. 2d 1038 (9th Cir. 1983).

Had Detective Baker made his initial observation through an uncovered window, a partially opened door, or some other aperture of such a nature as to negate a reasonable expectation of privacy within the building, our result would likely be different. However, in deciding questions relating to the objective reasonableness of one's expectation of privacy, it is apparent that each case must be judged on the basis of its own peculiar facts and circumstances. In this case we hold that the existence of quarter-inch cracks in a portion of an exterior wall, located within a roofed and partially enclosed porch at the rear of an otherwise secured building located in an isolated area, does not render unreasonable the occupant's expectation of privacy with respect to his activities conducted within the building.

The next issue with which we are confronted is whether Detective Baker's actions were sufficiently intrusive to constitute an infringement upon defendant's legitimate expectation of privacy, thus constituting a "search." *Macon, supra.* Since we have held that the existence of the quarter inch cracks in the rear wall of the building was insufficient to negate the reasonableness of defendant's expectation of privacy, it follows that Detective Baker's actions in peeping through the cracks infringed upon de-

fendant's rights of privacy and amounted to a "search" in the constitutional sense.

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz, supra*, 389 U.S. at 357, 19 L.Ed. 2d at 585, 88 S.Ct. at 514. There is no contention by the State that Detective Baker's actions were authorized by any exception to the warrant requirement. Since all of the information providing probable cause for the subsequent issuance of a search warrant was obtained as a result of Detective Baker's initial warrantless search of defendant's premises in violation of the Fourth Amendment, the warrant was invalid and evidence seized pursuant thereto is inadmissible. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961). The order of the trial court must be affirmed.

In view of our decision, we deem it unnecessary to address defendant's cross-assignments of error.

Affirmed.

Chief Judge HEDRICK and Judge COZORT concur.

LA NOTTE, INC. v. NEW WAY GOURMET, INC., AND W. B. DIXON, III, AND WIFE, KITTY DIXON, INDIVIDUALLY v. GIAVONNE GIANONNE

No. 8621SC347

(Filed 16 December 1986)

1. Cancellation and Rescission of Instruments § 9— rescission of contract by restaurant—lease assignment not executed—credibility of parties

In an action to recover damages for breach of contract to purchase a restaurant, the trial court properly denied defendants' motion for a directed verdict on their counterclaim for rescission where the agreement executed by the parties required the parties to cooperate in obtaining the assignment of the lease, the evidence tended to show that one defendant had refused to execute a document assigning the lease, and that defendant testified that his attorney had advised him not to sign the document because it contained errors. The credibility of the evidence presented a question for the jury.

2. Appeal and Error § 31.1— no objection to instructions—no appellate review

No question was presented for appellate review regarding the court's instructions on burden of proof where defendants failed to object to the instructions. N.C. Rules of App. Procedure, Rule 10(b)(2).

3. Unfair Competition § 1— breach of contract—evidence sufficient

The evidence presented at trial in an action for breach of contract to purchase a restaurant raised the issue of unfair or deceptive trade practices in violation of N.C.G.S. § 75-1.1 where John Giannone assured W. B. Dixon that the gross income of the restaurant was $13,000 per month, except in November and December, when the gross income was $26,000 per month; W. B. Dixon was not permitted to see the books because the records were combined with those of another restaurant; Giannone did not provide the books, records and files at closing, as required by the purchase agreement; W. B. Dixon testified that he was assured by Giannone and his wife that he could reasonably expect to make a profit and that he trusted Giannone; the actual gross sales of the restaurant from November 1982 through December 1983 had ranged from $5,743 to $7,222 per month; and the average gross income after defendants began to operate the restaurant in November 1983 was $7,000 per month.

Judge COZORT concurs in part and dissents in part.

APPEAL by defendants New Way Gourmet, Inc., and W. B. Dixon, III, from *Mills, Judge.* Judgment entered 3 October 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 November 1986.

This is a civil action wherein plaintiff seeks to recover damages for beach of contract to purchase a restaurant. In its complaint filed 30 March 1984, plaintiff alleged that defendants agreed to purchase the assets of a restaurant located in Hanes Mall in Winston-Salem, but had failed to make the monthly payments pursuant to a promissory note which defendants had executed to secure repayment of a portion of the purchase price. In their answer defendants denied that they had failed to make payments pursuant to the promissory note and filed a counterclaim against plaintiff and Giavonne (John) Giannone, the sole shareholder of plaintiff corporation, seeking rescission of the contract. In support of the counterclaim, defendants alleged that they had been fraudulently induced to purchase the restaurant and that the lease to the restaurant had not been assigned to defendants as required by the contract. They also alleged that Giannone had misrepresented the earnings of the restaurant, and this conduct constituted an unfair or deceptive trade practice. In their reply to the counterclaim, plaintiff and John Giannone denied the

allegations of fraud and alleged that the lease had not been assigned because defendants had failed to cooperate in obtaining the assignment. Plaintiff also filed a supplemental complaint seeking to recover damages for unjust enrichment, alleging that defendants had discontinued rent payments to the restaurant's landlord and that plaintiff had paid the rent in the amount of $8,798.09. Defendants did not file an answer to this supplemental complaint.

At trial an "asset purchase agreement" executed by the parties was introduced into evidence. The agreement provided that defendant W. B. Dixon would purchase from plaintiff the assets of a restaurant known as Antonella's for the purchase price of $68,000. The agreement provided that the purchase price was to be paid as follows: $1,000 earnest money was to be deposited with Renn Drum, an attorney; $39,000 was to be paid in cash, and the remaining $28,000 was to be paid in sixty payments of $541.32 pursuant to a promissory note. The agreement also contained the following provision:

> *Consents to Assignments.* Purchaser shall receive from the landlord of Hanes Mall written consents to the assignment of the lease. Buyer and seller shall cooperate to secure said assignment. If no consent to assignment [within] 6 months, then, contract shall be rescinded [and] all money paid seller by buyer shall be refunded.

Uncontroverted evidence in the record shows that the lease was not assigned to defendants within six months of the execution of the contract.

Plaintiff and John Giannone introduced evidence tending to show that defendants made only two payments pursuant to the promissory note and had discontinued payment of rent to the landlord, requiring plaintiffs to pay rent for the restaurant for two months and one week. They also introduced evidence tending to show that defendants' attorney had in his possession a document providing for the assignment of the lease, but that defendants had never signed it.

Defendants introduced evidence tending to show that John Giannone had misrepresented the restaurant's earnings prior to the sale and that after the sale the profits were much lower than

defendants had expected. W. B. Dixon testified that he did not sign the document providing for assignment of the lease because his attorney informed him that the document contained errors.

Issues were submitted to the jury and were answered as follows:

1. Was William B. Dixon, III induced to execute the asset purchase agreement dated October 10, 1983 by fraudulent representations of John Giannone?

ANSWER: No

2. Did William B. Dixon, III cooperate in such a manner as to secure the assignment of the lease?

ANSWER: No

3. What amount, if any, is the defendant, William B. Dixon, III, entitled to recover form the plaintiff, John Giannone?

ANSWER: $-0-

4. Is the plaintiff, John Giannone entitled to recover rent paid to Hanes Mall for the months of March, April and seven days in May?

ANSWER: Yes

5. If so, what amount, if any, is John Giannone entitled to recover from the defendant, William B. Dixon, III?

ANSWER: $6775.00

From a judgment ordering defendants New Way Gourmet, Inc., and W. B. Dixon, III, to pay plaintiff $6,775.00 plus interest and directing a verdict for defendant Kitty Dixon on all counts, defendants New Way Gourmet, Inc., and W. B. Dixon, III, appealed.

Alexander, Wright & Parrish, by Robert D. Hinshaw, for plaintiff, appellee.

Lawrence J. Fine and David B. Hough for defendants, appellants.

HEDRICK, Chief Judge.

[1] Defendants first contend that the trial court erred in denying their motion for directed verdict on their counterclaim for rescis-

sion. Defendants argue that they were entitled to a rescission of the contract because all of the evidence shows that the lease was not assigned within six months of the execution of the contract. Defendants further contend that the record contains no evidence that they failed to cooperate to secure the lease assignment. We disagree.

Directed verdicts for the party with the burden of proof are rarely granted, because there will ordinarily remain in issue the credibility of the evidence. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). Defendants in the present case had the burden of proof on their counterclaim for rescission. *See, Wells v. Clayton*, 236 N.C. 102, 72 S.E. 2d 16 (1952). The agreement executed by the parties in the present case provides that their contract would be rescinded if the lease to the restaurant was not assigned to defendant within six months, and the evidence tending to show that the lease was not assigned within the designated period of time is uncontroverted. The agreement also contains, however, a provision requiring the parties to cooperate in obtaining the assignment of the lease. The evidence tending to show that defendant W. B. Dixon refused to execute a document assigning the lease would support a finding by the jury that defendants had failed to cooperate. Although defendant W. B. Dixon testified that his attorney advised him not to sign the document because it contained errors, the credibility of this evidence presents a question for the jury. Therefore, the trial court properly denied defendants' motion for directed verdict on their counterclaim for rescission.

[2] By their second assignment of error, defendants contend that the trial court erred in instructing the jury that W. B. Dixon had the burden of proving that he cooperated in obtaining the lease assignment. The record before us discloses that defendants failed to object to this instruction. Thus, this assignment of error presents no question for review. Rule 10(b)(2), N.C. Rules App. Proc.

[3] By their final assignment of error, defendants contend that the trial court erred in refusing to submit to the jury "the factual issues necessary for a judicial conclusion that the plaintiff and third party defendant had engaged in unfair and deceptive trade practices." Defendants argue that the evidence presented at trial raised the issue of unfair or deceptive trade practices, in violation of G.S. 75-1.1, in addition to the issue of fraud. We agree.

It is the duty of the trial judge to submit to the jury issues which are raised by the evidence, and which, when answered, will resolve all material controversies between the parties. G.S. 1A-1, Rule 49; *Wooten v. Nationwide Mutual Ins. Co.*, 60 N.C. App. 268, 298 S.E. 2d 727, *disc. rev. denied*, 308 N.C. 392, 302 S.E. 2d 258 (1983). In cases under G.S. 75-1.1 and G.S. 75-16, it is ordinarily for the jury to determine the facts, and based on the jury's findings, the court must then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975). Proof of fraud would necessarily constitute an unfair or deceptive act or practice; however, the converse is not always true. *Id.*

In *Marshall v. Miller*, 302 N.C. 539, 543-44, 276 S.E. 2d 397, 400 (1981), our Supreme Court discussed the intent of the legislature in enacting G.S. 75-16, which provides for civil actions by persons injured by unfair or deceptive trade practices in violation of G.S. 75-1.1, as follows:

> Such legislation was needed because common law remedies had proved often ineffective. Tort actions for deceit in cases of misrepresentation involved proof of scienter as an essential element and were subject to the defense of "puffing." . . . Proof of actionable fraud involved a heavy burden of proof, including a showing of intent to deceive.

(Citations omitted.) The Court in *Marshall* also discussed the type of conduct prohibited by G.S. 75-1.1:

> 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.

Id. at 548, 276 S.E. 2d at 403. (Citations omitted.) Good faith is not a defense to an alleged violation of G.S. 75-1.1. *Id.*

In the present case, defendants introduced evidence tending to show the following: John Giannone assured W. B. Dixon that

the gross income of the restaurant was $13,000 per month, except in November and December, when the gross income was $26,000 per month. W. B. Dixon was not permitted to see the restaurants' books because the records of Antonella's were combined with the records of another restaurant owned by Giannone. Giannone did not provide him with the books, records and files of the restaurant at closing, as required by the asset purchase agreement. W. B. Dixon testified that he was assured by Giannone and his wife that he "could reasonably expect with prudent business operation to make a profit from this restaurant." He further testified that he trusted John Giannone. Defendants also introduced evidence tending to show that the actual gross sales of the restaurant from November 1982 through September of 1983 had ranged from $5,743.00 to $7,222.00 per month and that after defendants began to operate the restaurant in November 1983, the restaurant's average gross income was $7,000 per month. This evidence would support findings by the jury from which the trial court could conclude that plaintiff and third-party defendant engaged in trade practices which were unfair or deceptive in violation of G.S. 75-1.1.

For the foregoing reasons we remand the case for a new trial on defendants' third counterclaim alleging that plaintiff's conduct amounted to unfair or deceptive trade practices. In the trial of the remaining issues, we find no error.

No error in part; remanded for new trial in part.

Judge MARTIN concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurs in part and dissents in part.

I dissent with the portion of the majority opinion granting a new trial for defendants on the issue of the defendants' counterclaim and third party claim for unfair and deceptive trade practices. In my opinion the defendants waived the right to have certain factual issues determined by the jury because they failed to properly demand their submission to the jury. In *Superior Foods, Inc. v. Harris-Teeter Super Markets, Inc., and Merico, Inc.*, 288 N.C. 213, 217 S.E. 2d 566 (1975), the Supreme Court held that,

"the right to have an issue of fact determined by the jury is waived unless a party demands its submission before the jury retires." *Id.* at 225, 217 S.E. 2d at 575. At the issue conference below, attorney for defendants asked the trial court to submit to the jury the issue of whether plaintiff and the third-party defendant committed an unfair trade practice. The defendants were not entitled to have that issue submitted to the jury because that issue is a matter of law to be determined by the trial court after the jury answers appropriate factual issues. The trial court below failed to submit the appropriate factual issues which arose from the evidence. Defendants did *not* request the submission of the appropriate factual issues, and, by failing to make such a demand or request, have waived the right to have them submitted. *See* G.S. 1A-1, Rule 49(c), and *Wright v. American General Life Insurance Company*, 59 N.C. App. 591, 599-600, 297 S.E. 2d 910, 915-16 (1982), *disc. rev. denied*, 307 N.C. 583, 299 S.E. 2d 653 (1983).

I vote no error.

STATE OF NORTH CAROLINA v. ROGER WILLIAM GILES

No. 8628SC575

(Filed 16 December 1986)

1. **Homicide § 21.7; Robbery § 4.3— second degree murder—armed robbery—sufficiency of evidence**

The State's evidence was sufficient to show that defendant, whether acting alone or together with a codefendant pursuant to a common purpose, committed the crimes of second degree murder and armed robbery where it tended to show that defendant initially disabled the victim when the victim entered a shed by striking him with a pistol; either defendant or the codefendant struck the victim in the head with an ax and caused his death; after the attack on the victim, defendant left the shed and asked the victim's wife to go inside to get her husband a drink of water; and when arrested, defendant had the money taken from the victim in his pocket.

2. **Criminal Law § 75.9— spontaneous statement by defendant—admissibility**

The evidence supported the trial court's determination that defendant's statement, "The old man's money is in my right front pocket," made within a few minutes after his arrest and without *Miranda* warnings, was spontaneous and admissible.

3. Criminal Law § 75.10— in-custody statement voluntarily made

The evidence supported the trial court's determination that defendant's statement that he hit the victim and knocked him down but the codefendant beat him with an ax was made voluntarily after defendant had been advised of his constitutional rights and was thus admissible into evidence.

4. Criminal Law § 74.3— joint trial—defendant's confession—deletion of references to codefendant

The trial court did not abuse its discretion in ordering a joint trial of defendant and a codefendant in an armed robbery and murder case where the *Bruton* rule and N.C.G.S. § 15A-927(c)(1) were complied with by sanitizing defendant's statement by deleting all references to the codefendant before the statement was admitted into evidence, and where the deletions did not materially change the nature of defendant's statement as to the reason he struck the victim with a gun.

5. Criminal Law § 40.1— transcript of prior hearing—witness now deceased

A transcript of testimony given by a witness at defendant's juvenile transfer hearing was admissible in defendant's robbery and murder trial under N.C.G.S. § 8C-1, Rule 804(b)(1) where the witness is now deceased, and defendant had the opportunity to cross-examine the witness at the previous hearing.

APPEAL by defendant from *Allen (C. Walter), Judge.* Judgment entered 14 September 1984 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 29 October 1986.

Defendant was indicted for first degree murder and robbery with a dangerous weapon. His trial was consolidated with that of his codefendant, William Lee Rasor. Defendant was convicted of robbery with a dangerous weapon and second degree murder. He was given concurrent presumptive sentences of fourteen and fifteen years respectively.

At trial, evidence was presented tending to show the following facts. On 19 March 1984, defendant and Rasor escaped from the Juvenile Evaluation Center in Swannanoa, North Carolina where they had been incarcerated as delinquent juveniles. They spent that night under a bridge and on the evening of March 20, defendant and Rasor broke into the home of Garland Norton. They vandalized the house, wrote "red rum" ("murder" spelled backwards) on a wall, made several long distance phone calls and stole guns, ammunition, a knife and some clothing. They left the Norton residence sometime on March 22.

Defendant and Rasor spent the night of March 22 in a shed owned by John and Georgia McMahan. On the morning of March

23, Georgia McMahan went outside to hang her clothes and noticed defendant in the shed. She also noticed shotgun shells on the floor of the shed. She asked defendant what he was doing there and he said, "nothing." Defendant talked with Mrs. McMahan and offered to help her hang out the clothes. Mrs. McMahan became upset by defendant's continued presence and returned to her house. She told her 86-year-old husband, John, that there was a prowler outside.

Mr. and Mrs. McMahan then went outside to the clothesline and asked defendant what he was doing there. Again, defendant said, "nothing." John McMahan and defendant then walked into the shed while Mrs. McMahan remained by the clothesline.

When John McMahan saw the shells on the floor of the shed, he told defendant that he was going to "call the law." Defendant testified that when McMahan turned, he hit him in the back of the head with a pistol. He also testified that when McMahan started to get up, Rasor came out of hiding, grabbed an ax, and hit McMahan on the head two or three times. He further testified that when McMahan fell, Rasor took McMahan's wallet and handed him the money. Defendant then walked over to the clothesline and asked Mrs. McMahan, who had not seen the attack in the shed, to go inside to get her husband a drink of water. When the police arrived, defendant walked out of the shed and was arrested.

After arresting defendant, Officer Cole of the Buncombe County Sheriff's Department returned to the shed to assist McMahan. As Cole attempted to help McMahan, Rasor pointed a rifle out from his hiding place inside the shed. The officer commanded Rasor to lay down the rifle which Rasor eventually did. Rasor was immediately apprehended by the officer.

John McMahan suffered a traumatic head injury as a result of the attack. Approximately two weeks later, McMahan died. The doctor who performed the autopsy determined that the traumatic head injury was the initiating factor in a chain of events leading to McMahan's death.

From the judgment imposing sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Joan H. Byers, for the State.

Assistant Appellate Defender Robin E. Hudson and Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

ARNOLD, Judge.

[1] In his first assignment of error, defendant contends that the trial court erred in entering judgment against him for second degree murder and robbery with a dangerous weapon because the evidence was insufficient. We do not agree.

Second degree murder is the unlawful killing of a human being with malice. G.S. 14-17. The essential elements of the offense of armed robbery are (1) the unlawful taking or attempted taking of personal property from another; (2) the possession, use or threatened use of firearms or other dangerous weapon, implement or means; and (3) danger or threat to the life of the victim. *State v. Joyner*, 295 N.C. 55, 243 S.E. 2d 367 (1978). When a defendant moves for dismissal based on the insufficiency of the evidence, the trial court must determine whether there is substantial evidence of each essential element of the offense charged, and evidence of the defendant being the one who committed the crime. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). If that evidence is present, the motion to dismiss is properly denied. *Id.*

In the case *sub judice*, the jury was instructed on the theory of acting in concert. "To act in concert means to act together, in harmony or in conjunction one with another pursuant to a common plan or purpose." *State v. Joyner*, 297 N.C. 349, 356, 255 S.E. 2d 390, 395 (1979). A defendant may be convicted of a crime under the theory of concerted action if he is present at the scene of the crime and the evidence is sufficient to show he is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *Id.* The theory of acting in concert does not require an express agreement between the parties. All that is necessary is an implied mutual understanding or agreement to do the crimes. *See id.*

Defendant was present at the scene of the crime. He admitted that he initially disabled McMahan by striking him with a pistol. He also admitted that he had the money which had been

taken from the victim's wallet. After the attack on McMahan, defendant left the shed and told Mrs. McMahan that her husband wanted a drink of water. There was evidence at trial that Rasor administered the deadly blows, however, Rasor testified that it was defendant who had wielded the ax.

Evidence in this case is clearly sufficient to show that defendant, whether acting alone or together with Rasor pursuant to a common purpose, committed the crimes of second degree murder and armed robbery against John McMahan. The trial court properly entered judgment against defendant for second degree murder and robbery with a dangerous weapon.

In his second assignment of error, defendant contends that he is entitled to a new trial because the trial judge committed prejudicial error both in conducting voir dire, and in making findings and conclusions regarding the admissibility of statements made by the defendant. Defendant makes three arguments under this assignment of error.

[2] First, defendant argues that the trial court erred by not suppressing defendant's statement, "The old man's money is in my right front pocket." Defendant asserts that this statement was coerced in response to custodial interrogation.

On voir dire, the trial court found as fact that "this statement was made prior to the defendant having received any Miranda warnings and that it was made prior to being asked any questions or interrogated in any manner and within a few minutes after he had been placed in custody." The trial court concluded that the statement was spontaneous and thus admissible.

The trial court's findings of fact after such a voir dire hearing are conclusive on appeal when supported by competent evidence in the record, even if the evidence is conflicting. *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983); *State v. Rook*, 304 N.C. 201, 283 S.E. 2d 732 (1981), *cert. denied*, 455 U.S. 1038 (1982).

The trial court's findings of fact are supported by competent evidence and the facts fully support the conclusion that the statement was spontaneous and admissible.

[3] Second, defendant argues that the trial court erred by not suppressing his statement, "I hit the man and knocked him down,

but Rasor beat him with the ax." Defendant asserts that this statement was involuntarily made.

On voir dire, the trial court found as fact that after being advised of his rights, defendant informed Officer Cole that he understood his rights. The trial court concluded that the statements made by the defendant to Cole were made "voluntarily, freely and understandingly, and that the defendant was in full understanding of his constitutional right to remain silent, his right to counsel, his right to have a parent or guardian present and all other constitutional rights."

Again, the trial court's findings of fact are supported by competent evidence and the facts support the conclusion that the statement was voluntarily made.

Third, defendant argues that "the trial judge erred by refusing to allow defense counsel to elicit relevant testimony from voir dire witnesses, and in refusing to allow him to obtain answers for the record." After reviewing the record, this argument also appears to be devoid of merit.

In his third assignment of error, defendant contends that he is entitled to a new trial because the trial judge admitted a statement into evidence against him, even though the evidence showed that the defendant had not previously waived his rights. This argument is likewise unconvincing.

As previously stated, the trial court found as fact that defendant informed Officer Cole that he understood his rights after being advised of them.

Even if the evidence is conflicting, the trial court's findings of fact are conclusive on appeal when supported by competent evidence. *Id.* There is competent evidence in the record which supports the finding that defendant was advised of his rights, understood his rights, waived his rights and voluntarily made the statements to the police officer. Defendant's contention is inapposite because it is not based on the facts as found by the trial court.

[4] In his fourth assignment of error, defendant contends that "after the trial judge erroneously admitted the defendant's statement, he compounded the error by continuing with a joint trial,

even though he was not able to delete from the statement references to the co-defendant without changing the meaning of the statement so that it prejudiced Roger Giles." We do not agree.

Defendant argues that the trial judge abused his discretion in ordering a joint trial where it was impossible for the State to comply with G.S. 15A-927(c)(1) and *Bruton v. United States*, 391 U.S. 123 (1968).

G.S. 15A-927(c)(1), which has been referred to as a codification of the *Bruton* rule, provides as follows:

> When a defendant objects to joinder of charges against two or more defendants for trial because an out-of-court statement of a codefendant makes reference to him but is not admissible against him, the court must require the prosecutor to select one of the following courses:
>
> a. A joint trial at which the statement is not admitted into evidence; or
>
> b. A joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been effectively deleted so that the statement will not prejudice him; or
>
> c. A separate trial of the objecting defendant.

In this case, the statute was complied with in that defendant's statement was "sanitized" by deleting all references to Rasor before the statement was admitted into evidence. Defendant's original statement was:

> "Wait a minute," he [Giles] said, "I did hit the old man in the back of the head with the gun and knocked him down. He started to get back up and Rasor hit him two or three times with the ax." And I [Officer Cole] asked him "Why?" He [Giles] said, "Because he was going to call the law."

After deleting references to Rasor in accordance with G.S. 15A-927, the statement was presented to the jury as follows:

> He said that he had hit or slapped the old man in the back of the head with a gun and knocked him down. . . . I [Cole] asked him why. . . . The Defendant Giles stated, "Because he was going to call the law."

The deletions did not materially change the nature of defendant's statement. Defendant was not prejudiced by the admission of the "sanitized" statement.

Defendant further argues that the trial court erred in joining his case with Rasor's case for trial.

The propriety of joinder depends upon the circumstances of each case. Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed upon appeal. *State v. Brower*, 289 N.C. 644, 224 S.E. 2d 551 (1976). In the present case no abuse of discretion has been shown, and there was no error in the consolidation of the cases for trial.

[5] In his fifth assignment of error, defendant contends that "the trial court erred in denying the defendant his right to confront witnesses against him when he introduced into evidence against defendant Giles a transcript of testimony of a deceased witness who had testified at the probable cause hearing in the case of co-defendant Rasor, where the defendant Giles had no opportunity to cross-examine the witness at the time the testimony was taken."

This contention lacks merit because the transcript offered into evidence was that of defendant's own juvenile transfer hearing, not Rasor's probable cause hearing. Since the witness died before trial, and because defendant had the opportunity to cross-examine the witness at the previous hearing, the prior testimony was properly admitted under G.S. 8C-1, Rule 804(b)(1).

We have reviewed defendant's remaining assignments of error and find them to be without merit.

No error.

Judges JOHNSON and EAGLES concur.

FACET ENTERPRISES, INCORPORATED v. DONNIE R. DELOATCH AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 866SC195

(Filed 16 December 1986)

Master and Servant § 108.1— unemployment compensation—failure to notify company of absence—no misconduct

Petitioner did not discharge respondent for misconduct or substantial fault connected with his work so as to disqualify him from receiving unemployment compensation where petitioner allegedly fired respondent for being absent from work for three consecutive days without notifying the company, but the company had notice during that time through respondent's immediate supervisor that respondent was in the hospital with a broken back and had been advised by his doctor that he would be unable to work for one to two months.

APPEAL by plaintiff from *Wright, Judge.* Judgment entered 18 November 1985 in Superior Court, HERTFORD County. Heard in the Court of Appeals 19 August 1986.

Revelle, Burleson, Lee & Revelle, by L. Frank Burleson, Jr., for plaintiff.

No brief filed by defendant appellee Deloatch.

Deputy Chief Counsel V. Henry Gransee, Jr. and Staff Attorney James A. Haney for defendant appellee Employment Security Commission of North Carolina.

PHILLIPS, Judge.

The judgment appealed from upheld a decision of the Employment Security Commission that respondent Deloatch, who was discharged by the plaintiff on 24 May 1985, is not disqualified from receiving unemployment benefits. Under our Employment Security Law an employee that is discharged for "misconduct connected with his work," G.S. 96-14(2), or for "substantial fault connected with his work," G.S. 96-14(2A), is disqualified from receiving unemployment benefits, and the only issue raised in the Commission hearing was whether petitioner fired respondent for a disqualifying reason. The Commission found and concluded that respondent was not fired for a disqualifying reason; and the Superior Court judge ruled that the facts found by the Commission were based upon competent evidence and that the law was

correctly applied to those findings. That ruling is clearly correct and we affirm it.

Though petitioner argues otherwise the evidence presented, including its own, supports the central findings of fact upon which the judgment rests. For petitioner's evidence was to the explicit effect that it fired respondent for no other reason but being absent from work for three consecutive days without notifying the company as its work rule required; and respondent's evidence was to the effect that he was excused from giving notice, and notice was unnecessary in any event, because he was in the hospital with a broken back as the company knew. Based on this and other competent evidence the Commission found that: On 7 May 1985, while on authorized leave due to a prior on-the-job injury, respondent employee was injured in a motorcycle accident and suffered three crushed lumbar vertebra; that two days later respondent's immediate supervisor visited him in the hospital and learned about his broken back; that the next day the supervisor again visited respondent in the hospital, noted that he was heavily sedated, and was told that his doctor had advised him he would not be able to return to work for one or two months; that after being released from the hospital on 17 May 1985 respondent reported to the employer's place of business on 20 May 1985 and told both his immediate supervisor and the plant secretary of his injury, hospitalization, and doctor's advice; and that the petitioner fired respondent on 24 May 1985 for allegedly failing to give notice of his absence from work as its rule required. From these findings the Commission concluded as a matter of law that the petitioner had failed to show that it discharged respondent for misconduct or substantial fault connected with his work and that respondent is not disqualified for unemployment benefits.

Though petitioner proposes several other questions for our consideration, the only questions properly raised by its appeal are whether the Commission's findings of fact 11 and 12 are supported by competent evidence and if so whether they and the other facts found support the Commission's decision. This is because these are the only questions petitioner raised in appealing from the Commission that have not been abandoned. In authorizing the judicial review of Employment Security Commission decisions, G.S. 96-15(h) requires the appellant to act within 30 days of notification or mailing, whichever is earlier, and to explic-

itly state the exceptions that the appeal is based upon. The Commission decision was mailed to petitioner on 23 August 1985 and in its petition for review filed 12 September 1985 petitioner stated for its exceptions that: All of the Commission's findings of fact, except the first three which merely recited the history of the case, were unsupported by competent evidence; and that the Commission's decision "is not supported by the facts found" and "is not supported by the evidence." Its exceptions to all the findings but findings 11 and 12 have been abandoned, however, as only those findings are argued against in the brief. Rule 28(a), N.C. Rules of Appellate Procedure. Findings of fact 11 and 12 are to the effect that petitioner discharged respondent for allegedly violating the 3-day absence reporting rule and that the motorcycle accident was not a significant factor in petitioner's decision to fire him. The evidentiary support for these findings is too clear for debate, as petitioner's own plant manager testified that "[b]asically the reason for the termination was for Mr. Deloatch not calling in for work, notifying the company of his whereabouts or where he was going or what his situation was." That these and the other findings made support the decision that respondent is not disqualified from receiving benefits is equally manifest. *Inter alia* the findings establish that respondent's discharge was not due to a violation of the 3-day notice rule because the company had notice through its employee and supervisor during that time. And, of course, the correctness of the conclusion that respondent was not disqualified from receiving benefits is equally clear; for a worker's failure to notify his employer why he is absent from work cannot be regarded as "misconduct" or "fault" under our Employment Security Law when the worker is unable to give notice because he is in the hospital with a broken back, and when the employer already has knowledge of his whereabouts and condition anyway.

The other contentions that petitioner undertakes to make—that the Commission misapplied the law in various respects—are not properly before us, and were not properly before the Superior Court, because they are not based on *timely* exceptions to the Commission's decision, as G.S. 96-15(h) requires. Petitioner's only timely exceptions that have not been abandoned have already been discussed and overruled. The purported exceptions that are the basis for these contentions were stated without effect in an

"Amendment to Petition for Judicial Review" filed 46 days after the Commission's decision was made and 36 days after the petition for judicial review was filed. Even so, the contentions are manifestly without merit and we overrule them; for all the contentions rest upon the fallacious claim that on the disqualification issue the Commission erroneously placed the burden of proof on the petitioner. It is fundamental in our jurisprudence, in the absence of some rule or statute to the contrary, that the party who raises an issue and asserts the affirmative of it has the burden of proving it. *Neal v. Fesperman*, 46 N.C. 446 (1854). The disqualification issue was raised by petitioner immediately upon receiving respondent's application for benefits and it supported the affirmative of that issue at the hearing with evidence; and nothing in our Employment Security Law supports the anomalous proposition that when an employer asserts that an applicant for benefits is disqualified for some reason that the applicant is required to disprove the defense asserted.

Affirmed.

Chief Judge HEDRICK and Judge MARTIN concur.

STATE OF NORTH CAROLINA v. THEODORE ALPHONSO OSBORNE

No. 866SC605

(Filed 16 December 1986)

1. **Criminal Law § 66.9— photographic lineup—effect of prior composites**

The preparation of composites prior to a photographic lineup did not necessarily make the lineup suggestive.

2. **Criminal Law § 66.9— photographic lineup—defendant's distinctive appearance**

Due process did not require that all subjects in a photographic lineup be identical in appearance; nor was a photographic lineup impermissibly suggestive merely because the defendant has closely cropped hair and slanted eyes which gave him a distinctive appearance.

3. **Criminal Law § 66.9— photographic lineup—no impermissible suggestiveness**

A pretrial identification procedure, including the use of composites and a photographic lineup, was not impermissibly suggestive where seven photographs were shown to the witness; the trial judge found that only two or three of the photographs were of individuals with physical characteristics sub-

stantially dissimilar to defendant, and even as to those there were certain similarities; and there was no evidence of any improper inducement of the witness to choose one photograph over another.

4. Criminal Law § 66.16— in-court identification—independent origin

The trial court's determination that a robbery victim's in-court identification of defendant was of independent origin and not tainted by pretrial procedures was supported by evidence tending to show that the victim observed defendant attentively, face to face, at close range, in a well-lighted area for three to four minutes during the robbery; she accurately described defendant immediately after the robbery and at trial; she positively identified defendant from the lineup within two or three days after the crime and at trial less than four months later; and the victim testified that her identification of defendant was based on her recollection of the robbery.

APPEAL by defendant from *Lake, Judge.* Judgment entered 26 February 1986 in Superior Court, HERTFORD County. Heard in the Court of Appeals 11 November 1986.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for the State.

Donnie R. Taylor for defendant appellant.

BECTON, Judge.

Defendant, Theodore Alphonso Osborne, was convicted by a jury of robbery with a dangerous weapon. From a judgment imposing a thirty-five-year sentence for the Class D felony, defendant appeals. Defendant's eight assignments of error relate to the admission of certain real and testimonial evidence, the trial court's denial of defendant's motion for a mistrial and motion to dismiss the charges at the conclusion of the evidence, and the court's findings on mitigating and aggravating factors. We find no error.

I

The State's evidence tended to show that on the morning of 10 November 1985 at approximately 12:50 a.m., an armed black man robbed the Fast Fare convenience store in Ahoskie, North Carolina, where Irene Bedgood was working as cashier. Holding Ms. Bedgood at gunpoint, the assailant demanded and took approximately $100 from the cash register as well as Ms. Bedgood's pocketbook containing $110 to $120. He then backed out the door and fled.

Following the robbery, Ms. Bedgood accompanied the investigating officer to the police station where she assisted another officer in preparing a composite photograph of the robber. She helped prepare a second composite the following day. Two or three days later, Ms. Bedgood positively identified the defendant as the robber from a lineup of seven photographs.

At trial, the State's primary inculpatory evidence consisted of Ms. Bedgood's testimony, including her in-court identification of the defendant, and a pair of gloves, found near Ms. Bedgood's recovered pocketbook and which matched gloves the defendant had been seen wearing at work. The defendant presented evidence of an alibi.

II

Defendant contends that Ms. Bedgood's in-court identification of the defendant was tainted by an unnecessarily suggestive pretrial identification procedure and thus should not have been allowed. Prior to the presentation of any evidence to the jury, a *voir dire* was conducted concerning the in-court and out-of-court identification of the defendant. Based upon testimony of Ms. Bedgood and of Doug Doughtie, the investigating officer, and upon his own observation of the two composites and the seven photographs used in the lineup, the trial judge made numerous findings of fact and concluded that the pretrial identification procedure was not overly suggestive. He further determined that, even in the event of an unnecessarily suggestive photographic lineup, the in-court identification was of independent origin based upon Ms. Bedgood's direct observations during the robbery.

[1] The test for determining whether an identification procedure violates due process is whether the procedure "in the totality of the circumstances . . . is so unnecessarily suggestive and conducive to irreparable misidentification that it offends fundamental standards of decency and justice." *State v. Freeman*, 313 N.C. 539, 544, 330 S.E. 2d 465, 471 (1985); *State v. Grimes*, 309 N.C. 606, 609, 308 S.E. 2d 293, 294 (1983). Defendant's chief contention is that the preparation of a composite prior to the photographic lineup necessarily made the lineup suggestive. We disagree. Law enforcement officers often make use of composites when compiling live or photographic lineups, *see, e.g., State v. Williams*, 69 N.C. App. 126, 316 S.E. 2d 322 (1984), and there is nothing inherently

unfair in this procedure nor a resulting lineup in which the defendant, of all the subjects, most closely resembles the composite. *See State v. Montgomery*, 291 N.C. 91, 229 S.E. 2d 572 (1976).

[2] The description given by Ms. Bedgood and the composite prepared with her assistance indicated that the perpetrator had closely cropped hair and slanted eyes. Due process does not require that all subjects in a photographic lineup be identical in appearance. *See, e.g., Montgomery*, 291 N.C. at 100, 229 S.E. 2d at 579. Nor is such a lineup impermissibly suggestive merely because the defendant has a distinctive appearance. *Freeman*, 313 N.C. at 545, 330 S.E. 2d at 471. All that is required is that the lineup be fair and that the investigating officers do nothing to induce the witness to select one subject rather than another. *Id.*; *Montgomery*, 291 N.C. at 100, 229 S.E. 2d at 579.

[3] We do not have the photographs before us on this appeal and must therefore rely upon Officer Doughtie's testimony regarding their appearance. His testimony indicates that the seven photographs were of black males of varying size and build, hair length and degree of facial hair. Three photographs showed individuals with very short hair and three were of subjects with slanted eyes. The trial judge made findings that only two or three pictures were of individuals with physical characteristics substantially dissimilar to the defendant, and even as to those there were certain similarities. Furthermore, there is no evidence of any improper inducement of Ms. Bedgood to choose one subject over another. We conclude that the evidence supports the court's findings and conclusion that the pretrial identification procedure, including the use of the composites and photographic lineup, was not impermissibly suggestive.

[4] Even when a pretrial identification procedure is invalid, an in-court identification is admissible if found to be of independent origin. *State v. Clark*, 301 N.C. 176, 270 S.E. 2d 425 (1980). Defendant argues that "conflicting evidence" given by Ms. Bedgood regarding her identification establishes that the in-court identification was not of independent origin. The witness testified that the man who robbed her was clean shaven except for a slight mustache. However, the two composites prepared almost immediately after the event showed no mustache or facial hair. On the other hand, the photograph of defendant chosen from the lineup

showed him as having a mustache, a goatee and sideburns. The defendant testified that at the time of the robbery, he wore thick sideburns, a goatee, and a thick mustache.

Obviously a man may grow or shave his facial hair at will. And any perceived discrepancies or equivocation in Ms. Bedgood's identification go merely to the weight of her testimony, not its competency. *See State v. Pridgen*, 313 N.C. 80, 326 S.E. 2d 618 (1985). The factors which determine whether an in-court identification is of independent origin are:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

Freeman, 313 N.C. at 544, 330 S.E. 2d at 471; *State v. Baldwin*, 59 N.C. App. 430, 433, 297 S.E. 2d 188, 191 (1982), *cert. denied*, 307 N.C. 698, 301 S.E. 2d 390 (1983).

The testimony of Ms. Bedgood on *voir dire* and during the trial indicate that she observed the defendant attentively, face to face, at close range, in a well-lighted area, without obstruction, for three to four minutes during the course of the robbery. She accurately described the defendant immediately after the robbery and at trial. She positively identified the defendant from the line-up within two or three days of the crime and again at trial less than four months later. Moreover, Ms. Bedgood testified that her identification was based on her recollection of the robbery. We therefore hold that the Court's determination that Ms. Bedgood's in-court identification was of independent origin is supported, as it must be, by clear and convincing evidence. *See State v. Yancey*, 291 N.C. 656, 231 S.E. 2d 637 (1977).

III

We have carefully reviewed the defendant's remaining seven assignments of error and find them to be without merit. Thus we conclude that defendant received a fair trial free of prejudicial error and that the sentence imposed was proper.

No error.

Judges WELLS and ORR concur.

PERRY M. ALEXANDER CONSTRUCTION COMPANY v. WILLIAM F. BURBANK

No. 8628SC830

(Filed 16 December 1986)

1. **Contracts § 27.1— liability under contract—issue of material fact**

A genuine issue of material fact was presented as to whether the individual defendant was liable under an oral agreement to pay for demolition work on a burned building owned by defendant after a written contract for the work had been entered between plaintiff and the corporate lessee of the building.

2. **Contracts § 4.1— same consideration in contract with third party**

Plaintiff's promise to perform demolition work on a burned building constituted sufficient consideration for an oral agreement by the individual defendant who owned the building to pay for the work even though the promise to perform the demolition work was also the consideration in a prior written agreement between plaintiff and the corporate lessee of the building.

APPEAL by defendant from *Ferrell, Judge*. Judgment entered 3 March 1986 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 30 October 1986.

On 26 December 1984, fire destroyed a warehouse in Asheville which was owned by defendant and leased to Sure-Fire Distributing Company. Defendant is the president and majority shareholder of Sure-Fire.

After the fire, the building was condemned and defendant was ordered to have the building demolished. Charles Smith, vice president of plaintiff Perry M. Alexander Construction Company, met with defendant at the site and agreed to perform the demolition. In his capacity as president of Sure-Fire, defendant signed a brief written agreement on 28 December 1984 evidencing the previous oral agreement.

On 31 December 1984, the president of plaintiff construction company, Tom Alexander, returned from out of town and learned that defendant, in his individual capacity, owned the property

where the work was to be done. Alexander drew up another agreement to be signed by defendant individually and on behalf of Sure-Fire. On 4 January 1985, defendant signed the agreement only in his capacity as president of Sure-Fire. He did not sign it individually.

Plaintiff completed the demolition and was not paid for the work. Plaintiff filed a claim of lien against the property and instituted this action. Before trial, defendant unsuccessfully moved for summary judgment.

At the trial, there was evidence that Sure-Fire is insolvent and that it is presently involved in a lawsuit with its insurer regarding coverage for the fire loss.

Plaintiff presented evidence that after signing the second written agreement in his corporate capacity, defendant refused to sign the agreement in his individual capacity because he believed that it could interfere with the insurance settlement. However, plaintiff presented testimony that defendant orally agreed to be personally bound for the cost of the demolition. Plaintiff also presented evidence that Sure-Fire's payment period was orally extended from 45 days to 60 days at that time.

Defendant testified that he never agreed to be personally liable for the demolition.

The trial judge, in his written findings of fact, found as follows:

> 4. On the 4th day of January, 1985, Plaintiff and Defendant Sure-Fire Distributing, Inc. entered into a written contract whereby Plaintiff agreed to knock down the remaining walls of the building situated on Defendant's Burbank's property and further agreed to haul away the debris from the building destroyed in the fire.
>
> 5. On the 4th day of January, 1985, and subsequent to the written contract referred to in paragraph 4 just next above, the Plaintiff and the Defendant Burbank entered into an oral contract for the same tearing down of the building and hauling away of the debris from the building referred to in paragraph 4 just next above, this oral contract being entered into between Defendant Burbank as owner of the

real property and Plaintiff, Plaintiff insisting that Defendant Burbank as owner also agree and become obligated to pay Plaintiff for its services to be rendered in tearing down the building and hauling away the debris from the building.

The trial judge concluded as a matter of law that both Sure-Fire and defendant breached their contract and are each indebted to plaintiff in the sum of $30,346.50 (the cost of the demolition) together with interest thereon. The trial judge also concluded that plaintiff is entitled to enforce its lien rights, and he ordered that the property be sold in order to satisfy plaintiff's lien against the property.

From the judgment for plaintiff, defendant appeals.

Tharrington, Smith & Hargrove, by J. David Farren and Elizabeth Kuniholm, for defendant appellant.

Riddle, Kelly and Cagle, by E. Glenn Kelly, for plaintiff appellee.

ARNOLD, Judge.

[1] The test on a motion for summary judgment is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *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).

We find that the trial court properly denied defendant's motion for summary judgment because an issue of material fact existed with respect to defendant's contractual liability.

Defendant contends that there is insufficient evidence to support the court's finding that a subsequent agreement was entered into between plaintiff and defendant.

The trial court determined that plaintiff and defendant Burbank entered into an oral contract under which Burbank became obligated to pay plaintiff for the demolition. The well-established rule is that findings of fact made by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E. 2d 160 (1979). A careful review of

the record reveals that there is competent evidence to support the trial court's findings of fact.

[2] Defendant also contends that the oral contract is not supported by consideration. We disagree.

The trial court found that plaintiff and Sure-Fire entered into a written contract under which plaintiff agreed to perform the demolition. The trial court further found that plaintiff and defendant Burbank entered into an oral contract under which plaintiff agreed to perform the same demolition. Defendant argues that because plaintiff was already obligated to perform the demolition under its contract with Sure-Fire, its promise to perform the same demolition in the contract with defendant Burbank is not consideration for Burbank's promise to pay. In other words, the question is whether plaintiff's promise to perform the demolition can suffice as consideration for both Sure-Fire's promise to pay and Burbank's promise to pay in the two separate contracts.

> It is generally established that a promise to perform an act which the promisor is already bound to perform is insufficient consideration for a promise by the adverse party, *Sinclair v. Travis*, 231 N.C. 345, 57 S.E. 2d 394 (1950); *Tile and Marble Co. v. Construction Co.*, 16 N.C. App. 740, 193 S.E. 2d 338 (1972), and undoubtedly this is sound policy. But the same factors do not come into play where a third person is involved.

Burton v. Kenyon, 46 N.C. App. 309, 311, 264 S.E. 2d 808, 809 (1980).

In the case *sub judice*, a third person is involved since defendant Burbank and Sure-Fire are separate parties.

> Restatement of Contracts § 84 (1932) provides in pertinent part:
>
> 'Consideration is not insufficient because of the fact
>
> * * *
>
> (d) that the party giving the consideration is then bound by a contractual or quasi-contractual duty to a third person to perform the act or forbearance given or promised as consideration . . .'

The rationale of the Restatement rule is best set forth in 1A. Corbin on Contracts § 176 (1950) wherein it is stated:

> 'But suppose that the pre-existing duty is owed to a third person and not to the promisor. Is the performance of this kind of duty a sufficient consideration for a promise? The American Law Institute has stated that it is sufficient. This should be supported for two reasons: (1) the promisor gets the exact consideration for which he bargains, one to which he previously had no right and one that he might never have received; (2) there are no sound reasons of social policy for not applying in this case the ordinary rules as to sufficiency of consideration. The performance is bargained for, it is beneficial to the promisor, the promisee has forborne to seek a rescission or discharge from the third person to whom the duty was owed, and there is almost never any probability that the promisee has been in position to use or has in fact used any economic coercion to induce the making of the promise. There is now a strong tendency for the courts to support these statements and to enforce the promise. The reasons that may be advanced to support the rule that is applied in the two-party cases, weak enough as they often are in those cases, are scarcely applicable at all in three-party cases.' (Footnote omitted.)

Id. at 311-12, 264 S.E. 2d at 809-10.

In light of the above, we hold that plaintiff's promise to perform the demolition suffices as consideration for Burbank's promise to pay even though the promise to perform the demolition was also the consideration in the contract between plaintiff and Sure-Fire.

The judgment of the trial court is

Affirmed.

Judges JOHNSON and EAGLES concur.

HENRY C. BRUEGGE AND ALMA D. BRUEGGE v. MASTERTEMP, INC.

No. 8629SC613

(Filed 16 December 1986)

Negligence § 29.3— house fire—repairs to furnace pipe—evidence of negligence sufficient for jury

There was sufficient evidence that defendant's negligence was a proximate cause of a house fire to submit the case to the jury where an employee of defendant serviced and replaced a six-inch elbow pipe on plaintiffs' furnace; the elbow was located at the exhaust port and was within nine inches of a floor joist; the correct way to connect the elbow would be to attach the elbow to the exhaust port over the flue collar and insert a minimum of three sheet metal screws, then screw the elbow to a straight section of flue pipe; support from above was required for a pipe over two or three feet in length; defendant's employee could not recall anything about the work he performed on plaintiffs' furnace; the testimony of a fire inspector established that there were no screw holes or rivet holes in the elbow at the point where it should have been connected to the straight section of pipe; a volunteer fireman testified that he did not recall observing any support coming from above the vent or the straight section of pipe; there was further testimony of a burning area adjacent to the furnace and that the flue pipe connected to the furnace was detached from the elbow and had dropped down from the elbow; a lieutenant with the fire department testified that the most deeply charred wood was in the area around and above where the elbow was detached and that the charring became less severe the further he looked away from the elbow; two floor joists were burned in two, with the joist directly above the elbow the more severely burned; and the fire lieutenant and an expert witness testified that the origin of the fire was in the area of the elbow.

APPEAL by plaintiff from *Hyatt, Judge*. Judgment entered 15 January 1986 in Superior Court, RUTHERFORD County. Heard in the Court of Appeals 28 October 1986.

On 30 September 1983, plaintiffs, Henry C. Bruegge and Alma D. Bruegge, filed their complaint against defendant, Mastertemp, Inc. Plaintiffs alleged that on 25 November 1981 and 22 January 1982, agents for defendant were negligent in the repair of plaintiffs' furnace, to wit: they "failed to properly connect or failed to take reasonable measures to prevent the detachment of a six-inch elbow pipe, which carried hot exhaust gasses from the furnace, from a six-inch flue pipe which carried the hot exhaust gasses to a chimney to be vented outdoors." It was further alleged by plaintiffs that as a result of the alleged negligence of defendants, the six-inch elbow became detached on 24 January 1982,

which allowed hot exhaust gases to escape and start a fire which damaged plaintiffs' property. Plaintiffs claimed damages in the amount of $34,726.17. On 25 October 1983, plaintiffs amended their complaint to include 29 December 1981, as an additional date when defendant's agents undertook the repair of their furnace.

On 9 November 1983, defendant answered plaintiffs' complaint denying all allegations of negligence and asserting that plaintiffs' complaint failed to state a claim upon which relief may be granted. A jury trial was requested by defendant.

On 13 January 1986, this cause was called for trial. At the close of plaintiffs' evidence, defendant moved the court for a directed verdict on the basis that there was no evidence that defendant's negligence was the proximate cause of the fire. The trial court, after hearing arguments of the parties, granted defendant's motion for a directed verdict. Plaintiffs appeal.

Morris, Golding, Phillips & Cloninger, by William C. Morris, III and Jeff Durham, for plaintiff appellants.

Collie & Wood, by George C. Collie and Charles M. Welling, for defendant appellee.

JOHNSON, Judge.

The ultimate issue we must decide is whether plaintiffs' evidence, when considered in the light most favorable to them, was sufficient for submission to the jury. *See, e.g., Wallace v. Evans*, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). The purpose of a motion for directed verdict was stated in *Wallace, supra*, as follows:

> Settled principles establish that the purpose of a G.S. 1A-1, Rule 50(a) motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for plaintiffs; that in determining such a motion the evidence should be considered in the light most favorable to plaintiffs and the plaintiffs should be given the benefit of all reasonable inference; and that the motion should be denied if there is any evidence more than a scintilla to support plaintiffs' prima facie case in all its constituent elements.

Wallace, supra, at 146, 298 S.E. 2d at 194. Evidence that raises a mere possibility or conjecture is insufficient to withstand a motion for a directed verdict. *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 181 S.E. 2d 173 (1971). However, in ruling upon a motion for a directed verdict, "[t]he evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor." *Summey v. Cauthen*, 283 N.C. 640, 647, 197 S.E. 2d 549, 554 (1973).

The asserted basis for defendant's motion for a directed verdict was that there was not a scintilla of evidence that there was any negligence by defendant that proximately caused the fire. The trial court ruled that there was no evidence that defendant's negligence, if any, proximately caused the fire. Our review of the record on appeal shows that there was sufficient evidence that defendant's negligence was a proximate cause of the fire to submit the case for a jury determination.

Plaintiffs' evidence established that in November 1981, Don Jenkins, an employee of defendant, serviced and replaced a six-inch elbow pipe of plaintiffs' furnace. This elbow, located at the exhaust port, was within nine inches of a floor joist. Testimony by Mr. Jenkins established that the correct way to replace the elbow was to attach the elbow to the exhaust port over the flue collar and insert a minimum of three sheet metal screws therein. Once this procedure is complete, the elbow is then attached to a straight section of flue pipe and screwed together. Support for a pipe from above is required if the pipe is over two or three feet in length. The importance of the elbow and pipe being secure is that gases are thereby prevented from escaping. Mr. Jenkins could not recall anything about the work he performed on plaintiffs' furnace. However, plaintiffs established, through the testimony of a fire investigator, that there were no screw holes or rivet holes in the elbow at the point where it should have been connected to the straight section of the flue pipe. One of the volunteer firemen who responded to the fire testified that he did not recall observing any support coming from above the vent or straight section of the pipe. Mr. Smith testified that as he was extinguishing the fire in a crawl space he observed a burning area adjacent to the furnace, and that the flue pipe connected to the furnace was detached from the elbow and had dropped down from

the elbow. Mr. Marshall Baynard, a lieutenant with the Forest City Fire Department, testified that during his investigation he entered the crawl space and observed that the most deeply charred wood in plaintiffs' home was the area around and above the area where the elbow detached from the exhaust system that was going to the chimney. He observed that the farther away he looked from the elbow, the less severe the charring was. Mr. Baynard further testified two floor joists in the crawl space were burned in two, but the joist that was directly above the elbow area was more severely burned. Mr. Baynard's opinion about the origin of the fire was that "there was a possible gap occurred [sic] between the elbow and the pipe that went to the chimney that let the super heated gases escape right in under the floor joists and sub-flooring and caused the wood to dry out and actually ignite itself." Plaintiffs also presented the expert testimony of Dr. Charles Manning. Dr. Manning testified that "the origin of the fire was in the area above and just in front of the elbow that came out of the furnace, that the flue gases are normally delivered from the furnace to the chimney."

Cases involving allegations of negligence as the cause of a fire typically have less direct evidence of causation. Plaintiffs appropriately rely upon *Fowler-Barham Ford, Inc. v. Indiana Lumbermen's Mutual Ins. Co.*, 45 N.C. App. 625, 628, 263 S.E. 2d 825, 827-28, *disc. rev. denied*, 300 N.C. 372, 267 S.E. 2d 675 (1980), for the following principles:

> Ordinarily, there is no direct evidence of the cause of a fire, and therefore, causation must be established by circumstantial evidence. It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown by reasonable inference from the admitted or known facts. The evidence must show that the more reasonable probability is that the fire was caused by the plaintiffs or an instrumentality solely within their control.

Indiana Lumbermen's Mutual Ins. Co., supra, at 628, 263 S.E. 2d at 827-28 (citations omitted). In defendant's brief it is contended that "[T]he plaintiffs simply did not produce sufficient evidence, either direct or circumstantial, to permit a jury to make an inference that Defendant's failure to place sheet metal screws in the joint formed by the elbow and the flue pipe and upon that in-

ference make an inference that the elbow flue pipe separated for the lack of screws." We disagree; there was sufficient evidence to raise a question for the jury to decide. *See Patton v. Dail*, 252 N.C. 425, 114 S.E. 2d 87 (1960). "[I]t is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence." *Fitzgerald v. Railroad*, 141 N.C. 530, 534, 54 S.E. 391, 393 (1906). In the case *sub judice*, the trial court improvidently granted defendant's motion for a directed verdict at the conclusion of plaintiffs' evidence. We hold that plaintiffs presented sufficient evidence of defendant's actionable negligence to withstand defendant's motion for a directed verdict. Plaintiffs' remaining Assignments of Error are not likely to recur; therefore, we need not address them.

For the reasons stated hereinabove, the judgment is

Reversed.

Judges ARNOLD and EAGLES concur.

VIRGINIA M. TATE AND SUZANNE TATE MORROW v. BOARD OF ADJUSTMENT OF THE CITY OF ASHEVILLE

No. 8628SC653

(Filed 16 December 1986)

Municipal Corporations § 31— zoning dispute—jurisdiction of board of adjustment

N.C.G.S. § 160A-388(b) confers on the board of adjustment only appellate jurisdiction to hear and decide appeals from determinations by administrative officials charged with enforcement of zoning ordinances, and the board was without jurisdiction to decide whether the use of a swimming pool in conjunction with a day care program violated a zoning ordinance where it was clear that no administrative official charged with enforcing the ordinance had made any decision on the validity of the use. N.C.G.S. § 160A-388(c).

APPEAL by petitioners from *Ferrell, Judge*. Judgment entered 17 March 1986 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 28 October 1986.

This action involves the board of adjustment's interpretation of the City of Asheville's zoning ordinance. Since 1973, petitioners have operated, as a non-conforming use, a day care center at the residence of petitioner Tate. In 1984, Ms. Tate applied for and received a permit to build a swimming pool at her home. In the application, she stated that the pool would not be used in conjunction with the day care center. Once it was built, however, petitioners allowed the children participating in the day care program to use the pool.

Consequently, a dispute arose between petitioners and some of the neighbors over the use of the pool in connection with the day care program. The dispute first came before the city's board of adjustment on 1 November 1984, at which time the board suggested to the parties that they settle their differences without board action. The parties failed to resolve the dispute and appeared before the board once again on 24 June 1985. At that hearing, the board heard the arguments of the parties and issued an order which held that petitioners' use of the swimming pool in conjunction with the day care center violated the city's zoning ordinance. Petitioners appealed to superior court, which affirmed the board's decision.

Riddle, Kelly & Cagle, by E. Glenn Kelly, for the petitioners-appellants.

William F. Slawter, for the respondent-appellee.

EAGLES, Judge.

Petitioners make several arguments. Because we agree with petitioners that the board was without jurisdiction to enter the disputed order, we address only that issue.

G.S. 160A-388(b) provides, in relevant part, that "[t]he board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part." The statute clearly confers on the board only appellate jurisdiction, as distinguished from original jurisdiction, to decide whether a particular use is permitted under the zoning ordinance. Since the record here is devoid of any indication that those charged with the enforcement

of the zoning ordinance had made a decision whether petitioners' use of the pool was permitted or not, we must hold that the board of adjustment lacked jurisdiction to decide the question. Consequently, the board's order is void and without effect. *See Bagwell v. Brevard,* 267 N.C. 604, 148 S.E. 2d 635 (1966).

The grant of the original permit to build the swimming pool is not at issue here. It is undisputed that petitioner may have a swimming pool at her residence. The dispute arose only after the pool was used in conjunction with the day care center. The impetus for the board's ruling, however, was not an appeal from city zoning enforcement officials' decision that petitioners' use of the pool was, or was not, a violation of the ordinance. Instead, the matter arose from a request by those officials that the board decide the question in the first instance. The board's order states that the city's director of planning and zoning had advised the board that he could not enforce the ordinance in this case without an interpretation of the applicable section from the board. Furthermore, at the 24 June 1985 hearing, in response to a question from the board chairman as to why the board was needed in this situation, a representative of the city building inspector's office stated that the staff was asking for an interpretation of the ordinance. It is clear from the record then, that no administrative official charged with enforcing the city's zoning ordinance had made any decision on the validity of petitioners' use of the swimming pool. There having been no decision, there could be no appeal. In effect, the board decided an appeal from the administrators' "decision not to decide." *Hilbert v. Haas,* 283 N.Y.S. 2d 440, 441, 59 Misc. 2d 777 (1967).

The unambiguous language of G.S. 160A-388(b) proscribes city boards of adjustment from rendering these kinds of decisions. Those states with similar statutory provisions apparently have been unanimous in holding that boards of adjustment are without jurisdiction to render advisory opinions concerning the meaning of a zoning regulation or its application to a particular situation. *See generally* 101A C.J.S. "Zoning and Land Planning" Section 185 (1979); 3 Anderson "American Law of Zoning 2d" Section 20.05 (1977); 3 Rathkopf, "The Law of Zoning and Planning" Section 37.01(6)(a) (4th ed. 1986). Boards of adjustment have been held to lack jurisdiction to act on an application by a citizens group seeking an interpretation of a zoning ordinance, *YWCA of Sum-*

mit v. Board of Adjustment, 134 N.J. Super. 384, 341 A. 2d 356 (1975), *affirmed*, 141 N.J. Super. 315, 358 A. 2d 211 (1976); to decide whether a particular use was a non-conforming use before the building inspector had made his decision, *Hilbert v. Haas, supra;* and to act on a building permit application where the building inspector had refused to process and consider the application. *Town Bd. v. Zoning Board of Appeals*, 165 N.Y.S. 2d 954, 7 Misc. 2d 210 (1957). *See also Board of Zoning Appeals v. Heyde*, 160 Ind. App. 165, 310 N.E. 2d 908 (1974); *Kaufman v. City of Glen Cove*, 45 N.Y.S. 2d 53, 180 Misc. 349, *affirmed*, 42 N.Y.S. 2d 508, 266 A.D. 870 (1943); *H. R. Miller Co. Inc. v. Bitler*, 21 Pa. Commw. 466, 346 A. 2d 887 (1975). On the other hand, we have discovered no case in which any court has abrogated the plain meaning of the statute and allowed a board to make the initial determination of whether a particular use is valid under the ordinance.

Respondent argues that the language in G.S. 160A-388(c) which says that "[t]he board shall hear and decide all matters referred to it or upon which it is required to pass under any zoning ordinance" contemplates that the question before us can come before the board via alternative routes, including, by request of zoning officials. Respondent's argument is untenable for several reasons. First, G.S. 160A-388(b) is fairly specific and detailed in setting out the process by which appeals to the board must be taken. Interpreting the statute so as to remove the need for an initial decision by a zoning official, as respondent urges, would render subsection (b) meaningless. Second, even if the language on which respondent relies is applicable to subsection (b), we do not believe that it confers on the board any powers that are not specifically enumerated in either the statute or the ordinance. *See* 3 Rathkopf, *supra*. Finally, statutes which vest local governments with certain powers are to be strictly construed against the existence of the power. *In re Incorporation of Indian Hills*, 280 N.C. 659, 186 S.E. 2d 909 (1972). Respondent's interpretation of G.S. 160A-388 would confer virtually unlimited jurisdiction on a statutorily created body whose powers otherwise are specifically provided for in the statute. We reject that interpretation and accordingly reverse the decision of the trial court affirming the city board of adjustment.

Reversed.

Judges ARNOLD and JOHNSON concur.

TOWN AND COUNTRY CIVIC ORGANIZATION, AN UNINCORPORATED ASSOCIATION, JOSEPH F. NICASTRO, W. JEFFREY MILLER, WILLIAM J. PARSONS, JOHN J. ONESTA, JAMES A. STEPHENS, MYRON M. CHENAULT, EILEEN B. FORMAN, BILLY E. DEAL, MARLENE OLENICK, ANDREW V. DALE, SUSAN KOIVISTO, CHARLES H. BOHRER, ELEANOR M. KISTNER, BERNHARD K. KISTNER, MICHAEL R. BROOKS, PATRICIA M. DONNELLY, JIM DONNELLY, DONALD G. SMITH, PEGGY L. MASON, GEORGE M. CLELAND, ELIZABETH CLELAND, BARBARA TAYLOR, ALLISON W. ANDREWS, HILDA M. NELSON, ROBERT LANGLOIS, CLAUDETTE LANGLOIS, BROCK W. WILLIAMS, ROBERTA D. SMITH, LENA N. DAVIS, JOHN M. DAVIS, JOHN W. GOLLOWAY, STELLA H. GOLLOWAY, DOYCE T. AMOS, HORACE H. MAGAVERO, ETHEL G. MAGAVERO, MASON O. MOBLEY, JR., RICHARD B. TOOHEY, ARNOLD G. HORTON, CLINTON A. CORAN, MARGARET T. VIGLIANCO, CARL M. VIGLIANCO, C. H. RICHARDS, JR., WALT WHITEMAN, ALAN SCHNEIDER, LARRY R. TAYLOR, MADELINE PARSONS, RICHARD L. DULL, W. L. BAIN, SHARON LEONARD, JOHN A. KOIVISTO, JOHN D. VERSAGGI, RALPH MARRUJO, BARBARA J. KELLEY, GRIFF BELLAMY, DONALD W. HAILE, ISAAC N. ALBRIGHT, PAMELA J. TOOHEY, JAMES G. VOGLER, MARION W. MASON, ROBERT E. BRANT, ANTHONY R. RAHL, M.D., DAVID J. JOHN, LINDA J. MICHALSKI, VIRIGINA P. HENSCHEL, HERNEY D. MARTIN, LOUISE B. ELESHA, DORIS W. DULL, HAROLD W. PORTER, MOLLY S. SCHNEIDER, SUSAN S. CHOQUETTE, CATHY MILLS, W. K. KEENER, JR., ELAINE H. KEENER, CARRIE P. THOMAS, N. CHRISTINA ROCHE, SANDY NICASTRO AND JOHN G. HEDRICK, JR. v. WINSTON-SALEM ZONING BOARD OF ADJUSTMENT, CHARLES L. FREEMAN, ISAAC C. ROGERS, JONATHAN EDWARDS, RENCE CALLAHAN, CYNTHIA C. DERVIN, KHALID FATTAH GRIGGS, AMOS E. SPEAS, AND SALEM MEDIA OF N.C., INC., A NORTH CAROLINA CORPORATION DOING BUSINESS AS "WTOB RADIO STATION"

No. 8621SC484

(Filed 16 December 1986)

Municipal Corporations § 31— zoning dispute—jurisdiction of board of adjustment—notice of appeal

The Winston-Salem Board of Adjustment lacked authority to hear an appeal from a zoning officer regarding the construction of radio towers where the rules of procedure for the board of adjustment required notice of appeal within thirty days and the appeal here was filed one hundred days after the permit was issued. While there was evidence that the permit was not posted

within thirty days following its issuance, there was a finding that the towers arrived on the site at least thirty days before the petitioners filed their appeal.

Judge EAGLES concurring.

APPEAL by petitioners from *Mills, Judge.* Judgment entered 24 December 1985 in Superior Court, FORSYTH County. Heard in the Court of Appeals 17 November 1986.

On 25 February 1985, WTOB Radio Station applied for and was issued a building/zoning permit allowing the erection of six radio towers along with an accessory transmittal building. The zoning permit was issued pursuant to Winston-Salem Zoning Ordinance § 25-6(G) which provides a Table of Permitted Uses. Since the requested use, "radio transmission towers," did not specifically appear in the table, the zoning officer determined as authorized by the ordinance, which listed use was most similar to the requested use. The zoning officer determined that the requested use was most similar to "utilities, public or private, except terminal facilities."

In February 1985, grading of the site began and the radio towers arrived in April 1985. On 5 June 1985, residents of the Town and Country Subdivision, claiming to be aggrieved parties, appealed to the Zoning Board of Adjustment from the decision of the zoning officer. On 3 July 1985, the Board held an evidentiary hearing where it was brought to their attention that the appeal was made untimely. The Board affirmed the zoning officer's decision.

The appellants filed a petition for writ of certiorari and judicial review in Forsyth County on 17 July 1985. The Board's decision was affirmed by the trial court. Petitioners appeal from the judgment of the trial court.

Pfefferkorn, Pishko & Elliot, by David C. Pishko, for petitioner appellants.

Ronald G. Seeber, City Attorney, for Winston-Salem Zoning Board of Adjustment, appellee.

Hutchins, Tyndall, Doughton & Moore, by George E. Doughton, Jr., for Salem Media, Inc., appellee.

ARNOLD, Judge.

The scope of judicial review for decisions made by a board sitting as a quasi-judicial body involves:

(1) Reviewing the record for errors in law,

(2) Insuring that procedures specified by law in both statute and ordinance are followed,

(3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) Insuring that decisions are not arbitrary and capricious.

Concrete Co. v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E. 2d 379, 383, *reh'g denied*, 300 N.C. 562, 270 S.E. 2d 106 (1980).

Defendant contends that the trial court erred in affirming the Winston-Salem Zoning Board of Adjustment's decision because it was not supported by competent, material and substantial evidence in the record. Before reaching this issue, however, it must first be determined whether the Board had jurisdiction to hear the appeal.

The Rules of Procedure-Zoning Board of Adjustment, Winston-Salem, North Carolina VI. B. states that: "No appeals shall be heard by the Board unless notice thereof is filed within thirty (30) days of the order, requirement, decision or determination by the Superintendent of Inspections." In the case *sub judice*, appellants filed their appeal on 5 June 1985, one hundred days after the zoning permit was issued. The specified procedure here was not followed. The established rules of the Board are binding on the Board itself, as well as on the public. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 202 S.E. 2d 129 (1974). The thirty-day rule should have been applied literally. The Board was without jurisdiction to hear the appeal.

Appellants contend that to enforce the thirty-day requirement would deny them due process of law because they did not have notice of the zoning officer's decision within the thirty days immediately following the ruling. We disagree.

While there is evidence which might tend to suggest that WTOB's zoning permit was not posted within thirty days following the issuance of the permit, there is also a finding of fact by the trial court that the radio towers arrived on the site at least thirty days before the petitioners filed their appeal with the Zoning Board. This delivery of the towers provided notice for the appellants, yet they still waited more than thirty days from that date to act. Petitioners were not prejudiced by the thirty-day rule requiring notice to be posted.

By way of dicta, we note that in other circumstances where aggrieved parties entirely lack any form of notice of a zoning officer's decision, there might be a due process question. The thirty-day rule will always be reasonable for the zoning applicant because notice of the zoning officer's decision is necessarily communicated to that individual. Aggrieved parties, however, may be without such notice until after the thirty-day time limit has expired. This matter should be addressed by the Board of Adjustment or the Winston-Salem City Council.

Having determined that the present appeal is barred due to lack of jurisdiction, appellant's contention concerning the validity of the Superintendent of Inspection's decision is not properly before this Court.

Appeal dismissed.

Judges JOHNSON and EAGLES concur.

Judge EAGLES concurring.

I concur with the majority. I consider it worthwhile to point out that the parties concede that it is the City's practice to not enforce its ordinance requirement that notices be posted. In my judgment this practice of winking at non-compliance is an open invitation for future litigation.

WXQR MARINE BROADCASTING CORPORATION v. JAI, INC., HARRY BHULABHAI, C. N. BURTEL AND RAYMOND BURTEL

No. 864DC322

(Filed 16 December 1986)

Rules of Civil Procedure § 56.7— summary judgment before ruling on motion— frivolous appeal

Defendants' contention that the trial court erred in entering summary judgment for plaintiff before defendants' motions to extend the time for answering requests for admissions were ruled on was frivolous where (1) the motions were not made in the trial court and thus are not supported by exceptions or assignments of error, App. Rule 10(a), and (2) when summary judgment was entered the motions were moot and there was nothing to hear under them because the only extension of time that they sought expired five weeks before the hearing was held and four weeks before the answers were filed.

APPEAL by defendants from *Martin, James N., Judge.* Judgment entered 25 October 1985 in District Court, ONSLOW County. Heard in the Court of Appeals 16 September 1986.

Plaintiff's suit is on an open account for radio advertising time that defendants allegedly bought but have not paid for. In its short, simple seven paragraph complaint plaintiff alleged in substance that: It and defendant JAI, Inc. are North Carolina corporations with their principal offices in Onslow County; the individual defendants are Onslow County residents; and the defendants purchased radio advertising time worth $4,536 from plaintiff and have refused to pay for it. Defendants jointly applied for and obtained additional time within which to answer and when answer was eventually filed every allegation made in the complaint was denied. On 18 July 1985 plaintiff served nine requests for admission on each defendant. The first seven of the requests repeated verbatim the seven paragraphs of the complaint, and the other two merely stated when the alleged radio advertising was done and that plaintiff had fulfilled its obligation to defendants in regard to it. Though the requests for admission required each defendant to admit or deny the truth of each statement made therein within 30 days, none of the defendants answered or objected to any of them within the time designated. On 20 August 1985, 33 days after the requests were served, defendants' lawyer filed identical motions for each defendant requesting that the time for answering the requests be extended until 20 September

1985 because "said defendant is out of Onslow County." No notice of hearing was attached to the motions and, so far as the record shows, no effort has since been made to have a hearing on them. On 4 October 1985 plaintiff notified defendants that on 21 October 1985 or as soon thereafter as the matter could be heard it would move for summary judgment or in the alternative for sanctions for defendants' failure to comply with discovery. On 18 October 1985 substantially identical answers to the requests for admission were filed for each defendant. The answers admitted the truth of only one request—that plaintiff is a North Carolina corporation whose principal place of business is in Onslow County—and denied the truth of the other eight requests, either without qualification or by claiming that he or it was "without sufficient information and belief upon which to admit or deny the allegations." Plaintiff's motion came on for hearing on 25 October 1985 and the court entered summary judgment against the defendants upon findings of fact to the effect that defendants' failure to respond to the requests for admissions within the time designated constituted an admission of the facts stated under Rule 36(a), N.C. Rules of Civil Procedure and that defendants had not moved to amend or withdraw the admissions as Rule 36(b) permits.

Robert W. Detwiler for plaintiff appellee.

Samuel S. Popkin for defendant appellants.

PHILLIPS, Judge.

Before addressing the defendants' sole assignment of error we note with disapprobation the dilatory, evasive course that defendants have followed in defending this case. Litigants in this state are required to respond to pleadings, interrogatories and requests for admission with timely, good faith answers. They may not deny an allegation generally when part of it is known to be true. Rule 8(b), N.C. Rules of Civil Procedure. Pleadings not made in the good faith belief that they are supportable are sham pleadings that can be stricken. Rule 11, N.C. Rules of Civil Procedure. Nor may parties unduly delay or impede their adversaries in their search for relevant information and admissions by professing to be ignorant of what can be learned by reasonable effort. When a party claims not to have enough information to forthrightly answer a request for admission, good faith and Rule 36(a)

of the N.C. Rules of Civil Procedure requires the claimant to state that reasonable inquiry was made. Yet although the defendants were familiar with the statements contained in the requests for admission and had answered them once when stated in the complaint, they let the time for answering them expire and then moved for an extension of time without stating even a semblance of a valid reason, which they could not state, of course, if their answer to the complaint was made in good faith; and upon eventually answering the requests 93 days after they were served defendants claimed not to have enough information to admit or deny most of them but did not state, as Rule 36(a) requires, that they had made a reasonable attempt to ascertain the truth or falsity of the requests. Defendants' conduct was clearly dilatory and obstructive and the trial judge could have justifiably imposed sanctions had he seen fit to do so. Too, though no documentary proof of the status of the defendant JAI, Inc. is recorded since that defendant filed several papers with the court in that name we question the candor of defendants' denial that JAI, Inc. is even a corporation, which is the effect of their unqualified denial that JAI, Inc. is a corporation organized under North Carolina law with its principal place of business in Onslow County.

Defendants' assignment of error—that the court erred in entering summary judgment—is based only upon exceptions taken to the court's conclusions of law and judgment. They did not except to any of the court's findings of fact, which conclusively established that the defendants owe plaintiff $4,536. The court's conclusions of law and judgment, that plaintiff is entitled to recover $4,536 of the defendants, simply follows the findings of fact, as inexorably as night follows day, and defendants do not argue otherwise. What they argue is that the court erred in entering summary judgment before their motions to extend the time for answering the requests for admission were ruled on. Leaving aside the untimeliness of the motions and defendants' failure to state a justifiable reason for delaying their answers, this argument is frivolous for at least two reasons: First, it was not made in the trial court and thus is supported by no exception or assignment of error. Rule 10(a), N.C. Rules of Appellate Procedure. Second, when summary judgment was entered the motions were moot and there was nothing to hear under them because the only extension of time that they sought expired five

weeks before the hearing was held and four weeks before the answers were filed.

Affirmed.

Judges PARKER and COZORT concur.

NORMAN LOCKE STONER v. MARY LOU BOWLING STONER

No. 8619DC513

(Filed 16 December 1986)

Rules of Civil Procedure § 60.2— relief from divorce judgment—insufficient evidence

Defendant was not entitled to relief from a judgment of absolute divorce under Rule 60(b) on the ground that she and plaintiff had not lived separate and apart for one year at the time of the divorce where the evidence showed that defendant told plaintiff's attorney on the day the divorce complaint was filed that the parties had been separated for more than a year; defendant accompanied plaintiff's attorney to the courthouse to file the divorce complaint and then to the sheriff's department where she was personally served; defendant failed to contest plaintiff's testimony at the divorce trial; and defendant only filed her motion nine months after the judgment when she learned that the absolute divorce revoked her name on plaintiff's life insurance policy.

APPEAL by defendant from *Grant, Judge*. Order entered 19 March 1986 in District Court, ROWAN County. Heard in the Court of Appeals 11 November 1986.

On 28 February 1985, plaintiff Norman Locke Stoner instituted an action for absolute divorce alleging in his complaint that he and defendant had lived separate and apart since 20 February 1984. On that same day, defendant stated to plaintiff's lawyer that she wanted a divorce and that she and her husband had been separated for more than one year. In fact, she accompanied plaintiff's lawyer to the courthouse to file the complaint and then to the Sheriff's Department where she was personally served.

On 4 April 1985, a judgment of absolute divorce was entered after a finding was made that plaintiff and defendant had continuously lived separate and apart for over a year. Defendant was

neither present nor represented by counsel. Defendant received a copy of the absolute divorce decree on approximately 9 April 1985.

On 6 October 1986, Norman Locke Stoner died. On 21 January 1986, defendant filed a motion to set aside the judgment of absolute divorce pursuant to Rule 60(b). At the hearing on 12 March 1986 defendant presented evidence which suggested that she and plaintiff were never separated and that they continued to have sexual relations both before and after the divorce.

Plaintiff's attorney in the divorce action testified at the hearing that defendant called him on 28 February 1985 and stated that she wanted to get a divorce. Defendant also assured the attorney that she had been separated from her husband for more than one year. Plaintiff's attorney also testified that Mr. Stoner had a life insurance policy in the amount of $22,830.00 which named defendant as beneficiary. The absolute divorce entered on 4 April 1985, however, revoked her name as beneficiary.

On 19 March 1986, the trial court denied defendant's motion for relief from judgment, and defendant gave oral notice of appeal in open court. From the order of the trial court, defendant Mary Lou Bowling Stoner appeals.

Corriher, Whitley, Busby & Locklear, by Robert F. Busby and Richard D. Locklear, for defendant appellant.

Woodson, Linn, Sayers, Lawther & Short, by Donald D. Sayers, for plaintiff appellee.

ARNOLD, Judge.

Defendant appellant first argues that the trial court committed reversible error in finding that the parties were separated for at least one year next preceding the institution of the divorce action. We disagree.

In addition to defendant's evidence at the hearing for relief from judgment, the trial court had before it: 1) the verified complaint of the plaintiff which stated that the parties had lived separate and apart since 20 February 1984, 2) the sworn testimony of a corroborating witness at the trial for divorce and 3) the testimony at the later hearing of plaintiff's attorney who stated

that on the day the divorce complaint was filed, defendant told him that she had been separated for more than a year. There was ample evidence to support the trial court's finding on this matter.

Defendant next contends that the trial court erred in concluding as a matter of law that the trial court had jurisdiction over the subject matter to grant the divorce. In support of her position defendant cites a line of cases including *Henderson v. Henderson*, 232 N.C. 1, 59 S.E. 2d 227 (1950). We hold, however, that this line of cases is not dispositive of the issue in the present case because the above line of cases involved situations where the defendant was served by publication and the fraud involved due process. *See Carpenter v. Carpenter*, 244 N.C. 286, 93 S.E. 2d 617 (1956).

The Supreme Court held in *Carpenter* that if a divorce decree regular on its face is obtained by false swearing, by way of pleading and evidence which relates to the grounds for divorce, the decree is not void but merely voidable. *Id.* It is immune from attack by either party to the divorce. *Id.* The rationale behind this decision is that the defendant had ample opportunity at trial to meet this testimony. *See* 1 R. Lee, North Carolina Family Law § 90, at 423 (4th ed. 1979); *Thrasher v. Thrasher*, 4 N.C. App. 534, 167 S.E. 2d 549 (1969). Based on this authority we find the cases supporting defendant's second contention inapposite.

Defendant next contends that the trial court erred in concluding as a matter of law that the defendant failed to allege and prove fraud, misrepresentation or misconduct sufficient to entitle her to relief under Rule 60(b) and that the trial court erred in concluding that defendant by her own actions is barred from the relief sought. We disagree.

Rule 60(b) states that the court "may" relieve a party from a final judgment "upon such terms as are just." A motion under Rule 60(b) is within the sound discretion of the trial court and appellate review is limited to a determination of whether the trial court abused its discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E. 2d 532 (1975). In light of the facts that defendant herself told plaintiff's attorney that the parties were separated for over one year, that defendant accompanied the attorney to file the complaint and to be served, that defendant failed to contest plaintiff's testimony at the divorce proceeding and that she only filed her

motion nine months after the judgment when she learned that absolute divorce revoked her name as beneficiary on plaintiff's life insurance policy, we find no abuse of discretion on the part of the trial court in denying defendant's motion.

Defendant lastly contends that the trial court erred in that the findings of fact are not supported by the evidence, the conclusions are not supported by the findings, the trial court lacked subject matter jurisdiction to grant the divorce and that the trial court abused its discretion in denying defendant's Rule 60(b) motion. For the reasons stated above we disagree.

Affirmed.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. MELVIN R. WILLIAMS

No. 863SC315

(Filed 16 December 1986)

1. **Criminal Law §§ 69, 73.2— telephone conversation—not authenticated—not hearsay—admissible**

The trial court did not err in an armed robbery prosecution by admitting testimony from the victim that he had received a telephone call in which the caller identified herself as the wife of the man who robbed him. Defense counsel had put in question the victim's motives for going to defendant's girl friend's house and the victim was merely explaining why he went there. The statement was not hearsay because it was not offered to prove the truth of the matter asserted.

2. **Criminal Law § 89— credibility of witness—source of rent**

The trial court did not err in an armed robbery prosecution by overruling defendant's objection to a question concerning how his girl friend paid her rent because the prosecution was attempting to show bias on the part of the witness in that she had been living with defendant and their two children and had no job or money of her own.

APPEAL by defendant from *Barefoot, Judge.* Judgment entered 23 May 1985 in Superior Court, PITT County. Heard in the Court of Appeals 13 October 1986.

Defendant was charged in a proper bill of indictment with robbery with a firearm in violation of G.S. 14-87. He was found guilty as charged. From a judgment imposing a prison sentence of fourteen years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debbie K. Wright, for the State.

Assistant Appellate Defender Geoffrey C. Mangum for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends that the trial court erred to his prejudice in overruling defendant's objection to testimony by George Walston, the victim of the robbery, that he had received a phone call from defendant's girl friend in which she identified herself as "that fellow that had robbed [you]'s wife." Defendant argues that this statement is inadmissible because the phone call was not properly authenticated and also because the statement is hearsay not subject to any exception to the hearsay rule.

We must examine the context of this testimony. On cross-examination, defense counsel had asked Mr. Walston if he had been to defendant's girl friend's home:

Q: Didn't you go around to where his girl friend lives?

A: Yes.

Q: Won't that while my client was in the County Jail that you went to visit his girl friend?

A: Yes. He was.

Q: And you were checking on her to see what?

A: We had collected the box of items to take to them.

Q: Some food items, was it?

A: Yes, it was.

Q: And you were checking on her welfare while he was in jail; is that right?

A: I was taking food for the welfare of the kids there.

Q: All right. You were there for the welfare of my client's girl friend and his kids, and you won't the least bit interested in the girl friend of his; were you?

A: No.

Q: That didn't have anything to do with the purpose of going there?

A: No.

On redirect examination, the prosecutor tried to clear up Mr. Walston's reasons for going to defendant's girl friend's home:

Q: How did you know, Mr. Walston, that Mr. Williams's girl friend needed food?

A: She made a telephone call down there at my place of business.

Q: She called you at Alice's?

A: Yes, she did.

Q: How did she identify herself to you? Do you remember?

A: She identified herself as that fellow that had robbed me's wife.

. . .

Q: What did she say to you?

A: She said she was going through some hard times and had kids that didn't have any food.

Defense counsel had put in question Mr. Walston's motives for going to the girl friend's house. Mr. Walston, in the disputed testimony, was merely explaining why he went there. Therefore, it was not necessary for the telephone call to be authenticated as coming from defendant's girl friend.

The statement Mr. Walston testified that he heard over the phone was not hearsay. G.S. 8C-1, Rule 801(c) provides that " '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." The statement in ques-

tion was not offered into evidence to prove the truth of the matter asserted (that the caller was the wife of someone who had robbed Mr. Walston), but only to show why Mr. Walston went to defendant's girl friend's home.

[2] Defendant next contends that the trial court committed prejudicial error in overruling defendant's objection to a question asked of Carolyn Hardy, defendant's girl friend, on cross-examination. Defendant argues that the question, which concerned how Ms. Hardy paid her rent, asked for irrelevant information.

It is well-established that a party to an action may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation. *State ex rel. Everett v. Hardy*, 65 N.C. App. 350, 309 S.E. 2d 280 (1983). An examination of the trial transcript reveals that at this point in her cross-examination, the prosecutor was attempting to show bias on the part of Ms. Hardy by showing that she had been living with defendant and their two children, she had no job or money of her own, and thus she was very much interested in the outcome of the case. The question was proper.

We hold that defendant had a fair trial, free from prejudicial error.

No error.

Judges ARNOLD and ORR concur.

STATE OF NORTH CAROLINA v. EDWARD DANIEL CLONINGER

No. 8627SC648

(Filed 16 December 1986)

1. Weapons and Firearms § 1— possession of handgun by felon—length of barrel

Proof of barrel length or overall length is not an essential element of possession of a handgun within five years after conviction of a felonious offense under N.C.G.S. § 14-415.1 because the statutory measurements language applies to firearms other than handguns.

2. Weapons and Firearms § 1— possession of handgun by felon—exception for home or business—not applicable to motel

The statutory exception for possession of a firearm by a felon within his own home or his lawful place of business does not apply to the common areas of a motel because the legislature intended to limit the exception to the convicted felon's own premises over which he has dominion and control to the exclusion of the public. N.C.G.S. § 14-415.1.

APPEAL by defendant from *Sitton, Judge*. Judgment entered 5 February 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 8 December 1986.

This is a criminal case in which defendant was charged in a proper bill of indictment with possession of a handgun within five years after conviction of a felonious offense in violation of G.S. 14-415.1.

The evidence tends to show the following: The defendant was convicted of a felony or felonies and sentenced to a three year term of imprisonment on 6 August 1984. On 19 July 1985, shortly after his release from prison, defendant rented a motel room on the second floor of the Carolina Motel in Gastonia, North Carolina. Gastonia City police officers, who had a warrant to search defendant's motel room, observed defendant leave a room on the first floor of the motel and walk about the premises. A detective saw defendant deposit a dark object in a bush approximately sixty feet from the motel office in a common area of the property. Defendant then retrieved the object from the bush and was followed to the second level of the motel. There he was confronted by the detective, who determined that the object in defendant's possession was an automatic pistol.

The jury found defendant guilty as charged. From a judgment imposing a prison sentence of five years, defendant appealed.

Attorney General Thornburg, by Assistant Attorney General Dolores O. Nesnow, for the State.

Childers, Fowler & Childers, by David C. Childers, for defendant-appellant.

EAGLES, Judge.

Defendant's assignments of error are based upon the trial court's denial of his motion to dismiss at the close of the State's evidence. Specifically, defendant presents two questions for review: (1) Whether the State failed to prove an essential element of the offense charged in that it offered no evidence that the barrel length of the handgun found in defendant's possession was less than 18 inches, or its overall length was less than 26 inches; and (2) whether the evidence showed that defendant's conduct came within the language of the statute which allows all persons to possess firearms within their own homes.

[1] With respect to the first issue, we hold that proof of barrel length or overall length is not an essential element of the offense under the facts of this case. The indictment charges the defendant with possession of a ".380 caliber automatic pistol, serial No. B42742Y, which is a handgun. . . ." G.S. 14-415.1 provides, in pertinent part:

> It shall be unlawful for any person who has been convicted of any crime set out in subsection (b) of this section to purchase, own, possess, or have in his custody, care, or control *any handgun* or other firearm with a barrel length of less than 18 inches or an overall length of less than 26 inches, or any weapon of mass death and destruction as defined in G.S. 14-288.8(c), within five years from the date of such conviction. . . . [Emphasis added.]

We do not construe the statutory measurements language as being applicable to handguns. Had the General Assembly not intended a distinction between handguns and other firearms, its use of both words would be redundant. It is a well settled principle of statutory construction that words of a statute will not be deemed redundant if they can be construed so as to add to the statute something in harmony with its purpose. *See In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). Because the defendant was charged with possession of a handgun, the State was not required to prove its length. The specified measurements are qualifying words which distinguish those firearms, other than handguns, which are also covered by the statute.

[2] The second issue raised by the defendant is whether the trial court should have applied the quoted language of G.S. 14-415.1:

"Nothing in this subsection would prohibit the right of any person to have possession of a firearm within his own home or on his lawful place of business."

Defendant contends that the Court should liberally construe the word "home" to encompass not only his motel room, but also the premises of the motel. The statutory exception, however, does not apply to the common areas of a motel. As we stated in *State v. McNeill*, 78 N.C. App. 514, 337 S.E. 2d 172 (1985), *disc. rev. denied*, 316 N.C. 383, 342 S.E. 2d 904 (1986), the legislature intended to limit the exception to the convicted felon's own premises over which he has dominion and control to the exclusion of the public.

No error.

Judges BECTON and PHILLIPS concur.

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

No. 8628SC700

(Filed 16 December 1986)

Evidence § 22— testimony at former trial—conflict of interest—witness not unavailable—harmless error

The trial court erred in ruling that an attorney was "unavailable" and in admitting the attorney's testimony given at a previous trial on the ground that the attorney's testimony at the second trial would create a conflict of interest because his firm had been retained by plaintiff subsequent to the first trial, since the assertion of a conflict of interest does not constitute a privilege under N.C.G.S. § 8C-1, Rule 804(a)(1). However, any possible prejudice to plaintiff from the attorney's testimony that a lease between the parties was unambiguous was cured by the trial judge's charge to the jury in which he stated that the lease was in fact ambiguous.

APPEAL by plaintiff from *Ferrell, Judge.* Judgment entered 3 March 1986 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 29 October 1986.

Plaintiff brought this action seeking to enjoin defendant-lessee from altering the north wall of the leased premises. Defendant alleged that under the terms of the lease, alterations of

the north wall are permitted. Plaintiff alleged that the wall is not part of the demised premises and that defendant has no right to make alterations.

The first trial in this case resulted in a judgment for defendant. On appeal, however, this Court held that the lease was ambiguous and ordered a new trial in which parol testimony concerning the parties' negotiations could be admitted.

At the second trial, plaintiff and defendant presented witnesses who testified as to the intended meaning of the terms of the lease. Defendant also presented the prior trial testimony of Gwynn Radeker, a real estate attorney, who, due to a perceived conflict of interest, was reluctant to testify at the second trial.

At the conclusion of the evidence, the jury determined that the north wall was in fact leased to defendant. From the judgment for defendant, plaintiff appeals.

Riddle, Kelly & Cagle, by E. Glenn Kelly, for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes & Davis, by Larry McDevitt and Michelle Rippon, for defendant appellee.

ARNOLD, Judge.

Plaintiff contends that "the trial court erred in ruling that the defendant's expert witness, attorney Gwynn Radeker, was 'unavailable' and in admitting into evidence the witness Radeker's testimony given at the first trial of this action." We agree that the trial court erred in ruling that Radeker was unavailable and in admitting his testimony, but we find that plaintiff was not prejudiced by the admission of this testimony.

Under Rule 804 of the North Carolina Rules of Evidence, the exception to the rule against hearsay for former testimony requires that the declarant be unavailable. Unavailability includes situations where the court exempts the declarant from testifying on grounds of privilege. G.S. 8C-1, Rule 804(a)(1).

Because Radeker's law firm had been retained by plaintiff subsequent to the first trial, the trial judge, over plaintiff's objection, concluded that Radeker's testimony at the second trial would create a conflict of interest and require Radeker to violate

the code of ethics of an attorney. On the basis of this conclusion, the trial judge found Radeker to be an unavailable witness under 804(a)(1) and admitted his testimony from the first trial.

We hold that the assertion of the conflict of interest in this case is not a privilege under Rule 804(a)(1). The trial court erred in finding Radeker to be unavailable and in admitting his testimony from the first trial.

Plaintiff asserts that the admission of Radeker's prior trial testimony was prejudicial because he testified that the lease was not ambiguous. Plaintiff argues that it was prejudiced by the testimony because this Court subsequently held that the lease was ambiguous in *Asheville Mall, Inc. v. F. W. Woolworth Co.*, 76 N.C. App. 130, 331 S.E. 2d 772 (1985).

We find that any possible prejudice to plaintiff was cured by the trial judge's charge to the jury in which he stated that the lease agreement was in fact ambiguous.

Plaintiff also argues that it was prejudiced because Radeker's testimony at the first trial was based on an expurgated version of the lease rather than the original lease. After reviewing the record and accompanying exhibits, we find no prejudicial error in the admission of Radeker's prior trial testimony.

Therefore, even though it was error for the trial court to admit Radeker's testimony, the error was harmless and resulted in no prejudice to plaintiff.

Moreover, we are not persuaded by plaintiff's contention that the trial court erred in denying plaintiff the right to cross-examine Radeker. Plaintiff was not denied its right of cross-examination. The cross-examination portion of Radeker's testimony was admitted into evidence. Therefore, plaintiff's argument that it was deprived of the right to cross-examine Radeker is without merit.

Plaintiff also contends that the trial court erred in striking certain testimony of plaintiff's witness, R. L. Coleman.

The exclusion of testimony is not prejudicial when the same witness has testified to facts with substantially the same meaning. *See Terrell v. Life Ins. Co. of Va.*, 269 N.C. 259, 152 S.E. 2d 196 (1967).

Assuming *arguendo* that it was error for the trial court to strike the testimony, we find said error to be harmless inasmuch as substantially the same information was placed before the jury by Coleman's further testimony.

We have examined plaintiff's remaining assignments of error and find them to be without merit.

No error.

Judges JOHNSON and EAGLES concur.

IN RE: JULIUS DEVON EWING A JUVENILE

No. 8614DC688

(Filed 16 December 1986)

Infants § 17— juvenile's confession—waiver of rights by mother

The trial court's finding that respondent juvenile's mother knowingly and understandingly waived respondent's juvenile rights was not equivalent to a finding that respondent knowingly and understandingly waived his rights, and the trial court erred in admitting respondent's inculpatory statement without first finding that respondent waived his juvenile rights.

APPEAL by respondent from *LaBarre, Judge*. Order entered 31 January 1986 in District Court, DURHAM County. Heard in the Court of Appeals 8 December 1986.

A juvenile petition was filed on or about 22 October 1985 alleging that the respondent was delinquent as defined by G.S. 7A-517(12) in that he unlawfully and willfully took and carried away a cap gun, caps, a transformer "motorcycle" and a hot wheel car belonging to Rose's Department Store in violation of G.S. 14-70 and 72(a). Respondent was 10 years old at the time.

After a hearing, the trial court adjudicated respondent delinquent and ordered that he be placed in North Carolina Memorial Hospital in Chapel Hill, North Carolina, for psychiatric treatment for an indefinite period of time. Respondent appealed.

Attorney General Thornburg by Assistant Attorney General Jane Rankin Thompson for the State.

Fowler & Baldasare, by Thomas L. Fowler for respondent.

EAGLES, Judge.

Respondent contends that the trial court erred in failing to suppress the inculpatory statement made by him during custodial interrogation. We agree.

G.S. 7A-595 governs the procedures which must be followed when a juvenile is interrogated. G.S. 7A-595(d) provides:

> Before admitting any statement resulting from custodial interrogation into evidence, the judge must find that the juvenile knowingly, willingly, and understandingly waived his rights.

Clearly, the statute requires the trial court to find as a fact that the juvenile knowingly, willingly, and understandingly waived his juvenile rights prior to admitting any statement made by the juvenile during a custodial interrogation. *In re Riley*, 61 N.C. App. 749, 301 S.E. 2d 750 (1983).

Here, the trial court found as facts:

> [T]hat these rights were explained in detail to the juvenile in his mother's presence and that his mother understood these rights and had each and every one of them read and explained to her as well as to the juvenile and the Court, in the area of juvenile law, has to be guided not only by the general principles of the constitutional law but has to look specifically at the statutory scheme for juveniles and often our appellate courts have said that we have to look to the specific statutory language and it appears that, and the Court finds and rules that the statutory scheme is designed to protect the rights of the juvenile; that the purpose of having parents available with juveniles when they're questioned by law enforcement personnel is to be sure that the parent is advised as well as the juvenile of these rights. It's not necessary in this court's mind that the juvenile totally understand each and every legal term involved with these rights. That in addition to having these rights explained to the juvenile, they're

> explained to the parents as well so that the parent understands and can acquiesce on behalf of the juvenile in terms of understanding the procedures. And it appears that the mother was specifically involved in this process; that she was there when each and every one of these rights were explained and she understood that these questions were for the purpose of determining this young man's involvement, if any, with the episode and that she, on behalf of her son, waived these rights; that is, waived any right against self-incrimination and acquiesced in allowing the police officer to examine this young man and that she did so freely, understandingly, knowingly understanding what the process was. . . .

These findings do not meet the requirements of G.S. 7A-595(d). In particular, the finding that respondent's mother freely, understandingly, and knowingly waived respondent's juvenile rights is not equivalent to a finding that respondent knowingly and understandingly waived his rights. Furthermore, "a parent, guardian, or custodian may not waive *any* right on behalf of the juvenile." G.S. 7A-595(b) (emphasis added). Accordingly, we hold that the trial court erred in admitting respondent's inculpatory statement without first finding that he knowingly, willingly and understandingly waived his juvenile rights.

We note also that the trial court failed to affirmatively state that the allegations of the juvenile petition were proved beyond a reasonable doubt as required by G.S. 7A-635 and -637. *In re Wade*, 67 N.C. App. 708, 313 S.E. 2d 862 (1984); *In re Johnson*, 32 N.C. App. 492, 232 S.E. 2d 486 (1977). Failure to follow the statutory mandate is error. *In re Wade, supra*, at 711, 313 S.E. 2d at 864.

Reversed and remanded.

Judges BECTON and PHILLIPS concur.

MARY EDITH BURRISS v. ROBERT VON HEAVNER AND BRENDA HARRIS HEAVNER

No. 8627SC655

(Filed 16 December 1986)

Witnesses § 6.1— bankruptcy application—relevancy on damages and credibility issues

Cross-examination of plaintiff in an automobile accident case about a statement in a corporate bankruptcy application she signed as corporate president that her salary was $500 per week was relevant to the damages issue and to the issue of plaintiff's credibility since it contradicted plaintiff's testimony that her company salary was $1,000 per week.

APPEAL by plaintiff from *Sitton, Judge.* Judgment entered 27 January 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 17 November 1986.

In this civil action for personal injuries sustained when plaintiff's car was struck from the rear by a car driven by one defendant and owned by the other, the jury returned a verdict in favor of the plaintiff for $5,000 and she appealed.

Harris, Bumgardner & Carpenter, by Reid C. James and Nancy C. Northcott, for plaintiff appellant.

Stott, Hollowell, Palmer & Windham, by James C. Windham, Jr., for defendant appellees.

PHILLIPS, Judge.

Since the record on appeal does not contain the testimonial evidence adduced at trial in either of the forms authorized by Rule 9(c) of the N.C. Rules of Appellate Procedure, plaintiff's contention that the trial court erred in denying her motion to set aside the verdict as being against the greater weight of the evidence cannot be reviewed. But copies of the transcript pages relating to plaintiff's other assignment of error are appended to the briefs of both parties and we will determine the question that it raises.

By that assignment of error plaintiff contends that the trial court erred to her great prejudice in permitting defense counsel to cross-examine her about an irrelevant matter—the bankruptcy

of a company of which she was President and co-owner. But the transcript pages involved show that the matter that she was cross-examined about was relevant to two issues in the case and the assignment is therefore overruled. On direct examination plaintiff testified that when she was injured in the accident and prevented from earning her usual income that her company salary was $1,000 a week. The cross-examination that she objects to was about a statement in the bankruptcy application, which she signed as President, that her salary was $500 a week at that time. G.S. 8C-1, Rule 611(b) provides that, "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." Since plaintiff's testimony on cross-examination tended to contradict her testimony on direct examination, it certainly bore upon her credibility as a witness and defendants had a right to present it. *Piper v. Ashburn*, 243 N.C. 51, 89 S.E. 2d 762 (1955). It was also relevant to the damages issue, since it tended to show that plaintiff lost less income because of the injury than her earlier testimony indicated.

No error.

Judges BECTON and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 25 NOVEMBER 1986

COBB v. COBB No. 8626DC518	Mecklenburg (85CVD6005)	Affirmed
DOUGHERTY v. CRUTCHFIELD No. 8617DC490	Rockingham (84CVD1086)	Reversed and Remanded
IN RE APPEAL OF GENERAL TIRE AND RUBBER CO. No. 8610PTC362	NCPTC (84PTC5)	Affirmed
IN RE BALLARD No. 8626DC437	Mecklenburg (80-J-618)	Affirmed
IN RE PAUL No. 8610SC230	Wake (85CRS12865)	Reversed
IN RE STEPHENS No. 8611SC397	Johnston (85CVS1481)	Affirmed
IN RE TAYLOR No. 8610DC464	Wake (85J59)	Affirmed
MOORE v. LAYE No. 8627SC376	Gaston (83CVS781	Reversed and Remanded
SHUMATE v. SHUMATE No. 8621DC350	Forsyth (85CVD4280)	No Error
STATE v. BROADNAX No. 8617SC435	Rockingham (84CRS6450)	No prejudicial error as to conviction; the order of restitution is reversed.
STATE v. CANTRELL No. 8628SC536	Buncombe (82CRS9554)	No Error
STATE v. HALL No. 865SC589	New Hanover (85CRS16241) (85CRS16242) (85CRS16245)	No Error
STATE v. HARVEY No. 864SC473	Duplin (85CRS4609) (85CRS4612) (85CRS4635)	No Error
STATE v. NORWOOD No. 799SC573	Person (78CRS5197) (78CRS5198) (78CRS5200)	Affirmed

STATE v. PATTON No. 8626SC606	Mecklenburg (85CRS46684)	No Error
SUMMERS v. HOBBY No. 8610DC622	Wake (85CVD7692)	Affirmed
VANDOOREN v. STROUD AND MASTROM, INC. No. 863SC428	Carteret (84CVS125)	Reversed and Remanded
WHITE v. FLEET FINANCE AND MORTGAGE, INC. No. 8521SC1352	Forsyth (85CVS886)	Affirmed
WOOD v. LAWSON No. 8617SC440	Surry (85CVS276) (85CVS277)	Affirmed

FILED 2 DECEMBER 1986

BATTS v. HIATT No. 867SC505	Wilson (85CVS918)	Affirmed
STATE v. CARRUTHERS No. 8612SC631	Cumberland (85CRS26516)	No Error
STATE v. MACK No. 8614SC603	Durham (85CRS7901) (85CRS10803)	Affirmed

FILED 16 DECEMBER 1986

ABBATE v. ABBATE No. 8630DC480	Haywood (85CVD336)	Affirmed in Part and Remanded for Entry of Judgment
CARTER v. BROCK No. 8613DC535	Columbus (84CVD879)	Appeal Dismissed
DEPT. OF TRANSPORTATION v. KIVETT No. 8622SC587	Iredell (81CVS1407)	Affirmed
ESTATE OF TOMLINSON v. McLEOD No. 8626SC559	Mecklenburg (85CVS9099)	Appeal Dismissed
GREGORY v. GILLESPIE No. 868SC625	Wayne (85CVS008)	Reversed and Remanded
IN RE LEECH AND YOUNG No. 8627DC591	Gaston (85J569) (85J571)	Affirmed

IN RE PONDER No. 8627DC352	Cleveland (82J21K, M)	Reversed and Remanded
JAYNES v. STOUT No. 8630DC442	Haywood (84CVD391)	Reversed and Remanded
KIMBERLING v. STEPP No. 8629DC759	Henderson (85CVD106)	Dismissed
LEMMONS v. LEMMONS No. 8629SC537	Henderson (85CVS284)	Reversed and Remanded
RALEIGH-DURHAM AIRPORT AUTH. v. HOWARD No. 8610SC723	Wake (81CVS5941)	Affirmed
SMITH v. SMITH No. 8621SC692	Forsyth (85CVS3549)	Reversed and Remanded
SPAULDING v. SPAULDING No. 8621DC93	Forsyth (84CVD168)	Affirmed
STATE v. AUSTIN No. 8611SC732	Johnston (85CRS9369)	No Error
STATE v. BODSFORD No. 8621SC636	Forsyth (85CRS37098)	Reversed
STATE v. CHAMBERS No. 8625SC725	Catawba (86CRS1100) (86CRS1101)	No Error
STATE v. CRAWFORD No. 8615SC343	Alamance (85CRS9665) (85CRS9666)	No Error
STATE v. HALL No. 861SC494	Chowan (85CRS1145) (85CRS1146)	No Error
STATE v. HAYES No. 8627SC627	Gaston (85CRS29350)	No Error
STATE v. HICKS No. 8610SC200	Wake (84CR68719) (84CR68723) (84CR80250) (84CR80269) (84CR69533)	Affirmed in Part and Vacated in Part
STATE v. JORDAN No. 861SC549	Chowan (85CRS628) (85CRS281)	No Error
STATE v. KORN No. 8618SC719	Guilford (83CRS27619) (83CRS27692)	Affirmed

STATE v. LIPSCOMB No. 8612SC780	Cumberland (85CRS42880)	No Error
STATE v. LOCKLEAR No. 8616SC689	Scotland (85CRS4273)	No Error
STATE v. LUCKEY No. 8626SC546	Mecklenburg (85CRS82584) (85CRS82585)	No Error
STATE v. MOORE No. 8619SC596	Randolph (85CRS12504) (85CRS12505) (85CRS12506)	No Error
STATE v. NORTON No. 8616SC594	Scotland (85CRS3379)	No Error
STATE v. PERRY No. 8610SC598	Wake (85CRS19061) (85CRS19062) (85CRS23532)	No Error
STATE v. REYNOLDS No. 8619SC672	Randolph (85CRS07636)	No Error
STATE v. SACONN No. 8615SC541	Alamance (85CRS15788)	No Error
STATE v. SHULER No. 8630SC697	Haywood (85CRS6328) (85CRS6329)	No Error
STOUT v. STOUT No. 8630DC612	Haywood (79CVD482)	Reversed and Remanded

CINEMA I VIDEO, INC. D/B/A CINEMA I VIDEO, SUNSHINE VIDEO, INC. D/B/A SUNSHINE VIDEO, HOME VIDEO, INC. D/B/A HOME VIDEO, PHILLIP J. RINK AND DOUGLAS HONEYCUTT D/B/A HOME VIDEO, THE VIDEO GALLERIES, INC. D/B/A THE VIDEO GALLERY, L & J ELECTRONIC, INC., D/B/A L & J ELECTRONICS, PIZZA KEG, INC. D/B/A SHOWBIZ, VIDEO TIME, INC. D/B/A VIDEO TIME, ANDRE, INC. D/B/A AUDIO VIDEO MART, THE VIDEO BAR, INC. D/B/A THE VIDEO BAR, THE VIDEO BAR, INC. AND A & N, INC. D/B/A THE VIDEO BAR, THE VIDEO BAR, INC. AND VIDEO BAR EAST D/B/A THE VIDEO BAR, JIM ALLEN, INC. NORTH CAROLINA VIDEO, INC. D/B/A NORTH CAROLINA VIDEO, MULTI-VIDEO, INC. D/B/A MULTI-VIDEO, VIDEO COUNTRY CORP. D/B/A VIDEO COUNTRY, RONALD CRAMER D/B/A VIDEO 99 AND VIDEO SEARCH, PIC-A-FLICK OF SHELBY, INC. D/B/A PIC-A-FLICK, PIC-A-FLICK OF GASTONIA INC. D/B/A PIC-A-FLICK, JOY GALLYON, RONNIE McLELLAND AND PAUL McLELLAND D/B/A EAST SIDE MOVIES, JOY GALLYON AND TOM FOX D/B/A BROADWAY MOVIES, JOHN D. McLAUCHLIN AND BUTCH LUCAS D/B/A VIDEO STATION OF FAYETTEVILLE, N.C., JOHN D. McLAUGHLIN, THURMAN LUCAS, E. SCOTT McLAUCHLIN AND JOHN D. McLAUCHLIN, III D/B/A VIDEO STATION OF CLINTON, N.C., C. H. McCUBBIN, J. A. McCUBBIN AND PHYLLIS SMITH D/B/A VIDEO SHOWCASE, LES CAILLOUET D/B/A VIDEO WORLD OF GREENSBORO, CHRISTINE T. BREWER D/B/A BREWER'S MOVIE CLUB, TONY G. McDOWELL D/B/A GREAT ESCAPES VIDEO TAPE CLUB, LEE ROY JOHNSON D/B/A TROUTMAN VIDEO, JIMMY E. HUFF D/B/A STAR VIDEO, JOHN ALLEN D/B/A PRIME TIME VIDEO, BILLY E. OVERMAN D/B/A ALL STAR HOME VIDEO, JIMMY DEAN WRIGHT D/B/A SHOWCASE VIDEO CLUB, CLENTON J. SMITH D/B/A VIDEO WAY, DAVID M. MAGILL D/B/A SILVER SCREEN VIDEO, VIDEO CITY OF RALEIGH, INC. D/B/A VIDEO CITY v. LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, ROBERT E. THOMAS, DISTRICT ATTORNEY FOR THE TWENTY-FIFTH JUDICIAL DISTRICT OF NORTH CAROLINA, GEORGE E. HUNT, DISTRICT ATTORNEY FOR THE FIFTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOHN W. TWISDALE, DISTRICT ATTORNEY FOR THE ELEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA, D. LAMAR DOWDA, DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, DAVID McFAYDEN, JR., DISTRICT ATTORNEY FOR THE THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, EDWARD W. GRANNIS, JR., DISTRICT ATTORNEY FOR THE TWELFTH JUDICIAL DISTRICT OF NORTH CAROLINA, PETER S. GILCHRIST, III, DISTRICT ATTORNEY FOR THE TWENTY-SIXTH JUDICIAL DISTRICT OF NORTH CAROLINA, PHILLIP WALTERS ALLEN, DISTRICT ATTORNEY FOR THE SEVENTEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, H. W. ZIMMERMAN, JR., DISTRICT ATTORNEY FOR THE TWENTY-SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, RONALD C. BROWN, DISTRICT ATTORNEY FOR THE TWENTY-EIGHTH JUDICIAL DISTRICT OF NORTH CAROLINA, W. HAMPTON CHILDS, JR., DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, THOMAS D. HAIGWOOD, DISTRICT ATTORNEY FOR THE THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, CARL FOX, DISTRICT ATTORNEY FOR THE FIFTEENTH (B) JUDICIAL DISTRICT OF NORTH CAROLINA, DONALD JACOBS, DISTRICT ATTORNEY FOR THE EIGHTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOE FREEMAN BRITT, DISTRICT ATTORNEY FOR THE SIXTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA,

WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOSEPH G. BROWN, DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, JAMES E. ROBERTS, DISTRICT ATTORNEY FOR THE NINETEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, RONALD L. STEPHENS, DISTRICT ATTORNEY FOR THE FOURTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, HOWARD S. BONEY, JR., DISTRICT ATTORNEY FOR THE SEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA, J. RANDOLPH RILEY, DISTRICT ATTORNEY FOR THE TENTH JUDICIAL DISTRICT OF NORTH CAROLINA

NORTH AMERICAN VIDEO, LTD. OF DURHAM, D/B/A NORTH AMERICAN VIDEO, NORTH AMERICAN VIDEO, LTD. OF RALEIGH D/B/A NORTH AMERICAN VIDEO, CHARLES H. CROW & ASSOCIATES, INC. D/B/A CROW'S VIDEO CENTER AND COMPUTER & VIDEO CENTER, VERNON S. CHURCH, JR. D/B/A HOME VIDEO OF WILKES, ABELIAN ENTERPRISES, INC., VIDEO WORLD, INC., MELVIN WAYNE CALDWELL D/B/A VIDEO SHOPPE, MICHAEL MYERS D/B/A U.S.A. VIDEO, BYRON E. TRIPLETT D/B/A VIDEO ONE, FERRELL DENNIS WITTE D/B/A VIDEO SHOWPLACE, PIC-A-FLICK OF ASHEVILLE, INC. D/B/A PIC-A-FLICK, W.S.J., INC. D/B/A VIDEO WORLD, JACK E. ELLIOTT D/B/A CITY NEWS VIDEO AND CITY VIDEO, JACK E. ELLIOTT, JANE STRAUS, RACHEL GUINN AND GLORIA GUINN D/B/A JACKIE'S VIDEO, VIDEO WORLD OF SHELBY, INC. D/B/A VIDEO WORLD, VIDEO WORLD OF CHERRYVILLE, INC. D/B/A VIDEO WORLD, RALPH D. CUNNINGHAM D/B/A HOME MOVIE RENTAL, AMERICAN VIDEO, INC. D/B/A ALL AMERICAN VIDEO, D/B/A ALL AMERICAN VIDEO, J.J.L. ENTERPRISES, INC. D/B/A VIDEO CONNECTION, THOMAS C. DUNLAP, SR. AND TRACY C. DUNLAP, SR. D/B/A THE VIDEO STATION, BOBBY JOE BRADLEY D/B/A HOME VIDEO CENTER, DUNCOURT, INC. D/B/A THE VIDEO CENTER, VON ENTERPRISES, INC. D/B/A VON'S HOME VIDEO MOVIES, VIDEO WORLD OF GASTONIA, INC. D/B/A VIDEO WORLD v. LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, ROBERT E. THOMAS, DISTRICT ATTORNEY FOR THE TWENTY-FIFTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOHN W. TWISDALE, DISTRICT ATTORNEY FOR THE ELEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA, D. LAMAR DOWDA, DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, DAVID MCFAYDEN, JR., DISTRICT ATTORNEY FOR THE THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, EDWARD W. GRANNIS, JR., DISTRICT ATTORNEY FOR THE TWELFTH JUDICIAL DISTRICT OF NORTH CAROLINA, PETER S. GILCHRIST, III, DISTRICT ATTORNEY FOR THE TWENTY-SIXTH JUDICIAL DISTRICT OF NORTH CAROLINA, PHILLIP WALTERS ALLEN, DISTRICT ATTORNEY FOR THE SEVENTEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, H. W. ZIMMERMAN, JR., DISTRICT ATTORNEY FOR THE TWENTY-SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, RONALD C. BROWN, DISTRICT ATTORNEY FOR THE TWENTY-EIGHTH JUDICIAL DISTRICT OF NORTH CAROLINA, W. HAMPTON CHILDS, JR., DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (B) JUDICIAL DISTRICT OF NORTH CAROLINA, CARL FOX, DISTRICT ATTORNEY FOR THE FIFTEENTH (B) JUDICIAL DISTRICT OF NORTH CAROLINA, JOE FREEMAN BRITT, DISTRICT ATTORNEY FOR THE SIXTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, WILLIAM H. ANDREWS, DISTRICT

ATTORNEY FOR THE FOURTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOSEPH G. BROWN, DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, JAMES E. ROBERTS, DISTRICT ATTORNEY FOR THE NINETEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, RONALD L. STEPHENS, DISTRICT ATTORNEY FOR THE FOURTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, MICHAEL A. ASHBURN, DISTRICT ATTORNEY FOR THE TWENTY-THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, WILLIAM C. GRIFFIN, JR., DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, GEORGE E. HUNT, DISTRICT ATTORNEY FOR THE FIFTEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, ALAN LEONARD, DISTRICT ATTORNEY FOR THE TWENTY-NINTH JUDICIAL DISTRICT OF NORTH CAROLINA, J. RANDOLPH RILEY, DISTRICT ATTORNEY FOR THE TENTH JUDICIAL DISTRICT OF NORTH CAROLINA

NORTH CAROLINA ASSOCIATION OF FAMILY ENTERTAINMENT CENTER, INC. v. LACY H. THORNBURG

PARKER NEWS, INC., A NORTH CAROLINA CORPORATION; JESSE F. FRYE, JR., D/B/A L & J NEWSTAND; BRIAR PATCH MOUNTAIN INVESTMENTS, INC., A CORPORATION; SUGAR & SPICE, INC., A NORTH CAROLINA CORPORATION; J & J VIDEO TAPE EXCHANGE, A PARTNERSHIP; SALISBURY VIDEO, A PARTNERSHIP; SALISBURY NEWS, A PARTNERSHIP; ETTA MAE MOTHERSHEAD, D/B/A R & R ENTERTAINMENT CENTER; DANAN ENTERPRISES, INC., A NORTH CAROLINA CORPORATION; ADULT TRADING POST, A PARTNERSHIP; W & S ENTERPRISES, LTD., A NORTH CAROLINA CORPORATION; SHOW BIZ, A PARTNERSHIP; SHARON S. BUNDY, D/B/A VIDEO TRACS; ROBERT T. CADIEU, SR., D/B/A CATHY'S VIDEO, TOO; CATHY'S BOOK SWAP/VIDEO, A PARTNERSHIP; JACK ELLIOTT D/B/A CITY NEWS VIDEO; J, J & B ENTERPRISES, A NORTH CAROLINA CORPORATION; JOHNNY T. ALLEN, JR., D/B/A PRIME TIME VIDEO; EVELYN L. HATCHER, D/B/A L.A. VIDEO RENTALS; EMPIRE VIDEO, INC., A NORTH CAROLINA CORPORATION; W.S.J., INC., A NORTH CAROLINA CORPORATION; PIERRES OF WILMINGTON, INC., A NORTH CAROLINA CORPORATION; H & H ENTERPRISES OF WILMINGTON, INC., A NORTH CAROLINA CORPORATION; MIND'S EYE, INC., A NORTH CAROLINA CORPORATION; CROWN VIDEO UNLIMITED, INC., A NORTH CAROLINA CORPORATION; CAMERA'S EYE, INC., A NORTH CAROLINA CORPORATION; AND BILL WILKERSON D/B/A XXX, INN v. LACY H. THORNBURG, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, JAMES E. ROBERTS, DISTRICT ATTORNEY FOR THE NINETEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, H. W. ZIMMERMAN, JR., DISTRICT ATTORNEY FOR THE TWENTY-SECOND JUDICIAL DISTRICT OF NORTH CAROLINA, GEORGE E. HUNT, DISTRICT ATTORNEY FOR THE FIFTEENTH (A) JUDICIAL DISTRICT OF NORTH CAROLINA, LAMAR DOWDA, DISTRICT ATTORNEY FOR THE EIGHTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, PETER S. GILCHRIST, III, DISTRICT ATTORNEY FOR THE TWENTY-SIXTH JUDICIAL DISTRICT OF NORTH CAROLINA, W. HAMPTON CHILDS, JR., DISTRICT ATTORNEY FOR THE TWENTY-SEVENTH (B) JUDICIAL DISTRICT OF NORTH CAROLINA, EDWARD W. GRANNIS, JR., DISTRICT ATTORNEY FOR THE TWELFTH JUDICIAL DISTRICT OF NORTH CAROLINA, JERRY L. SPIVEY, DISTRICT ATTORNEY FOR THE FIFTH JUDICIAL DISTRICT OF NORTH

CAROLINA, WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH JUDICIAL DISTRICT OF NORTH CAROLINA, JOE FREEMAN BRITT, DISTRICT ATTORNEY FOR THE SIXTEENTH JUDICIAL DISTRICT OF NORTH CAROLINA, HOWARD S. BONEY, JR., DISTRICT ATTORNEY FOR THE SEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA, DONALD M. JACOBS, DISTRICT ATTORNEY FOR THE EIGHTH JUDICIAL DISTRICT OF NORTH CAROLINA, J. RANDOLPH RILEY, DISTRICT ATTORNEY FOR THE TENTH JUDICIAL DISTRICT OF NORTH CAROLINA, W. DAVID McFAYDEN, JR., DISTRICT ATTORNEY FOR THE THIRD JUDICIAL DISTRICT OF NORTH CAROLINA, JOHN W. TWISDALE, DISTRICT ATTORNEY FOR THE ELEVENTH JUDICIAL DISTRICT OF NORTH CAROLINA

No. 8610SC269

(Filed 30 December 1986)

1. Obscenity § 2— dissemination of obscenity—statute not unconstitutionally overbroad

The statute prohibiting the dissemination of obscenity, N.C.G.S. 14-190.1, is not unconstitutionally overbroad because the language "taken as a whole" does not appear in the third prong of the test for obscenity set forth in subsection (b)(3), that the material lacks serious literary, artistic, political, or scientific value, since the second prong of the test for obscenity set forth in subsection (b)(2), when considered in *pari materia* with subsection (b)(3), precludes an interpretation which would permit the trier of fact to determine obscenity of material on the basis of isolated depictions contained therein.

2. Constitutional Law § 4; Obscenity § 1— constitutionality of obscenity statutes—standing of video dealers to challenge

Plaintiff video dealers have standing to challenge the constitutionality of the statute prohibiting the dissemination of obscenity, N.C.G.S. 14-190.1, and the statute creating the offense of first degree sexual exploitation of a minor, N.C.G.S. 14-190.16.

3. Obscenity § 1— dissemination of obscenity—no prohibition of possession in home—statute not overbroad

The statute prohibiting the "dissemination" of obscenity, N.C.G.S. 14-190.1, does not prohibit the mere possession of obscenity in the privacy of one's own home and is not unconstitutionally overbroad.

4. Obscenity § 1— intentional dissemination of obscenity—sufficient scienter requirement

The statute providing that it shall be unlawful for any person, firm or corporation to "intentionally" disseminate obscenity, N.C.G.S. 14-190.1(a), contains a constitutionally sufficient scienter requirement.

5. Obscenity § 2— judging with reference to "especially susceptible audiences"—constitutionality

N.C.G.S. 14-190.1(d) is not unconstitutionally vague or overbroad because it permits obscenity to be judged with reference to "especially susceptible au-

diences" when the material was especially designed for or directed toward such audiences.

6. Obscenity § 2— definitions of "sexual conduct" not vague or overbroad

N.C.G.S. 14-190.1(c) is not unconstitutionally vague or overbroad in setting forth what constitutes "sexual conduct." Specifically, the statute is not vague or overbroad in defining sexual conduct to include "excretory functions" or to include the depiction of "torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume."

7. Obscenity § 1— seized materials—absence of prompt adversary hearing on obscenity

The absence of a right in N.C.G.S. 14-190.1 to an adversary hearing on the obscenity of seized material prior to trial does not constitute an unconstitutional prior restraint of First Amendment rights. The burden is on the person seeking return of the material to request such a hearing, and a defendant may make a motion to suppress the seized evidence under N.C.G.S. 15A-977.

8. Obscenity § 1— sexual exploitation of minors—necessity for live minor

When the statutes setting forth criminal offenses for the sexual exploitation of minors, N.C.G.S. 14-190.16 and 14-190.17, refer to drawings or visual representations of a minor, they are referring to a representation of a live person under eighteen years of age; therefore, the statutes do not impermissibly permit the State to prosecute a charge of dissemination of materials harmful to minors when the production of said material does not require the use of a live minor in violation of the First and Fourteenth Amendments to the U. S. Constitution.

9. Obscenity § 1— sexual touching involving minors—statute not overbroad

The statute proscribing depictions of apparent sexual touching involving minors, N.C.G.S. 14-190.13(5)(c), is not substantially overbroad. Moreover, whatever overbreadth may exist in the statute should be cured through a case by case analysis of fact situations to which its sanctions assertedly may not be applied.

10. Obscenity § 1— sexual exploitation of minors—scienter requirement

There is a scienter requirement in the statutes creating the offenses of first and second degree sexual exploitation of a minor, N.C.G.S. 14-190.16 and 14-190.17, and the proscriptions contained in the statutes do not constitute prior restraints.

11. Obscenity § 1— sexual exploitation of minors—inference of minority—due process

The inference of minority permitted by N.C.G.S. 14-190.16 and 14-190.17 does not relieve the State of its burden of proving beyond a reasonable doubt every essential element of the offenses of first and second degree sexual exploitation of a minor in violation of the due process clause of the Fourteenth Amendment to the U. S. Constitution and Art. I, sec. 19 of the N. C. Constitution.

12. Obscenity § 1— sexual exploitation of minors—inference of minority—First Amendment rights

The inference of minority permitted by N.C.G.S. 14-190.16 and 14-190.17 does not violate protections guaranteed by the First Amendment of the U. S. Constitution.

13. Obscenity § 2— sexual exploitation of minors—visual representations—statutes not unconstitutionally vague

The statute which makes it unlawful to disseminate material containing a "visual representation" of a minor engaged in sexual activity, N.C.G.S. 14-190.17, and the statute which includes "visual depictions or representations" in the definition of "material," N.C.G.S. 14-190.13(2), provide fair notice of their prohibitions and are not unconstitutionally vague.

Judge BECTON concurring in part and dissenting in part.

Judge COZORT concurs.

APPEAL by plaintiffs from *Bailey, Judge*. Judgment entered 10 January 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 28 August 1986.

This is a civil action wherein plaintiffs seek a declaratory judgment with respect to the constitutionality of the following statutes: G.S. 14-190.1, entitled "Obscene literature and exhibitions"; G.S. 14-190.13, entitled "Definitions for certain offenses concerning minors"; G.S. 14-190.16, entitled "First degree sexual exploitation of a minor"; and G.S. 14-190.17, entitled "Second degree sexual exploitation of a minor." On 11 July 1985, in the first session of 1985, the North Carolina General Assembly enacted House Bill 1171 entitled "AN ACT TO STRENGTHEN THE OBSCENITY LAWS OF THIS STATE AND THE ENFORCEMENT OF THESE LAWS, TO PROTECT MINORS FROM HARMFUL MATERIAL THAT DOES NOT RISE TO THE LEVEL OF OBSCENITY, AND TO STOP THE SEXUAL EXPLOITATION AND PROSTITUTION OF MINORS." House Bill 1171 amended, *inter alia*, G.S. 14-190.1, -190.13, -190.16, and -190.17 and repealed G.S. 14-190.2. The effective date of the amendments was 1 October 1985. On 30 September 1985, plaintiffs in case number 85CVS6750 (Cinema I Video) filed their complaint and motions for injunctive relief from the enforcement of the aforementioned statutes as amended by House Bill 1171. Plaintiffs alleged that because they "are in the business of selling and renting video tapes, including video tapes which are sexually explicit, they will be the target of defendants' intended enforcement of N.C.G.S. secs. 14-190.1, 14-190.13, 14-190.16 and 14-190.17." Plaintiffs

claimed that said statutes abridged their rights as protected by the First, Fifth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and Article I, sec. 27 of the Constitution of North Carolina. The Attorney General of the State of North Carolina, along with district attorneys for each judicial district of the State, were named as defendants in plaintiffs' complaint. Plaintiffs alleged, *inter alia*, that the amended statutes were vague in their terms, substantially overbroad, and that the impending enforcement of the statutes deprived them of their due process rights and deprived them and their customers of the free exercise of their rights as protected by the United States Constitution as well as the Constitution of North Carolina. Plaintiffs also averred, as irreparable injury, the severe financial loss or ruin and possible criminal prosecution of them pending a determination of the case on its merits.

On 2 October 1985, plaintiffs in case number 85CVS1796 (Parker News) filed a similar complaint in Wayne County Superior Court. On 3 October 1985, plaintiffs in case number 85CVS6850 (North American Video) filed their complaint in Wake County Superior Court also challenging the constitutionality of the statutes *sub judice*. Superior Court Judge Henry Barnette, Jr., of Wake County, in an order filed 3 October 1985, issued temporary restraining orders prayed for in case numbers 85CVS6750 and 85CVS6850, pending a hearing on plaintiffs' motions for preliminary injunctions. On 4 October 1985, Judge Barnette denied plaintiffs' motions for preliminary injunctions in case numbers 85CVS6750 and 85CVS6850. On 4 October 1985, plaintiffs filed with this Court petitions for a writ of certiorari, a writ of supersedeas, and a temporary stay. This Court denied plaintiffs' petitions.

On 23 October 1985, defendants filed their answers and motions for summary judgment in case numbers 85CVS6750 and 85CVS6850. On 1 November 1985, defendants filed their answer and motion for summary judgment in case number 85CVS1796. Plaintiffs in case number 85CVS1796, on 5 November 1985, filed a motion for summary judgment on their prayer for a permanent injunction. On 5 November 1985, plaintiffs' motion for summary judgment was denied. (85CVS1796).

On 15 November 1985, plaintiffs (North Carolina Family Entertainment Center, Inc.) in 85CVS8071 filed their complaint in Wake County Superior Court. By consent of the parties case numbers 85CVS1796 and 85CVS8071 were consolidated and on 5 December 1985 plaintiffs in case number 85CVS1796 made motions to remove and continue the case in Wake County. Also, on 5 December 1985, a motion was made pursuant to Rule 42, N.C. Rules Civ. P., to consolidate case numbers 85CVS1796, 85CVS6750 and 85CVS6850. On 20 December 1985, transfer of 85CVS1796 to Wake County was allowed; on 13 January 1986 the motion for consolidation was allowed. In an order filed 13 January 1986, defendants' motion for summary judgment was granted and plaintiffs' complaints were dismissed. Plaintiffs appeal.

Kirby, Wallace, Creech, Sarda & Zaytoun, by David F. Kirby and Robert E. Zaytoun; and Whitley, Coley and Wooten, by Everette L. Wooten, Jr., for plaintiff appellants.

Attorney General Lacy H. Thornburg, by Chief Deputy Attorney General Andrew A. Vanore, Jr., Special Deputy Attorney General Edwin M. Speas, Jr., and Assistant Attorney General Thomas J. Ziko, for defendant appellees.

JOHNSON, Judge.

The North Carolina General Assembly recently legislated extensive amendments to the North Carolina General Statutes pertaining to obscenity and child pornography. Many of plaintiffs' questions presented for our review pertain to those amendments aimed at preventing child pornography and are typical of what was once described as "a new phase of the intractable obscenity problem." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 704, 20 L.Ed. 2d 225, 243, 88 S.Ct. 1298, 1313 (1968) (Harlan, J., concurring in part and dissenting in part). Plaintiffs question virtually every amendment to the statutory scheme in question as well as many provisions that were in effect prior to amendment of the statutory scheme. The extensiveness of plaintiffs' appeal is without parallel in the relevant case law on this subject. Plaintiffs' zealous attack on the constitutionality of the statutes enacted is replete with serious questions which give us great cause for concern; however, in light of the State's compelling interest in the protection of society as a willing or unwilling au-

dience from the corrupting effects of obscenity and the State's interest of surpassing importance in the protection of minors from the physiological and psychological injuries resulting from sexual exploitation and abuse, we affirm the trial court's judgment that the statutes in the case *sub judice* are permissible under the North Carolina Constitution and the United States Constitution.

Due to the nature of plaintiffs' claim that the statutes under consideration are unconstitutional as written, to the extent possible, we have endeavored to set forth the statutes as amended with relevant comparisons of the statutes prior to amendment. We are constrained by traditional rules of constitutional interpretation and note that in the context of this declaratory judgment action *our opinion is limited to the constitutionality of the statutes as drawn and we have no basis for deciding the constitutionality of the present applications of the statutes in pending cases.*

[1] The first question presented for our review is whether G.S. 14-190.1 is substantially overbroad in its coverage such that enforcement of it would violate the First and Fourteenth Amendments to the United States Constitution as well as Article I, sec. 14 of the North Carolina Constitution. Obscenity is not a constitutionally protected form of expression. *See Roth v. United States*, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957). In *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (1973), a five justice majority opinion stated a constitutional test to identify obscene material. The three-pronged *Miller* test to identify obscene material that a state may regulate without violating the protections of the First Amendment, as made applicable to the states through the Fourteenth Amendment, establishes the following guidelines:

> The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, *Kois v. Wisconsin, supra*, at 230, 33 L.Ed. 2d 312, *quoting, Roth v. United States, supra*, at 489, 1 L.Ed. 2d 1498; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (c) whether

> the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, supra, at 24, 37 L.Ed. 2d at 431, 93 S.Ct. at 2615. It is worthy of noting that the Court in *Miller, supra,* further stated:

> If a state law that regulates obscene material is thus limited, as written *or construed,* the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.

Miller, supra, at 25, 37 L.Ed. 2d at 431, 93 S.Ct. at 2615 (emphasis supplied).

The linchpin of plaintiffs' argument is that G.S. 14-190.1 is unconstitutional because the language "taken as a whole" does not appear in every instance as it does in the *Miller* test. We disagree. G.S. 14-190.1(b) defines obscene materials as follows:

> (b) For purposes of this Article any material is obscene if:
>
> (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
>
> (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that *the material taken as a whole* appeals to the prurient interest in sex; and
>
> (3) The material lacks serious literary, artistic, political, or scientific value; and
>
> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

G.S. 190.1(b) (emphasis supplied). Although the language "taken as a whole" appearing in subsection (b)(2) corresponds to the second prong of the *Miller* test, that language does not appear in subsection (b)(3). In *Hamling v. United States,* 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974), the Court offered its perspective of *Miller, supra,* as follows:

> The *Miller* cases, important as they were in enunciating a constitutional test for obscenity to which a majority of the Court subscribed for the first time in a number of years, were intended neither as legislative drafting handbooks nor as manuals of jury instructions.

Hamling, supra, at 115, 41 L.Ed. 2d at 619, 94 S.Ct. at 2906. Plaintiffs' contention is that G.S. 14-190.1 allows a trier of fact to determine the obscenity of material under judicial consideration on the basis of isolated depictions contained therein. There are no reported decisions wherein there is such a construction of the statute. We unequivocably reject such an unreasonable construction of G.S. 14-190.1. The only amendment to G.S. 14-190.1(b) was the deletion of the word "educational" in subsection (b)(3).

The second prong of G.S. 14-190.1(b), when considered in *pari materia* with the third prong, of which plaintiffs complain, precludes such an unconstitutional interpretation; subsection (b)(4) evidences the General Assembly's intent to exclude any constitutionally protected expressions from the proscriptions of the statute. Moreover, the North Carolina Supreme Court passed on the constitutionality of the same codification of the *Miller* test, with the exception as noted hereinabove, as follows:

> It appears that the definition of 'obscenity' in our former statute under which these defendants are charged placed a heavier burden on the State to convict than the definition prescribed in *Miller v. California, supra.* Since the latest amendment to G.S. 14-190.1 through G.S. 14-190.11 (a codification of Chapter 1434 of the 1973 Session Laws) makes it easier for the State to convict violators, the amendment affords these defendants no grounds on which to contend that their convictions are now illegal and must abate.

State v. Hart, 287 N.C. 76, 81, 213 S.E. 2d 291, 295 (1975). The Supreme Court of the United States has acknowledged that this state through G.S. 14-190.1 has codified the *Miller* test. *See New York v. Ferber,* 458 U.S. 747, 755-56, 73 L.Ed. 2d 1113, 1122, 102 S.Ct. 3348, 3354, n. 7 (1982). Accordingly, we hold plaintiffs' claim that G.S. 14-190.1(b) is unconstitutional on its face is without merit.

We next consider plaintiffs' argument that the proscription in G.S. 14-190.1(a)(3) is substantially overbroad in its coverage. The issue raised by plaintiffs' argument is whether the First, Fourth and Fourteenth Amendments as applicable to the states and Article I, sec. 14 of the North Carolina State Constitution protects the *dissemination* of obscene materials.

[2] Before we address the issue raised by plaintiffs' argument, we first address defendants' assertion and the trial court's judgment that plaintiffs lack standing to claim that the statute unconstitutionally prohibits dissemination of obscene materials in the home. Defendants argue that: (1) plaintiffs have no standing to enjoin the enforcement of G.S. 14-190.1 because plaintiffs have not shown that their rights have been infringed upon, *see High Point Surplus Co. v. Pleasants*, 263 N.C. 587, 139 S.E. 2d 892 (1965); and (2) that plaintiffs have not sufficiently demonstrated a justiciable controversy to invoke the jurisdiction of the Declaratory Judgment Act, *see State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 323 S.E. 2d 294 (1984).

The authority relied upon by defendants for both their contentions is distinguishable because the rules for standing have been altered for those engaged in litigation involving First Amendment protections. *See Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973). In *Broadrick, supra*, the Court enunciated its basis for altering the traditional rules of standing as follows:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represents a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society. As a corollary, the Court has altered its traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.' Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the

> statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.

Broadrick, supra, at 611-12, 37 L.Ed. 2d at 839-40, 93 S.Ct. at 2915-16 (citations omitted). Also, the Court in *Carey v. Population Services International,* 431 U.S. 678, 52 L.Ed. 2d 675, 97 S.Ct. 2010 (1977) (citing *Craig v. Boren,* 429 U.S. 190, 50 L.Ed. 2d 397, 97 S.Ct. 451 (1976)), recognized that vendors are uniformly permitted to act as advocates for the rights of third parties who seek access to their market or function. We hold that plaintiffs do have standing to challenge the constitutionality of G.S. 14-190.1(a)(3). Contrary to the lower court's judgment, we also hold that plaintiffs have standing to challenge G.S. 14-190.16 (creating the offense of First degree sexual exploitation of a minor), and we shall address their challenge hereinbelow.

[3] Plaintiffs primarily rely upon *Stanley v. Georgia,* 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243 (1969), for the main point of their argument that there is a right to possess obscene material in the privacy of one's home. The argument posited by plaintiffs is that in amending G.S. 14-190.1, the General Assembly's deletion of the phrase "in any public place" infringes on one's zone of privacy wherein one may lawfully possess obscenity in the privacy of one's home. Plaintiffs' argument is misplaced. The Court in *Stanley, supra,* stated the following:

> [W]e think that mere categorization of these films as 'obscene' is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his home, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

Stanley, supra, at 565-66, 22 L.Ed. 2d at 549-50, 89 S.Ct. at 1248. Plaintiffs, in their brief, correctly interpret the amendment of G.S. 14-190.1 as follows:

> By deleting the 'public place' requirement from N.C.G.S. sec. 14-190.1, the North Carolina Legislature has promulgated a regulatory scheme which proscribes not only dissemination of materials in places of public accommodation, but also in the realm of private and personal *transactions* which could conceivably take place in the privacy of one's home.

(Emphasis supplied.) G.S. 14-190.1 is aimed at the *dissemination* of obscenity which is not protected by any constitutional guarantees. *See Miller, supra.* The statute is not aimed at mere possession of obscenity in the privacy of one's own home. In *United States v. Reidel,* 402 U.S. 351, 28 L.Ed. 2d 813, 91 S.Ct. 1410 (1971), the Court expressly limited the holding in *Stanley, supra.* The Court in *Reidel, supra,* enunciated the limits to be placed on the holding in *Stanley, supra,* as follows:

> The District Court gave *Stanley* too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in *Reidel* to sell it to him would effectively scuttle *Roth,* the precise result abjured. *Whatever the scope of the 'right to receive' referred to in Stanley, it is not so broad as to immunize the dealings in obscenity* in which Reidel engaged here—dealings that *Roth* held unprotected by the First Amendment.
>
> The right *Stanley* asserted was 'the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.' The Court's response was that 'a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.' The focus of this language was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials. The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitu-

> tionally protected. Their rights to have and view that material in private are independently saved by the Constitution.

Reidel, supra, at 355-56, 28 L.Ed. 2d at 817-18, 91 S.Ct. at 1412-13. We hold that the proscription in G.S. 14-190.1 against *dissemination* of obscenity is not substantially overbroad. It is our considered opinion that G.S. 14-190.1 does not authorize the issuance of criminal process for mere possession of obscenity in the privacy of one's own home. We note that the General Assembly expressly excluded from the reach of G.S. 14-190.1 *any use of materials protected by the guarantees of the Constitution of the United States and of the North Carolina Constitution. See* G.S. 14-190.1(b)(4) (emphasis supplied).

[4] Plaintiffs' next argument is that G.S. 14-190.1 does not include scienter as an essential element of the offense of disseminating obscenity. Plaintiffs contend that G.S. 14-190.1 imposes a strict liability standard whereby a conviction for disseminating obscenity may be had regardless of the nature of a defendant's knowledge of the material upon which that defendant's conviction would be based. After careful consideration of the argument advanced by plaintiffs, we disagree.

Plaintiffs contend in support of their argument that *Smith v. California*, 361 U.S. 147, 4 L.Ed. 2d 205, 80 S.Ct. 215 (1959), held that a person may not be held strictly liable for the contents of the materials which he or she disseminated; and that *Mishkin v. New York*, 383 U.S. 502, 16 L.Ed. 2d 56, 86 S.Ct. 958 (1966), reaffirmed the Court's interpretation of the Constitution to require proof of scienter to avoid the inherent problems with self-censorship and the difficulties in establishing what may legally be considered obscene.

G.S. 14-190.1 in pertinent part states the following:

> (a) It shall be unlawful for any person, firm or corporation to *intentionally* disseminate obscenity.

G.S. 14-190.1(a) (emphasis supplied). Defendants cite *State v. Bryant and State v. Floyd*, 16 N.C. App. 456, 192 S.E. 2d 693 (1972), *appeal dismissed and cert. denied*, 282 N.C. 583, 193 S.E. 2d 747, *vacated and remanded*, 413 U.S. 913, 37 L.Ed. 2d 1036, 93 S.Ct. 3065, *reaffirmed*, 20 N.C. App. 223, 201 S.E. 2d 211 (1973), *affirmed*, 285 N.C. 27, 203 S.E. 2d 27 (1974), wherein this Court re-

jected an identical argument against G.S. 14-190.1 as that advanced by plaintiffs in the case *sub judice*. There has been no change in the *mens rea* requirement stated in G.S. 14-190.1 since the filing of that opinion. This Court held the following:

> We hold that any citizen who desires to obey the law will have no difficulty in understanding the conduct proscribed by this statute. The dissemination of obscenity is not protected by the Constitutions; thus, this statute by its terms does not infringe upon the rights to disseminate protected material. In the statute it is required that one must 'intentionally disseminate obscenity.' We hold that therefore this statute does require a finding of intent and guilty knowledge before a defendant may be convicted thereunder. We reject defendants' contention that the statute is vague, overbroad, or does not require an intent and guilty knowledge. We hold that the statute is not unconstitutional. . . .

Bryant and Floyd, supra, 16 N.C. App. at 461, 192 S.E. 2d at 696. Upon the Supreme Court's remand of the case in light of the *Miller* cases, both this Court and the North Carolina Supreme Court upheld the constitutionality of G.S. 14-190.1. We are not aware of any recent Supreme Court rulings that require a different result from that reached in *Bryant and Floyd, supra*. During oral arguments plaintiffs strenuously argued that *Mishkin v. New York*, 383 U.S. 502, 16 L.Ed. 2d 56, 86 S.Ct. 958 (1966), and *Smith v. California*, 361 U.S. 147, 4 L.Ed. 2d 205, 80 S.Ct. 215 (1959), mandates that we hold there is not a constitutionally sufficient scienter requirement codified in G.S. 14-190.1. Our tripartite response to plaintiffs' argument is that (1) in *Smith, supra*, the Court merely held that it must be shown that a distributor must have knowledge of the contents of the material being disseminated, *id.* at 153, 4 L.Ed. 2d at 211, 80 S.Ct. at 218-19; (2) upon reconsideration by this Court in light of, *inter alia*, *Miller, supra*, as directed by the United States Supreme Court, *see State v. Bryant and State v. Floyd*, 413 U.S. 913, 37 L.Ed. 2d 1036, 93 S.Ct. 3065 (1973), this Court and the North Carolina Supreme Court upheld the scienter requirement of G.S. 14-190.1, *see State v. Bryant and State v. Floyd*, 20 N.C. App. 223, 201 S.E. 2d 211, *affirmed*, 285 N.C. 27, 203 S.E. 2d 27 (1974), which therefore, remains sound precedent; and (3) the Court in *Hamling v. United States*, 418 U.S. 87, 41 L.Ed. 2d 590, 94 S.Ct. 2887 (1974), reviewed

its prior decisions on the constitutional requirement that the State must prove scienter to sustain a conviction. In doing so the Court in *Hamling, supra,* at 124, 41 L.Ed. 2d at 624, 94 S.Ct. at 2911 (quoting *United States v. Wurzbach,* 280 U.S. 396, 399, 74 L.Ed. 508, 510, 50 S.Ct. 167, 169 (1930)), reaffirmed the following familiar precept of criminal law:

> 'Whenever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing so, it is familiar to the criminal law to make him take the risk.'

Id. It is not innocence but *calculated dissemination* of obscene material which is exorcised by G.S. 14-190.1 and accordingly, we hold that the scienter requirement therein is constitutionally sufficient.

[5] Plaintiffs next argue that G.S. 14-190.1(d) is substantially overbroad and vague. Plaintiffs contend that G.S. 14-190.1(d) departs from the *Miller* test by allowing obscenity to be judged with reference to especially susceptible audiences.

The Court in *Miller, supra,* only required that material be judged according to the average contemporary community standards when the material is not aimed at a "deviant group." *See Miller, supra,* at 33, 37 L.Ed. 2d at 436, 93 S.Ct. at 2620. *See also Mishkin, supra,* at 508-509, 16 L.Ed. 2d at 62, 86 S.Ct. at 963. G.S. 14-190.1(d) states the following:

> Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences.

G.S. 14-190.1(d). Although the Court in *Mishkin, supra,* relied upon its holding in *Roth v. United States,* 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957), we find as persuasive the following:

> Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient appeal requirement of the *Roth*

> test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. . . . We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons [footnote omitted], it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test.

Mishkin, supra, at 508-09, 16 L.Ed. 2d at 62, 86 S.Ct. at 963-64. We find nothing in the aforementioned cases controlling on this question that would require the General Assembly to include a detailed list of each and every pertinent type of deviant sexual group. We hold that G.S. 14-190.1 is not substantially overbroad and gives sufficiently definite warning of the proscriptions therein.

[6] Plaintiffs next argue that G.S. 14-190.1(c) is unconstitutionally vague under the North Carolina Constitution and the Constitution of the United States because its terms and coverages are such that a reasonable person would not reasonably know the conduct proscribed by said statute's terms. We disagree.

The principle dispositive of the question presented by plaintiff was stated by Justice Brennan in *Roth, supra* (quoting *United States v. Petrillo*, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877, 1883 (1946)), as follows:

> Many decisions have recognized that these terms of obscenity statutes are not precise. [Footnote omitted.] This Court, however, has consistently held that lack of precision is not itself offensive to the requirements of due process. '. . . [T]he Constitution does not require impossible standards'; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . .'

Roth, supra at 491, 1 L.Ed. 2d at 1510-11, 77 S.Ct. at 1312. In *Miller, supra*, the Court outlined a "few plain examples" of statutes that could pass constitutional muster, as follows:

> We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:
>
> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, *excretory functions* and lewd exhibition of the genitals.

Miller, supra, at 25, 37 L.Ed. 2d at 431, 93 S.Ct. at 2615 (emphasis supplied). Considering the inclusion of the emphasized portion of the excerpt, quoted hereinabove, we do not find as persuasive plaintiffs' argument that "inclusion of such activities [excretory functions] makes the statute vague when considered in the context of the *Miller* decision." Another aspect of plaintiffs' argument is that "torture, physical restraint by being fettered or bound, or flagellation by a person clad in undergarments or bizarre costume have no sexual connotation whatsoever." It is paradoxical that these plaintiffs complain that many portions of the statute are vague, but when the State definitively gives notice of the conduct to be proscribed, plaintiffs attack the proscription of the specific conduct as stated by the General Assembly. As we have discussed, *supra,* it is constitutionally permissible to draft an obscenity statute that will take into account the dominant theme of material which is aimed at an especially susceptible audience. *See Miller, supra.* Moreover, since the trier of fact evaluates the material in a manner substantially mandated by G.S. 14-190.1(a) and G.S. 14-190.1(d), we read subsections (a) and (d) of G.S. 14-190.1 in *pari materia* with G.S. 14-190.1(c) and thereby find plaintiffs' Assignment of Error is without merit.

[7] Plaintiffs' next issue to be addressed is, whether the absence of a statutory right in G.S. 14-190.1 to an adversarial hearing or a judicial determination of the obscenity of materials held as evidence constitutes a prior restraint on plaintiffs' First Amendment rights. We hold, for reasons to follow, that it is not constitutionally mandated for a state to statutorily create a right to a prompt

adversary proceeding on the obscenity of material seized and retained as evidence pending a trial wherein said evidence will be introduced.

In our research we find no reported opinions by the United States Supreme Court wherein a statutory scheme defining obscenity has been held invalid due to the absence of a statutorily specified procedure to a prompt adversary proceeding on the obscenity of seized evidence that is held pending trial. The Supreme Court of the United States has stated that there is no First or Fourteenth Amendment right to an adversary hearing prior to the seizure of allegedly obscene material. *Heller v. New York*, 413 U.S. 483, 488, 37 L.Ed. 2d 745, 751, 93 S.Ct. 2789, 2792 (1973). In *Heller, supra*, the Court distinguished the cases of large scale seizure of books for their destruction, *see A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L.Ed. 2d 809, 84 S.Ct. 1723 (1964); *see also Marcus v. Search Warrant*, 367 U.S. 717, 6 L.Ed. 2d 1127, 81 S.Ct. 1708 (1961), from cases where there is seizure of a single item seized as evidence for the bona fide purpose of preserving evidence in a criminal proceeding. The Court articulated its approach to the latter case as follows:

> If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and following the seizure a prompt [footnote omitted] judicial determination of the obscenity issue in an adversary proceeding *is available at the request of an interested party*, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding [footnote omitted] otherwise the film must be returned.

Heller, supra, at 492-93, 37 L.Ed. 2d at 754, 93 S.Ct. at 2795 (emphasis supplied). The Court in *Heller, supra*, went on to hold as constitutional the New York Penal Laws dealing with obscenity and the procedures involved with the prosecution of the obscenity charges based on New York Penal Laws even though there were no statutory provisions for a prompt adversary hearing. We note that the defendant in *Heller, supra*, received his trial forty-seven

(47) days after his arrest. The Court, in a footnote, defined "prompt" as "the shortest period compatible with sound *judicial* resolution." *Heller, supra,* at 492, 37 L.Ed. 2d at 754, 93 S.Ct. at 2795, n. 9 (emphasis supplied).

In the more recent case of *New York v. P. J. Video, Inc.*, --- U.S. ---, 89 L.Ed. 2d 871, 106 S.Ct. 1610 (1986), the Court explained its reasoning in the *Heller* opinion, as follows:

> In *Heller v. New York*, 413 U.S. 483, 37 L.Ed. 2d 745, 93 S.Ct. 2789 (1973), we emphasized that, even where a seizure of allegedly obscene materials would not constitute a 'prior restraint,' but instead would merely preserve evidence for trial, the seizure must be made pursuant to a warrant and there must be an opportunity for a prompt *post seizure* judicial determination of obscenity.

New York v. P. J. Video, Inc., supra, at ---, 89 L.Ed. 2d at 879, 106 S.Ct. at 1614 (emphasis supplied). Although there is no statutory right to a prompt post-seizure adversary hearing, our understanding of *Heller, supra,* and *P. J. Video, Inc., supra,* is that the Constitution requires that there must be an opportunity for a prompt post-seizure adversary hearing on the obscenity of the evidence being held pending trial and the burden is on the person seeking the return of the material to request such a hearing. The Court in *Heller, supra,* noted that defendant had not made a motion to suppress the evidence. In North Carolina a defendant may make a motion to suppress the evidence, *see* G.S. 15A-977, and although a probable cause hearing is not required for a felony charge in Superior Court, upon request a court could conceivably grant such a request to provide an adversary hearing as mandated by *Heller, supra.* Accordingly, we hold that the statutory scheme does not constitute a prior restraint merely because there is no provision for an adversary hearing which a defendant bears the burden of requesting. We note that any complaint or criminal process issued pursuant to G.S. 14-190.1 *et seq.*, must be requested by a prosecutor. G.S. 14-190.20. Plaintiffs in their brief illustrate many "fictitious-worst case-scenarios" wherein impermissible *applications* of the statute may infringe upon the right to a prompt adversary hearing. However, these scenarios are not justiciable controversies and do not pertain to the facial validity of the statutes. If these fears are realized and a

defendant is deprived of his right to a prompt adversary hearing, then if called upon our courts will rule accordingly. *See generally Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 86 L.Ed. 2d 394, 105 S.Ct. 2794 (1985) (the evident likelihood that Washington Courts would construe a state statute aimed at preventing and punishing the publication of obscene materials to conform with the *Miller* standards counseled against facial invalidation of that statute).

Next, plaintiffs argue that G.S. 14-190.16 and G.S. 14-190.17 are substantially overbroad and vague in violation of the First and Fourteenth Amendment of the United States Constitution and Article I, sec. 19 of the Constitution of North Carolina. It is contended by plaintiffs that G.S. 14-190.16 and G.S. 14-190.17 prohibit the dissemination of material that is not related to the exploitation of minors.

[8] Our discussion of the statute *sub judice* began with the principle that obscenity is not protected expression within the meaning of the First Amendment. *See Roth, supra.* The Supreme Court of the United States has ruled that it is constitutionally permissible to consider as without the protections of the First Amendment those materials classified as child pornography. *Ferber, supra,* at 764, 73 L.Ed. 2d at 1127, 102 S.Ct. at 3358. The Court went on to articulate a test for child pornography and distinguish that test from the *Miller* test for obscenity:

> The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.

Id.

Our line of inquiry now turns to those questions presented by plaintiffs with respect to the facial validity of those subsections of G.S. 14-190 pertaining to the criminal offense of sexual exploitation of minors. The first question presented by plaintiffs is, whether, in violation of the First and Fourteenth Amendments to

the United States Constitution, G.S. 14-190.16 and G.S. 14-190.17 authorize the State to prosecute a charge of dissemination of materials harmful to minors when the production of said material does not require the use of a live minor. Plaintiffs complain that G.S. 14-190.13(2) states, *inter alia*, that for purposes of G.S. 14-190.16 and G.S. 14-190.17, "material" is defined as follows:

> Pictures, *drawings*, video recordings, films or other visual depictions or *representations* but not material consisting entirely of written words.

G.S. 14-190.13(2) (emphasis supplied). Thus, plaintiffs argue, "Despite the clear admonition of the Supreme Court, North Carolina General Statute 14-190.17 prohibits the dissemination of drawings or 'representations' that depict minors engaged in sexual activity. However, neither a drawing nor a representation would require the use of an actual person in their production." We agree with plaintiffs' assertion that the Court in *Ferber v. New York*, 458 U.S. 747, 73 L.Ed. 2d 1113, 102 S.Ct. 3348 (1982), noted that "depictions of sexual conduct otherwise not obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." *Id.* at 764-65, 73 L.Ed. 2d at 1127, 102 S.Ct. at 3358. However, plaintiffs' argument that G.S. 14-190.16 and G.S. 14-190.17 do not require a live minor as an essential element is without merit. Clearly, G.S. 14-190.16 repeatedly refers to live performances, which in turn would require a live minor. Moreover, immediately following the definition of "material" we find the definition of a "minor" in G.S. 14-190.13(3), as follows:

> (3) Minor.—An *individual* who is less than 18 years old and is not married or judicially emancipated.

G.S. 14-190.13(3) (emphasis supplied). Therefore, when G.S. 14-190.16 and G.S. 14-190.17 refer to a visual representation of a minor, they are referring to a representation of a live person under 18 years of age. We hold that the State has an interest of surpassing importance in the health, safety and welfare of minors; G.S. 14-190.16 and G.S. 14-190.17 are sufficiently narrowly tailored toward said interests and do require the exploitation of a *live* minor to sustain convictions thereunder.

[9] We now address plaintiffs' argument that the statutes in question impermissibly ban all depictions of persons portrayed as minors in a romantic encounter that involves an apparent sexual touching. G.S. 14-190.13(5)(c) defines sexual activity as follows:

> c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.

G.S. 14-190.13(5)(c). Plaintiffs in support of their argument contend that there are films with a "P.G." rating or an "R" rating which are "accepted entertainment," but would fall within the ambit of the statute. We express no opinion on the artistic value of the films mentioned by plaintiffs, nor do we attempt to refute the acceptance of these types of films as entertainment. We do recognize that whatever value those mentioned films may have, such value is overwhelmingly outweighed by the State's compelling interest in protecting its youth from the debilitating psychological and emotional trauma that are attendant with child pornography and bear so heavily and pervasively upon the welfare of children. *See Ferber, supra.* Our sentiment in this regard was aptly expressed by the Court in *Ferber, supra,* as follows:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications.

Id. at 773, 73 L.Ed. 2d at 1133, 102 S.Ct. at 3363. The Court in *Ferber, supra,* before adjusting the *Miller* test, stated the following:

> As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here, the nature or the harm to be combatted requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age. [Footnote omitted.] The category of sexual conduct must also be suitably limited and described.

Id. at 764, 73 L.Ed. 2d at 1127, 102 S.Ct. at 3358. We hold that G.S. 14-190.13(5)(c) is not substantially overbroad and comports with the requirement stated in *Ferber, supra,* that there must be

limits placed on the category of sexual conduct. G.S. 14-190.13(5)(c) proscribes *apparent* sexual stimulation. G.S. 14-190.13(5)(c) (emphasis supplied). We further hold that whatever overbreadth may exist should be cured through a case-by-case analysis of fact situations to which its sanctions assertedly may not be applied. *See Ferber, supra,* at 773-74, 73 L.Ed. 2d at 1133, 102 S.Ct. at 3363. *See also Broadrick, supra,* at 615-16, 37 L.Ed. 2d at 842, 93 S.Ct. at 2918.

[10] Plaintiffs next present a multi-faceted argument that G.S. 14-190.16 and G.S. 14-190.17 do not require scienter as an essential element thereunder and therefore violate their rights under the First and Fourteenth Amendments of the United States Constitution. We disagree. As a prelude, plaintiffs fashion a strained and difficult to follow argument that, in essence, G.S. 14-190.16 and G.S. 14-190.17 constitute prior restraints upon video dealers because under said statutes there is no mistake of age defense to prosecutions and the trier of fact may infer from, *inter alia,* the title and text of the material viewed that the person depicted as a minor engaged in sexual activity is a minor. Plaintiffs contend that the reasoning in *Ginsberg v. New York,* 390 U.S. 629, 20 L.Ed. 2d 195, 88 S.Ct. 1274 (1968), and *Smith, supra* (wherein the Court discussed the dangers of self-censorship in connection with the states' power to restrict the dissemination of *obscenity*) is applicable and urge us to hold that these statutes creating the offenses of the sexual exploitation of minors are unconstitutional. We do not find plaintiffs' analogy appropriate for the State is entitled to "a greater leeway in the regulation of pornographic depictions of children." *Ferber, supra,* at 756, 73 L.Ed. 2d at 1122, 102 S.Ct. at 3354. As the Court noted in *Ferber, supra,* "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways." *Id.* at 759, 73 L.Ed. 2d at 1124, 102 S.Ct. at 3355. The Court, in a footnote, has found and we likewise find the following explanation persuasive:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who was posed for a camera must go

> through life knowing that the recording is circulating within the mass distribution system for child pornography.

Id. n. 10 (quoting Shouvlin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 Wake Forest L. Rev. 535, 545 (1981)). Bearing in mind such somber reasoning, we find as persuasive defendants' argument that mistake of age is not a defense to prosecution for first degree rape, G.S. 14-27.2(a)(1), nor to first-degree sexual offense, G.S. 14-27(a)(1). *See State v. Wade*, 224 N.C. 760, 32 S.E. 2d 314 (1944). Moreover, mistake of age is not a defense to the offense of taking indecent liberties with a minor. G.S. 14-202.1. We are cognizant of the fact that "criminal responsibility may not be imposed without some element of scienter on the part of the defendant." *Ferber, supra*, at 765, 73 L.Ed. 2d at 1127, 102 S.Ct. at 3358. Both G.S. 14-190.16 and G.S. 14-190.17 require that a defendant must "[know] the character or content of the material" in question. A reasonable construction of the statute would be that in order to sustain a conviction, the State would have to prove that a defendant knew that the material in question contained depictions of persons appearing to be minors engaged in sexual activity as defined by G.S. 14-190.13(5). *See Andrews v. Chateau X*, 296 N.C. 251, 250 S.E. 2d 603 (1979), *vacated and remanded on other grounds*, 445 U.S. 947, 63 L.Ed. 2d 782, 100 S.Ct. 1593 (1980), *affirmed*, 302 N.C. 321, 275 S.E. 2d 443 (1981). *See also Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 175 S.E. 2d 665 (1970) (when the constitutionality of a statute is challenged every presumption is to be indulged in favor of its validity). Accordingly, we hold that there is a scienter requirement in G.S. 14-190.16 and G.S. 14-190.17. We further hold that the proscriptions contained in said statutes do not constitute prior restraints.

[11] Plaintiffs also argue that the statutory inference of minority permitted by G.S. 14-190.16(b) and G.S. 14-190.17(b) violates the due process clause of the Fourteenth Amendment to the United States Constitution and Article I, sec. 19 of the North Carolina Constitution. G.S. 14-190.16(b) and G.S. 14-190.17(b) are identical and they state the following:

> (b) Inference. In a prosecution under this section, the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations, or otherwise represents or depicts as a minor is a minor.

In *Barnes v. United States*, 412 U.S. 837, 37 L.Ed. 2d 380, 93 S.Ct. 2357 (1973), the Court summarized its holdings from prior cases dealing with statutory inferences as follows:

> [I]f a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.

Id. at 843, 37 L.Ed. 2d at 386, 93 S.Ct. at 2361-62. Bearing these principles in mind, we turn to the statutory inference in the case *sub judice* to determine if it meets the reasonable doubt standard.

The statutory inference of minority *permits*, but does not mandate that the trier of fact consider as sufficient the circumstantial evidence from which it may be concluded beyond a reasonable doubt that an actor is still of the age of minority. The actor's appearance and growth are competent evidence for the jury to look upon and draw reasonable inferences as to the age of the actor. *See State v. Hunter*, 299 N.C. 29, 261 S.E. 2d 189 (1980). In *Hunter, supra*, the State, in order to obtain a first-degree kidnapping conviction of the defendant, had to prove beyond a reasonable doubt that the victim was 16 years of age or older. The Court stated the following:

> She was before the jury and it was competent for the jury to look upon her and draw reasonable inferences as to her age from her appearance and growth.

Id. at 40, 261 S.E. 2d at 196. G.S. 14-190.16(b) and G.S. 14-190.17(b) do not relieve the State of its burden of proving an essential element of the offense. The inference section merely states what is already recognized by common law and evidentiary rules in North Carolina, to wit: the jury *may* be convinced beyond a reasonable doubt by the State's presentation of circumstantial evidence. The trier of fact may choose to accept the evidence as convincing or reject the evidence as unconvincing. We note that in *Ferber, supra*, the Court upheld New York Penal Law, sec. 263.25 (McKinney 1980), which embodies the same type of inference as that permitted by G.S. 14-190.16(b) and G.S. 14-190.17(b). We hold that G.S. 14-190.16(b) and G.S. 14-190.17(b) do not relieve the State of its

burden of proving beyond a reasonable doubt every essential element of the heinous offenses of first and second degree sexual exploitation of a minor.

[12] Plaintiffs further argue that the inference of minority pursuant to G.S. 14-190.16(b) and G.S. 14-190.17(b) is a violation of the protections guaranteed by the First Amendment of the United States Constitution. The basic argument forwarded by plaintiffs is that the inference permitted by the aforementioned statutes does not meet the *Ferber* test. We disagree.

Plaintiffs begin their argument with the following statement by the Court in *Ferber, supra*: "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized [footnote omitted]." *Id.* at 763, 73 L.Ed. 2d at 1126, 102 S.Ct. at 3357. The inference allowed does not prevent the dissemination of films that utilize actors who have reached the age of majority. We hold, consistent with our reasoning *supra*, with respect to the subject statutory inference, that this is a paradigmatic case of a state statute whose legitimate reach dwarfs its *arguably* impermissible applications. *Ferber, supra*, at 773, 73 L.Ed. 2d at 1133, 102 S.Ct. at 3363.

[13] Plaintiffs' last argument is that G.S. 14-190.17 and G.S. 14-190.13 are unconstitutionally vague and do not provide fair notice of their prohibitions. G.S. 14-190.17 makes it unlawful to disseminate material that contains a "visual representation" of a minor engaged in sexual activity. G.S. 14-190.17(b) as quoted *supra* also refers to "visual representations." In G.S. 14-190.13(2), "material" is defined as "pictures, drawings, video recordings, films or other visual *depictions* or *representations* but not material consisting entirely of written words." Plaintiffs opine that the use of such language as "representations" forces the plaintiffs to guess at what activity and material is prohibited and therefore has a chilling effect on the exercise of their right to free speech as guaranteed by the First Amendment of the Constitution of the United States and Article I, sec. 19 of the North Carolina Constitution. Our first response to plaintiffs is that a careful reading of the Court's opinion in *Ferber, supra*, reveals that New York Penal Law sec. 263.00(4) (McKinney 1980) was drafted with the very same language as that complained of by plaintiffs. The Court in *Ferber, supra*, construed the aforementioned statute as follows:

> A performance is defined only to include live or visual *depictions*: 'any play, motion picture, photograph or dance . . . [or] other *visual representation* before an audience.' sec. 263.00(4).

Ferber, supra, at 765, 73 L.Ed. 2d at 1128, 102 S.Ct. at 3359 (emphasis supplied). The Court in *Ferber, supra,* upheld the constitutionality of the New York laws addressing child pornography. We hold that G.S. 14-190.17(b) and G.S. 14-190.13 comport with the constitutional principles articulated in *Ferber, supra.* In support of our holding we note that all that is required to pass constitutional muster is that a statute's language "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo,* 332 U.S. 1, 7-8, 91 L.Ed. at 1877, 1883, 67 S.Ct. at 1538, 1542 (1947). For reasons stated hereinabove, the judgment is

Affirmed.

Judge COZORT concurs.

Judge BECTON dissents.

Judge BECTON concurring in part and dissenting in part.

Though mindful of the cardinal principle of statutory interpretation that legislative acts are presumed to be constitutional, and recognizing the power of courts to authoritatively construe legislation consonant with the constitutional standards, I can concur in only part of the majority's opinion. Specifically, I believe our "Obscene Literature and Exhibition" statute is constitutional even though the language "taken as a whole" does not appear in N.C. Gen. Stat. Sec. 14-190.1(b)(3) (1985), ante pp. 553-554, and even though N.C. Gen. Stat. Sec. 14-190.1(d) allows obscenity to be judged with reference to especially susceptible audiences, ante p. 560. Like the majority, I also reject plaintiffs' arguments that the reference to activities like "excretory functions" and "torture, physical restraint by being fettered or bound, or flagellation by a person clad in undergarments or bizarre costume" makes the statute vague and includes activities that have no sexual connotation whatsoever. *See* ante p. 562. With regard to our "Sexual Exploitation of Minors" statute, I agree with the majority that N.C. Gen.

Stat. Secs. 14-190.16 and 14-190.17 "require the exploitation of a live minor to sustain convictions thereunder," ante p. 566.

Plaintiffs' other challenges to N.C. Gen. Stat. Sec. 14-190.1 *et seq.* are meritorious, in my view, and I therefore dissent. I do not question our General Assembly's authority to address comprehensively the burgeoning and sensitive issues relating to obscenity and sexual exploitation of minors. After all, obscenity is not now, nor has it ever been, considered protected speech under the United States Constitution or the North Carolina Constitution,[1] and legislators are expected to respond properly to the felt needs of the electorate. However, the public's clarion call to eradicate the evils of child pornography and the crass commercialization of obscenity does not obviate the need for prudential judicial review of legislation regarding obscenity and sexual exploitation of minors. And the undergirding purpose supporting this legislation, whether noble or rancorous, cannot justify imposing a unified moral orthodoxy on the public when that purpose can be achieved in a way that does not unduly stifle constitutionally protected speech or press.

Sex and obscenity are not synonymous, *Roth*, 354 U.S. 476, 487, 1 L.Ed. 2d 1498, 1508, and some sexually explicit material has serious literary, artistic, or scientific value. Consequently, although obscenity is not considered protected speech, statutes regulating obscenity must be narrowly drawn and precisely worded so that otherwise protected expression will not be outlawed or chilled. Even child pornography legislation must limit the proscribed materials to those whose production is physically or psychologically harmful to children, *New York v. Ferber*, 458 U.S. 747, 760-64, 73 L.Ed. 2d 1113, 1124-27 (1982). "Ceaseless vigilance is the watchword to prevent . . . the States" from eroding the fundamental freedoms of speech and press. *Roth*, 354 U.S. at 488, 1 L.Ed. 2d at 1509.

1. *See Roth v. United States*, 354 U.S. 476, 484, 1 L.Ed. 2d 1498, 1507 (1957) ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."); *Miller v. California*, 413 U.S. 15, 23, 37 L.Ed. 2d 419, 430 (1973) ("This much has been categorically settled by the court, that obscene material is unprotected by the First Amendment."), *reh'g denied*, 414 U.S. 881 (1973); *State v. Bryant*, 16 N.C. App. 456, 461, 192 S.E. 2d 693, 696 (1972) ("The dissemination of obscenity is not protected by the Constitutions.").

North Carolina's statutory scheme to control obscenity and the sexual exploitation of minors is not a paradigm of clarity. Indeed, the trial court in upholding the constitutionality of the challenged statutes, acknowledged, albeit obliquely, the arguably intractable ambiguity of some provisions by stating, on eleven separate occasions in its four-page order, that the statutes "when reasonably construed" are constitutional. Some would question the constitutionality of any statutory scheme that had to be "saved" in so many particulars; however, in my view, even the trial court's limiting construction did not eliminate all the constitutional infirmities. Believing the statutory scheme still suffers major maladies that require legislative surgery, not judicial patchwork, considering the unquestioned constitutional right to pursue first amendment activities, and seeking scrupulously to observe the dictates of *Roth* and other first amendment cases, I conclude that the challenged statutes are fatally flawed in the following particulars: (1) N.C. Gen. Stat. Sec. 14-190.1 constitutes a prior restraint of expression because it fails to provide for a prompt adversary hearing and judicial determination of the obscenity of materials retained as evidence; (2) N.C. Gen. Stat. Sec. 14-190.1 sets up a standard of strict liability and does not require knowledge of the content and nature of materials to support a conviction; (3) N.C. Gen. Stat. Sec. 14-190.1 proscribes the private dissemination of obscenity in one's home; (4) N.C. Gen. Stat. Secs. 14-190.16 and 14-190.17 are overbroad and prohibit the dissemination of material that has no sexual connotation and is not related to the exploitation of minors; and (5) N.C. Gen. Stat. Secs. 14-190.16 and 14-190.17 require no scienter, impose strict liability upon the disseminator of material depicting an individual under eighteen engaging in "sexual conduct," and create an inference that a person depicted as a minor is a minor.

I

Obscene Literature and Exhibitions Statute

A. Prior Restraint

In 1985 the North Carolina legislature enacted House Bill 1171 which made several major changes to the obscenity laws of North Carolina. One amendment repealed the adversary hearing procedures contained in N.C. Gen. Stat. Sec. 14-190.2, thereby deleting from the statute any mechanism for an adversary hear-

ing either before or after seizure of allegedly obscene material. Consequently, the statute does not allow for a determination of the obscenity of the material short of a jury trial. I agree with the plaintiffs who assert that the "seizure and holding of material allegedly obscene in itself can become a form of censorship."

Addressing the requirement of a prompt judicial determination of obscenity, the United States Supreme Court in *Heller v. New York*, stated that a seizure for the bona fide purpose of preserving materials as evidence in a criminal proceeding is constitutionally permissible

> [i]f such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a *prompt* judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party. . . . (Emphasis added.)

413 U.S. 483, 492, 37 L.Ed. 2d 745, 754 (1973). The requirement of an adversary hearing *before* a seizure allowed one to disseminate suspected obscene material up until the time of the hearing and to substitute equally obscene material for material declared obscene in a prior hearing. That some disseminators therefore avoided prosecution does not justify, however, the North Carolina legislative response which fails to include a mechanism for a *prompt post-seizure* judicial determination of obscenity.

The majority's suggestion that, "although a probable cause hearing is not required for a felony charge in superior court, upon request a court could conceivably grant such a request to provide an adversary hearing," ante p. 564, is too slender a reed to support the prior restraint in this case. The present statutory scheme allows a seizure and a holding of allegedly obscene material and constitutes a form of censorship. What the majority describes as "fictitious-worst case-scenarios," ante p. 564, represents the reality of the situation, not unfounded fears. A prosecutor who believes certain material is obscene, who has obtained a warrant to seize the obscene material, and who has had the disseminator arrested, is likely to proceed directly to the grand jury for an indictment. Moreover, the final determination on the issue of obscenity at trial may not occur for several months following a disseminator's arrest. As stated by plaintiffs in their brief, the North Carolina Speedy Trial Act, requiring that a person be

brought to trial within 120 days of arrest or indictment whichever occurs last, is of minimal aid to a person who is charged with dissemination of allegedly obscene material in the difficult marginal case, and who desires a prompt hearing on the issue of obscenity.

Significantly, the mechanism for a prompt post-seizure judicial determination of obscenity could easily have been placed in the statute. For example, the North Carolina nuisance statute, N.C. Gen. Stat. Sec. 19-1 to 19-8.3 (1983 & Cum. Supp. 1985) sets out a specific mechanism for assuring that the allegedly obscene nature of material is promptly adjudicated. The statute sets forth a procedure whereby one temporarily enjoined from certain activity cannot only file a motion to dissolve the temporary restraining order, but can also have that motion heard within 24 hours of the time a copy of the motion is served or on the next day the superior court is open in the district. *See* N.C. Gen. Stat. Sec. 19-2.3.

Given the repeal of N.C. Gen. Stat. Sec. 14-190.2, there is no statutory safeguard against either the dilatory or good faith administrative delay by prosecutors. Thus, the seizure of allegedly obscene material is a form of censorship, and constitutes a "prior restraint." In sum, the North Carolina statute is defective in view of *Heller* because it fails to provide a mechanism guaranteeing a *prompt* judicial determination of obscenity.

B. Strict Liability

N.C. Gen. Stat. Sec. 14-190.1 makes it unlawful for any person to intentionally disseminate obscenity. Defining obscenity has never been an easy chore. *See New York v. Ferber*, 458 U.S. 747, 754, 73 L.Ed. 2d 1113, 1121. *See also Jacobellis v. Ohio*, 378 U.S. 184, 197, 12 L.Ed. 2d 793, 803-04 (1964) (Justice Stewart could not define obscenity but he knew it when he saw it). The phrase "intentionally disseminate obscenity" is fraught with ambiguity. Knowledge of the character and nature of material is certainly different from knowledge of the legal status of the material, but does the phrase "intentionally disseminate obscenity" mean that the disseminator must have knowledge of the content and the character of the material disseminated? Is knowledge of the contents alone sufficient? Or does the phrase impose strict liability when one intentionally acts? For example, pulling the trigger of a gun is an intentional act, but the nature, character or content of

the act may differ if the gun is fired into the ocean or if the gun contains no bullets.

To avoid the hazard of self-censorship of constitutionally protected material, the United States Supreme Court rejected the notion that a person could be held strictly liable for the contents of material he disseminated. *Smith v. California*, 361 U.S. 147, 4 L.Ed. 2d 205 (1959). Equally important, the United States Supreme Court requires states to "show that a defendant had knowledge of the contents of the materials he distributed, *and* that he knew the character and nature" of those materials. *Hamling v. United States*, 418 U.S. 87, 123, 41 L.Ed. 2d 590, 624 (1974) (emphasis added).

A disseminator must not only know that the material contains descriptions or depictions of sexual conduct (content), but he must also know that the descriptions or depictions of sexual conduct are, or could reasonably be deemed, lewd or offensive (character).[2] This two-pronged scienter requirement, first suggested in 1966 in *Mishkin v. New York*, 383 U.S. 502, 16 L.Ed. 2d 56, *reh'g denied*, 384 U.S. 934 (1966) protects defendants from the ambiguity inherent in these types of laws, and avoids the dangers of self-censorship. *Mishkin*, 383 U.S. at 511, 16 L.Ed. 2d at 63. Admittedly, the two-pronged scienter requirement hampers effective law enforcement. It is not always easy to prove, for example, that those who disseminate books, periodicals, films, or videos, know the character of the material they sell. It is even more difficult to prove that sales clerks, by way of further example, know the character of all the material they sell. Further, nothing in *Hamling* prevents a disseminator from ordering, sight unseen, video tapes and books which are sealed in tamper-proof containers. The *Hamling* Court was obviously aware that some defendants would not be convicted because of the stringency of the content and character test. Nevertheless the *Hamling* Court used the conjunc-

2. The strict liability standard was actually a part of G.S. Sec. 14-190.1 before the 1985 amendment. At that time, however, a prior hearing was statutorily mandated. Thus, anyone who could be prosecuted under G.S. Sec. 14-190.1 would not only know the nature of the material before the prohibited dissemination, but would also know that the material was in fact obscene. With the repeal of the proviso authorizing a prior adversary hearing the strict liability standard becomes particularly burdensome.

tion "and." Indeed, the Supreme Court has not relaxed the two-pronged scienter requirement in the twenty years since *Mishkin.*

Apparently, the trial court agreed with plaintiffs that Section 14-190.1, as written, is constitutionally overbroad. Giving the statute a limiting construction, the trial court said: "When reasonably construed, G.S. Sec. 14-190.1(a) provides that a person may be convicted of violating that statute only upon proof beyond a reasonable doubt that he knew the character *or* content of the material when he disseminated it as required by *Hamling.*" (Emphasis added.) This construction, however, does not save the statute because *Hamling* and *Mishkin* require proof of the defendant's knowledge of both the contents *and* the character of the material.

Defendants' reliance on *State v. Bryant*, 16 N.C. App. 456, 461, 192 S.E. 2d 693, 696 (1972) is misplaced. *Bryant* was decided nineteen months before *Hamling*, and the *Bryant* holding that the intentional dissemination of obscenity requires a finding of intent and guilty knowledge, does not suggest whether "intent and guilty knowledge" refers to the content or the character (or both) of the material one intentionally disseminates.

In my view, the two-pronged scienter requirement helps to ensure that individuals will not be deterred from disseminating constitutionally protected material out of fear that the material could be found unlawful since the line between obscene and non-obscene material is "dim and uncertain." *Bantam Books v. Sullivan*, 372 U.S. 58, 66, 9 L.Ed. 2d 584, 590 (1963). The majority's quote from *United States v. Wurzbach* that "[t]he precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk," is inapposite since *Wurzbach* is not a first amendment case. 280 U.S. 396, 399, 74 L.Ed. 2d 508, 510 (1930). Some rights can be chilled but not first amendment rights.

C. Private Dissemination

The 1985 amendment to G.S. Sec. 14-190.1 deleted the words "in any public place" so as to prohibit the dissemination of obscenity in any place, whether public or private. Because dissemination does not require a commercial transaction and because a right to possess obscene material in the privacy of one's home

was recognized in *Stanley v. Georgia*, 394 U.S. 557, 22 L.Ed. 2d 542 (1969), plaintiffs argue that G.S. Sec. 14-190.1 is overbroad and conflicts with *Stanley* by extending its tentacles of proscription far beyond the public realm contemplated by the United States Supreme Court.

The United States Supreme Court has adamantly refused to permit state regulation of possession of obscenity in one's home. *See Stanley v. Georgia*; *Paris Adult Theater I v. Slayton*, 413 U.S. 49, 37 L.Ed. 2d 446 (1973); *United States v. Orito*, 413 U.S. 139, 37 L.Ed. 2d 513 (1973); *United States v. 12 200-ft Reels of Super 8 MM. Film*, 413 U.S. 123, 37 L.Ed. 2d 500 (1973). Specifically, in *Stanley*, the Court stated:

> [W]e think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

394 U.S. at 565, 22 L.Ed. 2d at 549-50. And, in *Paris Adult Theater*, the court said: "The States have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation, as long as these regulations do not run afoul of specific constitutional prohibitions," 413 U.S. at 57, 37 L.Ed. 2d at 457.

Yet, G.S. Sec. 14-190.1 seems to criminalize the innocent sharing of a magazine by a person with his or her friend in the privacy of his home. And although it may not be popular, it is no doubt relatively common for consenting adults, including spouses, to view together what under the statute could be considered obscene material in the privacy of a home. Consequently, plaintiffs' challenge that the statute prohibits the non-commercial dissemination of obscenity in the privacy of one's home is understanda-

ble.[3] Plaintiffs' challenge is not fully supported by *Stanley*, however.

Although the right to possess obscene material may be hollow without the correlative rights to obtain or share obscene material, the holding in *Stanley* is narrow in scope and application. *Stanley* is a right to privacy case, focusing on "freedom of mind and thought and on the privacy of one's home." *United States v. Reidel*, 402 U.S. 351, 356, 28 L.Ed. 2d 813, 817 (1971). Possession of obscene material in the home is sanctioned by *Stanley*. The *Stanley* Court did not address the question whether the State can constitutionally criminalize the private communication of sexually explicit material from one consenting adult to another within the confines of the home.

My dissent on this issue is based on the accepted postulate that a law is overbroad if it does not aim specifically at the evil within the allowable area of government control. *See Thornhill v. Alabama*, 310 U.S. 88, 97, 84 L.Ed. 1093, 1100 (1940). In my view, the deletion of the words "in any public place" substantially extended the reach of the statute beyond its legitimate scope. Laudable legislative efforts to eliminate the calculated purveyors of filth for profit, *see Mishkin*, 383 U.S. at 510, 16 L.Ed. 2d at 63, and to prohibit selling and promoting the perversion of sex must be scrutinized carefully. When a statute peers into the bedrooms of married couples, for example, to close over-the-counter "Joy of Sex" type books or even clearly obscene books, the statute must yield to the Constitution which protects the people from their government.

In this case, defendants argue that the "public place" requirement was deleted "for fear that private clubs could not be prosecuted given the public place language in former G.S. Sec. 14-190.1 (a)." That goal could have been achieved by a much narrower statute—a statute that would not infringe on an adult's zone of priva-

3. The North Carolina Obscenity Statutes have historically excluded regulation of the kinds of private disseminations now made feloniously criminal by the amendment to G.S. Sec. 14-190.1. Like G.S. Sec. 14-190.1 prior to its amendment, former G.S. Sec. 14-189.1 contained a section which expressly excluded "disseminations not for gain, to personal associates other than children under sixteen." Today, such disseminations, occurring in the privacy of one's home, would subject the disseminator to felony prosecution.

cy when viewing obscene material in his home. In my view, the challenged statute is constitutionally overbroad.

And, were it sufficient to note, as did the majority, ante p. 558, that "the General Assembly expressly excluded from the reach of G.S. Sec. 14-190.1 any use of materials protected by the guarantees of the Constitution of the United States and of the North Carolina Constitution" then very little need would exist for the enactment of a comprehensive obscenity statute. The legislature could simply say in an all-purpose omnibus clause that "This State protects speech that is guaranteed by the federal and state constitutions." Of course, saying it is so does not make it so, and the suggestion that a citizen has to read First Amendment cases or guess about the specific conduct proscribed by statute does not square with constitutional jurisprudence.

A final, and equally incongruous if not fatal question arises: Does the challenged statute permit the anomalous result in which an individual can leave a room with obscene material in plain view (an opened book, a picture on the wall, or a playing video) and escape prosecution if a friend walks in and sees the material?

II

Sexual Exploitation of Minors Statute

That states have greater leeway to regulate sexually explicit material depicting minors is clear beyond cavil. *New York v. Ferber*, 458 U.S. 747, 756, 73 L.Ed. 2d 1113, 1122. Indeed, only few could decry, unabashedly, legislative efforts to eradicate the baleful impact of hard-core child pornography. As stated in *Ginsberg v. New York*, "a state may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." 390 U.S. 629, 649-50, 20 L.Ed. 2d 195, 209-10 (1968) (Stewart, J., concurring). That a legislature has correctly assessed community values and attitudes relating to sexual exploitation of minors does not mean, however, that the legislature has carte blanche authority to regulate all expression. Even in regulating the use of minors in sexually explicit materials, states must "suitably limit" the proscribed material to that which is pornographic and whose production is physically or psychologically harmful to minors. *See New York v. Ferber*, 458 U.S.

at 760-764, 73 L.Ed. 2d at 1124-1127. States must still draft and articulate obscenity statutes with precision so as not to infringe upon the constitutional rights of minors or adults.

In balancing the obvious need to protect children and the rights of adults to view or purchase non-obscene, yet sexually oriented, material, legislatures must not deter the legitimate exercise of free speech rights. The constitutional bounds of protected and unprotected expression must be clearly delineated, otherwise, legislatures will "reduce the adult population . . . to reading [or seeing] only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383, 1 L.Ed. 2d 412, 414 (1957) quoted in *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60, 73, 77 L.Ed. 2d 469, 482 (1983).

Significantly, the defendants admit in their pleadings that G.S. Secs. 14-190.16 and 14-190.17 make it unlawful to disseminate to adults or minors material which is not obscene, which is not harmful to minors, and which has serious literary, artistic, political or scientific merit. Nevertheless, as stated above, I concur in the majority's explicit and implicit holding that G.S. Secs. 14-190.16 and 14-190.17 require the use of a live minor to sustain a conviction thereunder and that G.S. Sec. 14-190.17's proscription against the dissemination of material that depicts minors engaged in sexual activity is not overbroad insofar as it relates to excretory functions and to "an act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in revealing or bizarre costume." However, I believe the statute is unconstitutional since it "impermissibly bans all depictions of persons portrayed as minors in a romantic encounter that involves an apparent sexual touching," ante p. 567, and since it contains an inference of minority and fails to include a mistake of age defense.

A. Overbreadth

The range of expressive activity falling within the import of the provision proscribing the dissemination of material that depicts minors engaged in sexual activity could be staggering. Some balletic representations of love that are danced may be proscribed, since the definition of sexual activity includes a touching, presumably with any part of the body, the clothed or unclothed buttocks of another person, or the clothed or unclothed breast of

a human female. Sexually suggestive ballroom dance scenes may be outlawed, too, even though not sexually exploitive of minors.

When a legislature seeks to protect minors by prohibiting material that is not harmful to minors, the legislature has gone too far. The admission by the defendants—the Attorney General of North Carolina and the prosecutors from various judicial districts who are authorized to enforce the law—that G.S. Secs. 14-190.16 and 14-190.17 prohibit the dissemination of material that is not harmful to minors is fatal to their claim that the statutes are not overbroad. Even given the requirement of "substantial overbreadth" when statutes regulate conduct plus speech, as opposed to pure speech, *New York v. Ferber*, 458 U.S. 747, 770, 73 L.Ed. 2d 1113, 1131, the statutes in question fall below the judicially cognizable chilling mark because the admission by the defendants points out the vagaries of prosecutorial discretion.

Admitting that a statute proscribes the dissemination of material not harmful to minors is qualitatively different from admitting that a statute prohibits the dissemination of material depicting minors engaged in sexual activity even if that material has serious literary, artistic, political, or scientific merit. If only the latter admission was involved, then the saving construction given the New York statute in *Ferber* might apply. Specifically, the *Ferber* Court said:

> While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of Sec. 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, Sec. 263.15 is "not substantially overbroad and . . .

> whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. at 615-16, 37 L.Ed. 2d 830, 93 S.Ct. 2908.

458 U.S. at 773-74, 73 L.Ed. 2d at 1133. This quote is based on the premise that minors will be harmed; however, nothing in this quote allows a state to proscribe the dissemination of material not harmful to minors.

Plaintiffs argue that if the challenged statute "is allowed to stand, . . . numerous 'PG' and 'R' rated video-tapes . . . , including . . . 'Summer of '42,' 'Animal House,' . . . 'Blue Lagoon,' 'Endless Love,' . . . fall within the statute and are banned." It is not necessary to agree with plaintiffs to conclude that if "the State's compelling interest in protecting its youth from the debilitating psychological and emotional trauma that are attended with child pornography," ante p. 567, is advanced by banning material not harmful to minors, then the legitimate reach of the statute has no bounds; no sex education film or pictorial documentary would be sacrosanct; many books in public libraries would be shelved; and few art museums could display all their classic works.

B. Strict Liability: Mistake of Age No Defense

1. G.S. Secs. 14-190.16 and 14-190.17 make sexual exploitation of minors a strict liability offense by imposing criminal sanctions upon one who produces or disseminates material that depicts individuals under eighteen engaged in "sexual activities." Both statutes state that "[m]istake of age is not a defense to a prosecution." Since the age of the individual engaged in sexual activity is an essential element of the offense, the strict liability imposed by the statutes fosters, rather than avoids, the hazards of self-censorship.

In *Smith v. California*, 361 U.S. at 152, 4 L.Ed. 2d at 210, the Supreme Court reversed an obscenity conviction, stating:

> [O]ur holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing book sellers,

> even though they had not the slightest notice of the character of the books they sold.

Similarly, in *Ginsberg*, the court stated that the constitutional requirements of scienter "rests on the necessity 'to avoid the hazards of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity'." 390 U.S. at 644, 20 L.Ed. 2d at 206, quoting *Mishkin*, 383 U.S. at 511, 16 L.Ed. 2d at 63. Of course, G.S. Secs. 14-190.16 and 14-190.17 are not "obscenity" statutes; however, the dangers of self-censorship are nevertheless present. Indeed, the chance of self-censorship looms even more prominently since neither section requires that the material be "obscene" and since both G.S. Secs. 14-190.16 and 14-190.17 impose mandatory prison sentences for violators. Because a substantial portion of the sexual expression prohibited by these sections would be entitled to full constitutional protection if a minor were not participating, a defendant's knowledge of the age of participants is especially crucial.

In my view, G.S. Secs. 14-190.16(c) and 14-190.17(c) chill the rights of those who seek to engage in legitimate, fully protected expressive activity. The risk is particularly acute for those who distribute or otherwise disseminate books, periodicals, films or video tapes because those people typically play no role in the production of the material they disseminate. How is the video tape dealer to know the ages of the actors and actresses in movies produced in Hollywood? Under G.S. Sec. 14-190.16 a distributor would be punished with mandatory imprisonment even if the producer, over whom he had no control, made an innocent mistake as to the age of the participants. As a practical matter, full compliance with G.S. Secs. 14-190.16 and 14-190.17 requires the prudent business person who knows the content and character of the material in stock to be correct in his or her assessment that no one under eighteen is depicted engaging in sexual activity, or to remove all movies involving sexual activities for fear that one of the persons might turn out to be a minor or, although over eighteen, might be playing the role of a minor. This the Constitution will not allow. In my view, the strict liability feature of the Sexual Exploitation of Minor statutes renders them unconstitutional.

C. Inference of Minority

The inference of minority under G.S. Secs. 14-190.16 and 14-190.17 are equally infirm. The statutes read, ". . . the trier of fact may infer that a participant in sexual activity whom material through its title, text, visual representations, or otherwise represents or depicts as a minor is a minor." G.S. Sec. 14-190.16; G.S. Sec. 14-190.17. When the effect of a statute places the burden on the defendant to prove that a participant in a movie is over eighteen years of age, the defendant has been denied due process. The Due Process clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 25 L.Ed. 2d 368, 375 (1970). Moreover, since the intent of N.C. Gen. Stat. Secs. 14-190.16 and 14-190.17 is to protect children and to prosecute those who profit from child pornography, the inference unconstitutionally brings within the statute's scope films in which adult actors and actresses portray minors. A film in which adult participants engage in sexual, but not obscene, activity, is considered to be protected speech by the *Ferber* decision in which the court stated: "[I]f it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." 458 U.S. at 763, 73 L.Ed. 2d at 1126.

The defendants' suggestion that the statutes were not intended to cover nineteen-year-old persons, for example, portraying seventeen-year-old persons is based on their interpretation of the statute, not on the literal wording of the statutes. We should not require our citizens presciently to anticipate how a law will be interpreted and confidently to disregard the literal wording of statutes. Finally, defendants' argument that G.S. Sec. 14-190.17 "is not unlike G.S. Sec. 14-202.1 which makes it a crime to take indecent liberties with a child under 16 years of age irrespective of the defendant's knowledge of his victim's age" is inapposite. The dissemination of books, films and videos produced by others, when the disseminator has never before seen the participants, is decidedly different from the situation in which a defendant sees, can question and make judgments about a person's age.

III

Conclusion

I applaud and support legislative efforts to address the particularly sensitive issues of obscenity and to eradicate the evils of sexual exploitation of minors, but I do not believe legislative purposes or ends, however praiseworthy, can be pursued by means that too broadly stifle fundamental liberties. The danger of allowing a local censor to impose his or her standard on the public is apparent. So, in responding to the felt necessities of the time and the stated or perceived needs of the public, the legislature must draft legislation whose tentacles of proscription do not exceed constitutional commands. Neither the trial court nor this Court should graft onto the challenged statutes judicial limitations that will not be apparent to the citizenry. After all, citizens should regulate their behavior according to the plain meaning of precisely drafted statutes, not according to their guesses about saving judicial construction.

Believing that the challenged statutes are unconstitutional in the particulars discussed above and that in those particulars the statutes cannot be salvaged by judicial interpolation or the all-purpose saving clause in G.S. Sec. 14-190.1(b)(4), I voice this dissent, knowing the legislature can try again.

CAROL WATKINS v. HATTIE MAE WATKINS AND ARNELL NIXON v. CHARLES WATKINS

No. 8610DC619

(Filed 30 December 1986)

1. Trusts § 13.1— purchase of house—express trust—sufficiency of evidence

The evidence was sufficient to support a verdict finding that plaintiff and her husband held property for the female defendant pursuant to an express trust where plaintiff's husband testified that he and plaintiff agreed at a family meeting to obtain a loan to purchase a house and to take title to the house in their names, that the female defendant agreed to make all the mortgage payments, and that everyone, including plaintiff, understood that the house would be owned by the female defendant and it would be her responsibility to make the payments on the loan.

2. Trusts § 13.2— purchase of house—resulting trust—sufficiency of evidence

The evidence was sufficient for the jury on the issue of resulting trust where it tended to show that plaintiff and her husband agreed to obtain a loan to purchase a house and to take title in their names; the female defendant agreed prior to the transfer of title to make all of the mortgage payments; and the female defendant paid the closing costs for the house and made all the mortgage payments with the assistance of two of her sons.

Judge JOHNSON concurring in the result.

Judge GREENE concurs in the result.

APPEAL by plaintiff from *Payne, Judge.* Judgment entered 24 February 1986 in District Court, WAKE County. Heard in the Court of Appeals 9 December 1986.

This civil proceeding was commenced by plaintiff when she sought to have the magistrate summarily eject defendants from the premises at 1011 Greenwich Street, Raleigh, North Carolina. From the magistrate's judgment for plaintiff, defendants appealed to the district court.

The evidence at trial tends to show the following: Plaintiff, Carol Watkins, is married to Charles Watkins, who is defendant Hattie Watkins' son. In 1973, Hattie and her son, Linwood, wanted to buy a house, but were unable to obtain a loan to do so. Hattie and Linwood discussed with Carol and Charles about purchasing a home using Charles' veteran's eligibility to obtain a loan. The parties agreed that a house located at 1011 Greenwich Street in Raleigh, the premises in question, would be purchased, that the deed for the property would be put in the names of Carol and Charles, and that the purchase would be financed by a loan obtained by Carol and Charles. Defendants' evidence tends to show that all the parties agreed that Hattie would pay the closing costs and all the mortgage payments and that the house would belong to her. Defendants' evidence further tends to show that Hattie paid the closing costs of $2,000, made all of the mortgage payments with contributions from Linwood and her daughter, Arnell, and paid for all of the repairs on the house. Plaintiff's evidence tends to show that the parties had agreed that Hattie would rent the house and pay rent in the form of mortgage payments. Plaintiff's evidence further tends to show that Hattie paid the mortgage payments for only six to eight months and plaintiff and Charles made the rest of the payments. Plaintiff's evidence

also tends to show that she and Charles paid for the repairs to the house.

At the close of the evidence, the following issues were submitted to and answered by the jury as indicated:

1. Is the property held under an express trust by Carol and Charles Watkins?

Answer: Yes.

2. Is the property held under a resulting trust by Carol and Charles Watkins?

Answer: Yes.

3. Is the property held under a constructive trust arising out of fraud on the part of Carol Watkins?

Answer: No.

4. What amount, if any, is Carol Watkins entitled to recover of Hattie Mae Watkins for monies loaned to Hattie Watkins for the purpose of making payments on the mortgage?

Answer: -0-

On 24 February 1986, the trial court entered judgment on the verdict, declaring that Carol and Charles Watkins "hold title to the property described in the Complaint impressed with both a resulting and an express trust in favor of Defendant Hattie Mae Watkins, and that Hattie Mae Watkins owns the land in fee simple absolute." On 16 January 1986, plaintiff made a motion for a new trial, which was denied. Plaintiff appealed.

M. Jean Calhoun for plaintiff, appellant.

Kirk, Gay & Kroeschell, by Joseph T. Howell, for defendants, appellees.

HEDRICK, Chief Judge.

[1] By Assignment of Error No. 4, based upon Exceptions Nos. 1 and 7, plaintiff contends that the trial court erred in denying her motion for directed verdict with respect to express trust. Plaintiff argues that the evidence was not clear and convincing that she

and Charles held the property for defendants pursuant to an express trust and that the issues should not have been submitted to the jury. We disagree.

It is uniformly held to be the law in North Carolina that "where one person buys land under a parol agreement to do so and to hold it for another until he repays the purchase money, the purchaser becomes a trustee for the party for whom he purchased the land, and equity will enforce such an agreement." *Bryant v. Kelly*, 279 N.C. 123, 129-30, 181 S.E. 2d 438, 442 (1971) (citations omitted). Whenever land is conveyed to one party under such an agreement, whether this agreement is made at the time of conveyance or before, an express trust is created. *Owens v. Williams*, 130 N.C. 165, 41 S.E. 93 (1902). Where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit the issue to the jury and for the jury to decide whether the evidence is clear, strong, convincing and cogent. *Taylor v. Wahab*, 154 N.C. 219, 70 S.E. 173 (1911).

In the present case Charles Watkins testified that at the family meeting he and plaintiff agreed to obtain a loan to purchase the house and to take the title to the house in their names, and Hattie agreed to make all of the mortgage payments. He further testified that everyone, including plaintiff, understood "from day one" that the house would be owned by Hattie and it would be her responsibility to make the payments on the loan, obtained in his name to purchase the property. We hold the evidence in this case is sufficient to raise the issue of express trust and to support the verdict thereon, and the trial court correctly denied plaintiff's motion for directed verdict.

[2] Plaintiff also assigns as error the trial court's denial of her motion for directed verdict on the issue of resulting trust. Plaintiff contends that the evidence was insufficient to raise the issue of resulting trust. Plaintiff argues that all of the evidence shows that Hattie did not pay the entire purchase price or obligate herself to do so at or before the transfer of the title to the property, and therefore that a resulting trust did not arise. We disagree.

In *Bryant v. Kelly*, 279 N.C. 123, 129, 181 S.E. 2d 438, 441 (1971), our Supreme Court held that "a resulting trust arises, if at all, in the same transaction in which legal title passes, and by vir-

tue of consideration advanced before or at the time legal title passes, and not from consideration thereafter paid." Where less than the entire purchase price is paid at the time of purchase, the party seeking imposition of the trust must have incurred an absolute obligation to pay the remainder as a part of the original transaction of purchase at or before the time of conveyance. *Waddell v. Carson*, 245 N.C. 669, 97 S.E. 2d 222 (1957). The person seeking the imposition of a resulting trust need not be obligated directly to the grantee's lender; it is sufficient if he is obligated to the grantee, pursuant to a promise made before title passes, to make payments to the grantee for the remainder of the purchase price. *Ray v. Norris*, 78 N.C. App. 379, 337 S.E. 2d 137 (1985), *disc. rev. denied*, 316 N.C. 378, 342 S.E. 2d 897 (1986).

In the present case, there is evidence in the record tending to show that Hattie paid the closing costs for the house and agreed, prior to the transfer of title to Charles and Carol, to pay all of the mortgage payments. There is also evidence in the record tending to show that she made all of the mortgage payments, with the assistance of Linwood and Arnell. We hold that this evidence is sufficient for the jury to find that a resulting trust arose when Charles and Carol purchased the property and that the trial court correctly denied plaintiff's motion for directed verdict on this issue.

By Assignments of Error Nos. 7 and 8 purportedly based on Exceptions Nos. 7 and 8, plaintiff contends the trial court erred in denying her motion for a new trial on the grounds that: 1) the evidence was insufficient to justify the verdict; 2) the verdict was contrary to law; 3) manifest disregard by the jury of the court's instructions; and 4) "the irregularities and the surprise which occurred with the presentation of the defendant's evidence lead to evidence which was not able to be discovered and produced at trial by plaintiff." A motion for a new trial pursuant to G.S. 1A-1, Rule 59 is addressed to the discretion of the trial judge, and the court's ruling thereon is not reviewable on appeal absent a manifest abuse of discretion. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). We have reviewed the record and hold that the record does not disclose that the trial court abused its discretion in denying plaintiff's motion for a new trial. These assignments of error are without merit.

By Assignments of Error Nos. 1 and 3, purportedly based on Exceptions Nos. 1, 3 and 7, plaintiff argues that the trial court erred in submitting issues and instructions on express trust and resulting trust. These assignments of error and exceptions do not raise questions for review not heretofore discussed. These assignments of error are meritless.

We have reviewed plaintiff's additional assignments of error, and find them to be wholly without merit.

No error.

Judges JOHNSON and GREENE concur in the result.

Judge JOHNSON concurring in the result.

I concur in the opinion up to the summary discussion of Assignments of Error Nos. 1 and 3, based on Exceptions Nos. 1, 3, and 7 wherein plaintiff contends that the court erred by submitting issues and instructions on express and resulting trusts in such manner that the jury was able and, in fact, did reach what appears to be inconsistent verdicts. I disagree with the opinion that these Assignments of Error raise questions already discussed in the opinion; therefore, I wish to more fully address these Assignments of Error.

A resulting trust issues from equity; whereas, an express trust issues from the remedies available at law. It is a fundamental rule that equity will not lend its aid where a plaintiff has a full and complete remedy at law. *Jefferson Standard Life Ins. Co. v. Guilford County*, 225 N.C. 293, 34 S.E. 2d 430 (1945). Hence, the court should have instructed the jury to the effect that if the jury answered "yes" to issue 1, it need not address issues 2 and 3, but that if it answered "no" to issue 1, it should go on to issue 2. Likewise the court should have instructed the jury in the alternative regarding issues 2 and 3. By instructing the jury as it did, the court allowed the jury to reach what appears to be inconsistent verdicts. A cardinal distinction between an express trust and a trust by operation of law, which includes a resulting trust, is that the former is based upon a direct declaration or expression of intention embodied in a contract, whereas the latter is raised by a presumption of law based on acts or conduct that are *not* a

direct declaration of intention. *Bowen v. Darden*, 241 N.C. 11, 13, 84 S.E. 2d 289, 291 (1954) (emphasis added). Where there is an express contract, no implied contract can exist. *John D. Latimer & Assoc. v. Housing Authority of Durham*, 59 N.C. App. 638, 642, 297 S.E. 2d 779, 782 (1982). Plaintiff here has failed to show prejudice; hence, the error is not fatal. "At worst, the jury answered yes to alternative theories of liability." *Hall v. Mabe*, 77 N.C. App. 758, 762, 336 S.E. 2d 427, 429 (1985). Either way plaintiff cannot prevail and the property is impressed with a trust in favor of defendant Hattie Watkins, who is entitled to own the land in fee simple absolute, subject to her promise to pay the remainder of the purchase price. *See Ray v. Norris*, 78 N.C. App. 379, 337 S.E. 2d 137 (1985), *disc. rev. denied*, 316 N.C. 378, 342 S.E. 2d 897 (1986).

STATE OF NORTH CAROLINA v. ELLEHUE JONES

No. 8516SC1392

(Filed 30 December 1986)

1. **Homicide §§ 17.2, 19.1— reputation of victim—threats against defendant—not admissible**

The trial court did not err in a murder prosecution by refusing to admit evidence of the victim's history and reputation for violence and evidence of a threat the victim had made to defendant where defendant's own evidence showed that, at least at the time of the fatal shot to the head, the deceased did not present any threat of imminent harm to the defendant or appear to be doing so.

2. **Homicide § 26— second-degree murder—instructions on malice—no plain error**

The trial court did not commit plain error in a homicide prosecution by instructing the jury in the final mandate that second-degree murder is a killing without malice where the trial court had repeatedly instructed the jury that they must find the defendant acted with malice in order to find him guilty of second-degree murder and instructed the jury that the defendant could be guilty of no more than voluntary manslaughter if the State failed to prove that he acted with malice.

3. **Criminal Law § 138.21— second-degree murder—especially heinous, atrocious or cruel**

The trial court did not err by finding that a second-degree murder was especially heinous, atrocious or cruel where defendant fired two shots from close range into the victim's groin, leaving four holes in the scrotum, then

walked over to the victim, stood over him for a few seconds and fired the third and fatal bullet into his head.

4. **Criminal Law § 138.22— second-degree murder—weapon dangerous to more than one person**

A .38 caliber handgun is not normally dangerous to the lives of more than one person and the trial court erred by finding that aggravating factor in a prosecution for second-degree murder.

5. **Criminal Law § 138.40— mitigating factor—acknowledgment of wrongdoing—not available with self-defense**

The trial court did not err by failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing to a law enforcement officer prior to arrest or at an early stage of the criminal process where defendant had confessed the details of the shooting to a law enforcement officer but had relied on self-defense at trial.

APPEAL by defendant from *Lane, Judge.* Judgment entered 8 April 1982 in Superior Court, ROBESON County. Heard in the Court of Appeals 12 May 1986.

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

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

COZORT, Judge.

Defendant petitioned this Court for a writ of certiorari to review his 8 April 1982 conviction for second-degree murder. By order of 24 April 1985, we allowed the petition.

Defendant contends the trial court erred: (1) in excluding evidence of a telephone conversation between the deceased and the defendant where the deceased threatened defendant's life; (2) in instructing the jury that second-degree murder is the unlawful killing without malice; (3) in finding as aggravating factors (a) that the "offense was especially heinous, atrocious, or cruel," and (b) that the "defendant knowingly created a great risk of death to more than one person by means of a weapon . . . which would normally be hazardous to the lives of more than one person"; and (4) in failing to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer at an early stage of the criminal process. We find no error in defendant's conviction; however, we find

the court erred in its findings of one of the aggravating factors, and we remand for resentencing.

The State's evidence tended to show the following:

Defendant lived with Pammy Gail Lowery for about two and a half years prior to June 1981. She had two children, a boy and a girl, by defendant. The children were in defendant's custody. During the end of June or July 1981, Ms. Lowery began "going with" John Allen Hall. On the date Hall was killed, 27 December 1981, Ms. Lowery was eighteen years old and pregnant with Hall's baby.

Ms. Lowery testified that on 27 December 1981, she was at her grandmother's house, along with Hall, two of her aunts, and their boyfriends. About 2:30 in the afternoon defendant called to say he was coming by to pick up his son. When defendant arrived at Ms. Lowery's grandmother's house, he took the boy off the bed and started out the front door. Ms. Lowery got in front of him and told him he was not taking the boy. Defendant turned around and started out the back door and Ms. Lowery started pulling on the baby. Defendant struck Ms. Lowery on the head with a pistol four times. After Ms. Lowery was struck on the head, Hall got up off the living room couch where he had been sitting and moved toward a door. When defendant and Hall were about nine feet apart, defendant shot Hall, who grasped his side and fell to the floor by a chair. Ms. Lowery testified that, after the defendant shot Hall once, defendant said, "John Allen Hall, you son of a bitch." Defendant then shot Hall again. Hall was not moving and was lying on the floor when the third shot was fired by defendant into Hall's head. Defendant was "about two feet" from the deceased at the time the last shot was fired. At no time did Hall, who was unarmed, make any threatening actions or remarks to the defendant. While defendant was firing the gun, he was holding his son, Danny Hue, in his left arm. Defendant then struck Ms. Lowery in the head and left the house.

Dr. Bob Andrews, a pathologist, testified that he examined the body of Hall. The body had received no more than three bullets which made nine wounds. There were four holes in the victim's scrotum, being entrance and exit wounds made by the bullets, and one hole in the deceased's forehead. The remainder of

the wounds were in the deceased's thighs. Hall's cause of death was the gunshot wound to the head.

Robeson County Deputy Sheriff Bobby Rogers testified that he went to the defendant's home on 27 December 1981 to find the defendant, but the defendant was not there. Defendant's father brought him to the station a short while thereafter. Defendant was cooperative, and, after being read his rights, at 4:45 p.m. gave the following written statement:

> Pammy Gail Lowery and myself used to live together. While we were living together we had two children, a girl and a boy. After we quit staying together I had kept the kids. This past Friday Pammy Gail had picked up the two children. I had agreed to Pammy Gail to keep them this weekend. This morning I called Pammy Gail and asked her to get the children's clothes together and I would be over to pick them up in about thirty minutes hour [*sic*]. Pammy told me she was going to keep the little boy. I said no, go ahead and get them ready. I will be there to get both of the children. I left home and went to Pammy's residence. I went in; John Allen Hall was sitting on the couch holding Pammy's head in his lap. I asked Pammy where the children was. Pammy said, the boy is in there, but Amy the little girl, was with Pammy's mother. I said, get the boy's clothes. Pammy told me I won't leaving with him. I went on into the bedroom and picked up the boy. I started out and Pammy got in front of me. I pushed her out of the way and John Allen Hall stood up, and I said, I'm going out the back door. Pammy ran into the kitchen and got back in front of me and tried to stop me and I pushed her out of the way and told her to get the hell out of my way. Pammy started crying. John Allen Hall started to the kitchen. I turned around and shot John Allen. John Allen Hall went back towards the living room. I walked back towards the living room. Pammy was still trying to take the baby. I saw John Allen Hall on the floor. I shot him again. I then hit Pammy in the head with the pistol and left. I shot three times. I don't remember whether it was twice in the kitchen or twice in the living room. There were some boys there and Marilyn and Jessica Lowery when the shooting took place. Signed, Ellehue Jones.

Defendant's evidence, with the defendant testifying, tended to show the following:

Defendant called Ms. Lowery at her grandmother's house at 2:00 p.m. on the 27th of December to tell her he was coming to get the children, and Ms. Lowery told him he was not taking the children anywhere. Defendant went to Ms. Lowery's grandmother's house and, after asking Ms. Lowery where the boy was, went into the bedroom and picked him up. When defendant started out the bedroom door, Ms. Lowery got off the couch and came towards the defendant telling him, "you ain't going nowhere with him." Defendant responded, "you move out of the way and let me out of the house," but Ms. Lowery would not move, so defendant pushed her to the side; and when he did, John Hall stood up at one end of the couch. So the defendant said, "I'm going out the back door." Defendant turned and went towards the back door, but by the time he got to the back door in the kitchen, Ms. Lowery was standing between defendant and the door pulling on defendant's arm. She would not let defendant out the door. Defendant looked around and saw John Hall come in the kitchen towards him. Defendant testified:

> When I turned around and observed him coming on me I pulled [the gun] out and I shot him twice. She still had hold of me [question omitted] . . . and I hit her over the head with [the gun] twice as far as I can remember.
>
> * * * *
>
> A. . . . I shot it twice. I hit her in the head a couple of times with it and started to walk out the front door, and he was laying there on the floor; he won't dead, and I stopped. When I stopped there, I stayed there for a few seconds, and he was laying, he wasn't dead, he was moving a little bit. By that time when I stopped there he throwed his hand out like that to me. I was standing there. I was already shook up, and he throwed his hand out like that and I shot again.

The defendant walked out of the house, got into his car, and left. Defendant testified that when he first shot John Hall, he was about four feet from him.

On cross-examination defendant testified that it was not Hall who was keeping him from going out of the house; rather, it was

Ms. Lowery. Defendant testified that he "didn't give time to take no look" to see if John Hall had anything in his hands; [defendant] "won't taking no chances."

Defendant later testified that John Hall had his hands around his [John Hall's] waist and after he [defendant] pushed Ms. Lowery, John Hall "came in there with anger, going to get me." Defendant testified that John Hall "didn't stumble back at the first shot; he was shot twice in the kitchen and went back to the living room, and in somewhat form or fashion he fell about that time and I turned around and hit Pammy Gail twice with the butt of the pistol." When asked by the prosecutor whether Hall turned around and went in the other direction to the stereo when defendant first shot him, defendant testified as follows:

> I don't know. I shot him twice and there was Pammy Gail landing on me and the young'un, and I got her off of me and I was going out the front door and he was between the kitchen door and the living room door and and when he was on the floor at the front of the stereo and I stopped there at his head in front of me he was not dead then, and I was standing there a few seconds and he, just like as if I was standing right over him nearly two or three feet, like he throwed his hand out to grab me, whatever, and I was half scared to death; I shot again right when he throwed his hands up, I shot again.

At the close of all the evidence the court refused to instruct on self-defense. During the trial court's final mandate, after having correctly instructed the jury on second-degree murder, malice, and voluntary manslaughter, the jury was instructed that "second degree murder is the unlawful killing of a human being without malice." Defendant did not object to this instruction. Defendant was convicted of second-degree murder. The court sentenced defendant to twenty years' imprisonment having found as aggravating factors (1) that "[t]he offense was especially heinous, atrocious, or cruel," (2) that "defendant knowingly created a great risk of death to more than one person by means of a weapon which would normally be hazardous to the lives of more than one person," and (3) that "defendant has a prior conviction or convictions punishable by more than 60 days' confinement." The court found no mitigating factors.

[1] Defendant first assigns as error that the trial court erred in refusing to allow into evidence John Allen Hall's history and reputation for violence of which defendant was aware and a threat John Allen Hall made to defendant. We find no error in the exclusion of such evidence.

The court sustained the prosecutor's objections to defendant's testimony regarding a telephone conversation between him and the deceased about three weeks before defendant shot Hall. Outside the jury's presence, defendant explained that a person identifying himself as John Allen Hall and whom he recognized as Hall, called him on the telephone and told defendant he had bought "a thirty-thirty rifle specially for [him]," and that he was going to "cut [his] throat and suck [his] blood." None of this testimony was allowed into evidence. Though prior to, and after, *voir dire* defendant testified, without objection, that he and John Allen Hall "had a shootout one time." The court also sustained the prosecutor's objections to defendant's testimony that he knew Hall had been twice convicted of murder and that Hall's reputation for danger and violence was "murder."

Defendant argues that "a defendant who claims self-defense is entitled to present this kind of evidence, and since the judge's refusal to admit the evidence deprived him of his only line of defense, [he] is entitled to a new trial." We disagree. In order for such evidence to be admissible defendant must do more than *claim* self-defense; he must put on evidence of self-defense:

> It is true that upon a proper showing that the accused in a homicide case may have acted in self-defense, the jury is entitled to hear and evaluate evidence of uncommunicated threats, *State v. Goode*, 249 N.C. 632, 107 S.E. 2d 70 (1959); communicated threats, *State v. Rice*, 222 N.C. 634, 24 S.E. 2d 483 (1943); specific acts of violence, *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48 (1967); and evidence of the general character of the deceased as a violent and dangerous man, *State v. Johnson, supra.* However, as a condition precedent to the admissibility of such evidence, the defendant must first present viable evidence of the necessity of self-defense. "[T]here must be evidence . . . that the party assaulted believed at the time that it was necessary to kill his adversary to prevent death or great bodily harm, before he may seek refuge

> in the principle of self-defense, and have the jury pass upon the reasonableness of such belief." *State v. Rawley*, 237 N.C. 233, 237, 74 S.E. 2d 620, 623 (1953). . . . "A defendant, when acting in his proper self-defense, may use such force only as is necessary, or as reasonably appears to him *at the time of the fatal encounter* to be necessary, to save himself from death or great bodily harm." (Emphasis added.) *State v. Fowler*, 250 N.C. 595, 598, 108 S.E. 2d 892, 894 (1959).

State v. Allmond, 27 N.C. App. 29, 31, 217 S.E. 2d 734, 736-37 (1975).

The evidence established that defendant shot Hall twice in the groin, and after Hall stumbled from the kitchen into the living room falling down by the stereo, defendant, rather than leaving through the back door, walked over to Hall, stood above him for a few seconds, and then fired the fatal bullet into Hall's head as Hall was raising his hand. Defendant admitted that when he shot Hall he did not know if Hall had a gun.

Defendant's own evidence shows that, at least at the time of the fatal shot to the head, the deceased did not actually present any threat of imminent harm to the defendant nor did he appear to be doing so. We hold the trial court correctly excluded the evidence defendant contends should have been admitted.

[2] Next, defendant contends the trial judge committed plain error by instructing the jury that second-degree murder is an unlawful killing *without* malice, instead of the correct standard, *with* malice. The defendant's argument concerns the trial court's final mandate to the jury:

> Now I have told you what is to be required to be proved by the state with respect both to second degree murder and with respect to voluntary manslaughter. I did not define them, but *second degree murder is the unlawful killing of a human being without malice* and you will consider that in light of the instructions I have given you as to what the state must prove in order for you to return a verdict of guilty of second degree murder. Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation, and you would consider that in light of what I have already instruct [*sic*] you must be proved

by the state in order for you to return a verdict of guilty as to that. (Emphasis added.)

Second-degree murder is the unlawful killing of a human being *with* malice. *State v. Mapp*, 45 N.C. App. 574, 264 S.E. 2d 348 (1980). Thus, the trial court's instruction that second-degree murder is the unlawful killing of a human being *without* malice was error. The defendant, however, failed to object to the instruction at trial and is precluded by North Carolina Rules of Appellate Procedure, Rule 10(b)(2), from challenging the instruction on appeal unless it constitutes plain error. *State v. Odum*, 307 N.C. 655, 300 S.E. 2d 375 (1983). The test for plain error is set out in *State v. Odum, supra*, as follows:

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."
>
> *United States v. McCaskill*, 676 F. 2d 995, 1002 (4th Cir. 1982) (footnotes omitted) (emphasis in original) . . . .

Id. 307 N.C. at 660, 300 S.E. 2d at 378. Having examined the entire record as directed by *State v. Odum, supra*, including construing the jury charge contextually as a whole, *State v. Litchford*, 78 N.C. App. 722, 338 S.E. 2d 575 (1986), we find no plain error, for the reasons which follow.

While the defendant is correct that the trial court misstated the definition for second-degree murder in its final mandate, defendant concedes that prior to his final mandate, the judge correctly described the elements of both second-degree murder and voluntary manslaughter. The trial court's instructions on second-

degree murder and voluntary manslaughter, given prior to the final mandate, were as follows:

> Now with respect to the charges, or the charge against the defendant, that charge being second degree murder, I instruct you that in order for you to find the defendant guilty of second degree murder the state must prove three things beyond a reasonable doubt: First, that the defendant intentionally and *with malice* shot John Allen Hall with a deadly weapon on or about December 27, 1981. Intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom. *Malice* means not only hatred, ill will, or spite as it is ordinarily understood, but of course that is *malice*, but it also means that condition of the mind which prompts a person to take the life of another person intentionally, or to intentionally inflict serious bodily harm which proximately results in the death of that person without just cause, excuse, or justification. Now a .38 calibre pistol, or a .38 calibre of the type described as State's Exhibit No. 1, is a deadly weapon, for a deadly weapon is a weapon which is likely to cause death or serious injury. Then the state must prove that the shooting of the defendant by the said—excuse me, that the shooting of the said John Allen Hall by the defendant was the cause of the death of John Allen Hall. Now I would instruct you that a proximate cause is a real cause, a cause without which the death of the said John Allen Hall would not have occurred. So if the state has proved to you beyond a reasonable doubt that the defendant intentionally killed John Allen Hall with a deadly weapon, or intentionally inflicted a wound upon John Allen Hall with a deadly weapon that proximately caused his death, then the law implies first that the killing was unlawful and second, that *it was done with malice*; you may then infer that the killing was unlawful and second, that *it was done with malice*, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether or not *it was done with malice*, but if the killing was unlawful,

and *was done with malice*, the defendant would be guilty of *murder in the second degree*. Now in this case you will be given the opportunity of returning three possible verdicts. You may find the defendant guilty of second degree murder; you may find him guilty of voluntary manslaughter, or you may find the defendant not guilty. Now I have just explained to you as to what second degree murder is. Now voluntary manslaughter is the unlawful killing of a human being *without malice*; so a killing *is not committed with malice* if the defendant acts in the heat of passion upon adequate provocation. Now the heat of passion does not mean mere anger; it means that the defendant's state of mind was at the time so violent so as to overcome reason, so much so that he could not think to the extent necessary to form a deliberate purpose and control his actions. And adequate provation [*sic*] may consist of anything which has a natural tendency to produce such passion in a person of average mind and average disposition, and then the shooting must have occurred so soon after the provocation that the passion of a person of average mind and average disposition would not have cooled at that time. And of course the burden is on the state to prove that—beyond a reasonable doubt that the defendant did not act in a heat of passion upon adequate provocation, but rather *that he acted with malice*. But if the state fails to prove that he acted with malice, then the defendant can be guilty of no more than voluntary manslaughter. So I charge if you find from the evidence beyond a reasonable doubt that on or about the 27th of December, 1981, the defendant, Ellehue Jones, intentionally *and with malice* shot John Allen Hall with a deadly weapon, and of course I instruct you that the gun identified as State's Exhibit 1 is a deadly weapon within the meaning and spirit of the statute, the criminal statute of this state, thereby proximately causing the death of John Allen Hall, it would be your duty to return a verdict of *guilty of second degree murder*. However, if you do not so find or if you have a reasonable doubt as to one or more of these things, you would not return a verdict of second degree murder, and then you would consider as to whether or not the defendant is guilty of voluntary manslaughter. If you find from the evidence beyond a reasonable doubt that on or about the 27th of December, 1981, the defendant, Ellehue

> Jones, intentionally shot John Allen Hall with a deadly weapon, and I instruct you that a .38 calibre weapon, pistol as described in state's Exhibit 1, within the meaning and spirit of the statute, thereby proximately causing the death of John Allen Hall, it would be your duty to find the defendant guilty of voluntary manslaughter; but if you do not find, or have a reasonable doubt as to one or more of these things, you would return a verdict of not guilty. (Emphasis added.)

In light of the fact that the trial court (1) repeatedly instructed the jury that they must find the defendant acted with malice in order to find him guilty of second-degree murder, and (2) instructed the jury that if the State failed to prove the defendant acted with malice, then defendant could be guilty of no more than voluntary manslaughter; we find its misstatement in the final mandate does not constitute plain error. In this case we cannot say that the instructional mistake had a probable impact on the jury's finding that the defendant was guilty. *See State v. Litchford, supra.*

Finally, we consider defendant's assignments of error concerning his sentencing. The trial court found that the aggravating factors outweighed the mitigating factors and sentenced the defendant to twenty years in prison. Defendant contends that the trial court incorrectly found as aggravating factors that (1) "[t]he offense was especially heinous, atrocious, or cruel"; and (2) "[t]he defendant knowingly created a great risk of death to more than one person by means of a weapon . . . which would normally be hazardous to the lives of more than one person." Defendant also assigns as error the trial court's failure to find as a mitigating factor that "[p]rior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer."

[3] With respect to the aggravating factor that the offense was especially heinous, atrocious, or cruel, we hold there was evidence before the trial court to support such a finding. In determining the appropriateness of this factor under the Fair Sentencing Act, "the focus should be on whether the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in that offense.*" [Em-

phasis in original.] *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E. 2d 783, 786 (1983). The facts surrounding Mr. Hall's murder meet this test. The first two shots fired by the defendant into Hall constitute excessive brutality, physical pain, or psychological suffering, or dehumanizing aspects not normally present in the offense. Defendant fired the first two shots from close range into Hall's groin, leaving "four wounds, four holes in the scrotum" of Mr. Hall. Defendant then walked over to Hall, who was lying on the living room floor, stood over him for a few seconds, then fired a third and fatal bullet into Hall's head. The record supports the trial court's finding that the offense was especially heinous, atrocious, or cruel. *See State v. Vaught*, 318 N.C. 480, 349 S.E. 2d 583 (1986).

[4] We agree with the defendant, however, that the trial court was in error in finding as an aggravating factor that the defendant knowingly created a great risk of death to more than one person by the use of a weapon which would normally be hazardous to the lives of more than one person. In *State v. Bethea*, 71 N.C. App. 125, 129, 321 S.E. 2d 520, 523 (1984), we held:

> The legislature intended this aggravating factor to be limited to those weapons or devices which are indiscriminate in their hazardous power. Automatic weapons such as machine guns or bombs would fit that description. These weapons are *normally* hazardous to the lives of more than one person. A rifle, while it may *sometimes* be dangerous to the lives of more than one person, is not so *normally*. (Emphasis in original.)

We hold that, like a rifle, a .38 caliber handgun is not normally dangerous to the lives of more than one person. The trial court erred in finding this aggravating factor and defendant is entitled to a new sentencing hearing.

[5] Lastly, we hold the trial court did not err in failing to find as a mitigating factor that, prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. While defendant confessed the details of the shooting to a law enforcement officer, at trial he sought, unsuccessfully, to rely on self-defense. A defendant who seeks to rely on self-defense is not entitled to the mitigating factor at issue here. *State v. Rathbone*, 78 N.C. App. 58, 336 S.E. 2d 702 (1985), *disc. rev. denied*, 316 N.C. 200, 341 S.E. 2d 582 (1986).

In sum, we find no error in the trial court's evidentiary rulings, and no plain error in its instructions. We remand, however, for a new sentencing hearing.

Affirmed in part, reversed in part, and remanded.

Chief Judge HEDRICK and Judge EAGLES concur in the result.

STATE OF NORTH CAROLINA v. BENNY WAYNE MILLS

No. 8617SC590

(Filed 30 December 1986)

1. **Criminal Law § 98.2— homicide—sequestration of witnesses denied—no abuse of discretion**

The court did not abuse its discretion in a murder prosecution by denying defendant's motion to sequester the State's witnesses where each witness testified to largely different events.

2. **Homicide § 18; Criminal Law § 34.7— homicide—prior bad acts—inadmissible to show premeditation and deliberation**

Evidence of prior misconduct was not admissible in a homicide prosecution to show premeditation and deliberation where defendant, in 1982, told his eventual victim to hush, pointed his gun at him, fired into the ceiling, and shot his victim in a altercation in 1985. There were no verbal threats to kill the victim in 1982, both men laughed afterwards, there was no indication of ongoing ill will from the incident, and the evidence did not show that defendant formed the intent to kill the victim in 1982. N.C.G.S. § 8C-1, Rule 404(b).

3. **Homicide § 19.1; Criminal Law § 85.2— homicide—prior act of misconduct—not admissible to show character for violence**

The trial court erred in a homicide prosecution by allowing testimony of a prior act of misconduct by defendant to show defendant's character for violence and that he had acted in conformity with that character and not in self-defense. N.C.G.S. § 8C-1, Rule 404(b).

4. **Criminal Law § 162.1— homicide—inadmissible prior bad acts—continuing objection**

Defendant's pattern of objections to testimony of prior bad acts in a homicide prosecution constituted a continuing objection to the line of questioning and all of the acts were considered on appeal even though only a part of them were objected to at trial and brought forward as exceptions where defense counsel had ceased to object because of the apparent futility of it.

5. Homicide § 19.1— defendant's prior violent acts—inadmissible

The trial court erred in a homicide prosecution by allowing evidence of prior acts involving defendant's ownership of guns and the various items he had shot at, and concerning an incident in which he had thrown the two men responsible for the car wreck in which his fiancee had died into a pond. Each of the acts was clearly relevant to no other issue than to show that defendant was a violent man and therefore must have been the aggressor when he shot and killed the victim, and there was prejudice because of the sheer number of extrinsic acts of violence allowed into evidence, the evidence was not quickly brought up and dropped but was drawn out and emphasized, the State's primary evidence was the testimony of the victim's mother, and it is reasonable to infer that the jury could have chosen to believe defendant's version of events without the inadmissible evidence and the resulting prejudice.

6. Criminal Law § 102.9— homicide—State's argument on defendant's character—prejudicial

The trial court in a homicide prosecution should not have allowed the State in its argument to the jury to repeatedly refer to defendant as an educated man who came from another city to live with ordinary people to whom he felt superior.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 15 February 1986 in SURRY County Superior Court. Heard in the Court of Appeals 11 November 1986.

Defendant was charged with murder in the first degree of Danny Lee Smith in violation of N. C. Gen. Stat. § 14-17. The evidence at trial tended to show the following events and circumstances:

Defendant Ben Mills, age 50, had lived with Hazel Moser in her mobile home for about five years prior to the incident on 14 August 1985. Hazel's son, Danny Lee Smith, age 32, had lived with them for approximately six weeks before his death; he and his wife Linda had separated. Hazel's 88-year-old mother also lived with them. Danny and Ben had been friends for several years, and it was through Danny that Ben met Hazel.

Danny and Ben spent much of 14 August together. Both men had been drinking. An autopsy showed that at the time of his death Danny's blood alcohol content was .26%. Shortly after 7:00 p.m., Hazel called Ben in for supper. Danny was already in the living room of the trailer talking on the telephone. After a few minutes, he started talking in a loud and angry manner. Hazel asked him to be quieter since her elderly mother was getting upset. Danny turned to Hazel and said, "Shut up, you lying bitch."

Ben got up from the table and knocked the telephone out of Danny's hand. Ben picked it up, gave it back to Danny and asked him to continue his conversation in the back of the trailer; Danny did so. Ben returned to the table. In a few minutes, Danny came into the living/dining area where his mother was sitting and told her, "I ought to kill you now, you lying, whoring son of a bitch." He then hit her on the back of the head with such force that it threw her whole upper body forward. Hazel, crying, asked Danny to leave. Ben asked him to come outside with him; they left the trailer.

Here the testimony of the two witnesses, Hazel and Ben, diverges. Defendant testified as follows: As they stood outside, Danny was extremely aggravated. He said his mother was the reason his father was dead. At one point, he grabbed Ben and threw him up against the car, saying, "I'm going to kill her tonight, you son of a bitch. And if you try to stop me, I'll kill you too." Hazel came outside perhaps fifteen minutes after they left the trailer. Danny accused her of having caused his father's death. While running toward the truck where she was standing, he was shouting, "I'm going to kill her now." He reached the passenger's side of the truck and grabbed some sort of stick or pipe that was four or five feet long, black in color, and probably an inch and a half in diameter. Hazel was on the driver's side of the truck. Ben ran toward the passenger's side where Danny was and stopped near the back of the truck. Danny again said to Hazel, "I'm going to kill you now." As Danny made a motion toward Hazel, Ben shouted, "Danny, don't." Danny told Ben, "I told you what I was going to do, you son of a bitch." Danny started around the truck toward Ben, raising his right hand. Ben backed away. Danny leaned forward with his arm raised as if getting ready to strike Ben. Ben shouted, "Danny, don't do it," and fired his pistol as he turned his head to avoid the blow.

Hazel Moser testified that fifteen minutes after the men went outside, she became worried and went to check on them. Danny and Ben were standing next to the car talking, and Danny yelled "Mama." Hazel replied, "I'm not your mama the way you treated me." She walked toward the truck and proceeded to roll up its windows. Danny and Ben came toward her, and Danny was "quarrelling" loudly; the witness could not remember the words he was using. Danny leaned against the truck. Ben said some-

thing, and Danny turned to face Ben. Danny had nothing in his hand. She saw Ben fire the gun.

The two witnesses were in agreement on the pertinent facts which followed: Danny had fallen, but then got partway back up. Ben and Hazel each took an arm to help in moving Danny toward the car to take him to the hospital, but Danny collapsed. Ben began administering CPR and Hazel called the rescue squad. Ben was still administering CPR when the rescue squad arrived. Danny died that night.

The jury returned a verdict of guilty of second degree murder. Defendant appealed from a judgment of forty years' imprisonment.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Wilson Hayman, for the State.

Hugh H. Peoples for defendant-appellant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends that the court erred in denying his motion to sequester the State's witnesses. We disagree. The rule in this State is that a motion to sequester witnesses is addressed to the discretion of the trial court, and the court's denial of the motion will not be disturbed absent a showing of abuse. *State v. Woods*, 307 N.C. 213, 297 S.E. 2d 574 (1982). The defendant here argues that the State's primary witnesses were related and that there was a greater risk that they would conform their testimony. However, since each witness testified to largely different events, that risk was diminished, and it was well within the discretion of the trial court to deny defendant's motion. This assignment is overruled.

[2] Defendant contends in his second assignment of error that the court erred in permitting the State to present testimony and cross-examine defendant concerning his prior bad acts. His first exception is to the introduction of testimony by Hazel Moser, which tended to show the following. Approximately three years before the shooting, Danny Lee Smith, his wife Linda, Ben Mills, and Ms. Moser were in the living room of the trailer. Defendant and Mr. Smith had both been drinking, and Danny was "fussing." Ben told him to hush and pointed his .22 Magnum at Danny's

stomach. He then fired the gun at the ceiling, after which both the defendant and Danny laughed. Defendant contends that this evidence was inadmissible under N. C. Gen. Stat. § 8C-1, Rule 404(b) of the N. C. Rules of Evidence.

Rule 404(b) provides as follows:

> (b) *Other crimes, wrongs or acts.*—Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Not only must evidence be offered pursuant to a controverted fact at trial—it must be *logically relevant* to that fact:

> 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

G.S. § 8C-1, Rule 401. This requirement is particularly important when considering admission of prior wrongs. As our Supreme Court held in *State v. McLain*:

> . . . the dangerous tendency and misleading probative force of this class of evidence require that its admission should be subjected by the courts to rigid scrutiny. Whether the requisite degree of relevancy exists is a judicial question to be resolved in the light of the consideration that the inevitable tendency of such evidence is to raise a legally spurious presumption of guilt in the minds of the jurors. Hence, if the court does not clearly perceive the connection between the extraneous criminal transaction and the crime charged, that is, its logical relevancy, the accused should be given the benefit of the doubt, and the evidence should be rejected. (Citations omitted.)

240 N.C. 171, 81 S.E. 2d 364 (1954). In the case at bar, the State contends that Ms. Moser's testimony was admissible under 404(b) to show that the defendant's act was premeditated and deliberate. We disagree.

Evidence of other crimes, wrongs or acts is admissible to show that a defendant had the requisite mental intent or state, *State v. King*, 301 N.C. 186, 270 S.E. 2d 98 (1980), *McLain, supra*; in this case, premeditation and deliberation. Premeditation has been defined by our Supreme Court as thought beforehand, however short. *State v. Corn*, 303 N.C. 293, 278 S.E. 2d 221 (1981). A killing is deliberate if it is done in a "cool state of blood," without legal provocation, and in furtherance of a "fixed design to gratify a feeling of revenge, or some unlawful purpose." *Id.* The question, then, is whether the evidence was relevant to these issues. Ms. Moser testified that the defendant told Danny to hush, pointed his gun at him and then fired up into the ceiling. No verbal threats to kill him were communicated, and both men laughed afterward; there is no indication that any ill will might be ongoing from the incident. Nor does the evidence tend to show that, when he pointed the gun at Danny in 1982, the defendant formed the intent to kill which was only realized three years later. Due to the circumstances of the incident and its extreme remoteness, the evidence has no tendency to make the existence of premeditation or deliberation "more or less probable than it would be without the evidence." Rule 401.

[3] It is apparent from the record that the prosecution introduced the evidence at trial in order to show that the defendant was the aggressor and did not act in self-defense. In *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986), our Supreme Court addressed the admissibility of prior wrongs for such a purpose. The defendant in that case had pointed a gun three months earlier at someone other than the man for whose murder he was being tried. The court found that the question of aggression was a contested element of defendant's self-defense claim, but held that the State's assertion that pointing a gun at another man was relevant to that claim "is precisely what is prohibited by Rule 404(b)":

> In order to reach its conclusion, the State is arguing that, because defendant pointed a shotgun at Mr. Hill [sic] three months earlier, he has a propensity for violence and therefore must have been the aggressor in the alleged altercation with Mr. Harrell and, thus, could have been acting in self defense.

Id. However, the court recognized that a different result might have been reached under other circumstances:

> Had the State's evidence been to the effect that defendant pointed a gun at or threatened Mr. Harrell three months earlier, such evidence would more likely be relevant as tending to show a plan or design, or as negating the defendant's claim that Mr. Harrell's attack on him was unprovoked.

Id. While situations such as the one before us are specifically excepted from the holding, the question of relevancy still remains to be determined. Self-defense raises the issue of the reasonableness of defendant's belief as to the necessity for, and reasonableness of, the force used to repel an attack upon his person. *Id. See also State v. Gladden*, 279 N.C. 566, 184 S.E. 2d 249 (1971). Here, the fact that defendant pointed his gun at Danny does not indicate that three years later he did not fear Danny or "make the apparent necessity to defend himself more or less probable than it would be without the evidence." *State v. Morgan, supra.* Thus, it was error to allow testimony of this extrinsic act of misconduct in order to show defendant's character for violence and that therefore he must have acted in conformity with that character, and not in self-defense, when he shot Danny Lee Smith.

[4] Defendant also takes exception to a number of other instances in which the trial court allowed testimony of prior bad acts. Although only part of these were objected to at trial and brought forward as exceptions to support the assignment of error, it would seem that counsel had ceased to object because of the apparent futility of it. We find that the pattern of objections constitutes a continuing objection to the line of questioning with respect to bad acts. Therefore, we will consider all of these acts, some brought out on cross-examination of defendant and some testified to by the State's witnesses.

[5] First, evidence indicating that at one time or another defendant shot the following items: an alarm clock; his motorcycle; a windowpane, wall, floor, bathroom mirror, antenna and meterbox of Ms. Moser's trailer. In addition, when he shot into her garden to scare some chickens away, he shot through the trees in the direction of a neighbor's house. The second type of evidence of bad acts concerns defendant's guns. The prosecutor asked defendant if he had told someone that he could take one of his own ordinary guns "and put a crank on it so you could fire it like a Gatling gun and fire it with a crank?" Over objection, defendant

was required to answer that he had purchased a crank at Pop's Gun Shop in Mount Airy. The prosecution also inquired in great detail into the number and types of guns defendant owned. Another incident concerned defendant's reaction to his fiancee's death in a car wreck years before. The prosecution asked if he had found the two men who had caused the accident and thrown them into a pond. This line of questioning was pursued for some time although defendant denied any knowledge that the wreck was anything other than a single-car accident.

As discussed *supra*, evidence of prior wrongs cannot come in to show the character of a person and that he acted in conformity with that character. Rule 404(b). Here, each of these incidents was clearly relevant to no other issue than to show that the defendant was a violent man and therefore must have been the aggressor on 14 August when he shot and killed Danny Smith. All of this evidence was in direct contravention of Rule 404(b) and the trial court erred in allowing it.

We now consider whether admission of these extrinsic acts was prejudicial: whether there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial." N.C. Gen. Stat. § 15A-1443(a) (1983). First, we note the sheer numbers of extrinsic acts of violence which were allowed into evidence: there were at least fourteen separate acts just involving shots fired by the defendant. Nor were the acts quickly brought up and then passed over. Testimony concerning several of the incidents was considerably drawn out; for example, the prosecution questioned two of its own witnesses as well as cross-examined the defendant concerning the incident when Ben pointed the gun at Danny and then fired into the air. Moreover, the State introduced pictures of several items which had been shot and even introduced the motorcycle itself. Nor can we say that the error was harmless in light of other evidence properly admitted at trial. The State's primary evidence is the testimony of Hazel Moser regarding the events of 14 August. Although an eyewitness to the incident, she is the victim's mother; without inadmissible evidence of defendant's prior acts and the prejudice resulting therefrom, it is reasonable to infer that the jury could have chosen to believe defendant's version of the events. Due to the incendiary nature of the evidence improperly admitted, and the emphasis placed on that evidence at

trial, we find that its admission was prejudicial error requiring a new trial.

[6] Of defendant's remaining assignments of error, we need address only one: his contention that the trial court erred in failing to order *ex mero motu* a new trial based on improper portions of the State's argument to the jury. Defendant excepts primarily to the prosecutor's repeated referral to defendant as an educated man who comes in from another city to live with ordinary people to whom he considers himself superior. We quote from some of the exceptions set forth:

> (1) Did he have respect for him? Now, I don't know how to put this, ladies and gentlemen of the jury, other than—and I don't mean to offend the family of the victim. But there is something here, ladies and gentlemen of the jury. There's a difference here, isn't there? And I think it makes the difference in this case. On the one hand you've got this fellow here that came to them from somewhere else, Hendersonville or wherever . . . . And I don't know how to say it but other than I've got a feeling that he would love for you to feel just like he did, that life of Danny Smith wasn't worth that much. . . . He probably never did consider Danny Smith himself worth a whole lot.
>
> (2) If you're going to find the truth about it, you don't have to ride along on your white horse and be a planter and a genteel pilot and anything else.
>
> (3) But somehow I get the feeling that Mr. Mills is put out by the fact that we're trying so hard in this case. 'Well, they're trying to convict me, I believe. They're serious. Well, I'm an educated man. I'm a college man. Was Danny Smith's life worth all of that? Should he have got on me so hard over Danny Smith?' Don't you all get that feeling? That's his attitude about this case.
>
> (4) I'm Ben Mills. I can shoot him down. I'm above these people over there. . . .
>
> (5) But nobody is in favor of first degree murder. I don't care if it's a Southern Planter that's done it and he done plum shot him down, Mr. Mills, or the sorriest, low-down dog that ever came into the county that done it.

(6) Maybe Mr. Genteel Planter over here didn't want to get his little pinky finger dirty pulling the trigger.

(7) Put yourself in his shoes. That's what his lawyers want you to do. Put yourself in there. Crawl right on in there and you'd be hot stuff. Imagine yourself.

(8) Why didn't they put up somebody besides Mr. Genteel over here to tell you about that?

In addition, the prosecutor stated several times that defendant lied or would lie.

The general rule in this State is that counsel must be allowed wide latitude in his argument to the jury, *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975), and counsel may "argue all the law and facts that are in evidence and all reasonable inferences to be drawn therefrom." *Id.* In the case at bar, counsel's argument was clearly improper. First, its factual basis is faulty. Second, even if such statements were factually accurate, there is nothing to support the inference that defendant's rationale for killing Danny was—as the prosecutor put it—" 'I'm Ben Mills. I can shoot him down. I'm above these people over there. . . .' " Clearly, the purpose of this line of argument was to incite the prejudices of the jurors against the defendant and was therefore improper, and should not have been allowed.

For the reasons stated above, we find that defendant is entitled to a

New trial.

Judges BECTON and ORR concur.

STATE OF NORTH CAROLINA v. BEVERLY ELAINE JENKINS

STATE OF NORTH CAROLINA v. RAY JENKINS

No. 8630SC686

(Filed 30 December 1986)

1. **Criminal Law § 92.2— indecent liberties with children—two defendants—multiple counts—joinder proper**

The trial court did not abuse its discretion by joining the cases of two defendants charged with taking indecent liberties with children where defendants were husband and wife; the sexual abuse was committed upon four young children for whom Ms. Jenkins was babysitting; Ms. Jenkins was present at all times, including both times Mr. Jenkins committed his offenses; the defendants' defenses were not antagonistic; the trial judge made it clear to the jury that there were six separate offenses; and defendants did not ask for other limiting instructions. N.C.G.S. § 15A-926(b)(2).

2. **Witnesses § 1.2; Rape and Allied Offenses § 19— indecent liberties with children—four-year-old witness—competent**

The trial court did not err in a prosecution for taking indecent liberties with a minor by allowing the testimony of one of the victims, a four-year-old girl. N.C.G.S. § 8C-1, Rule 601(b).

3. **Criminal Law §§ 101.4, 163— testimony read to jury—objection after jury retired—not considered on appeal**

The action of a trial judge in allowing testimony to be read back to the jury could not be reviewed on appeal where defense counsel did not object until after the testimony had been read and the jury had gone out. The judge gave defense counsel ample opportunity to object before the testimony was read.

4. **Criminal Law § 50.1; Rape and Allied Offenses § 4— indecent liberties with children—opinion of expert on credibility of specific witnesses—inadmissible**

The trial court committed prejudicial error in a prosecution for taking indecent liberties with children by allowing a child psychologist to give his expert opinion as to the credibility of two specific witnesses where the State's case was based in large part on the credibility of the children; *State v. Raye*, 73 N.C. App. 273, in which an expert witness testified that he did not believe children lied about sexual abuse, referred only to children in general. N.C.G.S. § 8C-1, Rule 405(a) and 608(a).

Judge COZORT concurs in the result.

APPEAL by defendants from *Gaines, Judge*. Judgments entered 7 February 1986 and 17 March 1986 in Superior Court, MACON County. Heard in the Court of Appeals 30 October 1986.

Defendant Beverly Elaine Jenkins was charged in proper bills of indictment with four counts of taking indecent liberties with children, in violation of G.S. 14-202.1. Defendant Ray Jenkins was charged in proper bills of indictment with two counts of taking indecent liberties with children, in violation of G.S. 14-202.1. All cases and both defendants were joined for trial. Both defendants were found guilty as charged. From judgments imposing prison sentences of a total of twelve years for Ms. Jenkins and a total of six years for Mr. Jenkins, defendants appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Smith, Bonfoey & Queen, by Frank G. Queen and Thomas W. Jones, for defendants, appellants.

HEDRICK, Chief Judge.

[1] Defendants first contend that the trial court committed prejudicial error in joining the cases of the two defendants. Defendants argue that the joinder served to "confuse the issues or mislead the jury." Defendants claim that the joinder did not meet the standard established by statute. G.S. 15A-926(b)(2) sets forth the grounds for a motion by the State for joining the cases of multiple defendants:

a. When each of the defendants is charged with accountability for each offense; or

b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

   1. Were part of a common scheme or plan; or

   2. Were part of the same act or transaction; or

   3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

The decision whether to try defendants separately or jointly is ordinarily within the sound discretion of the trial judge and, absent an abuse of that discretion, will not be overturned on appeal. *State v. Boykin*, 307 N.C. 87, 296 S.E. 2d 258 (1982). Public policy

strongly favors consolidation because it expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once. *Id.* at 91-92, 296 S.E. 2d at 261. This last factor is especially compelling when the trials involve young children testifying about sexual abuse. In view of these policy considerations, the trial judge's ruling shall not be disturbed absent a showing that joinder would hinder or deprive the defendant of his ability to present his defense. *State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983).

In the present case, defendants are husband and wife. The sexual abuse in issue was committed upon four young children whom Ms. Jenkins was babysitting in the Jenkins' home. Ms. Jenkins was present at all times, including both times Mr. Jenkins committed his offenses. Under these facts, the trial judge could certainly have made a reasoned decision that there was a common scheme or plan, namely a scheme on the part of the Jenkinses of gratifying their sexual desires on the children they took in to babysit. The defendants' defenses were not antagonistic. The trial judge made it clear to the jury that there were six separate offenses, and defendants did not ask for any other limiting instructions. Under these circumstances, we cannot find that the trial judge abused his discretion in joining the cases of these defendants.

[2] Defendants next contend that the trial court erred to their prejudice in allowing one of the victims, a four-year-old girl, to testify. Defendants argue that she was not qualified to testify because it appeared from the *voir dire* that she did not understand the duty of a witness to tell the truth. Defendants further contend that since this evidence is incompetent, there is insufficient evidence to convict Mr. Jenkins of the offense concerning that particular victim. This is the relevant portion of the *voir dire* of this witness:

> DIRECT EXAMINATION BY MS. SCOUTEN
>
> . . .
>
> Q. Do you know what the Bible is?

A. Jesus.

Q. Do you go to Sunday school?

A. (shakes head)

Q. Do you go to church?

A. (nods head)

Q. Now, speak in the microphone and answer. Do you go to church?

A. Yeah.

Q. Do you know what church you go to? The name of it?

A. No.

Q. Who do you go to church with?

A. Mommy and daddy.

Q. Do you know what it means to tell the truth?

A. (shakes head)

Q. What happens to you if you don't tell the truth?

MR. JONES: Objection.

Q. What happens to you if you tell a lie?

THE COURT: Overruled.

A. You get a spanking.

Q. Do you know that in court you're supposed to tell the truth?

A. Yeah.

Q. Are you going to tell the truth?

A. Yeah.

Q. Those are all the qualifying questions, Your Honor.

. . .

CROSS EXAMINATION BY MR. JONES

Q. [Name], can I ask you a question?

A. Yeah.

Q. Do you know what it means to tell the truth?

A. No.

Q. You don't?

A. (shakes head)

Q. Do you know what it means to tell a lie?

A. No.

Q. And you don't understand what it means to tell the truth?

A. No.

Q. That's all the questions I have.

EXAMINATION BY MS. SCOUTEN

Q. [Name], what color is this book?

A. Red.

Q. And if I told you this was a black book, what would that be?

A. I don't know.

Q. Would it be the truth or would it be a lie?

A. It would be the truth.

Q. If I told you this was black? Is this book black?

A. No.

Q. What color is it?

A. Red.

Q. Has your mother talked to you about telling the truth?

A. No.

Q. You learn in church about where you go when you're a good girl?

A. Yeah.

Q. Where do you go when you're a good girl?

A. To church.

Q. If you're a bad girl, what happens to you?

A. You don't.

Q. You don't what?

A. You don't go to church.

Q. Okay, you don't go to church. And if you tell a lie what happens to you?

A. Get a spanking.

G.S. 8C-1, Rule 601(b) sets out the applicable test of competency for a witness: "A person is disqualified to testify as a witness when the court determines that he is . . . (2) incapable of understanding the duty of a witness to tell the truth." This rule made no change in existing law. 1 H. Brandis, *Brandis on North Carolina Evidence* Sec. 55 (1986 Supp.). There is no age below which one is incompetent, as a matter of law, to testify. The test of competency is the capacity of the proposed witness to understand and to relate under the obligation of an oath facts which will assist the jury in determining the truth. This is a matter which rests in the sound discretion of the trial judge in the light of his examination and observation of the particular witness. *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984). By far, the vast majority of cases in which a child witness' competency has been addressed have resulted in the finding, pursuant to an informal *voir dire* examination of the child before the trial judge, that the child was competent to testify. *State v. Fearing*, 315 N.C. 167, 337 S.E. 2d 551 (1985). In *State v. McNeely*, 314 N.C. 451, 333 S.E. 2d 738 (1985), for example, the trial court's finding of competency was upheld even though the child gave these responses:

Q. Do you know what it means to tell the truth?

A. No.

. . .

Q. Are you going to say anything that didn't happen?

A. Yes.

Id. at 455-56, 333 S.E. 2d at 741. In *State v. Jones*, 310 N.C. 716, 314 S.E. 2d 529 (1984) the Court cited as evidence of competency that the child knew that if she did not tell the truth she would get a spanking. In *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971) the Court found a child competent to testify, holding that "[c]onflicts in the statements by a witness affect the credibility of the witness, but not the competency of the testimony." *Id.* at 291, 179 S.E. 2d at 368 (citations omitted). Based on these standards, we cannot find that the trial judge abused his discretion in allowing the child to testify in the present case.

Direct examination of this child included the following exchange:

Q. What did [defendant] Ray [Jenkins] do to you?

A. He touched my private pops too.

We cannot find that there was insufficient evidence to convict Mr. Jenkins of the charge concerning this child.

[3] Defendants next contend that the trial court erred to their prejudice in allowing the testimony of this victim to be read back to the jury, upon a juror's request. Defendants argue that the reading strengthened and over-emphasized her testimony.

After the jury had deliberated for two hours, the jurors asked for a lunch break. They had not reached a verdict. A juror asked if it would be possible to have this victim's testimony read back to them. The judge said he would think about it and let them know after lunch. After lunch, he announced that, in his discretion, he was going to let the reporter read back the requested testimony. He asked counsel if they had "[a]nything further." Defense counsel responded, "Not at this time, Your Honor." The reporter read the testimony. After the jury went out to deliberate, defense counsel said, "For the record the defendants would object and except to the Court's Order allowing the rereading of the transcript of the testimony of [name]."

This objection came too late. *See State v. Payne*, 280 N.C. 170, 185 S.E. 2d 101 (1971). The judge gave defense counsel ample opportunity to object before the testimony was read, and he did not do so. Thus, we cannot review the judge's action.

[4] Defendants next contend that the trial court committed prejudicial error in allowing Dr. Jerry Alan Coffey, a child psychologist, to give his expert opinion as to whether children lie about sexual abuse. Defendants argue that this sort of testimony is prohibited by 8C-1, Rules 405(a) and 608(a). The disputed testimony is as follows:

> Q. Do you have an opinion as to whether when [Name #1] states that an adult female, Beverly Jenkins, has tied him in a chair naked, and has touched his private parts, can he be making these things up?
>
> A. Yes I have an opinion.
>
> Q. What is that opinion?
>
> A. My opinion is that he is not making up the—if he has said that he has been sexually abused, he is not making that up. Children do not lie about sexual abuse. They sometimes lie about physical abuse, but the data that we have available says that they don't lie about that.
>
> MR. JONES: Move to strike.
>
> THE COURT: Denied.
>
> . . .
>
> Q. [D]o you have an opinion as to whether when [Name #2] states that Beverly Jenkins touched his private parts whether [Name #2] is making these things up?
>
> A. Based upon, again, experience with children in these matters in general and research that I'm familiar with, it is my opinion that he is very very unlikely to be making those things up. That he is making—let me rephrase that by explaining that children sometimes do have difficulty with specifics about what has happened to them, but they rarely have—they rarely lie about the fact that that—something of that nature occurred.

The propriety of these questions had been discussed on *voir dire*, and when the trial court made its ruling that the prosecutor could ask these questions, defense counsel entered a standing objection to them.

Rule 405(a) of the North Carolina Rules of Evidence provides in pertinent part that "[e]xpert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior." Rule 608(a) provides in pertinent part that "[t]he credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), . . ." The commentary to Rule 608 states that "[t]he reference to Rule 405(a) is to make it clear that expert testimony on the credibility of a witness is not admissible." Rules 405(a) and 608(a), read together, forbid an expert's opinion testimony as to the credibility of a witness. *State v. Chul Yun Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1986). This rule applies to child witnesses as well as adults. *Id.*

Dr. Coffey's testimony in the present case is clearly expert testimony as to the credibility of the two young witnesses to which he referred. The court, therefore, erred in allowing it. This situation is to be distinguished from that in *State v. Raye*, 73 N.C. App. 273, 326 S.E. 2d 333 (1985) where the following testimony by an expert witness was found by this Court to be properly admitted:

> Q. Are you saying from your practice in your particular profession children don't fantasize?
>
> A. [Dr. Ponzi:] Not to that extent. . . . I do not believe children will lie concerning sexual abuse. . . . I don't believe they make up stories along those lines.

Id. at 276, 326 S.E. 2d at 335. This testimony referred only to children in general, whereas the testimony in the present case refers in part to individual witnesses.

Under G.S. 15A-1443(a), an error is prejudicial to defendant when there is a "reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." The evidence against Ms. Jenkins is strong, but not overwhelming. As in *State v. Chul Yun Kim*, 318 N.C. 614, 350 S.E. 2d 347 (1986), only the victims and the defendant purported to have first-hand knowledge

of whether or not the illegal acts actually had occurred, and the testimony of the victims conflicted absolutely with that of Ms. Jenkins. Therefore, the State's case against her is based in large part on the credibility of these children. Under these circumstances we must conclude that there is a reasonable possibility that a different result would have been reached at trial had Dr. Coffey not been allowed to testify that these children were telling the truth.

For the foregoing reasons, we hold that defendant Beverly Jenkins is entitled to a new trial in Case No. 85CRS2510 and in Case No. 85CRS2513. In the other four cases, we hold that defendants had a fair trial, free from prejudicial error.

New trial in Case Nos. 85CRS2510 and 85CRS2513.

No error in Case Nos. 85CRS2511, 85CRS2512, 85CRS2514, and 85CRS2515.

Judge MARTIN concurs.

Judge COZORT concurs in the result.

FIRST UNION NATIONAL BANK v. DONALD ROLFE AND JOSEPHINE ROLFE

No. 8630SC509

(Filed 30 December 1986)

Execution § 1; Rules of Civil Procedure § 60.2 — property not exempt from execution — absence of notice — relief from order

Defendant was entitled to relief from an order declaring that none of her property in this state is exempt from an execution sale to satisfy plaintiff's default judgment against her because she is no longer a resident of this state where plaintiff's motion for such an order was not served on defendant in the manner provided in N.C.G.S. 1A-1, Rule 4, and defendant had no opportunity to contest the factual allegations as to her non-residency. Art. I, § 19 of the N. C. Constitution; N.C.G.S. 1A-1, Rule 60(b)(4).

APPEAL by defendant Josephine Rolfe from *Friday, Judge.* Order entered 11 December 1985 in Superior Court, MACON County. Heard in the Court of Appeals 28 October 1986.

Defendants Donald and Josephine Rolfe were formerly married to each other. During their marriage, Donald Rolfe executed a promissory note to plaintiff Bank, and Josephine Rolfe executed an unconditional guaranty for a portion of Donald Rolfe's obligations. Thereafter, the Rolfes were divorced. On 9 January 1985, plaintiff Bank brought this action alleging that Mr. Rolfe had defaulted upon the note and that Mrs. Rolfe had refused to make payment in accordance with the terms of the guaranty agreement. Personal service of the summons and complaint was had upon Mrs. Rolfe in this State.

Mr. Rolfe filed a voluntary petition in bankruptcy and this action was stayed as to him. Mrs. Rolfe did not file a responsive pleading and, on 6 March 1985, default judgment was entered against her.

On 30 April 1985, plaintiff Bank filed a "Motion and Notice of Motion to Determine That No Property in the State of North Carolina of the Debtor, Josephine Rolfe, is Exempt." Plaintiff alleged that Mrs. Rolfe was no longer a resident of North Carolina, but was a resident of Ireland. According to the record, the following events occurred on 30 April 1985:

1. Plaintiff filed its "Motion and Notice of Motion."

2. The motion was returned "unserved" on Mrs. Rolfe with the notation by a deputy sheriff that he had been unable to locate Mrs. Rolfe in Macon County and had been advised she "was in Irland [sic]."

3. Plaintiff's counsel mailed a copy of the Motion to Mrs. Rolfe at her address in Macon County.

4. Plaintiff's vice-president filed an affidavit in which he acknowledged that he had information that Mrs. Rolfe was in Ireland and that her mail was being forwarded to her there.

5. An order was entered by the assistant clerk granting plaintiff Bank the relief it requested in its "Motion and Notice of Motion."

6. An execution was issued.

On 28 May 1985, the Sheriff of Macon County issued a notice of levy upon certain personal property belonging to Mrs. Rolfe, but, due to claims to the property made by Mr. Rolfe, it was not sold during the life of the execution.

A second execution was issued on 23 September 1985 and the Sheriff gave notice of levy and notice of sale of the property. Prior to the sale, however, Mrs. Rolfe filed a motion to set aside the 30 April 1985 order of the assistant Clerk. She sought and obtained a temporary order restraining the execution sale pending a hearing on her motion. After a hearing before the Clerk of Superior Court and the entry of an order adverse to her, Mrs. Rolfe appealed to the Superior Court. After hearing, the trial judge denied her motion to set aside the 30 April 1985 order, directed that execution may issue against Mrs. Rolfe's property, and directed the Sheriff to proceed with execution. Mrs. Rolfe appeals.

Jones, Key, Melvin & Patton, P.A., by Joseph D. Johnson, for plaintiff appellee.

Lawrence Nestler, Western N. C. Legal Services, Inc.; and Margot Roten, N. C. Legal Services Resource Center, Inc. for defendant appellant, Mrs. Josephine Rolfe.

MARTIN, Judge.

We must reverse the trial court's denial of Mrs. Rolfe's motion for relief from the 30 April 1985 order declaring that none of her property in this State is exempt from execution. Mrs. Rolfe is entitled to relief from that order because it was entered without notice to her in violation of rights guaranteed her by our Constitution and statutes.

Every resident of North Carolina is entitled to claim certain of his property as exempt from sale to satisfy the claims of his creditors. N. C. Const., Art. 10; G.S. 1C-1601 *et seq.* Only a resident of this State, however, may claim the benefit of the exemption laws. *Cromer v. Self*, 149 N.C. 164, 62 S.E. 885 (1908).

In its original complaint, plaintiff alleged that Mrs. Rolfe was a resident of Macon County, North Carolina. The summons and a copy of the complaint were served upon her within this State. Thus, Mrs. Rolfe was put on notice that plaintiff claimed, *inter*

alia, that she was a resident of North Carolina and was indebted to plaintiff in the amount alleged. Mrs. Rolfe did not respond to the complaint, and plaintiff obtained an entry of default and a default judgment against her. When default is entered due to a defendant's failure to answer, the factual allegations of the plaintiff's complaint are deemed admitted and those facts are established for the purposes of entering a default judgment. *Bell v. Martin*, 299 N.C. 715, 264 S.E. 2d 101, *reh'g denied*, 300 N.C. 380 (1980). Having admitted by default that she was a resident of this State and that she was indebted to plaintiff, Mrs. Rolfe was entitled to assume that she would be afforded her rights to claim exemptions in the event plaintiff proceeded to enforce its judgment against her.

Plaintiff's "Motion and Notice of Motion to Determine That No Property in the State of North Carolina of the Debtor, Josephine Rolfe, is Exempt" alleged that Mrs. Rolfe "is no longer a resident of the State of North Carolina. . . ." By reason of this new allegation, plaintiff sought an order declaring that Mrs. Rolfe had no rights under the Constitution and laws of this State to claim exemptions. In our view, the motion sought relief different from that which plaintiff sought in the original complaint; i.e., it requested a determination that Mrs. Rolfe was not a resident of North Carolina and was therefore not entitled to protect any of her property in this State from sale to satisfy plaintiff's claim. A party who is in default for failure to appear is ordinarily not entitled to notice of additional pleadings in the case, but where a new or additional claim is asserted, service on the party, even though in default, is required in the same manner as provided by G.S. 1A-1, Rule 4 for the service of summons. G.S. 1A-1, Rule 5(a). Moreover, the "law of the land" clause contained in Article 1, § 19 of the North Carolina Constitution mandates that a party be given notice and an opportunity to be heard before he can be deprived of a legal claim or defense. *Shepherd v. Shepherd*, 273 N.C. 71, 159 S.E. 2d 357 (1968).

Plaintiff clearly did not accomplish service of its motion in the manner provided by G.S. 1A-1, Rule 4(j). The record reflects that personal service by delivery of a copy of the motion was attempted by a Macon County deputy sheriff who returned it unserved with the notation that Mrs. Rolfe was in Ireland. The motion was filed 30 April 1985 and was returned unserved by the

officer on the same date. The record also reflects that plaintiff's attorney deposited a copy of the motion in the United States Post Office, certified mail, return receipt requested, addressed to Mrs. Rolfe, on 30 April 1985, but that it was not delivered to her. According to his affidavit, plaintiff's attorney did not make any further attempt to serve the motion on Mrs. Rolfe. Thus, by plaintiff's own evidence, it appears that there was no effort made to obtain service of the motion on Mrs. Rolfe by publication as provided by G.S. 1A-1, Rule 4(j1). We note that plaintiff's attempt to serve the motion upon Mrs. Rolfe by mail would have provided little benefit to her since the relief requested therein was granted on the same day the motion was mailed to her.

In our view, the procedures prescribed by G.S. 1C-1603(a)(4), providing for notice to the judgment debtor of his rights to designate his exempt property, would have been appropriate in this case. A judgment debtor is permitted twenty days after service of the notice within which to move to designate exemptions, G.S. 1C-1603(e)(2), or the right to exemptions is deemed to be waived. Had Mrs. Rolfe moved, in response to the notice, to designate exemptions, plaintiff could then have challenged her residence and entitlement to exemptions. However, plaintiff's argument to the contrary notwithstanding, the record is clear that plaintiff did not comply with the procedures prescribed in the statute for service of the notice. *See* G.S. 1A-1, Rule 4; G.S. 1-75.10. Moreover, the order declaring that Mrs. Rolfe was not entitled to exemptions was entered the very same day that service of the motion was attempted.

In summary, Mrs. Rolfe was entitled to notice of plaintiff's motion to declare that none of her property is exempt, and an opportunity to contest the factual allegations as to her nonresidency. She was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions. The order declaring that her property is not exempt was, therefore, invalid, *In re Wilson*, 13 N.C. App. 151, 185 S.E. 2d 323 (1971), and she is entitled to relief therefrom pursuant to G.S. 1A-1, Rule 60(b)(4). The order of the superior court denying her such relief is reversed, and this cause is remanded for such further proceedings for enforcement of the judgment against Mrs. Rolfe as may be consistent with the law.

Reversed and remanded.

Chief Judge HEDRICK and Judge EAGLES concur.

JAMES C. SHEEHAN, PLAINTIFF v. HARPER BUILDERS, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. HAZELWOOD CONSTRUCTION COMPANY, INC., THIRD PARTY DEFENDANT

No. 8530SC1141

(Filed 30 December 1986)

Negligence § 2— building construction—negligence in installation of bolts—insufficient evidence of proximate cause

In an action to recover for injuries sustained by plaintiff, an employee of a steel erection subcontractor, when a steel column broke loose from two anchor bolts installed by defendant general contractor to affix it to the concrete footings of a building under construction, plaintiff's evidence was sufficient to support a finding that defendant was negligent in its installation of the anchor bolts where there was some evidence that the anchor bolts were smaller and softer than those required by the plans and specifications. However, plaintiff's evidence was insufficient to prove proximate cause because it was insufficient to show that the steel column would not have fallen if the larger anchor bolts specified in the plans had been used.

APPEAL by plaintiff from *Downs, Judge* and *Grist, Judge*. Order entered 12 January 1985 and judgment entered 14 February 1985 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 6 March 1986.

While working on a building under construction plaintiff, an employee of the steel erection subcontractor, was injured when an already erected and secured steel column broke loose from the two anchor bolts that affixed it to the concrete footings and fell. He sued defendant Harper Builders, the general contractor, alleging that the column fell because the bolts were defective and negligently installed. The defendant denied plaintiff's allegations, alleged that plaintiff was contributorily negligent, and filed a third party complaint against plaintiff's employer Hazelwood Construction Company, Inc. for indemnification as a subcontractor and contribution as a joint tort feasor. When the case was first tried the jury found that both defendant and the third party defendant were negligent, that plaintiff was not contributorily

negligent, and that plaintiff had been damaged in the amount of $100,000. But a new trial was ordered by Judge Downs and in that trial Judge Grist directed a verdict for defendant at the close of plaintiff's evidence. Plaintiff's appeal is from both the order entered after the first trial and the judgment entered after the second.

McLean & Dickson, by Russell L. McLean, III, for plaintiff appellant.

Morris, Golding, Phillips & Cloninger, by James N. Golding, for defendant appellee Harper Builders, Inc.

No brief filed by third party defendant appellee Hazelwood Construction Company, Inc.

PHILLIPS, Judge.

Plaintiff's only contention in regard to the order granting a new trial—that the motion which gave rise to it was not timely filed—has no foundation and we overrule it. Defendant's motion for a new trial, made under Rule 59, N.C. Rules of Civil Procedure, was served on 28 December 1984 and section (b) of that rule provides that motions made thereunder "shall be served not later than 10 days after entry of the judgment." The contention that the motion came too late is based upon the premise that judgment was entered on 12 December 1984, but the record does not show that judgment was entered on 12 December 1984 or at any other time for that matter. What was entered on 12 December 1984 was the jury verdict, which is not mentioned in the provision limiting the time within which motions for a new trial can be made.

The verdict directed against plaintiff at the conclusion of his evidence in the second trial was on the stated ground that his evidence was insufficient to establish either that defendant was negligent or that its negligence was a proximate cause of plaintiff's injury. The validity of this ruling depends upon whether plaintiff's evidence when viewed in its most favorable light tends to show that the two anchor bolts which held the steel column in place were defective and that their deficiency was a proximate cause of the column's fall. For his evidence is plainly sufficient to establish that defendant was responsible for install-

ing the anchor bolts and that they did not prevent the column from falling and causing plaintiff to be seriously injured.

Pertinent to the question presented the record shows the following preliminary or background facts: It was a one-story steel supported building in the early stages of construction. Some days earlier, just when is immaterial, the defendant general contractor had erected the outer masonry walls, had poured the concrete footings for the five steel columns that were to support the roof beams and had installed anchor bolts for the columns in the footings. Two anchor bolts, parallel to each other, were installed for each column and each anchor bolt except for the top 2 or 3 inches was embedded in the concrete footing. On the day of the accident and immediately before it happened plaintiff and other experienced members of the steel erection crew had erected two of the five steel columns and had affixed steel I-beams to the top of each column. The I-beams were the horizontal support for the roof, and each beam was about 30 feet long and weighed about 1,500 pounds. Each column was a 5 inch steel pipe, approximately 18 feet high with a 6 inch by 8 inch steel base plate. In erecting each column the following procedure was followed: A leveling nut and washer was run down on each anchor bolt to the level of the concrete floor that would be poured later; with the aid of a crane the column with its protruding base plate was set on the nuts; and after another washer and nut was put on the bolt and tightened down the crane was removed and the column was left standing with no other support. After the first column was set an I-beam was affixed to it and the wall as follows: While the I-beam was held up by a crane plaintiff, sitting or standing on the beam when necessary, first bolted one end of the beam to the top of the column and then welded the other end onto a steel bearing plate fastened into the building's outer wall, after which the crane was released without incident. Then the second column was erected and an I-beam was bolted to it and welded to the wall bearing plate as before; when the crane was removed from the second beam plaintiff, as he usually did, was sitting on the beam waiting for another beam to be delivered, but as the crane detached from the beam the second column began wavering and then fell over.

When repetition is eliminated plaintiff's other evidence relating to the anchor bolts and the fall of the column consists only of the following: *Plaintiff testified that*: The building plans

and specifications required two anchor bolts for each column and each bolt was supposed to be three-quarters of an inch in size and of a good grade of steel. After the falling column sent him to the ground he laid there and looked around, trying to figure out what went wrong. The fallen column was just a few feet away and upon looking at its base he saw that the top part of one bolt was sheared off and gone, and the top part of the other bolt was bent. The bolt that was still there appeared to be smaller and more shiny than the anchor bolts he was familiar with; it appeared to be a five-eighths inch bolt. The bolt looked like galvanized iron and appeared to be the kind of threaded bolt you would buy at a hardware or auto parts store. He was familiar with anchor bolts used in buildings of that type and they were more of a brownish color rather than a galvanized, chrome color. *Plaintiff's foreman, Mark Medford, testified that*: After the column fell he observed that one of its anchor bolts was broken and the other was bent; that the I-beam was still bolted to the column and that the weld to the wall bearing plate was still in place and held part of the I-beam flange which ripped away during the fall. In re-erecting the column they used both bolts—the bent bolt was straightened and the broken one was welded. In welding the bolt they had a lot of trouble, like there was a soft spot in it. He did not notice the size of the anchor bolts but did notice that the broken bolt would not take a weld well. Any kind of steel can have a galvanized finish on it but usually steel with a galvanized finish is a weaker steel. He never measured the bolts involved and does not know what type of steel bolts they were. The plan called for two anchor bolts for each footing; if the two bolts had been lined up differently the column would have been less likely to fall. If he had noticed anything unusual about the anchor bolts he would not have let plaintiff go up on the steel; he looked at the anchor bolts and saw nothing wrong with them. The column should have held itself up instead of falling, so no bracing was put on it. The procedure followed in erecting the steel was proper in all respects. *W. E. Patton, President of Hazelwood Construction Company, testified that*: The bolt that was sheared off was sticking up about two inches and it was an all threaded bolt, but he did not know what size it was. The concrete footing itself was undamaged and both bolts were still firmly embedded in it after the column fell.

The foregoing is at least some evidence that the anchor bolts defendant installed for the fallen column were defective; for the

evidence indicates, however weakly, that the bolts were smaller and softer than those required by the plans and specifications. From this evidence a jury could properly infer that defendant was negligent. Defendant's argument to the contrary is based on contradictory testimony elicited from plaintiff and his witnesses on cross-examination to the effect that the bolts were not smaller than the plans called for. But to recover in a case based upon negligence, proximate cause also must be established, *White v. The City of Charlotte*, 211 N.C. 186, 189 S.E. 492 (1937), and in our view plaintiff's evidence is insufficient to show that the steel column would not have fallen if the larger anchor bolts specified in the plans had been used. For there was no testimony, expert or otherwise, that the column would not have fallen if three-quarter inch bolts of a high grade steel had been used; nor was there any evidence as to the difference in strength, if any, between the bolts used and those required. Under the circumstances the jury could have only speculated that the column would not have fallen if the bolts had been one-eighth of an inch bigger and our law does not permit verdicts to be arrived at by surmise or speculation. *Miller v. Coppage*, 261 N.C. 430, 135 S.E. 2d 1 (1964).

Affirmed.

Judges ARNOLD and EAGLES concur.

JAMES W. ANDERSON, SR. v. TEXAS GULF, INC.

No. 863SC410

(Filed 30 December 1986)

Master and Servant § 35— negligence action—joint or loaned employee—Rule 12(b)(6) dismissal based on workers' compensation coverage—improper

Plaintiff's action for negligence arising from an accident at defendant's plant should not have been dismissed for failure to set forth a claim upon which relief could be granted on the grounds that plaintiff was an employee of defendant under either the joint or lent employee doctrines and therefore limited to workers' compensation where there was no allegation that there was a contract for hire with defendant, the special employer, and no allegation that the work being done was essentially that of the special employer. N.C.G.S. § 97-10.1, N.C.G.S. § 1A-1, Rule 12(b)(6).

Anderson v. Texas Gulf, Inc.

APPEAL by plaintiff from *Phillips (Herbert O., III), Judge.* Order entered 7 February 1986 in Superior Court, CRAVEN County. Heard in the Court of Appeals 24 September 1986.

Plaintiff, James W. Anderson, Sr., filed a personal injury action against defendant, Texas Gulf, Inc., alleging negligence in connection with an accident which occurred at the Texas Gulf plant in Aurora, North Carolina. Defendant filed a timely motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. From allowance of the motion to dismiss, plaintiff appeals.

Voerman & Ward, P.A., by J. Allen Murphy, attorney for plaintiff appellant.

Sumrell, Sugg & Carmichael, by James R. Sugg and Rudolph A. Ashton, III, attorneys for defendant appellee.

ORR, Judge.

The sole issue before the Court is whether the plaintiff's complaint should have been dismissed because it conclusively showed plaintiff to be an employee of defendant at the time he was injured and thereby limited his remedy to recovery under the Workers' Compensation Act. We conclude that the trial court erred in dismissing the case.

N.C.G.S. § 97-10.1 provides that if an employee and employer are subject to and have complied with the Workers' Compensation Act, the rights and remedies granted to the employee under the Act are his sole remedy and exclude all other rights and remedies he may have had against his employer at common law. According to defendant, plaintiff's complaint conclusively shows him to be an employee, either under the lent or joint employee doctrines such that recovery under the Workers' Compensation Act provides the sole remedy for his injuries.

Under the lent employee doctrine:

> "When a general employer lends an employee to a special employer, the special employer becomes liable for workmen's compensation only if
>
> "(a) the employee has made a contract of hire, express or implied, with the special employer;

"(b) the work being done is essentially that of the special employer; and

"(c) the special employer has the right to control the details of the work.

"When all three of the above conditions are satisfied in relation to both employers, both employers are liable for workmen's compensation."

Collins v. Edwards, 21 N.C. App. 455, 459, 204 S.E. 2d 873, 876, *cert. denied*, 285 N.C. 589, 206 S.E. 2d 862 (1974) (quoting 1C, Larson, *The Law of Workmen's Compensation* § 48.00). Joint employment, on the other hand, occurs when

> a single employee, *under contract* with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.

1C, Larson, *The Law of Workmen's Compensation* § 48.40, p. 8-511 (emphasis added).

In determining whether plaintiff's complaint was sufficient to withstand a motion to dismiss, "the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted." *Lloyd v. Babb*, 296 N.C. 416, 427, 251 S.E. 2d 843, 851 (1979) (quoting *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E. 2d 161, 163 (1970)). The material allegations of plaintiff's complaint are as follows:

1. "That at all times alleged . . . plaintiff was an employee of East Coast Machine and Iron Works, Inc.";

2. That "although an employee of East Coast Machine [,] . . . [plaintiff] was on loan to Texas Gulf, Inc. and was under the direct supervision and control of Texas Gulf, Inc. and [was] working *at* their place of business . . . in Aurora, North Carolina";

3. "That at all times alleged . . . defendant . . . was in direct control of the plaintiff's work activities and the plaintiff's safety";

4. That on the day of the accident plaintiff reported "directly to the defendant's business site in Aurora, North Carolina";

5. That on the day of the accident, "[a]t the direction of the supervisory personnel of the defendant, plaintiff was instructed along with two other employees on loan from East Coast Machine . . . to fit pipe together as part of a construction job at the business site of the defendant";

6. "That as a proximate result of the plaintiff working [in unsafe conditions] and without any safety features provided by the defendant, the plaintiff slipped and fell . . . and in doing so twisted and fractured his ankle severely and otherwise suffered severe permanent and disfiguring injuries";

7. That "the plaintiff was at all times doing his work for the defendant in as careful and safe a manner as possible under the conditions which the defendant instructed him to work"; and

8. "The proximate cause of the plaintiff's . . . injury was the negligence of the defendant. . . ."

In applying the lent employee doctrine to the allegations, we clearly have a general employer who has loaned his employee to a special employer. Similarly, the allegations state in unambiguous language that the plaintiff was under the direct supervision and control of Texas Gulf. The complaint does not allege, however, that there was a contract for hire, express or implied, with the special employer. Nor does the complaint allege that the work being done was essentially that of the special employer. Indeed, the complaint fails to even mention the line of work in which Texas Gulf is engaged.

In discussing the necessity, under the lent employee doctrine, that the employment be under an "appointment or contract of hire," this Court in *Collins v. Edwards* noted that in lent employee cases:

> The only presumption is the continuance of the general employment, which is taken for granted as the beginning point of any lent-employee problem. To overcome this presumption, it is not unreasonable to insist upon a clear

> demonstration that a new temporary employer has been substituted for the old . . . failing this, the general employer should remain liable. [Citations omitted.]

21 N.C. App. at 460, 204 S.E. 2d at 877. Thus, to find that all three conditions of the lent employee doctrine were met, this Court would be required to overcome presumptions and to make conclusions of law and unwarranted deductions of facts not admitted by the pleadings. This we will not do.

The joint employee doctrine poses a similar obstacle to defendant's motion to dismiss. For "although there is a mutual business interest between the two employers, and perhaps even some element of control, joint employment as to one employer cannot be found in the absence of a contract with that employer." 1C, Larson, *The Law of Workmen's Compensation* § 48.44, pp. 8-531-32.

The Supreme Court of North Carolina in *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E. 2d 161, 165-66 (1970), has noted and followed the rule that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." In *Sutton* it was additionally noted that the motion to dismiss under Rule 12(b)(6) may not be successfully interposed to a complaint formerly labeled a "defective statement of a good cause of action." "For such complaint . . . the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint." *Id.* at 106, 176 S.E. 2d at 168. Therefore, even if a clearer explanation of plaintiff's employment relationship with defendant would have been helpful, plaintiff's complaint cannot be dismissed on that ground.

"To dismiss the action now would be 'to go too fast too soon.' . . . This case is not yet ripe for a determination that there can be no liability as a matter of law." *Id.* at 108, 176 S.E. 2d at 169.

Allowance of the motion to dismiss was error. We reverse and remand this case for further proceedings in accordance with this opinion.

Reversed and remanded.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. HARRY DWAYNE LIVELY

No. 8618SC409

(Filed 30 December 1986)

Larceny § 7— insufficient evidence to show that defendant was perpetrator

The evidence was insufficient to support defendant's conviction of felonious larceny of a riding lawn mower where it tended to show that the lawn mower had been painted orange by defendant's employer and was taken at night from outside the employer's building; a chemical analysis of a streak of orange paint found on the outside of defendant's white van and particles of orange paint found inside the van matched the color, texture, type and elemental composition of paint in aerosol cans which had been used to paint the mower; tire tracks were seen on the floor of defendant's van; the keys to defendant's van were in his possession the night of the theft; and defendant's witnesses offered a plausible explanation for the presence of orange paint on and in defendant's van.

APPEAL by defendant from *Seay, Judge*. Judgment suspending sentence entered 14 November 1985 in Criminal Superior Court, GUILFORD County. Heard in the Court of Appeals 22 September 1986.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

Joseph E. Turner, Assistant Public Defender, for the defendant appellant.

ORR, Judge.

Defendant was charged with the felonious larceny of a riding lawn mower in an indictment proper in form. He was found guilty by a jury and placed on supervised probation for five years in lieu of serving an active sentence of three years. Defendant appeals his conviction, contending that the State failed to introduce substantial evidence of each element of the larceny and that the trial court thereafter erred in denying defendant's motions to

dismiss and for a judgment notwithstanding the verdict. We agree.

Evidence presented by the State tended to establish the following facts:

Defendant began working for Paul Harding at Harding's Power Mower Company in Greensboro in May of 1984. Harding was in the business of repairing, rebuilding, and repainting lawn mowers and other small engine appliances. Among the machines on his premises was a Jacobsen lawn and garden tractor and a 50-inch mowing deck attachment, which Harding had purchased as a demonstrator in the fall of 1983. Harding had been offered $3,850 for the tractor and mowing deck, and he had begun repainting them in early September 1984 in preparation for delivery on 10 October 1984. The tractor and mowing deck were being painted orange, and they were the only items being painted in Harding's shop at the time.

The morning of 10 October 1984 Harding discovered that the gate and back fence around the business premises were down, and he noticed tire tracks going around the porch. The tractor, which he had left outside on the south side of the building, and the mowing deck, which had been on an east side porch at the back of a separately fenced-in area, were both missing. Neither item was ever recovered.

Police detectives subsequently spotted a streak of orange paint on the exterior of defendant's white van, and, after advising him of his *Miranda* rights and obtaining a waiver, questioned him about it. Defendant denied knowledge of the theft, but acknowledged that the van was his and that the keys to the van had been in his possession on the night of 9 October 1984. Defendant permitted the officers to search the interior of the van where they discovered additional particles of orange paint on one of the side doors, on a rib inside the van, and on the back of the front seat. The officers also noticed what appeared to be tire tracks on the van floor.

A chemical analysis of scrapings of the paint particles in the van revealed a match in color, texture, type, and elemental composition with paint from three empty aerosol cans taken from trash barrels where Harding said he had disposed of the eighteen cans of paint used to paint the missing tractor and mowing deck.

Defendant produced two witnesses who testified that defendant had previously transported lawn mowers in his van. The 12-year-old son of defendant's girl friend testified that he had helped defendant paint two push mowers with orange paint and had helped defendant transport them to a flea market, where one was sold. In addition, the boy testified that defendant had transported the boy's own riding mower on one occasion. On cross examination, Harding testified that he was aware defendant worked on mowers at his home in his off-hours, and that he had warned defendant that if the practice continued, defendant would be fired. Harding testified further that, in either September or early October 1984, defendant had brought a Simplicity riding mower to work in his van. The back portion of that mower was orange, its original color, but its front part had been painted white.

The essential elements of larceny are that defendant (1) took the property of another and (2) carried it away (3) without the owner's consent (4) with the intent to deprive the owner of the property permanently. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982). Each of these elements must be established by sufficient, competent evidence. "[T]he essential facts can be proved by circumstantial evidence where the circumstance raises a logical inference of the fact to be proved and not just a mere suspicion or conjecture." *State v. Boomer*, 33 N.C. App. 324, 327, 235 S.E. 2d 284, 286 (1977).

The evidence presented by the State was circumstantial in nature. From the testimony and exhibits presented at trial, the jury could reasonably infer that the orange paint on defendant's van originated in cans identical or similar to those found in Harding's trash. It could also reasonably infer that the cans in the trash were the same cans used to paint the Jacobsen tractor and mowing deck. To conclude from these inferences that the paint on defendant's van came there by way of colliding with the tractor on the night of its disappearance is not an example of impermissibly stacked inferences, as defendant contends. Rather, it illuminates the difference between evidence that "reasonably conduces to its conclusion as a fairly logical and legitimate deduction" and evidence that "merely . . . raises a suspicion or conjecture in regard to [the fact in issue]." *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930). We find that the evidence in this case exemplifies the latter and raises only a suspicion or

conjecture in regard to whether the stolen tractor was in fact in defendant's van.

It is the jury's province to pass on circumstantial evidence and determine whether it excludes every other reasonable hypothesis. Whether the evidence is substantial on all essential elements is for the court to decide. *State v. Boomer*, 33 N.C. App. 324, 235 S.E. 2d 284. In determining whether a motion to dismiss was properly denied, we must consider all the evidence actually admitted in the light most favorable to the State. *State v. Irwin*, 304 N.C. 93, 282 S.E. 2d 439 (1981). Nevertheless, when the defendant has presented evidence explaining or making clear that which has been offered by the State, it too may be considered by the appellate court insofar as it is not inconsistent with the State's evidence. *State v. Evans and State v. Britton and State v. Hairston*, 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Ross*, 44 N.C. App. 323, 260 S.E. 2d 777 (1979).

Defendant's witnesses presented a plausible explanation for the presence of the orange paint streaks on his van. No evidence was presented that might have deprived this explanation of its reasonableness. There was no evidence, for example, that the height of the paint streaks on the van sides corresponded to the typical dimensions of the same model of a Jacobsen tractor but not to the dimensions of the other mowers defendant allegedly transported. Nor was there any such evidence concerning axle spread or tire width as indicated by the apparent tire tracks inside the van.

> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed. This is true even though the suspicion so aroused by the evidence is strong.

State v. Earnhardt, 307 N.C. 62, 66, 296 S.E. 2d 649, 652 (1982).

In prosecuting a criminal charge it is the State's burden to establish the following two propositions: "(1) that a crime has been committed; and (2) that it was committed by the person charged." *State v. Chapman*, 293 N.C. 585, 587, 238 S.E. 2d 784, 786 (1977). The State presented substantial evidence that the crime of larceny was committed—that the tractor and mowing

deck were the property of someone other than defendant, that they were carried away without the owner's permission, and that the intent of the taker was to deprive the owner of his property permanently. We hold, however, that the State failed to present evidence sufficient for the jury to find beyond a reasonable doubt that defendant committed the offense. This case is accordingly remanded to the Superior Court of Guilford County for entry of a judgment of nonsuit.

Reversed.

Chief Judge HEDRICK and Judge ARNOLD concur.

COLONIAL BUILDING COMPANY, INC. OF RALEIGH AND CENTURY 21, CROOM AND GAY REALTY, A NORTH CAROLINA GENERAL PARTNERSHIP v. LEWIS JUSTICE; CORNELIA JUSTICE BROWN; AMOS JUSTICE AND WIFE, VIARETTA JUSTICE; ABRAHAM JUSTICE AND WIFE, CORRENA JUSTICE; IRVING JUSTICE AND WIFE, ELEASE JUSTICE; ANDREW DYER AND WIFE, DAISEY DYER; SAMUEL RICHARDSON AND WIFE, DOROTHY RICHARDSON; ALBERT JUSTICE AND WIFE, FLORINE JUSTICE; DELIAH JUSTICE; BARBARA J. SAULS; ONNIE JUSTICE; ROBERT JUSTICE; OTIS McMICHAEL AND WIFE, PEARLENE McMICHAEL; RUSSELL B. SMITH AND WIFE, JOYCE E. SMITH; ROBERT JUSTICE AND WIFE, DOROTHY JUSTICE; WALTER L. JUSTICE, JR. AND WIFE, JOCELYN A. JUSTICE; LIONEL WILLIAMS AND WIFE, GERTRUDE WILLIAMS; MABEL BARHAM; SILAS DUNN AND WIFE, MAUDE DUNN; ERNEST HUNTER; LOUIS A. JUSTICE; LAWRENCE JUSTICE AND WIFE, MALEASIA A. JUSTICE; RAYMOND JUSTICE; RALPH JUSTICE, SR.; RUBY DUNN; LENORA JUSTICE; JIMMIE L. DOZIER AND WIFE, MAGGIE EUNIS DOZIER; ALVIN JUSTICE; MATTIE E. JUSTICE; ELONA JUSTICE AND WIFE, MARLENE JUSTICE; LIZZIE A. JUSTICE; PERCELL JUSTICE; LONNIE JUSTICE; BERNICE JUSTICE; SUSIE JUSTICE; MARION HOLDEN AND WIFE, LOUISE HOLDEN; HORACE DUNN AND WIFE, JESSE DUNN; WORTH DUNN AND WIFE, HELEN DUNN; BLONNIE MAY JUSTICE; WILLIE MASSENBURY AND WIFE, MALISSA MASSENBURY; AND JOHN AND JANE DOE

No. 8610SC562

(Filed 30 December 1986)

Vendor and Purchaser § 2— contract to sell land—specific performance—time expired

Summary judgment was properly granted for defendants in an action for specific performance of a contract to sell land where the contract stated that

the agreement would be terminated if the property had not been closed by December 31, there was no closing by December 31, the contract was unambiguous, and there was no allegation of fraud or mistake.

APPEAL by plaintiffs from *Bailey, Judge.* Judgment entered 15 January 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 12 November 1986.

This is a civil action wherein plaintiffs seek specific performance of a contract to convey four tracts of land, and also incidental damages and attorney fees.

In the pleadings, depositions, and affidavits, evidence is presented which tends to show the following:

Plaintiff Colonial Building Company, Inc., is a North Carolina corporation in the business of developing real property. Plaintiff Century 21, Croom and Gay Realty, is a North Carolina partnership in the business of real estate brokerage. Defendant Cornelia Justice Brown had listed four tracts of land, comprising about 60.3 acres, for sale with plaintiff Century 21. Mr. Gay of Century 21 introduced Mrs. Brown to Edd K. Roberts, president of plaintiff Colonial Building Company. On 3 November 1981, Mrs. Brown signed a contract to sell the land to Colonial Building.

At the time she signed the contract, Mrs. Brown did not own the four tracts; they belonged to various relatives of hers. They had once been part of the Justice family farm. It was lost in the Depression, but Mrs. Brown bought it back later and divided it among her siblings and herself. At the time Mrs. Brown signed the contract, she had a power of attorney for two of the tracts. The third tract belonged to Louise and Marion Holden, her sister and brother-in-law. The fourth belonged to the heirs of her deceased brother Bernis Justice. Plaintiffs had suggested to Mrs. Brown, and she agreed, that she should try to convince the Holdens to swap their tract for one that was not being sold and move their house onto it, so that their tract could be sold. Mrs. Brown also agreed to try to get all of Bernis' heirs to agree to sell the fourth tract.

Time passed, and Mrs. Brown did not manage to convince the Holdens to swap lots. The contract provided that it terminated if there was no closing by 31 December 1983. This date passed without closing.

Plaintiffs brought this action on 5 February 1985. On 29 October 1985, plaintiffs made a motion for partial summary judgment. On 8 November 1985 defendants made a motion for summary judgment. The trial court, in its order of 31 December 1985, denied plaintiffs' motion, granted defendants' motion, and dismissed the action. Plaintiffs made several more motions, including a motion to alter or amend the court's judgment pursuant to G.S. 1A-1, Rule 59. In its order of 15 January 1986, the court denied these motions and again granted defendants' motion for summary judgment.

Plaintiffs appealed.

Harris, Cheshire, Leager & Southern, by Stephen D. Coggins and Jodee Sparkman King, for plaintiffs, appellants.

Young, Moore, Henderson & Alvis, P.A., by B. T. Henderson, II, Edward B. Clark, and Josephine R. Darden, for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiffs contend that the trial court erred to their prejudice in granting summary judgment for defendants and dismissing plaintiffs' action.

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). Where the pleadings or proof of the plaintiff disclose that no claim exists, summary judgment for defendant is proper. *Warren Brothers Co. v. N.C. Dept. of Transportation*, 64 N.C. App. 598, 307 S.E. 2d 836 (1983). In such a case plaintiff's claim is said to be insurmountably barred. *Id.* An examination of the record in the present case discloses such a bar to plaintiffs' claim and dictates that the trial court's grant of summary judgment for defendants be affirmed.

It is undisputed that the contract that Mrs. Brown signed contains the following provisions: "The date of closing shall be within 60 days from the effective date of this agreement. The effective date shall be the date on which the sellers inform the purchaser of the names of all the owners of the property and of the

fact that they are able or will be able to furnish title as provided herein. . . . In the event the property has not been closed by December 31, 1983, this agreement shall be terminated and the earnest money, if any, returned to the Purchaser. Purchaser shall have the right to extend the closing date for an additional sixty (60) days upon depositing an additional earnest money in the sum of Ten Thousand Dollars ($10,000.00)."

It is also undisputed that not only had there been no closing by 31 December 1983, but that the "effective date of this agreement" had not (and still has not) occurred. Although the contract contained the provision allowing the purchaser to extend the closing date by depositing an extra ten thousand dollars, Colonial Building Company did not take advantage of this provision. Clearly the contract, if it ever became effective at all, terminated by its own terms.

Plaintiffs argue that this expiration date provision cannot be taken at face value. Edd K. Roberts, president of plaintiff Colonial Building Company, states in his affidavit that,

> . . . recognizing that (a) by December 31, 1983, circumstances may change in unforeseeable ways so that it would no longer be feasible to close and (b) Mrs. Brown might not succeed in locating all illegitimate heirs to Tract 4, we inserted a provision in the contract on page 2 that I would be relieved of my obligation to purchase the property and that if I wished to extend the closing date, I could do so by making an additional earnest money deposit. It certainly was not the intent of the parties that the contract would terminate without any consequences to any of the parties without regard to the reason why the transaction was not closed by December 31, 1983.

However, this is not what the contract says. The plain unambiguous language of the contract merely states that "[i]n the event the property has not been closed by December 31, 1983, this agreement shall be terminated . . ." The legal effect of a final instrument which defines and declares the intentions and rights of the parties cannot be modified or corrected by proof of any preliminary negotiations or agreement, nor is it permissible to show how the parties understood the transaction in order to explain or qualify what is in the final writing, in the absence of an

allegation of fraud or mistake or unless the terms of the instrument itself are ambiguous and require explanation. *Root v. Insurance Co.*, 272 N.C. 580, 158 S.E. 2d 829 (1968). In the present case, there has been no allegation of fraud or mistake, and the term in the contract is unambiguous. Under these circumstances, the term must be taken at face value, and plaintiffs have no claim against defendants.

Because the record discloses this insurmountable bar to plaintiffs' claim, the court was correct in granting defendants' motion for summary judgment and in denying plaintiffs' motions.

Affirmed.

Judges MARTIN and COZORT concur.

STATE OF NORTH CAROLINA v. JOHN EDWARD DARROW

No. 8610SC441

(Filed 30 December 1986)

1. **Criminal Law § 143.6— probation revocation—evidence, findings and conclusions sufficient**

The trial court did not err by denying defendant's motion to dismiss for insufficient evidence a probation revocation hearing where the court's findings that defendant had made obscene telephone calls were supported by the evidence, despite the presence of conflicting testimony, and the court's findings supported its conclusion that defendant had violated the terms of his agreement and that his removal from the felony diversion program was for just cause. N.C.G.S. § 15A-1341(a).

2. **Criminal Law § 143.5— probation revocation—background evidence—no error**

The trial court did not err in a probation revocation hearing by admitting evidence regarding defendant's original arrest for burglary, including an open copy of "Playboy" found in a closet, where the court stated that it was admitting the evidence only as background information and the findings were fully supported by competent evidence. The trial court is not bound by strict rules of evidence in probation revocation hearings and is presumed when sitting without a jury to rely only on competent evidence.

APPEAL by defendant from *Read, Judge*. Order entered 10 December 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 17 November 1986.

Defendant was charged in a warrant with first degree burglary of the home of Ms. Judy Crane. Prior to indictment, defendant, on 5 September 1984, executed an agreement with the State pursuant to G.S. 15A-1341(a) whereby he would participate in the felony diversion program and be placed on probation. The State agreed to defer prosecution on the burglary charge in exchange for defendant's agreeing to abide by certain restrictions while on probation. One of those restrictions was that defendant could not contact or harass Ms. Crane. Thereafter, Ms. Crane reported to the police that she had received two obscene telephone calls from defendant. Defendant's participation in the felony diversion program was terminated and an indictment was obtained charging defendant with second degree burglary.

Defendant filed a motion in superior court, stating that he had complied with the pretrial diversion agreement and asking the court to dismiss the indictment. The court held an evidentiary hearing on the question of whether the State had just cause to terminate his participation in the felony diversion program. After the hearing, the court made findings of fact and concluded that defendant had violated a condition of the agreement and that his termination from the program was for just cause. The court denied defendant's motion to dismiss the indictment.

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

Purser, Cheshire, Parker & Hughes, by Gordon Widenhouse, for the defendant-appellant.

EAGLES, Judge.

[1] Defendant argues that the court erred in denying his motion to dismiss because the evidence was insufficient to show that he violated the terms of the agreement. We disagree.

Defendant was allowed to participate in the felony diversion program pursuant to an agreement with the State under G.S. 15A-1341(a). This probationary status, however, is a matter of grace, not of right. *State v. Lombardo*, 306 N.C. 594, 295 S.E. 2d 399 (1982). Consequently, in probation revocation proceedings, grounds for revocation need not be proven beyond a reasonable doubt. *State v. Duncan*, 270 N.C. 241, 154 S.E. 2d 53 (1967). In-

stead, the court may allow revocation of probation on evidence which is sufficient to satisfy the court, in its discretion, that defendant has violated a valid condition of his probation. *State v. Ginn*, 59 N.C. App. 363, 296 S.E. 2d 825, *disc. rev. denied*, 307 N.C. 271, 299 S.E. 2d 217 (1982).

Here, the trial court found that the State proved, by a preponderance of the evidence, that defendant made an obscene telephone call to Ms. Crane on both 14 September 1984 and 10 July 1985. Since defendant signed his agreement with the State on 5 September 1984, these findings would support the trial court's conclusion that defendant violated the terms of his agreement and that his removal from the felony diversion program was for just cause. Findings of fact which are supported by competent evidence are binding on appeal, *State v. Dampier*, 314 N.C. 292, 333 S.E. 2d 230 (1985), even if there is evidence to the contrary. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977).

Examining the record, we find that the trial court's findings are fully supported by the evidence. Ms. Crane testified that she received an obscene telephone call on each of the dates in question. She testified that she was familiar with defendant's voice and that she recognized the voice of the caller as being defendant's. She further testified that she spoke with defendant for several minutes during each of the calls and that he used obscene language, attempted to convince her to engage in sexual acts with him, and told her that he was coming over to her home.

Defendant argues, however, that Ms. Crane's testimony was incredible. First, defendant claims that his evidence establishes an alibi on each of the two occasions she reported receiving a call. Second, defendant argues that the testimony of his witnesses show that, due to changes in his voice, Ms. Crane could have been mistaken as to the identity of her caller. Defendant's evidence clearly conflicts with Ms. Crane's testimony. This does no more, however, than raise an issue of credibility, which in this proceeding is a question for the trial court to decide. *State v. Booker*, 309 N.C. 446, 306 S.E. 2d 771 (1983). Ms. Crane's testimony regarding her familiarity with defendant's voice, and the length at which she spoke with the caller, serves as a sufficient basis from which the court could believe her identification of the caller. The trial court's finding of fact that defendant made obscene phone calls to Ms. Crane is adequately supported by the evidence.

[2] Defendant next argues that the trial court erred in admitting testimony by Ms. Crane regarding the events which resulted in defendant's arrest and charge of burglary. His objection includes Ms. Crane's testimony about an open copy of "Playboy" magazine which she found in a closet after defendant had allegedly broken into her home. Assuming, *arguendo*, that the evidence objected to was inadmissible under our rules of evidence, defendant has, nevertheless, failed to show any prejudicial error. The trial court, in probation revocation proceedings, is not bound by strict rules of evidence. *State v. Duncan, supra; State v. Coleman*, 64 N.C. App. 384, 307 S.E. 2d 207 (1983). Moreover, where the trial court, sitting without a jury, admits both competent and incompetent evidence, it will be presumed that the court relied on only the competent evidence and disregarded the incompetent evidence. *State v. Baines*, 40 N.C. App. 545, 253 S.E. 2d 300 (1979). Defendant has failed to show anything to overcome this presumption. The trial judge stated that he was admitting the evidence only as background information and his findings, as already noted, are fully supported by competent evidence.

No error.

Judges ARNOLD and JOHNSON concur.

MARY A. CAUSBY, EMPLOYEE-PLAINTIFF v. BERNHARDT FURNITURE COMPANY, EMPLOYER, AND TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANTS

No. 8610IC680

(Filed 30 December 1986)

Master and Servant § 65.2— workers' compensation—back injury—absence of traumatic incident

The evidence supported a determination by the Industrial Commission that plaintiff's back injury was not the result of a specific traumatic incident and thus was not compensable where it tended to show that plaintiff's job was to catch pieces of wood that had passed through various machines, stack them on a hand truck, and push the hand truck to another location; plaintiff was forced to stop working on 18 April 1985 because of a severe pain in her back; plaintiff had had similar trouble eight months earlier when she was pregnant; plaintiff's back had given her more and more pain during the previous two

months after she had again been given heavy work to do; a day or two before 18 April her back hurt so badly that she was crying while trying to do her job; and she had let a couple loads of wood go by earlier in the afternoon of 18 April because of the pain in her back.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission. Opinion and award entered 18 April 1986. Heard in the Court of Appeals 10 December 1986.

Plaintiff was an employee of defendant Bernhardt Furniture Company. On 18 April 1985, while plaintiff was acting within the scope of her employment, she grew ill and was forced to stop working, due to a severe pain in her back. Plaintiff's claim for workers' compensation was heard by Deputy Commissioner Winston L. Page, Jr., on 8 October 1985. At the hearing, evidence was presented tending to show the following:

Plaintiff was a "tailer," which means that her job was to catch various pieces of wood which had passed through various machines. She stacked the wood on a hand truck and, when the hand truck was full, she pushed it to a different spot.

On 9 August 1984 plaintiff was seven months pregnant, but working at her regular job. While pushing one of these hand trucks, she felt some stinging in her back, her legs got numb, she felt sick to her stomach, and she felt as though she was going to pass out. On the advice of her obstetrician, plaintiff took a leave of absence until 26 November 1984. During these months her back continued to bother her, but to a lesser degree.

When plaintiff returned to work, she was put on relatively light work for several months, but was switched to heavy work about two months before 18 April 1985. Her pain increased steadily over this two-month period. A day or two before the eighteenth her back was hurting her so badly that she was crying while trying to do her work.

On 18 April 1985, plaintiff was tailing a ripsaw, and was handling large pieces of wood. Her back was hurting to the extent that she had to let a couple of loads go through without doing what she was supposed to do. Finally, at 3:15 p.m., she felt a stinging in her back, her legs became numb, she felt sick to her stomach, and felt as though she was going to pass out.

The Deputy Commissioner filed an opinion and award denying plaintiff compensation. He stated in his findings of fact that plaintiff's back injury of 18 April 1985 was not the result of a specific traumatic incident. He stated in his conclusions of law that for that reason, this injury was not compensable. He also stated that plaintiff's injury of 9 August 1984 was not compensable because plaintiff did not either report in writing her injury to her employer within thirty days of its occurrence, or give a reasonable excuse for not doing so, as required by G.S. 97-22.

Plaintiff appealed to the full commission, which affirmed the opinion and award of the deputy commissioner, and adopted it as the opinion and award of the full commission. Plaintiff appealed.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, by C. Scott Whisnant, for plaintiff, appellant.

Patrick, Harper & Dixon, by Gary F. Young, for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiff contends the Industrial Commission erred in making the finding of fact that plaintiff's injury of 18 April 1985 was not the result of a specific traumatic incident, and the resulting conclusion of law that plaintiff did not sustain a compensable injury.

Review of an award of the Industrial Commission is limited to questions of (1) whether there was competent evidence before the Commission to support its findings of fact, and (2) whether such findings of fact support its conclusions of law. *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985).

The critical finding of fact in the present case, which plaintiff contends is error, is that plaintiff's injury was not the result of a specific traumatic incident. We hold that there is competent evidence in the record to support this finding of fact. Among the evidence tending to show that a specific traumatic incident was not the cause of plaintiff's injury is Ms. Causby's testimony that she had had similar trouble eight months earlier when she was pregnant; her testimony that her back had given her more and more pain in the two months before 18 April 1985, when she was given heavy work to do; her testimony that a day or two before 18

April her back hurt her so badly that she was crying while trying to do her job, and her testimony that earlier in the afternoon of 18 April she had let a couple of loads go by because of the pain in her back.

Plaintiff specifically excepts to the Industrial Commission's finding of fact that plaintiff "experienced additional back pain over the morning hours" and that "pain gradually increased to the point where she could no longer do her job." We hold that there is competent evidence to support this finding, except for the word "morning." However, the exact point in time at which plaintiff's back began to bother her on that day is insignificant. There is still ample evidence to support the important and legally significant finding of fact that "[p]laintiff's back pain was not the result of any specific traumatic incident in that plaintiff had experienced back pain over an extended period of time since returning to work in November of 1984."

For an injury to be compensable under the Workers' Compensation Act, the claimant must prove that the injury was caused by an accident. G.S. 97-2(6); *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 233 S.E. 2d 529 (1977). G.S. 97-2(6) provides that "[w]ith respect to back injuries, however, where injury to the back . . . is the direct result of a specific traumatic incident of the work assigned, 'injury by accident' shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident."

Therefore, the Industrial Commission's conclusion of law that plaintiff did not sustain a compensable injury is adequately supported by the finding of fact that "plaintiff's back pain was not the result of any interruption of her normal work routine in that plaintiff was doing her usual job in her usual and customary manner. Plaintiff's back pain was not the result of any specific traumatic incident in that plaintiff had experienced back pain over an extended period of time since returning to work in November of 1984."

Affirmed.

Judges JOHNSON and GREENE concur.

RAYNOR STEEL ERECTION, A PARTNERSHIP, AND GERALD NELSON RAYNOR AND EVA RAYNOR, PARTNERS D/B/A RAYNOR STEEL ERECTION v. YORK CONSTRUCTION COMPANY AND THE ATLANTIC STATES BANKCARD PROPERTIES CORPORATION

No. 8610SC329

(Filed 30 December 1986)

Negligence § 2— cause of steel framing collapse—genuine issue of material fact

In plaintiff subcontractor's action to recover for the erection of the steel framing for a building being constructed by defendant general contractor after the framing collapsed in a high wind, a genuine issue of material fact was presented as to the cause of the collapse, and the trial court erred in entering an order of summary judgment dismissing plaintiff subcontractor's complaint and allowing defendant general contractor to recover under its counterclaim, where defendant's forecast of evidence tended to show that the framing collapsed in wind of only 27 miles per hour due to plaintiff's failure adequately to brace the framing in accordance with requirements of the N. C. Building Code and plaintiff's failure to tighten various bolts that held the different parts of the framing together, and where plaintiff's forecast of evidence contradicted that of defendant by tending to show that it properly tightened and braced the framing, that defective materials furnished by defendant were used upon instructions by defendant, and that the structure fell because defendant's footings, fabricated steel and design were defective.

APPEAL by plaintiffs from *Bailey, Judge*. Order entered 3 January 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 23 September 1986.

Defendant York Construction Company, the general contractor, architect and engineer for a four-story steel supported building that was being constructed for the other defendant, contracted to pay plaintiffs $27,999 to erect the steel for the structure. After plaintiff had erected the steel framing up to the fourth floor the structure collapsed in a high wind and defendant York Construction, contending that the collapse was plaintiffs' fault, refused to pay for the work that had already been done. Plaintiffs sued under their subcontract to recover $22,999 of the defendant general contractor and to enforce a lien in that amount against the defendant property owner. York denied liability and counterclaimed for damages in the amount of $261,580, alleging that in erecting the steel plaintiffs failed to follow both the contract terms and approved steel construction practices. Following discovery and a hearing on motions made by the defendants the

court entered an order of summary judgment dismissing plaintiffs' complaint and allowing defendant York to recover $261,580 of plaintiffs on its counterclaim.

E. Gregory Stott and Poyner & Spruill, by John L. Shaw and David M. Barnes, for plaintiff appellants.

Sanford, Adams, McCullough & Beard, by J. Allen Adams and John J. Butler, for defendant appellee York Construction Company.

R. Frank Gray for defendant appellee The Atlantic States Bankcard Properties Corporation.

PHILLIPS, Judge.

At the hearing on defendants' motions for summary judgment they presented much evidence, expert and otherwise, tending to show that plaintiffs did not properly erect the steel for their building and are liabile to them for the structure's collapse. In gist, their evidence tends to show that the framing collapsed in wind of only 27 miles an hour due to two failures on plaintiffs part—the failure to adequately brace the steel framing, as the North Carolina State Building Code requires, and the failure to tighten various bolts that held the different parts of the framing together. The main question presented by plaintiffs' appeal is whether their forecast of evidence materially contradicts defendants' evidence as to the particulars stated, and thus raises a question of material fact for the jury. We believe that it does and vacate the order of summary judgment.

In pertinent part the affidavit of the plaintiff Gerald Raynor is to the following effect: He has twenty-two years experience in steel construction and is familiar with the generally accepted steel erection practices and procedures in this state. The drawings for many pieces of structural steel used in the building did not show bolt connections and required welding to hold them in place but before the steel could be welded it had to be erected and plumbed. York provided only two anchor bolts for each steel column, installed the bolts in concrete blocks not strong enough for the purpose, and one of the columns could not be firmly attached to an anchor bolt because the bolt was loose inside the block that it was embedded in. He told York Construction's site

superintendent, Mr. Little, that he was concerned that the structural steel had not been designed strong enough, it didn't have sufficient bracing, and the foundation was not strong enough to hold up the steel; Little told him to go ahead with his work and that York wanted the steel erected as soon as possible. During construction he discovered that many pieces of the structural steel were too long or too short and the holes for some connections were too big or misaligned; because of the defects he could not make the steel pieces fit snugly against each other, and the connecting bolts did not fit some of the holes. These fabrication errors were also called to York's attention and he was again told that they were in a hurry to complete the building and he should complete his work without further delays. On 27 July 1984 he had erected basically all of the structural steel and had properly tightened, bolted and braced the structure. He saw the collapsed steel and in many places the two anchor bolts had pulled out of the concrete block causing the columns to fall. In his opinion the structure collapsed because it was not designed properly and because of the fabrication errors and insufficient footings described.

This forecast of plaintiffs' proof at trial clearly raises issues of material fact for a jury and the court's ruling to the contrary is error. It tends to show, *inter alia*, that plaintiffs substantially performed their agreement and duties, and that they properly tightened and braced the frame; that defective materials furnished by defendants were used upon their instructions; and that the structure fell because defendants' footings, fabricated steel and design were defective. Nor is the judgment necessarily correct, as defendants argue, because defendants' proof indicates that the State Building Code was not complied with and there is authority for the proposition that the Code holds the erector strictly liable for properly bracing and tightening a steel frame under construction. *Lindstrom v. Chesnutt*, 15 N.C. App. 15, 189 S.E. 2d 749, *cert. denied*, 281 N.C. 757, 191 S.E. 2d 361 (1972). For plaintiffs' forecast of evidence gives rise to the legal principle that a subcontractor is not liable to his contractor for using the contractor's materials and following the contractor's instructions. *Burke County Public Schools Board of Education v. Juno Construction Corp.*, 50 N.C. App. 238, 273 S.E. 2d 504, *aff'd*, 304 N.C. 187, 282 S.E. 2d 778 (1981); 17A C.J.S. *Contracts* Sec. 515 (1963). But, of course, which of the many legal rules that could apply to the case actual-

ly do so will depend upon the view that the jury takes of the evidence when it is presented to them. Which is why issues involving negligence, proximate cause, reasonableness and the like can seldom be correctly determined by summary judgment. *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E. 2d 868 (1983). Thus, the judgment entered is vacated in all respects.

Vacated.

Judges PARKER and COZORT concur.

STATE OF NORTH CAROLINA v. ROBERT SPRINGER

No. 865SC383

(Filed 30 December 1986)

1. Homicide § 21.3— proximate cause of death—evidence sufficient

There was sufficient evidence in a homicide prosecution to support a finding that the blow allegedly struck by defendant proximately caused the victim's death where there was evidence tending to show that defendant struck the victim with an iron bar; that the victim fell immediately, was unconscious, and went into cardiac arrest; and that the victim's death was caused by a subarachnoid hemorrhage, which the State pathologist felt was caused by trauma, though other medical experts differed on the cause of the hemorrhage.

2. Criminal Law § 89.6— impeachment of witness—prior false statement

The trial court did not err in homicide prosecution by permitting the prosecutor to elicit testimony from a defense witness that he had obtained a warrant against defendant for assaulting him with a shotgun on the same day defendant assaulted the victim where the witness admitted that the statement to the magistrate was false. It was permissible for the prosecutor to impeach the witness by cross-examining him about a false statement under oath to the magistrate, and, considering the limiting instruction which was given, there was not a reasonable possibility that a different result would have been reached had the evidence not been omitted. N.C.G.S. § 8C-1, Rule 611(b) Rule 608(b), N.C.G.S. § 15A-1443(a).

APPEAL by defendant from *Allsbrook, Judge*. Judgment entered 5 December 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 8 December 1986.

Defendant was properly indicted for the murder of James Harold Jenkins and the State elected to proceed upon a charge of

second degree murder. At trial, the State's evidence tended to show that defendant struck Jenkins on the neck with an iron bar that was 40 inches long and weighed 13½ pounds. Jenkins fell to the ground, was rendered immediately unconscious, and was in "full cardiac arrest" when rescue personnel arrived. He was revived, but did not regain consciousness and died approximately three days later. The pathologist who performed an autopsy upon Jenkins' body testified that Jenkins died of a "diffuse subarachnoid hemorrhage of the brain" that, in his opinion, was a result of trauma and could have been caused by Jenkins' fall after being struck. On cross-examination, the doctor testified that he found no physical evidence of trauma to Jenkins' head and based his opinion upon the absence of a naturally occurring aneurism and upon the information related to him as to the manner in which Jenkins was injured.

Defendant presented evidence tending to show that he struck Jenkins in self-defense after Jenkins had pulled a knife. He also presented evidence from five medical doctors, four of whom had been involved in treating Jenkins at the hospital before his death. The fifth doctor had reviewed Jenkins' medical records. Each of these witnesses testified that he was unable to find evidence of trauma and could not reach the conclusion that Jenkins' hemorrhage resulted from the blow struck by defendant.

The jury returned a verdict of guilty of second degree murder. From judgment imposing a prison sentence of 35 years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Wilson Hayman, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., for defendant appellant.

MARTIN, Judge.

[1] Defendant first contends that it was error for the court to deny his motion to dismiss made at the close of all the evidence. He argues that the evidence was legally insufficient to support a finding that the blow allegedly struck by defendant proximately caused Jenkins' death. We disagree.

The question presented by a motion to dismiss in a criminal case is whether there is substantial evidence of each element of the offense charged. *State v. Brown*, 310 N.C. 563, 313 S.E. 2d 585 (1984). This standard is consistent with the federal standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed. 2d 560, 99 S.Ct. 2781, *reh'g denied*, 444 U.S. 890, 62 L.Ed. 2d 126, 100 S.Ct. 195 (1979), and urged upon us in this case by defendant. *Id.* In ruling upon the motion, the trial judge must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference which may be drawn therefrom. *State v. Powell*, 299 N.C. 95, 261 S.E. 2d 114 (1980). Conflicts in the evidence merely create issues for the jury and do not warrant dismissal of the charges. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

In the present case it is true, as defendant argues, that the opinions of the several medical expert witnesses differed as to the cause of the subarachnoid hemorrhage from which Jenkins' death resulted. However, the evidence tending to show that defendant struck Jenkins with the iron bar, that Jenkins fell immediately and was rendered unconscious and went into cardiac arrest, together with the testimony of the State's pathologist that Jenkins' death was caused by the subarachnoid hemorrhage which in his opinion, was produced by trauma, is sufficiently substantial evidence on the issue of proximate cause to warrant submission of the case to the jury. *See State v. Luther*, 285 N.C. 570, 206 S.E. 2d 238 (1974).

[2] By his other assignment of error, defendant contends that the trial court erroneously permitted the prosecutor to elicit testimony from a defense witness, James Edward Stokes, that he had obtained a warrant against defendant for assaulting him with a shotgun on the same day defendant assaulted Jenkins. Defendant contends that the evidence tended to show that he has a violent disposition, negating his claim of self-defense. He argues that the prejudicial effect of the evidence so outweighs its probative value that it should have been excluded pursuant to G.S. 8C-1, Rule 403.

Stokes gave testimony for defendant tending to support defendant's claim of self-defense. On cross-examination, the prosecutor asked Stokes if he had, on the same date, made a sworn

statement to a magistrate in order to cause a warrant to issue against defendant for assault with a shotgun. Defendant's objection was overruled. Stokes admitted having made the statement to the magistrate, but denied that defendant had assaulted him. He claimed that he made the sworn statement to the magistrate because he was angry with defendant. The trial court limited the jury's consideration of the challenged testimony to the issue of Stokes' credibility.

G.S. 8C-1, Rule 611(b) permits cross-examination of a witness "on any matter relevant to any issue in the case, including credibility." Rule 608(b) permits cross-examination of a witness as to specific instances of his conduct, if probative of truthfulness or untruthfulness, for the purpose of attacking or supporting his credibility. A specific instance of false swearing is clearly probative of untruthfulness. Thus, it was permissible for the prosecutor to impeach and cast doubt upon Stokes' other testimony by cross-examining Stokes concerning his false statement under oath to the magistrate. See State v. Gallagher, 313 N.C. 132, 326 S.E. 2d 873 (1985).

Furthermore, we cannot agree with defendant's assertion that the prejudicial effect of this evidence outweighed its probative value. Stokes admitted that his claim as to defendant's violent conduct on the day in question was false. Especially considering that a limiting instruction was given by the court, we perceive no reasonable possibility that a different result might have been reached if the evidence had not been admitted. *See State v. Gallagher, supra*; G.S. 15A-1443(a).

No error.

Judges COZORT and ORR concur.

CECIL C. HILL, JR. v. LINDA HILL (CRICHETT)

No. 863DC389

(Filed 30 December 1986)

Divorce and Alimony § 30— equitable distribution—equal division of property

An equitable distribution judgment dividing the marital assets equally between the parties was supported by the findings of fact and conclusions of law stated therein.

APPEAL by plaintiff from *Ragan, Judge.* Judgment entered 16 December 1985 in District Court, CARTERET County. Heard in the Court of Appeals 18 September 1986.

On 4 November 1983 the plaintiff sued defendant for an absolute divorce and for the equitable distribution of their property. Service on defendant was apparently obtained by publication and no answer or other pleading being filed within the time designated an entry of default was obtained from the Clerk. On 12 January 1984 Judge Roberts held a hearing and entered judgment divorcing the parties and divesting the defendant of her title interest in a certain piece of real estate. A few days later defendant filed a motion for relief from the judgment and following a hearing thereon the judgment was set aside upon findings that the purported service upon defendant was void because plaintiff had not exercised due diligence in attempting to locate and serve defendant personally. Following defendant's answer to the complaint and a new judgment of divorce, Judge Ragan heard the equitable distribution pleas of both parties and after making certain adjustments entered judgment dividing the marital assets equally between the parties. Plaintiff's appeal is from the latter judgment.

Wheatly, Wheatly, Nobles & Weeks, by C. R. Wheatly, Jr., for plaintiff appellant.

Richard F. Gordon for defendant appellee.

PHILLIPS, Judge.

Though plaintiff's brief lists six questions for determination, he makes only one argument; an argument that refers to no question stated and to no assignment of error whatever. And though

many exceptions are referred to in the brief the reference to all but three consists only of the following, with no clue given as to the page of the record or transcript where any exception might be found:

> Pursuant to the above, we are of the opinion Exceptions 25, 26, 27, 28, 29, 30, 32, 33, 34, 35, 36, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 62, 63, 64, 65, 66, 67, 68 and 69 are well taken, and are supported by the above argument and the documentary evidence.

No assignment of error having been brought forward and argued in the brief, all the assignments taken are deemed to have been abandoned. Rule 28(a), N.C. Rules of Appellate Procedure. Because of that circumstance our review is limited to examining the record proper and determining whether the judgment is supported by the findings of fact and conclusions of law stated therein. Rule 10(a), N.C. Rules of Appellate Procedure. Having examined the record we are of the opinion that the judgment is so supported.

Affirmed.

Judges PARKER and COZORT concur.

THE NEW HANOVER HUMAN RELATIONS COMMISSION AND NEW HANOVER COUNTY, AND INTERVENOR JAMES A. ROBINSON v. PILOT FREIGHT CARRIERS, INC.

No. 865SC741

(Filed 6 January 1987)

1. Administrative Law § 8— judicial enforcement of commission order—scope of review

The trial court had the authority pursuant to the New Hanover County Code to decline to enforce an order by the New Hanover Human Relations Commission that respondent rehire a Jehovah's Witness who had been fired for not working on Thursday nights where the court found that the Commission's order was affected by error of law and unsupported by substantial evidence in view of the entire record.

2. Master and Servant § 7.5— Jehovah's Witness—finding that employer burden de minimis—not supported by evidence

The trial court correctly concluded that findings by the New Hanover County Human Relations Commission that its suggested employer accommodations for a Jehovah's Witness who would not work on Thursday nights would impose only a de minimis cost on the employer were not supported by the evidence and were affected by an error of law.

3. Administrative Law § 8— judicial review of Human Relations Commission order—findings and conclusions sufficient

The trial court's findings and conclusions were sufficient to support its order declining to enforce an order of the New Hanover County Human Relations Commission where the court concluded that the Commission's order was affected by error of law and unsupported by competent evidence in the record and made additional conclusions of law, discussing its decision at length.

APPEAL by intervenor petitioner from *Strickland, Judge.* Judgment entered 25 March 1986, in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 17 December 1986.

This is a proceeding wherein petitioners seek enforcement of the order of petitioner New Hanover Human Relations Commission entered 27 June 1985, directing respondent Pilot Freight Carriers to reinstate intervenor petitioner Robinson as Operations Manager of its terminal located in Wilmington, N.C.

On 24 January 1985, a hearing panel of the New Hanover Human Relations Commission [hereinafter the Commission] conducted a hearing to determine whether Pilot Freight Carriers [hereinafter Pilot] had discharged an employee, James A. Robinson, because of his religion in violation of Sec. 6.5-23(a)(1) of the New Hanover County Code. Evidence was introduced at the hearing tending to show the following: Pilot hired Robinson for the position of Operations Manager of its Wilmington terminal in 1973. Robinson has been a Jehovah's Witness since 1957, and Pilot was aware of his religious affiliation when he was hired. Robinson's position in his church requires him to attend a meeting every Thursday night. From 1975 until 1980, Robinson worked for Pilot in the daytime. In 1980, Pilot found it necessary to reduce the clerical and salaried positions in its workforce. In these positions, only one full-time clerk, one part-time clerk and three salaried workers remained. The remaining salaried positions were the terminal manager, Lynn Frye (Robinson's supervisor); the operations manager, Robinson; and the sales representative,

Stanley Godwin. It was necessary for one of the clerical or salaried employees to work during operating hours to supervise the terminal. Robinson was required to begin working at night. When Robinson objected to working on Thursday nights, a clerical employee, Lena Williams, substituted for him on those nights from late 1980 until March 1982. Eventually, Williams only worked on Thursday nights until Pilot determined that for economic reasons it could no longer justify paying Williams to substitute for Robinson. Godwin and Frye began substituting for Robinson on alternate Thursdays. This arrangement required Godwin to work for sixteen hours on Thursdays and after a few weeks he informed Frye that he could not continue substituting for Robinson and continue his regular duties. Frye began working for Robinson every Thursday night, in addition to his regular duties. This additional work interfered with Frye's regular duties and had a negative effect on his morale and attitude. On Thursday, 20 May 1982, Frye told Robinson that he must work on Thursday nights. In discussions with Frye, Robinson suggested several arrangements for reconciling his need to attend his Thursday meetings and Pilot's requirements. Pilot rejected all of his suggestions. Robinson left the terminal the next Thursday, 27 May 1982, to attend his meeting. Frye then told Robinson to work on the next Thursday, 3 June 1982, or be terminated. Pilot's Vice President of Personnel, David Waugh, asked Robinson to work 3 June in order to give Pilot additional time to work out a solution and asked him if he would consider transferring to another terminal. Robinson would not agree to either of these suggestions. Robinson attended his meeting on 3 June 1982 and was discharged when he returned to work.

Following the hearing, the hearing panel on behalf of the Commission entered an order, making findings of fact consistent with the facts summarized above. The hearing panel also found that although Pilot had accommodated Robinson's religious practice from late 1980 until May 1982, that it had not tried to accommodate him during the period of 20 May 1982 until 3 June 1982. The hearing panel further found that the following arrangements could have been made by Pilot to accommodate Robinson's needs at a de minimis cost to Pilot. First, Robinson could have traded shifts on Thursdays with Margaret Spurling, a daytime clerk, because each was familiar with the duties of the other and

qualified to do the other's jobs. Second, Robinson could work Frye's day shift on Thursdays while Frye substituted for Robinson three hours on Thursday evening. The hearing panel reasoned that since Robinson had twice been offered the job of terminal manager and was familiar with Frye's daytime duties, he was qualified to substitute for Frye. The hearing panel also found that although this arrangement would prevent Frye from carrying out his duties related to sales and the entertainment of customers on Thursday evenings, Godwin was available for these duties or Frye could devote three hours during the day on Thursday to them. Based on these findings, the hearing panel concluded that Pilot had failed to reasonably accommodate Robinson's religious practices as required by the New Hanover County Code, because "it ignored at least two available alternative means of accommodating the charging party's religious practices, both of which were reasonable, and neither of which would have constituted a greater than *de minimis* hardship." The hearing panel on behalf of the Commission ordered Pilot, based on these findings and conclusions, to reinstate Robinson's employment at Pilot, to pay him back wages from 3 June 1982, and to make reasonable accommodations for his religious practices.

On 21 January 1986, the Commission and New Hanover County filed a petition in the Superior Court, New Hanover County, seeking an order compelling Pilot to comply with the order entered by the Commission on 27 June 1985, alleging that Pilot had failed to comply with the order in any respect. Robinson made a motion to intervene in the proceedings, which was allowed on 14 March 1986. Pilot filed a motion to dismiss the petition, alleging that the petition had not been timely filed, which the trial court denied. On 25 March 1986, after reviewing the record of the administrative proceedings and the briefs of the parties and hearing oral arguments, the trial court entered an order wherein it concluded as a matter of law that the accommodations to Robinson's religious beliefs suggested by the Commission were unsupported by the evidence, affected by error of law, and amounted to a substitution of uninformed business judgment for the judgment legitimately exercised by Pilot. The court concluded that Pilot's efforts to accommodate Robinson's religious practices prior to his discharge "went beyond the efforts required by law." The court further concluded that the Commission's suggestions that super-

visory personnel or personnel from other departments could trade jobs with Robinson on Thursdays without any loss of efficiency are speculative and contrary to reason and that such an arrangement was not required by the statute requiring employers to make "reasonable accommodations" to employees' religious practices.

From an order denying the petition for enforcement and dismissing the petition, intervenor petitioner Robinson appealed.

James B. Gillespie, Jr., for intervenor petitioner, appellant.

Blakeney, Alexander & Machen, by William L. Auten, for respondent, appellee.

HEDRICK, Chief Judge.

[1] By his first three assignments of error, intervenor petitioner contends the New Hanover County Code required the trial court to enforce the Commission's order. Intervenor petitioner argues that Pilot's failure to appeal the hearing panel's order to the full Commission or to the superior court precluded "substantive review" of the order when he sought to have it enforced. He further argues if the trial court was entitled to review the Commission's order, such review should have been limited to questions of "major irregularity of administrative proceedings."

Sec. 2-33(3), of the New Hanover County Code, provides that if sixty days after the entry of an order of the hearing panel or commission, a respondent has neither complied with nor sought review of the order, any aggrieved person or the commission may apply to the superior court for an order enforcing the commission's order. The ordinance further provides that following a hearing on such petition:

> (d) The court shall issue the order requiring compliance with the hearing panel's or commission's order unless it finds that enforcement of the order would prejudice substantial rights of the party against whom the order is sought to be enforced because the findings, inferences, conclusions or decisions of the hearing panel or commission are:
>
> 1. In violation of constitutional provisions;

2. In excess of the statutory authority or jurisdiction of the commission;

3. Made upon unlawful procedure;

4. Affected by other error of law;

5. Unsupported by substantial evidence in view of the entire record as submitted;

6. Arbitrary or capricious.

(e) If the court declines to enforce the hearing panel's or commission's orders for one of the reasons specified in subsection (3)(d), it shall either:

1. Dismiss the petition;

2. Modify the hearing panel's or commission's order and enforce it as modified;

3. Remand the case to the hearing panel or commission for further proceedings.

In the present case, the trial court found that the Commission's order was affected by error of law and unsupported by substantial evidence in view of the entire record. Clearly, the trial court had the authority pursuant to Sec. 2-33(3) of the New Hanover County Code to decline to enforce the petition based upon these findings, regardless of whether Pilot had appealed the Commission's order. These assignments of error are without merit.

[2] Petitioner intervenor next contends the trial court erred in declining to enforce the Commission's order because "the findings of fact, conclusions of law, decision, and order entered by the New Hanover Human Relations Commission were proper and appropriate." We disagree.

Chapter 6.5 of the New Hanover County Code was enacted pursuant to 1981 N.C. Sess. Laws Ch. 960 for the general purpose of securing for all individuals in New Hanover County "freedom from discrimination in connection with employment because of race, color, religion, sex, national origin, handicap or age" and "is intended to carry out in the county the policies provided for in various federal rules, regulations and laws prohibiting employment discrimination, including but not limited to Title VII of the

Civil Rights Act of 1964, as amended." New Hanover County Code Sec. 6.5-17(a), (b) (1981). Sec. 6.5-23 of this Code defines the practices prohibited by the chapter, in part, as follows:

> (a) It is a discriminatory practice for an employer:
>
> (1) To fail or refuse to hire, to discharge or otherwise to discriminate against an individual with respect to compensation on the terms, conditions or privileges of employment because of race, color, religion, sex, national origin, handicap or age.

For the purposes of this chapter, "religion" is defined as follows:

> *Religion* means all aspects of religious observance and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

New Hanover County Code Sec. 6.5-18(g). This definition is essentially the same as the definition of religion for the purposes of Title VII of the Civil Rights Act of 1964. 42 U.S.C. Sec. 2000e(j) (1981).

In *Transworld Airlines, Inc. v. Hardison*, 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed. 2d 113 (1977), the United States Supreme Court was presented with the issue of the extent of an employer's obligation under Title VII to make "reasonable accommodations" to an employee whose religious beliefs prohibit him from working on Saturdays. The Eighth Circuit Court of Appeals had held, in that case, that the employer had not made reasonable efforts to accommodate the employee's religious needs, because it had rejected three available means of accommodation. The Supreme Court reversed and held that any accommodation to the employee's religious practices which would impose more than a de minimis cost to the employer would be an undue hardship and is not required by Title VII. The Court specifically rejected the alternatives suggested by the Circuit Court of Appeals, including the suggestion that the employee be replaced on Saturdays with supervisory personnel or with qualified personnel from other departments, holding that this alternative would result in a

greater than de minimis cost to the employer in the form of lost efficiency.

We have examined the record in the present case and hold that Judge Strickland correctly concluded that the Commission's findings that its suggested accommodations would impose only a de minimis cost on Pilot were not supported by the evidence and were affected by error of law. The whole record before us, the same as the record before Judge Strickland, demonstrates that Pilot made great efforts to accommodate Robinson's religious practices from 1980 until May 1982, first by allowing a clerical employee to work for Robinson on Thursday nights and then by substituting Godwin and Frye for Robinson on those nights. When these alternatives failed because of economic reasons or loss of efficiency, Pilot's terminal manager and the vice president of personnel discussed possible alternatives with Robinson, but they were unable to work out a solution. The accommodations suggested by the Commission, that Robinson trade jobs on Thursdays with Frye, the terminal manager, or with Margaret Spurling, who did not have the same job duties as Robinson, were similar to the suggested accommodations specifically rejected by the Supreme Court in the *Hardison* decision. These accommodations would impose a more than a de minimis cost in the form of lost efficiency and are therefore not required by Chapter 6.5 of the New Hanover County Code.

[3] Finally, intervenor petitioner contends the trial court erred by failing to set out with sufficient specificity its reasons for declining to enforce the Commission's order. We disagree. In its order, the trial court concluded that the Commission's order was affected by error of law and unsupported by competent evidence in the record and made additional conclusions of law, discussing its decision at length. These findings and conclusions were sufficient to support the order declining to enforce the Commission's order, pursuant to Sec. 2-33(3) of the New Hanover County Code.

Because of our disposition of Robinson's appeal, it is unnecessary for us to reach the questions raised by the appellee's cross-assignment of error.

For the foregoing reasons, the judgment of the superior court is affirmed.

Affirmed.

Judges JOHNSON and GREENE concur.

TOWN OF HAZELWOOD v. TOWN OF WAYNESVILLE

No. 8630SC694

(Filed 6 January 1987)

Municipal Corporations § 2— annexation—prior jurisdiction rule—first mandatory public step—resolution of consideration

Summary judgment should have been entered for plaintiff rather than defendant in an action in which plaintiff had begun involuntary annexation procedures with the passage of a resolution of consideration but defendant subsequently completed voluntary annexation of the disputed area before plaintiff completed its involuntary annexation. The passage of a resolution of consideration pursuant to N.C.G.S. § 160A-37 is the first mandatory public procedural step in the statutory process for purposes of the prior jurisdiction rule.

APPEAL by plaintiff from *Pachnowski, Judge*. Order entered 21 February 1986 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 29 October 1986.

The case involves the applicability of the "prior jurisdiction rule" to our municipal annexation statutes. The facts are not is dispute. Both parties are municipal corporations located in Haywood County. On 5 November 1985, plaintiff, the Town of Hazelwood, adopted a "resolution of consideration" pursuant to the involuntary annexation procedures of G.S. 160A-37. Shortly thereafter, property owners in the area being considered for annexation petitioned defendant, the Town of Waynesville, for voluntary annexation pursuant to G.S. 160A-31. Defendant initiated annexation proceedings on 26 November 1985 and completed its voluntary annexation of the disputed area on 28 January 1986.

Prior to defendant's completion of its annexation, plaintiff, on 15 January 1986, filed this action to have defendant's action declared null and void and to enjoin defendant from further annexation proceedings. Both parties moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. On 21 February 1986, after a hearing on the motions, the court granted summary judgment for the defendant.

Haire & Bridgers, by R. Phillip Haire and James M. Spiro, for the plaintiff-appellant.

Smith, Bonfoey & Queen, by Frank G. Queen and Michael Bonfoey, for the defendant-appellee.

EAGLES, Judge.

Because the facts are not disputed and this case involves only a question of law, it is appropriate for summary judgment. *Hamilton v. Travelers Indemnity Co.*, 77 N.C. App. 318, 335 S.E. 2d 228 (1985), *disc. rev. denied*, 315 N.C. 587, 341 S.E. 2d 25 (1986). We reverse the trial court, however, since application of the "prior jurisdiction rule" requires judgment for the plaintiff rather than the defendant.

The prior jurisdiction rule was held applicable to our annexation statutes in *City of Burlington v. Town of Elon College*, 310 N.C. 723, 314 S.E. 2d 534 (1984). The rule operates on a "first in time, first in right" principle and states that, among equivalent proceedings, where two or more municipalities have concurrent jurisdiction to annex a particular area, the municipality which first institutes annexation proceedings has jurisdiction and subsequently commenced annexation proceedings by any other municipality have no effect. *City of Burlington v. Town of Elon College, supra.* Under the rule, annexation proceedings begin when a municipality takes "the first mandatory public procedural step in the statutory process" of annexation. *Id.* at 728, 314 S.E. 2d at 537.

In *City of Burlington*, both parties were municipal corporations seeking to annex the same area. The City of Burlington instituted its annexation proceedings first, adopting a "resolution of intent" pursuant to the involuntary annexation procedures in G.S. 160A-49. About a month later, landowners in the area being considered for annexation, petitioned the Town of Elon College for voluntary annexation under G.S. 160A-31. The town completed its voluntary annexation before the City of Burlington had finished its involuntary annexation of the same area. The court held that the City of Burlington, by passing its resolution of intent, took the "first mandatory public procedural step in the statutory process" and thereby acquired jurisdiction, rendering the Town of Elon's attempted annexation of the area null and void.

The facts here are almost identical to those in *City of Burlington*. The only difference lies in the first procedural step taken by the respective plaintiffs. In *City of Burlington*, the plaintiff adopted a resolution of intent pursuant to the procedures of G.S. 160A-49 which applies to involuntary annexation by a municipality with a population greater than 5,000. Here, the Town of Hazelwood passed a resolution of consideration pursuant to the procedures of G.S. 160A-37 which applies to the involuntary annexation by a municipality with a population less than 5,000. The issue presented here is whether passage of a resolution of consideration pursuant to G.S. 160A-37 is "the first mandatory public procedural step in the statutory process" of G.S. 160A-33 *et seq.* We hold that it is.

G.S. 160A-37(a) provides that a municipality desiring to carry out involuntary annexation under G.S. 160A-33 *et seq.* must pass a resolution stating its intent to consider annexation. G.S. 160A-37(i) states that no resolution of intent may be passed without first having adopted, at least one year prior to the adoption of the resolution of intent, an additional resolution identifying the area being considered for annexation. G.S. 160A-37(j), however, states that subsection (i) does not apply if both the resolution of intent and the annexation ordinance itself provide that the effective date of annexation will be at least one year after passage of the annexation ordinance. The statute thus provides two different procedural methods for beginning the involuntary annexation process under G.S. 160A-33 *et seq.* A municipality may either pass a resolution of consideration one year prior to adopting its resolution of intent or it may immediately adopt the resolution of intent and postpone the effective date of annexation for at least a year after the ordinance is passed.

Defendant argues that passage of a resolution of consideration under G.S. 160A-37(i) is not a "mandatory" procedural step since a resolution of intent will suffice if the date of annexation is properly postponed. We disagree. While a resolution of consideration is not absolutely essential to accomplishing involuntary annexation pursuant to G.S. 160A-33 *et seq.*, it is essential if the municipality does not wish, for whatever reason, to postpone the date of annexation for a year after the annexation ordinance is passed. Plaintiff's adoption of a resolution of consideration was the first mandatory public procedural step in the statutory proc-

ess it chose to utilize. The fact that there was an alternative procedure available to plaintiff is of no consequence here.

Were our holding otherwise, we would be arbitrarily preferring voluntary annexation over involuntary annexation since, once a resolution of consideration is passed, property owners in the area under consideration could, under similar circumstances, do what was done here, i.e. choose another municipality and petition for voluntary annexation by them. Defendant recognizes this but argues that for public policy reasons, it is desirable to allow the citizens of the disputed area to choose which municipality they will join. The court in *City of Burlington*, however, rejected that very argument, holding that voluntary and involuntary proceedings were "equivalent" for purposes of the prior jurisdiction rule and that the property owners in the area should have no choice of municipality once an annexation proceeding has been instituted. 310 N.C. at 729, 314 S.E. 2d at 538.

Plaintiff instituted valid annexation proceedings and acquired jurisdiction over the area when it adopted a resolution of consideration pursuant to G.S. 160A-37(i). Accordingly, defendant's subsequent actions are without effect. We reverse and remand for entry of judgment consistent with this opinion.

Reversed and remanded.

Judges ARNOLD and JOHNSON concur.

L. HARVEY AND SON COMPANY T/A SEVEN SPRINGS SUPPLY CO. v. JUANITA SHIVAR

No. 868SC450

(Filed 6 January 1987)

Appeal and Error § 14— clerk's notation in minutes of court—entry of judgment—notice of appeal not timely

Defendant's appeal from an order denying her relief from a judgment on a note was not timely where the trial judge rendered his decision in open court on 20 November 1985 and directed plaintiff's counsel to prepare the written order; the clerk made a notation of such action in the minutes of the court; there was no indication in the record that defendant gave oral notice of appeal

at the time the order was entered; and defendant filed and served her written notice of appeal on 9 December 1985, 19 days after entry of the order. N.C.G.S. § 1A-1, Rule 58, N.C.G.S. § 1-279(c), N. C. Rules of App. Procedure, Rule 3(c).

APPEAL by defendant from *Brown, Frank R., Judge.* Judgment entered 20 November 1985 in WAYNE County Superior Court. Heard in the Court of Appeals 10 November 1986.

Plaintiff brought this action to recover monies due under the terms of a promissory note. Defendant answered, admitting that she had executed the note. Plaintiff moved for summary judgment, and on 29 April 1985 the motion was allowed and judgment was entered against defendant in the sum of $20,000.00 plus interest, costs and $1,500.00 attorney's fees. Defendant did not appeal.

On 28 August 1985, defendant moved, pursuant to G.S. 1A-1, Rule 60(b), for relief from the judgment. The motion was heard at the 18 November 1985 civil session of the Superior Court of Wayne County. From an order denying her motion for relief from the judgment, defendant appeals.

Cecil P. Merritt for plaintiff appellee.

R. Michael Bruce for defendant appellant.

MARTIN, Judge.

One of defendant's contentions on appeal is that the order appealed from is invalid because it was entered after the expiration of the session of court at which the motion was heard. However, the record on appeal, as originally filed in this Court, was insufficient to enable us to resolve the issue. Therefore, pursuant to App. R. 9(b)(5), we ordered that the minutes of the 18 November 1985 civil session of the Superior Court of Wayne County be sent up and made a part of the record on appeal in this case. The minutes reflect that the trial judge rendered his decision in open court on 20 November 1985 and directed that plaintiff's counsel prepare the written order. The clerk made a notation of such action in the minutes of the court. Such a notation constitutes entry of judgment for the purposes of determining when notice of appeal must be given. G.S. 1A-1, Rule 58; *In re Moore*, 306 N.C. 394,

293 S.E. 2d 127 (1982), *appeal dismissed*, 459 U.S. 1139, 74 L.Ed. 2d 987, 103 S.Ct. 776 (1983).

There is no indication in the record that defendant gave oral notice of appeal at the time the order was entered. She filed and served her written notice of appeal on 9 December 1985, 19 days after "entry" of the order. G.S. 1-279(c) and App. R. 3(c) require that appeal from a judgment or order must be taken within ten days after its entry. "Failure to give timely notice of appeal in compliance with G.S. 1-279 and Rule 3 of the North Carolina Rules of Appellate Procedure is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 189, 301 S.E. 2d 98, 99-100 (1983). Therefore, we are without jurisdiction to consider the merits of defendant's appeal and must order that the appeal be dismissed.

Appeal dismissed.

Chief Judge HEDRICK and Judge COZORT concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 30 DECEMBER 1986

BOWENS v. N.C. STATE BD. OF DENTAL EXAM. No. 8610SC579	Wake (85CV4530)	Dismissed
CARROLL v. KELLY-SPRINGFIELD TIRE No. 8614SC660	Durham (85CVS3188)	Affirmed
DAVID v. DAVID No. 865DC586	New Hanover (80CVD2262)	Affirmed
EDWARDS v. EDWARDS No. 867DC326	Nash (81CVD912)	Reversed & Remanded
GUILFORD CO. PLANNING & DEV. DEPT. v. HICKORY RUN, INC. No. 8618SC652	Guilford (84CVS6053)	Affirmed
KIEL v. HIATT No. 8618SC755	Guilford (85CVS6502)	Affirmed
KING v. FULLER No. 8618SC670	Guilford (83CVS6619)	Affirmed
STATE v. AVERY No. 866SC578	Bertie (85CRS1947) (85CRS1948) (85CRS2277)	No Error
STATE v. GOLDEN No. 8612SC661	Cumberland (85CRS1493)	Affirmed
STATE v. GOLDSBORO No. 8618SC656	Guilford (85CRS7527)	No Error
STATE v. HEGLER No. 8618SC297	Guilford (83CRS76268)	Affirmed
STATE v. ROSS No. 8610SC733	Wake (85CRS43145)	New Trial
STATE v. SMITH No. 8612SC498	Cumberland (85CRS23265) (85CRS23266)	No prejudicial error.
STATE v. WILLIAMS No. 8616SC558	Robeson (85CRS21815)	No Error
WEEKS v. WEEKS No. 8611DC727	Johnston (86CVD0429)	Affirmed

FILED 6 JANUARY 1987

MABE v. WACHOVIA SOUTHERN OIL CO. No. 8610IC585	Ind. Comm. (031697)	Affirmed
PARKLAND CORP. v. SURE-FIRE DISTRIBUTING CO. No. 8628DC723	Buncombe (85CVD2338)	Vacated and Remanded

APPENDIX

EXTENSION OF ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY IN PUBLIC JUDICIAL PROCEEDINGS

IN THE GENERAL COURT OF JUSTICE
SUPREME COURT OF NORTH CAROLINA

ORDER

The ORDER CONCERNING ELECTRONIC MEDIA AND STILL PHOTOGRAPHY COVERAGE OF PUBLIC JUDICIAL PROCEEDINGS, adopted by this Court 21 September 1982, 306 N.C. 797, as amended 10 November 1982, 307 N.C. 741, is hereby extended through and including 30 June 1987.

This order shall be published in the advance sheets of the Supreme Court and of the Court of Appeals.

ADOPTED BY THE COURT IN CONFERENCE this the 16th day of December 1986.

WHICHARD, J.
For the Court

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WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

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ABATEMENT AND REVIVAL

§ 3. Abatement on Ground of Pendency of Prior Action in General

A petition for certiorari to review a zoning board of adjustment decision was no bar as a "pending action" to a second petition to review a decision which was not made until more than a year after the first. *Little v. City of Locust*, 224.

ADMINISTRATIVE LAW

§ 6. Availability of Review by Certiorari

A petition for certiorari seeking judicial review of a zoning board of adjustment decision was not required to be verified or accompanied by a summons. *Little v. City of Locust*, 224.

§ 8. Scope and Effect of Judicial Review

The trial court had the authority pursuant to the New Hanover County Code to decline to enforce an order by the New Hanover Human Relations Commission that respondent rehire a Jehovah's Witness. *New Hanover Human Relations Comm. v. Pilot Freight Carriers*, 662.

The trial court's findings and conclusions were sufficient to support its order declining to enforce an order of the New Hanover County Human Relations Commission. *Ibid.*

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

An order ruling on the sufficiency of service of process and refusing to set aside an entry of default is not immediately appealable. *Seabrooke v. Hagin*, 60.

Defendants could not appeal from the trial court's denial of their motion to invalidate all demands for a jury trial. *Faircloth v. Beard*, 235.

§ 14. Appeal and Appeal Entries

Defendant's appeal from an order denying her relief from a judgment on a note was not timely. *L. Harvey and Son v. Shivar*, 673.

§ 31.1. Necessity and Timeliness of Objections

Defendant could not complain on appeal that the trial court failed to give equal stress to his evidence where he failed to object to the charge at the trial. *Green Hi-Win Farm, Inc. v. Neal*, 201.

No question was presented for appellate review regarding the court's instructions on burden of proof where defendants failed to object to the instructions. *La Notte, Inc. v. New Way Gourmet, Inc.*, 480.

ARSON

§ 4.1. Cases When Evidence Was Sufficient

The State's evidence was sufficient to support defendant's conviction of burning a horse barn and burning personal property. *S. v. Graves*, 126.

The evidence was sufficient to be submitted to the jury in a prosecution for second degree arson. *S. v. Eubanks*, 338.

ATTORNEYS AT LAW

§ 1. Nature and Scope of Professional Obligations

A law firm was not liable on the ground of negligent supervision for the repayment of loans made by clients to a partner in the firm for investment purposes. *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 106.

§ 7.5. Allowance of Fees as Part of Costs

The trial court erred in taxing an attorney fee as part of the costs in a shareholder's action under G.S. 55-38 for a writ of mandamus requiring defendants to permit plaintiff to examine a corporation's records and to recover a penalty for defendants' refusal to permit plaintiff to examine the records. *Carter v. Wilson Construction Co.*, 61.

AUTOMOBILES

§ 43.2. Actions for Negligent Operation of Motor Vehicles; Allegations as to Proximate Cause

Defendants' negligent testing of a sprinkler system which caused an alarm to sound at the fire department was not a proximate cause of an accident between plaintiff's vehicle and the fire truck which responded to the alarm. *Ford v. Peaches Entertainment Corp.*, 155.

§ 45.8. Relevancy of Evidence; Harmless Error

Defendant was not prejudiced in an action arising from an accident in which plaintiff pedestrian was struck by defendant's automobile by the exclusion of testimony that plaintiff had been drinking all day where defendant elicited testimony from others that defendant had been drinking. *Fowler v. Graves*, 403.

§ 46. Opinion Testimony as to Speed

There was prejudicial error in the admission of a highway patrolman's estimate of defendant's speed based on his observation of skid marks. *Fowler v. Graves*, 403.

§ 46.1. Opinion Testimony as to Other Facts Surrounding Accident

The trial court did not err in an action by a pedestrian who had been struck by an automobile by admitting the opinion of plaintiff's physician on the similarity between the symptoms of a head injury and intoxication. *Fowler v. Graves*, 403.

§ 68.1. Defective Brakes

Defendant was not negligent where a collision was caused by the sudden unexpected failure of the brakes on defendant's car. *Mann v. Knight*, 331.

§ 72. Sudden Emergency Generally

The unexpected driving of plaintiff's car into the path of defendant's oncoming highway patrol car confronted the trooper with a sudden emergency, and he acted reasonably under the circumstances in trying to avoid the collision by veering his car to the left. *Langley v. N.C. Dept. of Crime Control & Public Safety*, 335.

§ 74.1. Contributory Negligence; Intoxication

Defendant's evidence of contributory negligence by the passenger was sufficient in a wrongful death action arising from an automobile accident in which both the defendant driver and the deceased passenger had been drinking. *Watkins v. Hellings*, 430.

AUTOMOBILES — Continued

§ 83.2. Contributory Negligence of Pedestrians while Standing or Walking along Highway

The trial judge did not err by denying defendant driver's motions for a directed verdict and for a judgment n.o.v. based on plaintiff pedestrian's contributory negligence in an action arising from an accident in which an automobile struck a pedestrian. *Fowler v. Graves*, 403.

The trial court did not err in an action by a pedestrian who was struck by an automobile by refusing to instruct the jury that they must find that there was contributory negligence if they determined that plaintiff had violated G.S. 14-444. *Ibid.*

§ 89. Sufficiency of Evidence to Require Jury to Determine Last Clear Chance

The evidence required the submission of an issue as to whether defendant motorist had the last clear chance to avoid a collision with a child on a bicycle. *Lewis v. Brumbles*, 90.

BILLS OF DISCOVERY

§ 6. Compelling Discovery; Sanctions Available

The trial court did not err in failing to grant defendant's motion for a recess because the State failed to provide a statement of a codefendant which it intended to offer at trial where the codefendant was not being tried jointly with defendant. *S. v. Brooks*, 179.

BOUNDARIES

§ 10.1. Admissibility and Effect of Evidence Aliunde Generally

The trial court did not err in allowing plaintiffs' lay and expert witnesses to testify as to the location of the boundary in question. *Welborn v. Roberts*, 340.

The trial court in a processioning proceeding did not err in admitting the opinion of an expert surveyor as to the location of the beginning point of defendant's property. *Green Hi-Win Farm, Inc. v. Neal*, 201.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence Generally

Defendant could not be convicted of first degree burglary where the State offered no evidence to raise an inference that any force was employed to gain entry to the victim's apartment. *S. v. Eldridge*, 312.

§ 5.8. Breaking or Entering and Larceny of Residential Premises; Sufficiency of Evidence

The State's evidence of felonious intent and of the value of the stolen goods was sufficient to support defendant's conviction of felonious breaking or entering and felonious larceny. *S. v. Thompkins*, 42.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 9. Burden of Proof

The trial court properly denied defendants' motion for a directed verdict on a counterclaim for rescission in an action to recover damages for breach of contract to purchase a restaurant. *La Notte, Inc. v. New Way Gourmet, Inc.*, 480.

CLERKS OF COURT

§ 1. Jurisdiction and Authority Generally

G.S. 1-440.9 gave the Clerk of Court sufficient authority to stop the sale of an attached aircraft. *North State Savings & Loan v. Carter Development Co.*, 422.

§ 4. Issuance and Revocation of Letters of Administration and Jurisdiction in Regard to Estates of Decedents

The Clerk of Superior Court had the authority to hear a motion to set aside an order to reopen an estate. *In re Estate of English*, 359.

CONSPIRACY

§ 2. Actions for Civil Conspiracy

Plaintiff's complaint was sufficient to state a claim for relief for conspiracy to force plaintiff out of an automobile dealership. *Newton v. Whitaker*, 112.

CONSTITUTIONAL LAW

§ 4. Standing to Raise Constitutional Questions

Petitioner had standing to contest the constitutionality of an ordinance regulating businesses providing male or female companionship based on its operation of Movie Mates businesses and on the invasion of privacy of employees and customers. *Treants Enterprises, Inc. v. Onslow County*, 345.

§ 14. Morals and Public Welfare Generally

An Onslow County ordinance aimed at Movie Mates businesses violated the North Carolina Constitution because it purported to regulate every business that provided companionship. *Treants Enterprises, Inc. v. Onslow County*, 345.

There were no provisions which could be given effect in an unconstitutional Onslow County ordinance regulating businesses which provided companions despite a severability clause. *Ibid.*

§ 17. Personal and Civil Rights Generally

An Onslow County ordinance which regulated businesses providing companionship violated the right to privacy of patrons under both the federal and state constitutions. *Treants Enterprises, Inc. v. Onslow County*, 345.

§ 24.7. Service of Process and Jurisdiction; Nonresident Individuals

The acts of defendant as president of a corporation could be imputed to him individually for the purpose of determining whether he had sufficient contacts with North Carolina for the exercise of in personam jurisdiction. *Brickman v. Codella*, 377.

§ 30. Discovery

Defendant was not prejudiced by the State's failure to comply with G.S. 15A-1054(c) by not disclosing that a law officer had promised to speak to the district attorney on a witness's behalf in exchange for her truthful testimony against defendant or by the trial court's error in failing to grant a recess when such information became known. *S. v. Brooks*, 179.

§ 31. Affording the Accused the Basic Essentials for Defense

Defendant was not entitled to a transcript of his sister's trial although they were charged with the same offense arising out of the same incident. *S. v. Robinson*, 146.

CONSTITUTIONAL LAW — Continued

§ 45. Right to Appear Pro Se

Defendant is entitled to a new trial where he was tried without counsel and the record is silent with regard to the trial court's inquiry concerning his waiver of counsel. *S. v. Callahan*, 323.

CONSUMER CREDIT

§ 1. Generally

The trial court erred in a Truth in Lending action by finding that defendant had disclosed all of the information required by the Truth in Lending Act and concluding that plaintiff should have no recovery. *Addison v. Britt*, 418.

CONTRACTS

§ 27.1. Sufficiency of Evidence of Existence of Contract

Plaintiff's promise to perform demolition work on a burned building constituted sufficient consideration for an oral agreement by the individual defendant who owned the building to pay for the work even though the promise to perform the demolition work was also the consideration in a prior written agreement between plaintiff and the corporate lessee of the building. *Alexander Construction Co. v. Burbank*, 503.

CORPORATIONS

§ 5.1. Right of Stockholder to Inspect Records

Plaintiff shareholder's evidence was sufficient to show that his request to examine the records of defendant corporation was for "any proper purpose" within the meaning of G.S. 55-38(b). *Carter v. Wilson Construction Co.*, 61.

The trial court could properly assess under G.S. 55-38(d) a $500 penalty against a corporation and another $500 penalty against the corporation's president for refusing to allow a qualified shareholder to examine the corporation's records. *Ibid.*

Defendants' contention that a corporation's refusal to allow a shareholder to examine its records was based on its good faith interest in "wanting to protect its current business practices from being divulged to a direct competitor" did not require the trial court to find a mitigating circumstance to compel a decrease in the penalty assessed under G.S. 55-38(d). *Ibid.*

CRIMINAL LAW

§ 34.7. Admissibility of Evidence of other Offenses to Show Premeditation or Deliberation

Evidence of prior misconduct was not admissible in a homicide prosecution to show premeditation and deliberation. *S. v. Mills*, 606.

§ 40.1. Evidence and Record at Former Trial or Proceeding; What Evidence and Records Are Admissible

A transcript of testimony given at defendant's juvenile transfer hearing by a witness who has since died was admissible in defendant's robbery and murder trial under Rule 804(b)(1). *S. v. Giles*, 487.

CRIMINAL LAW — Continued

§ 42.6. Admissibility of Articles Connected with Crime; Chain of Custody

The State sufficiently established a chain of custody of two plastic bags of cocaine to permit their admission into evidence. *S. v. Brooks*, 179.

§ 48. Silence of Defendant as Implied Admission

The trial court did not commit plain error in allowing the State's attorney to cross-examine defendant regarding his post-arrest silence about a man who he contended dropped a telephone found in his possession. *S. v. Eldridge*, 312.

§ 50.1. Admissibility of Expert Opinion Testimony

The trial court committed prejudicial error in a prosecution for taking indecent liberties with children by allowing a child psychologist to give his expert opinion as to the credibility of two specific witnesses. *S. v. Jenkins*, 616.

§ 57. Evidence in Regard to Firearms

The trial court did not err in allowing an SBI lab technician who had performed thousands of gunshot residue tests to testify that the accumulation of residue on the victim's hands was inconsistent with his having recently fired defendant's revolver, to testify how the residue could have gotten there, and to testify concerning his opinion as to possible causes of the failure of defendant's residue test to provide conclusive results. *S. v. Benjamin*, 318.

The trial court did not err in allowing the medical examiner to demonstrate with the use of a .357 magnum that a man the size of the victim could not have shot himself in the head with the gun from the necessary distance of 22 to 26 inches. *Ibid.*

§ 66.9. Identification of Defendant from Photographs; Suggestiveness of Procedure

A photographic array used to identify defendant as an armed robber was suggestive but there was not a substantial likelihood of misidentification. *S. v. McLean*, 397.

The preparation of composites prior to a photographic lineup did not make the lineup suggestive. *S. v. Osborne*, 498.

A photographic lineup was not impermissibly suggestive because defendant had closely cropped hair and slanted eyes which gave him a distinctive appearance. *Ibid.*

A pretrial identification procedure, including the use of composites and a photographic lineup, was not impermissibly suggestive. *Ibid.*

§ 66.16. Sufficiency of Evidence of Independent Origin of In-Court Identification of Defendant in Cases Involving Photographic Identifications

An in-court identification of defendant as an armed robber was not tainted by suggestive photographic procedures. *S. v. McLean*, 397.

The court's determination that a robbery victim's in-court identification of defendant was of independent origin and not tainted by pretrial procedures was supported by the evidence. *S. v. Osborne*, 498.

§ 69. Telephone Conversations

The trial court did not err in an armed robbery prosecution by admitting testimony from the victim that he had received a telephone call in which the caller identified herself as the wife of the man who robbed him. *S. v. Williams*, 526.

CRIMINAL LAW — Continued

§ 71. "Shorthand" Statements of Fact

The trial court did not err in a prosecution for willfully concealing merchandise by allowing a witness to characterize defendant's activities as "concealing" merchandise. *S. v. Daye*, 444.

§ 74.3. Confession Implicating Codefendant; When Confession Is Competent

The trial court did not err in ordering a joint trial of defendant and a codefendant in an armed robbery and murder case where defendant's statement was sanitized by deleting all references to the codefendant before the statement was admitted into evidence. *S. v. Giles*, 487.

§ 75.2. Admissibility of Confession; Effect of Promises, Threats, or other Statements of Officers

Defendant's confession was voluntarily and understandingly made after she at first had refused to make a statement. *S. v. Walden*, 152.

§ 75.9. Spontaneous Statements

The evidence supported the trial court's determination that defendant's statement within a few minutes after his arrest that the victim's money was in his right front pocket was spontaneous and admissible without Miranda warnings. *S. v. Giles*, 487.

§ 75.10. Confessions; Waiver of Constitutional Rights Generally

The evidence supported the trial court's determination that defendant's statement that he hit the victim and knocked him down but the codefendant beat him with an ax was made voluntarily after defendant had been advised of his constitutional rights. *S. v. Giles*, 487.

§ 75.11. Confessions; Sufficiency of Waiver of Constitutional Rights

The trial court did not err in admitting an in-custody incriminating statement made by defendant after defendant had invoked his right to remain silent. *S. v. Crawford*, 135.

§ 79. Acts and Declarations of Companions and Coconspirators

Evidence in a narcotics case that one of the principals had conversations with defendant, an aider and abettor, concerning cocaine when she first met him and that defendant and his wife were present at the principals' house the night an SBI agent first contacted them about purchasing cocaine was relevant to show defendant's motive, presence, relationship to the actual perpetrators, and guilty knowledge. *S. v. Brooks*, 179.

The trial court did not err in allowing an SBI agent to testify concerning statements made by the actual perpetrators of a cocaine sale and by allowing one perpetrator to testify about statements made by defendant. *Ibid.*

§ 89. Credibility of Witnesses

The trial court did not err in an armed robbery prosecution by overruling defendant's objection to a question concerning how his girlfriend paid her rent. *S. v. Williams*, 526.

§ 89.6. Impeachment of Witnesses

The trial court did not err in a homicide prosecution by permitting the prosecutor to elicit testimony from a defense witness that he had obtained a warrant against defendant for assaulting him with a shotgun on the same day defendant assaulted the victim. *S. v. Springer*, 657.

CRIMINAL LAW — Continued

§ 89.8. Impeachment; Promise or Hope of Leniency or other Reward

Defendant was not prejudiced by the State's failure to comply with G.S. 15A-1054(c) by not disclosing that a law officer had promised to speak to the district attorney on a witness's behalf in exchange for her truthful testimony against defendant or by the trial court's error in failing to grant a recess when such information became known. *S. v. Brooks*, 179.

§ 91. Time of Trial

The trial court in a narcotics case did not err in denying defendant's motion for a continuance at the beginning of trial to obtain an independent chemical analysis and to review the transcript of the probable cause hearing for the principals in the crimes charged. *S. v. Brooks*, 179.

§ 92.2. Consolidation Held Proper; Related Offenses

The trial court did not abuse its discretion by joining the cases of two defendants charged with taking indecent liberties with children. *S. v. Jenkins*, 616.

§ 98.2. Sequestration of Witnesses

The trial court did not abuse its discretion in a murder prosecution by denying defendant's motion to sequester the State's witnesses. *S. v. Mills*, 606.

§ 101.4. Conduct or Misconduct Affecting Jury

The action of a trial judge in allowing testimony to be read back to the jury could not be reviewed on appeal where defense counsel did not object until after the testimony had been read. *S. v. Jenkins*, 616.

§ 102.9. Argument of District Attorney; Comment on Defendant's Character Generally

The trial court in a homicide prosecution should not have allowed the State to argue that defendant was an educated man living among people to whom he felt superior. *S. v. Mills*, 606.

§ 113.7. Charge as to Acting in Concert

The trial court properly instructed the jury on acting in concert in a prosecution for manslaughter which occurred during an exorcism. *S. v. Robinson*, 146.

§ 116. Charge on Defendant's Failure to Testify

Defendant in a willful concealment case failed to show prejudicial error in the trial judge's corrected instruction on her decision not to testify. *S. v. Daye*, 444.

§ 117.2. Instruction on Interested Witnesses

The trial court sufficiently instructed the jury on interested witnesses. *S. v. Robinson*, 146.

§ 122.1. Jury's Request for Additional Instructions

The trial judge erred in denying the jury's request to review the testimony of the State's identification witness on the ground that a transcript was not available. *S. v. Thompkins*, 42.

§ 134.4. Sentence of Youthful Offenders

Defendant was granted a new sentencing hearing where a comment by the judge suggested that defendant was denied committed youthful offender status based on pending charges for armed robbery and assault. *S. v. McLean*, 397.

CRIMINAL LAW — Continued

§ 138.7. Severity of Sentence; Particular Matters Considered

The trial court's remarks in an incest case concerning his personal feelings with regard to the offense charged did not show an abuse of discretion in imposing the maximum sentence for the crime. *S. v. Cameron*, 69.

§ 138.14. Sentence; Consideration of Aggravating and Mitigating Factors in General

Separate findings of aggravation and mitigation as to each of two offenses were not required where the two offenses were consolidated for judgment. *S. v. Graves*, 126.

The trial court was not required to find aggravating and mitigating factors where defendant was given the presumptive sentence. *S. v. Blake*, 77.

The trial court did not err in finding that the aggravating circumstance of prior convictions warranted imposition of the maximum term for sale and delivery of cocaine. *S. v. Brooks*, 179.

§ 138.21. Sentence; Aggravating Factors; Especially Heinous, Atrocious or Cruel Offense

The trial court did not err by finding that a second degree murder was especially heinous, atrocious or cruel. *S. v. Jones*, 593.

§ 138.22. Sentence; Aggravating Factors; Use of Weapon Normally Hazardous to Lives of More than One Person

A .38 caliber handgun is not normally dangerous to the lives of more than one person. *S. v. Jones*, 593.

§ 138.28. Sentence; Aggravating Factors; Prior Convictions

Defendant's testimony under oath that he had been convicted of driving while his license was revoked and reckless driving constituted sufficient proof of the prior conviction aggravating factor. *S. v. Graves*, 126.

§ 138.33. Sentence; Mitigating Factors; Passive Participant

The trial court may find as separate mitigating factors that defendant was a passive participant and that defendant played a minor role in the crime if separate evidence is presented to support each mitigating factor. *S. v. Crandall*, 37.

§ 143.5. Probation Revocation Hearing; Admissibility of Evidence

The trial court did not err in a probation revocation hearing by admitting evidence regarding defendant's original arrest for burglary. *S. v. Darrow*, 647.

§ 143.6. Probation Revocation; Sufficiency of Particular Evidence with Respect to Violation of Conditions

Defendant's probation was properly revoked based on the court's finding that he had committed worthless check offenses even though defendant may not yet have been tried on those charges. *S. v. Monroe*, 143.

The trial court did not err by denying defendant's motion to dismiss a probation revocation hearing for insufficient evidence. *S. v. Darrow*, 647.

§ 162.1. Evidence, Testimony and Questions to which Objection Is Not Required; Consideration of Admissibility in Absence of Objection

Defendant's pattern of objections to testimony of prior bad acts constituted a continuing objection to the line of questioning. *S. v. Mills*, 606.

DAMAGES

§ 10. Credit on Damages; Collateral Source Rule

The trial court erred in a medical malpractice action by admitting evidence of receipt of benefits by plaintiffs from collateral sources. *Cates v. Wilson*, 448.

DEEDS

§ 21. Stipulation for Reconveyance of Land to Grantor

A provision in a deed giving the purchaser a right of first refusal on another piece of property owned by the grantor violated the rule against perpetuities. *Coxe v. Wyatt*, 131.

DESCENT AND DISTRIBUTION

§ 8. Bastards

Although defendants admitted that plaintiff is the illegitimate daughter of decedent, plaintiff has no right to inherit from decedent where there was no actual or constructive compliance with G.S. 29-19(b) governing succession by illegitimate children. *Hayes v. Dixon*, 52.

DIVORCE AND ALIMONY

§ 17. Alimony upon Divorce from Bed and Board Generally

The court's order preventing defendant husband from removing his personal property from the marital home absent an agreement between the parties and proper scheduling between their attorneys was erroneous. *Phillips v. Phillips*, 228.

§ 17.3. Alimony upon Divorce from Bed and Board; Amount

The trial court did not err in determining that plaintiff wife was the dependent spouse although plaintiff's salary was higher than that of defendant. *Phillips v. Phillips*, 228.

The trial court did not err in finding that plaintiff's reasonable expenses were $1,300 per month although that amount equalled the parties' combined expenses prior to their separation. *Ibid.*

§ 24.5. Modification of Child Support Order

The findings and conclusions were sufficient to support the trial court's child support award of $422 per month per child though the award was a modification of a 1981 order wherein plaintiff was given a lump sum award. *Prescott v. Prescott*, 254.

§ 27. Child Support; Attorney's Fees Generally

The trial court did not err in denying plaintiff's motion for attorney fees in a child support proceeding where defendant had complied with prior child support orders. *Prescott v. Prescott*, 254.

§ 30. Equitable Distribution

Defendant's offer of proof was insufficient to overcome the presumption that she consented to plaintiff's withdrawals of funds from a joint account or to show that plaintiff dissipated marital assets prior to separation. *Spence v. Jones*, 8.

Failure of the court to make findings regarding the twelve factors set out in G.S. 50-20(c) is not error when the court orders an equal division of the marital property. *Ibid.*

DIVORCE AND ALIMONY — Continued

The trial court did not err in an equitable distribution action by finding that 70% of defendant's military retirement pay was marital property and in awarding plaintiff one-half of that amount. *Lewis v. Lewis*, 438.

An equitable distribution judgment dividing the marital assets equally between the parties was supported by the court's findings and conclusions. *Hill v. Hill*, 661.

EASEMENTS

§ 6.1. Creation of Easements by Prescription; Burden of Proof

Plaintiff's evidence was sufficient for the jury in an action to obtain an easement by prescription in a road. *Williams v. Sapp*, 116.

ESTOPPEL

§ 4.3. Equitable Estoppel; Conduct of Party Sought to Be Estopped

A letter from defendant employer's claims manager stating that plaintiff "could" receive certain benefits under G.S. 97-30 did not constitute an admission which estops defendant from denying plaintiff's entitlement to compensation under that statute. *Gupton v. Builders Transport*, 1.

§ 4.6. Equitable Estoppel; Conduct of Party Asserting Estoppel; Reliance

The doctrine of estoppel will not be applied in a workers' compensation case without a showing of detrimental reliance. *Gupton v. Builders Transport*, 1.

EVIDENCE

§ 22. Evidence at Former Trial or Proceeding of Same Case

The trial court erred in ruling that an attorney was "unavailable" and in admitting the attorney's testimony given at a previous trial on the ground that the attorney's testimony at the second trial would create a conflict of interest because his firm had been retained by plaintiff subsequent to the first trial. *Asheville Mall, Inc. v. Woolworth Co.*, 532.

§ 47. Expert Testimony in General as Invasion of Province of Jury

The trial court erred in allowing an attorney testifying as an expert witness to give his opinion that, as a matter of law, plaintiff was entitled to an easement by implication. *Williams v. Sapp*, 116.

EXECUTION

§ 1. Property Subject to Execution

Defendant was entitled to relief from an order declaring that none of her property in this state is exempt from an execution sale because she is no longer a resident of this state where plaintiff's motion for such an order was not properly served on defendant. *First Union Nat'l Bank v. Rolfe*, 625.

EXECUTORS AND ADMINISTRATORS

§ 19.1. Time for Filing Claim against the Estate

The Clerk of Superior Court did not err by determining that an estate should remain closed. *In re Estate of English*, 359.

EXECUTORS AND ADMINISTRATORS — Continued

§ 32. Distribution of Estate in General

The trial court did not err by failing to remove plaintiff as a co-executor in an action arising from a will provision dealing with the distribution of corporate shares. *Kerhulas v. Trakas*, 414.

The trial court did not err by granting plaintiffs' motion for summary judgment in an action to recover from the beneficiaries of an estate amounts improperly paid to them. *Lee v. Barksdale*, 368.

The defenses of settlement, waiver, release, ratification, and estoppel were unavailing in an action to recover amounts improperly paid to beneficiaries of an estate. *Ibid.*

The trial court did not err in an action to recover from two beneficiaries of a will amounts improperly paid to them by denying their Rule 12(b)(6) motion to dismiss. *Ibid.*

Lawyers Mutual Liability Insurance Company and the executor of an estate as an individual lacked standing and were not the proper parties to bring an action against beneficiaries who benefitted from a wrongful or incorrect disbursement under a will. *Ibid.*

GUARANTY

§ 1. Generally

An agreement executed by defendants under seal which made them primarily liable for a corporation's indebtedness to a bank constituted a suretyship contract governed by the three-year statute of limitations of G.S. 1-52 rather than a guaranty under seal governed by the ten-year statute of limitations of G.S. 1-47(2) although the agreement was titled "Guaranty Agreement." *Fleet Real Estate Funding Corp. v. Blackwelder*, 27.

HOMICIDE

§ 14.3. Burden of Proof on State; Use of Presumption of Malice

The trial court did not err in allowing an SBI lab technician who had performed thousands of gunshot residue tests to testify that the accumulation of residue on the victim's hands was inconsistent with his having recently fired defendant's revolver, to testify how the residue could have gotten there, and to testify concerning his opinion as to possible causes of the failure of defendant's residue test to provide conclusive results. *S. v. Benjamin*, 318.

§ 15. Relevancy and Competency of Evidence in General

Defendant was not prejudiced by hearsay testimony that decedent, on the night of his death, told witnesses that he was afraid of defendant. *S. v. Blake*, 77.

§ 17.2. Evidence of Threats

The trial court did not err in a murder prosecution by refusing to admit evidence of the victim's history and reputation for violence and evidence of a threat the victim had made to defendant. *S. v. Jones*, 593.

§ 19.1. Evidence of Character or Reputation

The trial court erred in a homicide prosecution by allowing testimony of a prior act of misconduct by defendant to show defendant's character for violence. *S. v. Mills*, 606.

HOMICIDE — Continued

§ 20. Real and Demonstrative Evidence Generally

Defendant was not prejudiced by the admission of a tape recording of telephone calls made to the 911 emergency number. *S. v. Blake*, 77.

§ 21.3. Sufficiency of Evidence that Death Resulted from Wound

There was sufficient evidence in a homicide prosecution to support a finding that the blow allegedly struck by defendant proximately caused the victim's death. *S. v. Springer*, 657.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

The circumstantial evidence was sufficient for the jury to find that defendant was the perpetrator of a second degree murder. *S. v. Blake*, 77.

The State's evidence was sufficient to show that defendant, whether acting alone or together with a codefendant pursuant to a common purpose, committed the crime of second degree murder. *S. v. Giles*, 487.

§ 21.9. Sufficiency of Evidence of Guilt of Manslaughter

The evidence was sufficient to be submitted to the jury in a prosecution for involuntary manslaughter in a shooting death. *S. v. Benjamin*, 318.

§ 26. Instructions on Second Degree Murder Generally

The trial court did not commit plain error in a homicide prosecution by instructing the jury in the final mandate that second degree murder is a killing without malice. *S. v. Jones*, 593.

HOSPITALS

§ 2.1. Control and Regulation; Selection of Hospital Site

Where the Department of Human Resources issued a certificate of need for rehabilitation beds to plaintiff hospital's competitor and then denied plaintiff's request for a contested case hearing pursuant to G.S. 131E-188(a), plaintiff was not entitled to review in the Court of Appeals before exhausting its remedies in the superior court. *Charlotte-Mecklenburg Hosp. Authority v. N.C. Dept. of Human Resources*, 122.

A request by DHR for additional information from plaintiff hospital corporation to support its application for a certificate of need, including a request that petitioner provide letters of support from various health care professionals and service groups for a proposed psychiatric hospital, did not amount to the establishment of a criterion for review of petitioner's application and was therefore neither unlawful nor improper. *In re Charter Pines Hospital, Inc. v. N.C. Dept. of Human Resources*, 161.

Evidence in the record as a whole supported a determination by the DHR that petitioner's proposal to construct a psychiatric and substance abuse hospital lacked the necessary support from the health care community. *Ibid.*

Respondent DHR did not abuse its discretion in failing to approve a certificate of need for seven fewer beds than petitioner requested in its application. *Ibid.*

HUSBAND AND WIFE

§ 11.1. Operation and Effect of Separation Agreement

A prior action between the parties involving enforcement of a separation agreement was not res judicata in an indemnification action based on a provision of

HUSBAND AND WIFE — Continued

the separation agreement requiring defendant wife to satisfy a certain debt. *Baum v. Golden*, 218.

§ 12.1. Revocation and Rescission of Separation Agreement

Genuine issues of material fact were presented for jury determination as to whether a separation agreement should be reformed for mutual mistake in a provision for the annual adjustment of alimony to keep pace with the rate of inflation. *Fountain v. Fountain*, 307.

INCEST

§ 1. Generally

The trial court in an incest prosecution did not err in admitting evidence that defendant had had prior sexual contact with his stepdaughter. *S. v. Cameron*, 69.

The trial court's remarks in an incest case concerning his personal feelings with regard to the offense charged did not show an abuse of discretion in imposing the maximum sentence for the crime. *Ibid.*

INDICTMENT AND WARRANT

§ 12.2. Amendment; Particular Matters

The trial court did not err in allowing the State's motion to change the allegation in an incest indictment relating to the date of the offense. *S. v. Cameron*, 69.

INFANTS

§ 17. Juvenile Delinquent; Confessions and other Forms of Self-Incrimination

The trial court erred in admitting a juvenile's inculpatory statement upon finding that the juvenile's mother had waived his rights. *In re Ewing*, 535.

§ 18. Juvenile Delinquent; Hearings; Sufficiency of Evidence

The evidence was insufficient to support an adjudication that respondent juvenile committed the offenses of breaking or entering and larceny. *In re Walker*, 46.

§ 20. Juvenile Delinquent; Judgments and Orders

The trial court erred in adjudicating respondents to be delinquent children without stating affirmatively in the adjudication orders that the allegations had been proved beyond a reasonable doubt. *In re Walker*, 46.

INSURANCE

§ 84.1. Automobile Liability Insurance; Vehicles Covered by Policy; "Substitution" Provision

A truck purchased by defendant insured did not qualify as a temporary substitute vehicle for defendant's insured automobile. *Maryland Casualty Co. v. State Farm Mutual Ins. Co.*, 140.

§ 87. Automobile Liability Insurance; "Omnibus" Clause; Drivers Insured

Where the driver's brother was listed in an insurance policy as an operator of the insured vehicle owned by a third brother and was therefore an original permittee, and the driver was driving home after being told by the original permittee that

INSURANCE — Continued

he had better take the car home because he knew he wasn't supposed to be driving it, the original permittee gave the driver lawful possession of the automobile under the insurance policy, and the insurer was thus liable for damages caused when the driver collided with another vehicle. *Pemberton v. Reliance Ins. Co.*, 289.

§ 148. Title Insurance Generally

Summary judgment was properly granted for a law partnership in an action by a title insurance company arising from the certification of his own title by a member of the firm. *Investors Title Ins. Co. v. Herzig*, 392.

§ 149. General Liability Insurance

A provision in a railroad liability reinsurance certificate that the reinsured warranted to retain "for its own account" a liability of $500,000 was unambiguous and included only net retention and not net retention plus treaty reinsurance with another reinsurer. *Stonewall Insurance Co. v. Fortress Reinsurers Managers*, 263.

An insurer's breach of a provision in a railroad liability reinsurance certificate warranting that the insurer would retain a liability of $500,000 "for its own account" constituted a breach of a condition precedent which relieved defendant reinsurer of its duty to perform under the certificate. *Ibid.*

Defendant reinsurer's claims manager was competent to testify as to defendant's interpretation of the company retention provision of its reinsurance policy with plaintiff reinsured. *Ibid.*

JUDGMENTS

§ 37.3. Preclusion or Relitigation of Issues

A prior action between the parties involving enforcement of a separation agreement was not res judicata in an indemnification action based on a provision of the separation agreement requiring defendant wife to satisfy a certain debt. *Baum v. Golden*, 218.

JURY

§ 1. Nature and Extent of Right

Defendants could not appeal from the trial court's denial of their motion to invalidate all demands for a jury trial. *Faircloth v. Beard*, 235.

LARCENY

§ 7. Sufficiency of Evidence

The evidence was insufficient to support defendant's conviction of felonious larceny of a riding lawn mower from his employer. *S. v. Lively*, 639.

§ 7.4. Sufficiency of Evidence; Possession of Stolen Property

An 11-12 day period between a larceny and defendant's possession of stolen restaurant equipment was not so long as to preclude application of the doctrine of possession of recently stolen property. *S. v. Callahan*, 323.

§ 9. Verdict

An indictment charging felonious larceny committed pursuant to burglary was sufficient to support a conviction of felonious larceny committed pursuant to breaking or entering. *S. v. Eldridge*, 312.

LIMITATION OF ACTIONS

§ 16. Manner of Raising Defense of the Statute

Defendant properly raised the defense of the statute of limitations by a Rule 12(b)(6) motion to dismiss. *Fleet Real Estate Funding Corp. v. Blackwelder*, 27.

MALICIOUS PROSECUTION

§ 8. Pleadings

Plaintiff's complaint failed to state a claim for malicious prosecution based on a prior civil suit for alienation of affections and criminal conversation where it contained no allegation of special damages. *Stikeleather v. Willard*, 50.

MASTER AND SERVANT

§ 7.5. Discrimination in Employment

The trial court correctly concluded that findings by the New Hanover County Human Relations Commission that its suggested employer accommodations for a Jehovah's Witness would impose only a de minimis cost on the employer were not supported by the evidence and were affected by an error of law. *New Hanover Human Relations Comm. v. Pilot Freight Carriers*, 662.

§ 10. Duration and Termination of Employment

The superior court did not err in reversing a decision of the State Personnel Commission and remanding the case for a new hearing. *Tolliver v. Employment Security Comm.*, 240.

§ 10.1. Grounds for Discharge from Employment

Plaintiff's employment was terminable at will although the employer maintained a written personnel policy providing for the terms and conditions of termination of employment for work-related conduct. *Harris v. Duke Power Co.*, 195.

§ 35. Dual Employment; Which of Two Persons Is Responsible Employer

Plaintiff's action for negligence arising from an accident at defendant's plant should not have been dismissed for failure to set forth a claim upon which relief could be granted on the grounds that plaintiff was an employee of defendant under either the joint or lent employee doctrines and was therefore limited to workers' compensation. *Anderson v. Texas Gulf, Inc.*, 634.

§ 55.4. Workers' Compensation; Relation of Injury to Employment

An accident which occurred when plaintiff fell from a chair at her home while attempting to hang plants taken from her employer's office after the employer directed her to dispose of them did not arise out of and in the course of her employment. *Fortner v. J. K. Holding Co.*, 101.

§ 65.2. Workers' Compensation; Back Injuries

There was no prejudice in a workers' compensation case from the Industrial Commission's error in its findings regarding plaintiff's back injury. *Taylor v. Pardee Hospital*, 385.

There was sufficient competent evidence to support the Commission's finding that plaintiff had sustained a minimal compression fracture in his back in a fall. *Ibid.*

The evidence in a workers' compensation case supported the Industrial Commission's finding that plaintiff was permanently disabled and entitled to compensation under N.C.G.S. § 97-29. *Ibid.*

MASTER AND SERVANT — Continued

The evidence supported a determination by the Industrial Commission that plaintiff's back injury was not the result of a specific traumatic incident and thus was not compensable. *Causby v. Bernhardt Furniture Co.*, 650.

§ 68. Workers' Compensation; Occupational Diseases

The closing of the plant where plaintiff worked and plaintiff's "retirement" could not serve as the basis for denying plaintiff disability compensation for an occupational disease. *Heffner v. Cone Mills Corp.*, 84.

The Industrial Commission did not err in denying plaintiff's motion for a job site inspection in a workers' compensation case or in failing to make adequate findings on the issue of occupational aggravation. *Dean v. Cone Mills Corp.*, 273.

§ 69. Workers' Compensation; Amount of Recovery Generally

A letter from defendant employer's claims manager stating that plaintiff "could" receive certain benefits under G.S. 97-30 did not constitute an admission which estops defendant from denying plaintiff's entitlement to compensation under that statute. *Gupton v. Builders Transport*, 1.

The doctrine of estoppel will not be applied in a workers' compensation case without a showing of detrimental reliance. *Ibid.*

An Industrial Commission order was ambiguous as to whether defendant employer was required to pay plaintiff's future medical expenses, and the Commission was required to find whether further treatment would provide plaintiff with "needed relief" where plaintiff offered evidence on the subject. *Heffner v. Cone Mills Corp.*, 84.

Plaintiff was not limited to recovery under G.S. 97-31 for a back injury and an award under G.S. 97-29 for permanent total disability was proper. *Taylor v. Pardee Hospital*, 385.

§ 72. Workers' Compensation; Partial Disability

The Industrial Commission erred in awarding plaintiff compensation only for partial disability for a lung disease when it found that plaintiff was incapable of earning wages in any employment for which she was qualified. *Carothers v. Ti-Caro*, 301.

§ 73.1. Workers' Compensation; Loss of Vision or of Eye

An injury in which plaintiff lost 7% of his field of vision in his right eye was compensable exclusively as a partial "loss of vision" under G.S. 97-31(16) and (19) and was not compensable under G.S. 97-29 as temporary total disability or under G.S. 97-30 as permanent partial disability. *Gupton v. Builders Transport*, 1.

§ 77.1. Workers' Compensation; Modification of Award; Change of Conditions

The Industrial Commission properly applied the "change of condition" standard of G.S. 97-47 to plaintiff's claim for additional benefits after defendant insurer had filed I.C. Form 28B to close the case. *Chisholm v. Diamond Condominium Constr. Co.*, 14.

§ 93.3. Workers' Compensation; Proceedings before the Commission; Admissibility of Expert Evidence

The Industrial Commission erred in finding that testimony by plaintiff's psychology expert was incompetent on the question of whether plaintiff had suffered a permanent disabling brain injury. *Horne v. Marvin L. Goodson Logging Co.*, 96.

MASTER AND SERVANT — Continued

A doctor's testimony was not incompetent in a workers' compensation proceeding involving a pulmonary disease because he was not the examining physician. *Dean v. Cone Mills Corp.*, 273.

§ 94.3. Workers' Compensation; Rehearing and Review

Language in a prior opinion in this workers' compensation case stating that it was proper for the Industrial Commission to view the expert testimony in the light most favorable to plaintiff is withdrawn. *Ballenger v. ITT Grinnell Industrial Piping*, 55.

§ 94.4. Workers' Compensation; Rehearing and Review; New or Additional Evidence

The full Commission was not required to make findings of fact before denying plaintiff's motion to remand the case for a hearing to take additional evidence, and the Commission did not err in denying plaintiff's motion. *Chisholm v. Diamond Condominium Constr. Co.*, 14.

§ 95.1. Workers' Compensation; Procedure to Perfect Appeal

Plaintiff's appeal was properly before the appellate court, although she did not timely appeal from a February 1985 opinion and award, where this opinion and award was replaced by another order, the Industrial Commission later reinstated the original February 1985 opinion and award, and plaintiff timely gave notice of appeal from the reinstating order. *Carothers v. Ti-Caro*, 301.

§ 101. Unemployment Compensation; "Employees" within Coverage of Law

A magistrate is not a "member of the judiciary" so as to make him ineligible for unemployment insurance benefits under G.S. 96-8(6)i. *Bradshaw v. Administrative Office of the Courts*, 237.

§ 108.1. Right to Unemployment Compensation; Effect of Misconduct

Petitioner did not discharge respondent for misconduct so as to disqualify him from receiving unemployment compensation where petitioner allegedly fired respondent for being absent from work for three consecutive days without notifying the company but the company had notice through respondent's immediate supervisor. *Facet Enterprises v. Deloatch*, 495.

MUNICIPAL CORPORATIONS

§ 2. Annexation

Summary judgment should have been entered for plaintiff rather than defendant in an action in which plaintiff had begun involuntary annexation procedures with the passage of a resolution of consideration but defendant subsequently completed voluntary annexation of the disputed area. *Town of Hazelwood v. Town of Waynesville*, 670.

§ 9.1. Police Officers

A city policeman was not entitled to stand-by or on-call duty pay where the stand-by pay policy was approved only by the city manager and not by the city council. *Newber v. City of Wilmington*, 327.

§ 31. Zoning; Judicial Review

G.S. § 160A-388(b) confers on the board of adjustment only appellate jurisdiction to hear and decide appeals from determinations by administrative officials

MUNICIPAL CORPORATIONS — Continued

charged with enforcement of zoning ordinances. *Tate v. Bd. of Adjustment of City of Asheville*, 512.

The Winston-Salem Board of Adjustment lacked authority to hear an appeal from a zoning officer regarding the construction of radio towers. *Town and Country Civic Organization v. Winston-Salem Bd. of Adjustment*, 516.

NARCOTICS

§ 4. Sufficiency of Evidence

The evidence was sufficient for the jury on the issue of defendant's guilt as an aider and abettor in a prosecution for possession with intent to sell and deliver and delivery of cocaine. *S. v. Brooks*, 179.

§ 4.1. Cases Where Evidence Was Insufficient

Evidence that defendant had altered a prescription for Percocet tablets was insufficient to support defendant's conviction of obtaining a controlled substance by fraud. *S. v. McHenry*, 58.

NEGLIGENCE

§ 1.2. Degree and Standard of Care

The ordinary negligence rather than the veterinary malpractice standard applied in an action to recover for injuries received by plaintiff when her cat bit her while it was being treated by defendant veterinarian. *Branks v. Kern*, 32.

§ 2. Negligence Arising from Performance of a Contract

In plaintiff subcontractor's action to recover for the erection of the steel framing for a building being constructed by defendant general contractor after the framing collapsed in a high wind, a genuine issue of material fact was presented as to the cause of the collapse, and the trial court erred in entering an order of summary judgment dismissing plaintiff's complaint and allowing defendant to recover under its counterclaim. *Raynor Steel Erection v. York Construction Co.*, 654.

In an action to recover for injuries sustained by an employee of a steel erection subcontractor when a steel column broke loose from two anchor bolts installed by defendant general contractor, plaintiff's evidence was sufficient to support a finding that defendant was negligent in its installation of the anchor bolts but was insufficient to prove proximate cause. *Sheehan v. Harper Builders, Inc.*, 630.

§ 23. Pleading Contributory Negligence

Defendant's answer sufficiently alleged contributory negligence in a wrongful death action arising from an automobile accident. *Watkins v. Hellings*, 430.

§ 29.2. Sufficiency of Evidence; Duty of Care; Warnings

Plaintiff's forecast of evidence was sufficient to present a genuine issue of material fact as to whether defendant veterinarian was negligent in failing to restrain plaintiff's cat during a catheterization procedure and in failing adequately to warn plaintiff of the risks of remaining in close proximity to the cat during the procedure. *Branks v. Kern*, 32.

§ 29.3. Sufficiency of Evidence of Proximate Cause

There was sufficient evidence that defendant's negligence was a proximate cause of a house fire. *Bruegge v. Mastertemp, Inc.*, 508.

NEGLIGENCE — Continued

§ 38. Instruction on Contributory Negligence

The court erred in its instructions on contributory negligence in a wrongful death action arising from an automobile accident in which both the passenger and the driver had been drinking. *Watkins v. Hellings*, 430.

OBSCENITY

§ 1. Statutes Proscribing Dissemination of Obscenity

Video dealers have standing to challenge the constitutionality of statutes prohibiting the dissemination of obscenity and creating the offense of sexual exploitation of a minor. *Cinema I Video v. Thornburg*, 544.

The statute prohibiting the "dissemination" of obscenity does not prohibit the mere possession of obscenity in one's own home and is not unconstitutionally overbroad. *Ibid.*

The statute making it unlawful to "intentionally" disseminate obscenity contains a constitutionally sufficient scienter requirement. *Ibid.*

The absence of a right in the obscenity statutes to an adversary hearing on the obscenity of seized material prior to trial is not an unconstitutional prior restraint of First Amendment rights. *Ibid.*

Statutes setting forth offenses for the sexual exploitation of minors require a representation of a live person under eighteen years of age. *Ibid.*

The statute proscribing depictions of apparent sexual touching involving minors is not substantially overbroad. *Ibid.*

There is a scienter requirement in the statutes creating the offenses of first and second degree sexual exploitation of a minor. *Ibid.*

The inference of minority permitted by G.S. 14-190.16 and 14-190.17 does not relieve the State of its burden of proving beyond a reasonable doubt every essential element of the offenses of first and second degree sexual exploitation of a minor. *Ibid.*

§ 2. Definition of Obscenity

The statute prohibiting the dissemination of obscenity is not unconstitutionally overbroad because the language "taken as a whole" does not appear in the third prong of the test for obscenity set forth in subsection (b)(3). *Cinema I Video v. Thornburg*, 544.

G.S. 14-190.1(d) is not unconstitutionally vague or overbroad because it permits obscenity to be judged with reference to "especially susceptible audiences." *Ibid.*

G.S. 14-190.1(c) is not unconstitutionally vague or overbroad in setting forth what constitutes "sexual conduct." *Ibid.*

Statutes relating to the dissemination of material containing a "visual representation" of a minor engaged in sexual activity provide fair notice of their prohibitions and are not unconstitutionally vague. *Ibid.*

PARENT AND CHILD

§ 2.3. Child Neglect

The trial court did not err by removing custody of respondent's children from her because she failed to comply with prior court directives. *In re Brenner*, 242.

The trial court did not improperly shift the burden of proof to respondent in its order removing child custody from her. *Ibid.*

PARENT AND CHILD — Continued

The evidence was sufficient to support findings of the trial court with regard to respondent's neglect of her children, and the findings were sufficient to support the court's conclusion that custody of the children should be put with the Department of Social Services for placement. *Ibid.*

PENALTIES

§ 1. Generally

The proceeds of a forfeited bond given to ensure that a minor child would be returned to the jurisdiction of the court were not available to the county school fund but should have been distributed to the parent who had been awarded custody and who was damaged by the act of the non-custodial parent. *Mussallam v. Mussallam*, 213.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 11. Malpractice Generally

The ordinary negligence rather than the veterinary malpractice standard applied in an action to recover for injuries received by plaintiff when her cat bit her while it was being treated by defendant veterinarian. *Branks v. Kern*, 32.

§ 15. Malpractice; Competency and Relevancy of Evidence Generally

In a medical malpractice action, the testimony of another doctor that plaintiffs had sued him and that the suit had been dismissed was irrelevant. *Cates v. Wilson*, 448.

§ 15.2. Malpractice; Competency of Evidence; Who May Testify as Experts

On remand in a medical malpractice action, the trial court should exclude all opinion testimony on liability from plaintiffs' treating physicians. *Cates v. Wilson*, 448.

§ 16.1. Malpractice; Sufficiency of Evidence

The trial court erred in a medical malpractice action by directing a verdict against plaintiffs based on insufficient evidence of damages where the trial court had improperly excluded medical expenses satisfied from collateral sources. *Cates v. Wilson*, 448.

PRINCIPAL AND AGENT

§ 5.2. Scope of Authority in Particular Matters

An attorney was not acting within the scope of his apparent authority with a law firm when he solicited loans from plaintiffs for investment purposes, and the law firm was not liable for repayment of the loans. *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 106.

PRINCIPAL AND SURETY

§ 1. Nature and Construction of Surety Contract

An agreement executed by defendants under seal which made them primarily liable for a corporation's indebtedness to a bank constituted a suretyship contract governed by the three-year statute of limitations of G.S. 1-52 rather than a guaranty under seal governed by the ten-year statute of limitations of G.S. 1-47(2)

PRINCIPAL AND SURETY — Continued

although the agreement was titled "Guaranty Agreement." *Fleet Real Estate Funding Corp. v. Blackwelder*, 27.

§ 11. Miscellaneous Sureties

The proceeds of a forfeited bond given to ensure that a minor child would be returned to the jurisdiction of the court were not available to the county school fund but should have been distributed to the parent who had been awarded custody and who was damaged by the act of the non-custodial parent. *Mussallam v. Mussallam*, 213.

PROCESS

§ 9.1. Personal Service on Nonresident Individuals; Minimum Contacts Test

A contract to sell and lease back a houseboat and defendant's concomitant guaranty were sufficiently connected with North Carolina to justify the exercise of jurisdiction. *Brickman v. Codella*, 377.

§ 14. Service of Process on Foreign Corporation

Service of process on the Secretary of State did not allow the court to exercise personal jurisdiction over defendant foreign corporation. *Dowat, Inc. v. Tiffany Corp.*, 207.

§ 14.3. Service on Foreign Corporation; Sufficiency of Evidence of Minimum Contacts

Defendant nonresident did not have sufficient minimum contacts with North Carolina to permit the exercise of personal jurisdiction over him. *Cameron-Brown Co. v. Daves*, 281.

The requirement that defendant have certain minimum contacts with this state in order to exercise jurisdiction over him applies to actions quasi in rem as well as to actions in personam. *Ibid.*

ROBBERY

§ 4.3. Sufficiency of Evidence of Armed Robbery

The State's evidence was sufficient to show that defendant, whether acting alone or together with a codefendant pursuant to a common purpose, committed the crime of armed robbery. *S. v. Giles*, 487.

RULES OF CIVIL PROCEDURE

§ 11. Verification of Pleadings

A petition for certiorari seeking judicial review of a zoning board of adjustment decision was not required to be verified or accompanied by a summons. *Little v. City of Locust*, 224.

§ 12. Defenses

Defendant properly raised the defense of the statute of limitations by a Rule 12(b)(6) motion to dismiss. *Fleet Real Estate Funding Corp. v. Blackwelder*, 27.

§ 15.2. Amendments to Pleadings to Conform to Evidence

The trial court did not err in allowing plaintiff's motion to amend her complaint to allege that she was entitled to an easement by implication. *Williams v. Sapp*, 116.

RULES OF CIVIL PROCEDURE — Continued

§ 37. Failure to Make Discovery; Consequences

The Shuford approach to sanctions for failure to admit was adopted. *Watkins v. Hellings*, 430.

§ 53. Referees

The trial court was not required to order a compulsory reference in a processioning proceeding involving a complicated question of boundary. *Green Hi-Win Farm, Inc. v. Neal*, 201.

§ 56.7. Summary Judgment; Appeal

The trial court did not err in entering summary judgment for plaintiff before defendants' motions to extend the time for answering requests for admissions were ruled on. *WXQR Marine Broadcasting Corp. v. JAI, Inc.*, 520.

§ 60. Relief from Judgment or Order

Where, because of procedural blunders by attorneys representing plaintiffs, plaintiffs never had a full hearing on the merits of any of their claims with regard to ownership of their ancestral homeplace and its contents, the trial court abused its discretion in denying plaintiffs' Rule 60(b) motion to modify a prior court order which granted summary judgment for defendant on real property and slander claims and permanently enjoined plaintiffs from instituting any more lawsuits against defendant based on events arising out of the original land transaction. *Poston v. Morgan*, 295.

The trial court properly dismissed plaintiff wife's Rule 60(b) motion to set aside a consent order which she signed and to which she acquiesced for 32 months because the motion was not filed within a reasonable time. *Prescott v. Prescott*, 254.

§ 60.2. Grounds for Relief from Judgment or Order

Defendant was not entitled to relief from a divorce judgment under Rule 60(b) on the ground that she and plaintiff had not lived separate and apart for one year at the time of the divorce. *Stoner v. Stoner*, 523.

Defendant was entitled to relief from an order declaring that none of her property in this state is exempt from an execution sale because she is no longer a resident of this state where plaintiff's motion for such an order was not properly served on defendant. *First Union Nat'l Bank v. Rolfe*, 625.

SCHOOLS

§ 11.2. Liability for Injuries Received in School Sports

A local board of education, by purchasing general liability insurance, does not waive governmental immunity from liability for injuries expressly excluded from the insurance coverage. *Overcash v. Statesville City Bd. of Educ.*, 21.

§ 13.2. Dismissal of Teachers

A career teacher assigned duties as a probationary principal may resign those duties and claim rights as a career teacher. *Rose v. Currituck County Bd. of Education*, 408.

The applicable statute of limitations for an action against a school board by a career teacher was G.S. 1-52(2). *Ibid.*

The trial judge did not err by denying plaintiff's motion for summary judgment in an action under the Teacher Tenure Act. *Ibid.*

SCHOOLS — Continued

Findings by a city board of education were insufficient to support its conclusion that the board's reduction in force policy and state law were followed in the mid-year dismissal of plaintiff as a probationary teacher of emotionally handicapped students because of a decrease in funding for the Exceptional Children Program. *Taborn v. Hammonds*, 461.

Plaintiff teacher was not denied a fair hearing before a city board of education in a dismissal proceeding because the board had previously voted to terminate him; nor was he denied due process because a member of the board departed during the hearing and was absent during the board's deliberation. *Ibid.*

SEARCHES AND SEIZURES

§ 6. Particular Methods of Search; Particular Cases

The trial court correctly suppressed evidence of marijuana seized during a search of defendant's building because the information which furnished probable cause for the search warrant was obtained as a result of a constitutionally impermissible search. *S. v. Tarantino*, 473.

§ 26. Application for Search Warrant; Insufficiency of Showing of Probable Cause

Evidence seized under a search warrant issued pursuant to a bare bones affidavit was not admissible. *S. v. Roark*, 425.

SHOPLIFTING

§ 1. Generally

The trial court correctly denied defendant's motion to dismiss a charge of willfully concealing merchandise. *S. v. Daye*, 444.

STATE

§ 8.1. Negligence of State Employee; Contributory Negligence of Person Injured

The unexpected driving of plaintiff's car into the path of defendant's oncoming highway patrol car confronted the trooper with a sudden emergency, and he acted reasonably under the circumstances in trying to avoid the collision by veering his car to the left. *Langley v. N.C. Dept. of Crime Control & Public Safety*, 335.

TORTS

§ 7.2. Release from Liability; Avoidance of Release

Summary judgment was properly granted for defendant insurance company based on a release in an action arising from an automobile accident. *Buchanan v. Buchanan*, 428.

TRIAL

§ 3.2. Motions for Continuance; Particular Grounds

The trial court did not err in denying defendant's motion for a continuance of an equitable distribution proceeding made on grounds that defendant thought the hearing was limited to a pretrial conference and that defendant needed until the following week to obtain certain information vital to her cause. *Spence v. Jones*, 8.

TROVER AND CONVERSION

§ 2. Nature and Essentials of Action for Possession of Personalty

A law firm was not liable under G.S. 78A-56(a) and (c) for two acts of conversion by a partner who failed to repay loans made by clients to the partner for investment purposes. *McGarity v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 106.

TRUSTS

§ 13.1. Creation of Resulting Trusts; Express Agreements

The evidence was sufficient to support a verdict finding that plaintiff and her husband held property for the female defendant pursuant to an express trust. *Watkins v. Watkins*, 587.

§ 13.2. Resulting Trust; Parol Agreement to Purchase or Accept Title for Benefit of Another

The evidence was sufficient for the jury on the issue of resulting trust. *Watkins v. Watkins*, 587.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

The evidence presented at trial in an action for breach of contract to purchase a restaurant raised the issue of unfair or deceptive trade practices. *La Notte, Inc. v. New Way Gourmet, Inc.*, 480.

UNIFORM COMMERCIAL CODE

§ 28. Commercial Paper; Definitions; Execution

The trial court properly excluded testimony that defendant never received any money or anything of value himself in exchange for signing two promissory notes. *Smith v. Allison*, 232.

§ 29. Commercial Paper; Competency of Parol Evidence

The promise to pay set forth in promissory notes could not be contradicted by parol evidence that defendant would not be called upon to pay in accordance with the terms of the notes. *Smith v. Allison*, 232.

§ 33. Commercial Paper; Liability of Parties; Signatures

Parol evidence was inadmissible to show that defendant signed two promissory notes as agent of his employer. *Smith v. Allison*, 232.

USURY

§ 1.3. What Constitutes Usury; Excess of Legal Maximum

An agreement for a loan to purchase a motel which required the borrower to pay the lender one-sixth of the motel's profits while the loan was unpaid and one-sixth of any gain on a sale of the motel within three years, in addition to 15% interest, was usurious. *Bagri v. Desai*, 150.

VENDOR AND PURCHASER

§ 1. Requisites and Validity of Contracts to Convey and Options

A contract existed between plaintiffs and the individual defendants where defendants made a signed written offer to plaintiffs to purchase the land in ques-

VENDOR AND PURCHASER — Continued

tion, and language of the offer which mentioned the corporate defendant's alleged right of first refusal was ineffective. *Coxe v. Wyatt*, 131.

§ 2. Time of Performance

Summary judgment was properly granted for defendants in an action for specific performance of a contract to sell land. *Colonial Building Co. v. Justice*, 643.

VENUE

§ 1. Definition and Nature of Venue

Defendant's failure to put its motion for a change of venue on a hearing calendar until eight months after the case was filed was unreasonable and thus a waiver of its right to have the case removed. *Johnson v. Hampton Industries, Inc.*, 157.

WEAPONS AND FIREARMS

§ 1. Generally; Definitions

Proof of barrel length or overall length is not an essential element of possession of a handgun within five years after conviction of a felonious offense. *S. v. Cloninger*, 529.

The statutory exception for possession of a firearm by a felon within his own home or his lawful place of business does not apply to the common areas of a motel. *Ibid.*

WILLS

§ 57. Description of Amount or Share

In the absence of special provisions so indicating, a bequest of corporate stock does not carry with it debts that the corporation owes a particular stockholder. *Kerhulas v. Trakas*, 414.

WITNESSES

§ 1.2. Competency of Children

The trial court did not err in a prosecution for taking indecent liberties with a minor by allowing the testimony of a four-year-old victim. *S. v. Jenkins*, 616.

§ 6.1. Evidence Competent to Impeach or Discredit Witness; Inconsistent or Contradictory Statements

Cross-examination of plaintiff in an automobile accident case about a statement in a corporate bankruptcy application she signed as corporate president that her salary was $500 per week was relevant to the damages issue and to the issue of plaintiff's credibility. *Burriss v. Heavner*, 538.

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Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina