NORTH CAROLINA COURT OF APPEALS REPORTS

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OF

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K. EDWARD GREENE
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*Appointed 4 January 1988 to replace John C. Martin who resigned 31 December 1987.

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1. Appointed 21 September 1987 to replace Edward K. Washington who retired.
2. Appointed 17 August 1987.
3. Appointed 1 December 1987.
4. Appointed 29 January 1988 to replace Donald L. Smith who went on the Court of Appeals bench.

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CASES REPORTED WITHOUT PUBLISHED OPINION

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

VIRGINIA TYSON AND ROSE BENNETT v. L'EGGS PRODUCTS, INC., EDNA M. GOODWIN, RAYMEL COLLINS, ESSIE KNIGHT, MARY LANDON, BETTIE MARKS, MARGARET ROGERS, JOYCE HENRY, PATSY MITCHUM, DEBBIE KING, IDA MCNEILL, WILMA BAILEY, NAN DAVIS, NANCY ARNETTE, SANDRA STEWART

No. 8620SC268

(Filed 20 January 1987)

1. Process § 13— foreign corporation—d/b/a L'eggs Products, Inc.—initial service on agent for Leggs, Inc.

Plaintiffs did not sue the wrong corporation for defamation, but merely sought service on the wrong agent, and their complaint was not barred by the statute of limitations by the time an alias and pluries summons issued, where plaintiffs named as corporate defendant "L'eggs Products, Inc." but initially directed the summons to the registered agent for "Leggs, Inc.," an unrelated corporation. L'eggs Products, Inc. was an assumed and registered name for Consolidated Foods, a Maryland corporation, which changed its name to Sara Lee. The captions of the complaint and summons plainly named as defendant L'eggs Products, Inc., the summons was directed to the corporate defendant in care of the agent, and the same paragraph which described defendant as a North Carolina rather than Maryland corporation also described defendant as having its principal place of business in Winston-Salem and as operating a place of business in Richmond County, which was true of L'eggs Products but not of Leggs.

2. Rules of Civil Procedure § 4; Process § 5.1— foreign corporation—properly sued in assumed name

Sara Lee Corporation was adequately served with sufficient legal process under its assumed name, "L'eggs Products, Inc.," where L'eggs Products, Inc. was the registered assumed name in North Carolina for Consolidated Foods, which changed its name to Sara Lee before the complaint was filed but which

did not register an amendment to its assumed name registration until after the complaint was filed. The company was actively conducting business as "L'eggs Products, Inc." and holding itself out to the public and to its employees by that name; while plaintiffs might have unearthed defendant's true identity with more effort, a search of the appropriate records would have revealed only the erroneous description of L'eggs Products as an assumed name of Consolidated Foods; and service of an alias and pluries summons was eventually accomplished upon Sara Lee's Vice President of Manufacturing in its L'eggs Products Division. Under the circumstances, there was no substantial confusion concerning the identity of the intended defendant and defendant was not misled or prejudiced.

3. Libel and Slander § 16— libel—letter to editor—dismissal proper

The trial court properly dismissed a defamation action where two employees of the corporate defendant wrote a letter to the editor of a local newspaper to voice their opinions concerning the work-related nature of employee tendonitis at the corporate defendant's manufacturing plant; the allegedly defamatory response was circulated among employees of the mill, was signed by the individual defendants and twenty-three other employees, and was mailed to the newspaper; plaintiffs' complaint did not allege that the letter was susceptible of two meanings; the letter was not defamatory *per se* when considered in its entirety; and the letter was not libel *per quod* because it was published in the context of an ongoing public controversy.

Judge PHILLIPS concurs in the result.

APPEAL by plaintiffs from *Freeman, Judge.* Judgment entered 18 December 1985 in Superior Court, RICHMOND County. Heard in the Court of Appeals 26 August 1986.

Patrice Solberg for plaintiff appellants.

Parker, Poe, Thompson, Bernstein, Gage & Preston, by Max E. Justice and William L. Brown for the individual defendant appellees.

Charles Y. Lackey and Constangy, Brooks and Smith, by Edward Katz and Terry Price for the corporate defendant appellee.

BECTON, Judge.

I

This is a civil action for damages brought by Virginia Tyson and Rose Bennett against their employer, L'eggs Products, Inc. (the corporate defendant) and fourteen fellow employees (the individual defendants), based upon an allegedly defamatory letter. Sara Lee Corporation, of which L'eggs Products is a division, by

special appearance moved to dismiss the suit as to the corporate defendant under Rule 12(b) for lack of jurisdiction, insufficiency of process and of service of process, and failure to state a claim for which relief could be granted, upon the grounds that L'eggs Products is not a legal entity capable of being sued in North Carolina. The individual defendants, in their Answer, moved to dismiss the action pursuant to Rule 12(b)(6) for failure to state a claim. The trial judge, after considering the pleadings, attached exhibits, affidavits related to jurisdiction and service of process, briefs, and memoranda of all parties and the arguments of counsel, found that the defendants were entitled to judgment as a matter of law and granted the motions of all the defendants. Plaintiffs appeal. We affirm.

II

We first consider the position of the corporate defendant in this action. The sole issue raised in the parties' brief is whether the corporate defendant's motion to dismiss was properly granted on the grounds that it is not a legal entity capable of being sued in North Carolina.

A

These are the relevant facts. On 27 July 1981, Consolidated Foods Corporation, a Maryland corporation, registered its assumption of the assumed name "L'eggs Products, Inc." with the Register of Deeds of Richmond County, North Carolina. On 2 April 1985, Consolidated Foods changed its name to Sara Lee Corporation (Sara Lee), and retained the assumed name "L'eggs Products, Inc." for its L'eggs Products Division. An Amendment to Assumed Name registration reflecting these changes was executed on 3 April 1985 but was not filed with the Richmond County Register of Deeds until 5 July 1985.

The letter upon which this action is based was allegedly publicized in early June 1984. On 6 June 1985, plaintiffs filed the Complaint, and their summons was issued. In addition to the fourteen individual defendants, the captions of the Complaint and summons named as corporate defendant, "L'eggs Products, Inc." The summons was directed to "L'eggs Products, Inc. c/o Registered Agent Proctor-Wayne Leggett, Route 2, Box 340, Fairmont, North Carolina 28340."

Proctor-Wayne Leggett is the registered agent for a corporation named "Leggs, Inc." which is a for-profit North Carolina corporation located in Fairmont, North Carolina and which is in no way related to Sara Lee or its L'eggs Products Division. The registered agent for Sara Lee (formerly Consolidated Foods) in North Carolina is and was C.T. Corporation System, Wachovia Bank Building, 100 South Corcoran Street, Durham, North Carolina.

In the Complaint the plaintiffs alleged: "Upon information and belief Defendant L'eggs Products, Inc. is a for-profit corporation organized under the laws of the State of North Carolina with its principal place of business at Winston-Salem, North Carolina, and owns a place of business in Richmond County, North Carolina, where it manufactures products for sale throughout North Carolina."

On 5 July 1985, Sara Lee, by special appearance and through counsel, served its motion to dismiss the defendant L'eggs Products, Inc. under Rules 12(b)(2), (4), (5), and (6) on account of lack of jurisdiction, insufficient process and service of process, and failure to state a claim for which relief can be granted. Thereafter, on 15 July 1985, the Amendment to Assumed Name Registration which was executed earlier in April of 1985 was filed with the Richmond County Register of Deeds.

On 14 August 1985, an Alias and Pluries Summons was issued, and directed to be served on "L'eggs Products, Inc., c/o Bill Flinchum, Post Office Box 2495, Winston-Salem, North Carolina 27102." William F. Flinchum is Sara Lee Corporation's Vice-President of Manufacturing in its L'eggs Products Division. The record contains the registry receipt, showing actual receipt of the complaint and summons by the defendant. On 23 September 1985, Sara Lee Corporation renewed its motion to dismiss the corporate defendant.

B

[1] 1. First, defendant's counsel contends that plaintiffs actually sued Leggs, Inc., the wrong corporation. As a result, their claim would be barred by the statute of limitations by the time the alias and pluries summons issued, even assuming the second summons cured the error by substituting the correct party. In support of its contentions, the defendant points to (1) the direction of

the summons to defendant "c/o Registered Agent, Proctor-Wayne Leggett," and (2) the allegation in the complaint that the defendant "is a for-profit corporation organized under the laws of the State of North Carolina." Because Proctor-Wayne Leggett is the registered agent for a for-profit North Carolina corporation called Leggs, Inc., defendant concludes that plaintiffs intended for the trial court to exert jurisdiction over Leggs, Inc. We disagree.

In *Wiles v. Welparnel Construction Co.*, 295 N.C. 81, 243 S.E. 2d 756 (1978), the court held that a summons directed to the registered agent of a corporation is not defective if the captions of the summons and complaint clearly indicate that the corporation, and not the agent, is the intended defendant. In the case *sub judice*, the captions of the complaint and summons plainly named as defendant "L'eggs Products, Inc.," *not* "Leggs, Inc." Moreover, unlike the summons in *Wiles* which was addressed directly to the agent, this summons was directed to the corporate defendant *in care of* the agent. Therefore, Rule 4(b) of the Rules of Civil Procedure, which requires that a summons "be directed to the defendant," has been satisfied.

Furthermore, the erroneous description in the Complaint of defendant as a North Carolina corporation, rather than a Maryland corporation, is not sufficient grounds to find that Leggs, Inc. was the intended defendant. This is especially true since the same paragraph of the Complaint describes the defendant as having its principal place of business in Winston-Salem and as operating a place of business in Richmond County, both allegations which are true of L'eggs Products, Inc. but not of Leggs, Inc.

We conclude that plaintiffs did not sue the wrong corporation but merely sought service on the wrong agent. The function of an alias and pluries summons is to keep a lawsuit alive and maintain the original date of the commencement of the action when the original summons has not been properly served upon the original defendant named therein. *See Roshelli v. Sperry*, 63 N.C. App. 509, 305 S.E. 2d 218, *cert. denied*, 309 N.C. 633, 308 S.E. 2d 716 (1983). Thus plaintiffs' suit was properly instituted against L'eggs Products, Inc. within the statute of limitations period and was kept alive by the alias and pluries summons until service was properly made upon a corporate officer.

[2] 2. The corporate defendant's second position is that because L'eggs Products, Inc. is only a division of Sara Lee without separate corporate status, plaintiffs' action is directed against a legal nonentity which is incapable of being sued. Defendant further asserts that the failure of the Complaint and summons to name Sara Lee as defendant precludes the court from asserting jurisdiction over Sara Lee, and that any later attempt to do so constitutes an improper substitution of parties which is barred by the statute of limitations.

In its brief the defendant discusses a number of cases involving the relation back of amendments and the correction of misnomers which are inapposite to this case. For example, defendant cites *Teague v. Asheboro Motor Co.*, 14 N.C. App. 736, 189 S.E. 2d 671 (1972) to support its proposition that a plaintiff may not amend its summons and Complaint to substitute another party for a nonexistent corporation as defendant. In that case, the intended corporate defendant had changed its name from "Asheboro Motor Company, Inc." to "Rabb and York, Inc." and a new, unrelated corporation had assumed the company's old name. Thus, when plaintiff sued "Asheboro Motor Company, Inc." he literally sued the wrong legal entity and an amendment would have involved substituting an entirely new party after the statute of limitations had run.

In *Crawford v. Aetna Casualty and Surety Co.*, 44 N.C. App. 368, 261 S.E. 2d 25 (1979), *cert. denied*, 299 N.C. 329, 265 S.E. 2d 394 (1980), the Complaint and summons named as defendant "Michigan Tool Company, a Division of Ex-Cell-O Corporation" and were served upon an officer of Ex-Cell-O. In fact, Michigan Tool Company was not a division of Ex-Cell-O but was a separate corporate entity which had been acquired and later dissolved by Ex-Cell-O. Accordingly, plaintiff's amendment deleting "Michigan Tool Company, a Division of" was improperly allowed because it, in effect, substituted a new defendant that had never been properly served.

Teague and *Crawford* are easily distinguished from the present case. In both those cases there was some attempt to substitute one legal entity for another as defendant, whereas in the case at bar we are concerned with only one legal entity which uses two names.

In *Park v. Sleepy Creek Turkeys, Inc.*, 60 N.C. App. 545, 299 S.E. 2d 670 (1983), one defendant was a sole proprietorship which operated under the assumed name, "Amchick Associates," to which the summons and Complaint were addressed. The court did not address the propriety of suing the defendant under its assumed name. Plaintiff's critical error was in serving process upon the executive manager of the business, a method of service which is proper for an unincorporated association but insufficient for a sole proprietorship. By way of contrast, in the case *sub judice*, service of process was properly accomplished by way of certified mail upon an officer of the corporate defendant as provided by Rule 4(j)(6) of the Rules of Civil Procedure.

The other cases relied upon by the defendant are equally inapplicable to the present action. The true issue raised by these facts, and one for which there is no precedent in North Carolina, is whether a corporation may properly be sued in its assumed name.

"It seems to be universally recognized that a corporation may do business under an assumed name, or a name differing from its true corporate name." Annot., 56 A.L.R. 450 (1928). Moreover, there is some authority that a corporation may be sued under its assumed name or trade name. *See Hutcheson Memorial Tri-County Hospital v. Oliver*, 120 Ga. App. 547, 171 S.E. 2d 649 (1969).

North Carolina Gen. Stat. Sec. 66-68 (1985) requires a certificate of assumed name to be filed "before a corporation engages in business in any county other than under its corporate name." The object of the statute is "to require notice to be given to the business world of the facts required to be set out in the certificate, to the end that people dealing with a firm may be fully informed as to its membership and know with whom they are trading. . . ." *Security Finance Co. v. Hendry*, 189 N.C. 549, 553, 127 S.E. 2d 629, 631 (1925).

At the time plaintiffs instituted this action, Sara Lee Corporation had not complied with this statute. The company was actively conducting business as "L'eggs Products, Inc." and holding itself out to the public and to its employees under that name. Admittedly, with greater effort the plaintiffs might have unearthed the true identity of "L'eggs Products, Inc." However, a search of

the appropriate records would have revealed only the erroneous designation of "L'eggs Products, Inc." as an assumed name of Consolidated Foods. Furthermore, service of process was accomplished upon Sara Lee's Vice President of Manufacturing in its L'eggs Products Division, a corporate agent who might be expected to know that "L'eggs Products" is a name used by Sara Lee.

Under these circumstances, we do not believe that any substantial confusion existed concerning the identity of the intended defendant nor that the defendant was misled or prejudiced. On these facts we therefore conclude that Sara Lee Corporation was adequately served with sufficient legal process under its assumed name, "L'eggs Products, Inc." and that the trial court had jurisdiction.

The corporate defendant belabors the fact that the plaintiffs never sought leave to amend their summons and complaint after acquiring actual notice of the defendant's true legal identity. In *Paramore v. Inter-Regional Financial Group Leasing Co.*, 68 N.C. App. 659, 662, 316 S.E. 2d 90, 91 (1984), this Court reiterated the rule that when a misdescription "does not leave in doubt the identity of the party intended to be sued, or, even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment *at any stage of the suit*." (Emphasis added.) We are cognizant of the need for accurate naming of parties when instigating legal proceedings. However, since the plaintiffs have sued and served the appropriate party, their delay in substituting the correct name of that party is not fatal.

Having determined that the trial court had jurisdiction over the corporate defendant, we nevertheless affirm the court's dismissal of the action against it. Plaintiffs' sole allegations regarding this defendant are that the individual defendants circulated the allegedly defamatory letter at its place of business with the knowledge and permission of plant supervisors, and acted as agents of the corporate defendant in publishing the letter. Thus, any liability of the corporate defendant must be entirely derivative. For reasons discussed hereafter in Section III, we conclude that the letter in question is not defamatory and that the plaintiffs' suit against the individual defendants was properly dismissed. Consequently, dismissal of the corporate defendant was also proper.

III

We next address the propriety of the judgment for the individual defendants. The pertinent facts are as follows.

A

Virginia Tyson and Rose Bennett wrote a letter to the editor of the Richmond County Daily Journal which was published on the editorial page on 2 May 1984. The purpose of the letter was to voice their opinions concerning a controversy over the work-related nature of employee tendonitis at the Richmond County manufacturing plant where the plaintiffs and the individual defendants are employed. The plaintiffs' letter specifically attacked an article released to the press by their employer which summarized findings of a medical study of the tendonitis issue and concluded that tendonitis was not a work-related condition. In their letter, the plaintiffs accused their employer of inaccurately quoting the findings of the study, of down-playing the recommendations made, of being irresponsible and failing to admit the truth, of denying all Workers' Compensation claims, and of ridiculing the complaints of many employees and telling them not to report their injuries. The plaintiffs further stated that "there are numerous other employees, mostly ladies, who are experiencing job-related tendonitis symptoms but who are afraid to make any complaints not only because of fear of losing their job but also because of the intimidation which will come down from management." They indicated a hope that their letter would raise "public awareness" of the issue.

On 31 May 1984 the plaintiffs also appeared on a WSOC-TV (Charlotte, North Carolina) news report to voice their opinions on the tendonitis issue.

The plaintiffs' comments raised company, if not public, awareness. On June 5 and 6, 1984 the allegedly defamatory letter was circulated among employees of the Richmond County mill and was signed by the individual defendants in addition to 23 other employees who were not made defendants in this action. This letter expressly referred to "an article in your paper from two ladies employed by L'eggs Products" which "told of terrible working conditions and of women being afraid to report injuries," and responded directly to these assertions as "a bunch of hog wash."

The individual defendants expressed skepticism regarding the numbers of employees claimed to experience tendonitis symptoms, challenging them to "come out of the woodwork and speak their own minds," and caustically criticized "some people" who "want the money but don't want to work for it." The letter strongly disagreed with the plaintiffs' assertions of employee mistreatment and claimed that "the majority of the employees feel this is one of the best companies anyone could work for."

The letter signed by the individual defendants was placed in the mail on 6 July 1984 by an unspecified person, and was received by the Richmond County Daily Journal on 7 June 1984, and by WSOC-TV on 8 June 1984.

B

Rule 12(b) of the Rules of Civil Procedure provides that a motion to dismiss for failure to state a claim is converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979). Because the record indicates that the trial judge considered matters outside the pleadings, we must review the court's decision as if it were a ruling on a motion for summary judgment.

Summary judgment is appropriate whenever there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. The purpose of the rule is to "eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim or defense of a party is exposed." *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 642, 281 S.E. 2d 36, 40 (1981).

C

[3] Although the pleadings and briefs of the parties raise a number of grounds upon which the trial judge's ruling might have been based, the judgment dismissing the complaint fails to state the grounds upon which dismissal was considered appropriate. The individual defendants first argue that the letter at issue is not defamatory as a matter of law. We agree and therefore find it unnecessary to address any other contentions of the parties.

In order to recover for defamation, a plaintiff must allege and prove that the defendant made false, defamatory statements of or

concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation. *Hall v. Publishing Co.*, 46 N.C. App. 760, 266 S.E. 2d 397 (1980). Because we find that the letter signed by the defendants is not defamatory, a fatal weakness exists in the plaintiffs' claim which entitles the defendants to summary judgment.

North Carolina courts recognize three classes of libel:

> (1) Publications which are obviously defamatory and which are termed libels *per se*; (2) publications which are susceptible of two reasonable interpretations, one of which is defamatory and the other is not, and (3) publications which are not obviously defamatory, but which become so when considered in connection with innuendo, colloquium and explanatory circumstances. This type of libel is termed libel *per quod*.

Flake v. Greensboro News Co., 212 N.C. 780, 785, 195 S.E. 55, 59 (1938); *see also Arnold v. Sharp*, 296 N.C. 533, 537, 251 S.E. 2d 452, 455 (1979); *Cathy's Boutique v. Winston-Salem Joint Venture*, 72 N.C. App. 641, 325 S.E. 2d 283 (1985).

In the present case, the complaint is insufficient to state a claim for libel within the second class because the complaint does not allege that the letter is susceptible of two meanings. *See Renwick v. News and Observer Publishing Co.*, 310 N.C. 312, 312 S.E. 2d 405 (1984); *Cathy's Boutique*. Therefore, we must determine whether the offending letter is capable of supporting an action for libel *per se* or libel *per quod*.

1. Libel *Per Se*

Plaintiffs allege in their complaint that the letter's publication "was intended to discredit plaintiffs, implying that they were liars and malingerers" and that the persons who received the letter understood it to have this meaning. In their brief they point to the following statements in the letter in support of their claim: "The two ladies who sent the letter in have always been out of work for numerous reasons . . . We are not saying that there is nothing wrong with these ladies, we definitely think that there is." Plaintiffs further emphasize the defendants' response to the plaintiffs' claims of terrible working conditions and intimidation of workers: "This in our opinion is a bunch of hog wash . . . We

know the difference between reality and fantasy." The plaintiffs conclude that the letter when read in its entirety *clearly states* that they are "liars and deadbeats who expect to receive 'a free giveaway program all of their lives.' " We disagree.

In *Flake v. Greensboro News Co.* our Supreme Court summarized the law of libel *per se*:

> . . . [d]efamatory words, to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided. . . .
>
> . . .
>
> The question always is how would ordinary men naturally understand the publication. (Citation omitted.) The fact that supersensitive persons with morbid imaginations may be able, by reading between the lines of an article, to discover some defamatory meaning therein is not sufficient to make it libelous. (Citation omitted.)
>
> In determining whether the article is libelous *per se* the article alone must be construed, stripped of all insinuations, innuendo, colloquium, and explanatory circumstances. The article must be defamatory on its face 'within the four corners thereof.' (Citations omitted.)

Id. at 786-87, 195 S.E. at 60.

Applying these principles, we conclude that the letter giving rise to this appeal is not defamatory *per se*. When viewed "within the four corners thereof" and stripped of all innuendo and explanatory circumstances, the letter is not of such nature that the court can presume as a matter of law that it is injurious to the reputations of the plaintiffs. On the contrary, when considered in its entirety, the letter's overall thrust is not a personal attack upon the plaintiffs but a hearty declaration of disagreement with the plaintiffs' views and an explicit expression of anger toward an unnamed "handful of employees" who "are trying to ruin a company that has been good to its employees over the years." The obvious intent of the publication is to defend the defendants' jobs

and employer and to inform the reader that they, and not the plaintiffs, represent the views of the majority of employees.

2. Libel *Per Quod*

Although the plaintiffs maintain in their Brief that the letter is libelous *per se*, the Complaint alleges special damages and innuendo. Therefore, we must determine whether the letter is reasonably susceptible of the libelous construction which plaintiffs place upon it by way of innuendo so as to constitute libel *per quod.*

We acknowledge that whenever an allegedly defamatory publication is ambiguous or capable of a meaning other than the obvious one, it is for the jury to determine how it was understood by the recipient. However, it is the province of the court to determine in the first instance whether a communication is *capable* of a defamatory meaning. *Bell v. Simmons*, 247 N.C. 488, 495, 101 S.E. 2d 383, 388 (1958). In determining whether a published article is libelous, it must be read and considered in its setting. *Yancey v. Gillespie*, 242 N.C. 227, 230, 87 S.E. 2d 210, 212 (1955). The circumstances of the publication are pertinent, as well as the hearers' knowledge of facts which would influence their understanding of the words used. *Oates v. Wachovia Bank and Trust Co.*, 205 N.C. 14, 17, 169 S.E. 869, 871 (1933).

The defendants' letter was signed and published in the context of an ongoing public controversy regarding the tendonitis issue. Its production was a direct response to the plaintiffs' own statements which by their nature invited response, and which were published on the editorial page of the local newspaper, a forum in which plaintiffs knew others would have an opportunity to state a contrary view. "Everyone has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose." *Yancey v. Gillespie*, 242 N.C. at 229, 87 S.E. 2d at 212.

In addition, the letter by its terms indicates that it was signed in the context of a labor dispute: "The word tendonitis never came up until the union started working to get into the plant." In *Bouligny, Inc. v. Steelworkers*, the Supreme Court stated:

> Mere vituperation and name calling directed by a union against an employer, or vice versa, in the course of a labor dispute or organization campaign, are not sufficient basis for a recovery of damages for slander or libel. Even when the plaintiff is an individual, some thickness of skin is required of him by the law in the realm of labor disputes, just as in battles in the political arena.

270 N.C. 160, 173, 154 S.E. 2d 344, 356 (1967).

We acknowledge that the opinions of the individual defendants are expressed in a robust manner and with some anger or hostility toward the plaintiffs. However, the plaintiffs having publicly expressed their own strong feelings on a controversial issue of public interest, must have some "thickness of skin" when the response is less than favorable. We believe the words used do not go beyond the bounds of proper debate, and that the letter read as a whole and considered in its setting is not reasonably susceptible of the defamatory meaning alleged by the plaintiffs.

IV

Concluding as we do that the letter complained of by the plaintiffs is not defamatory as a matter of law, we hold that summary judgment in favor of both the individual and corporate defendants was proper.

Affirmed.

Judge MARTIN concurs.

Judge PHILLIPS concurs in the result.

GURTHA HUGGINS v. HALLMARK ENTERPRISES, INC.

GURTHA HUGGINS v. BAILEY'S TUNNEL ROAD CAFETERIA, INC.

Nos. 8628SC40 and 8628SC41

(Filed 20 January 1987)

1. **Process § 3.2— summons not served in time—absence of jurisdiction**

A summons not served within thirty days and not revived under Rule 4(d) by endorsement or issuance of an alias or pluries summons could not subject defendant to the jurisdiction of the court.

2. **Process § 12— domestic corporation—substituted service on Secretary of State—failure to mail to registered office**

The court did not obtain jurisdiction over a domestic corporation by substituted service of an alias summons on the Secretary of State under N.C.G.S. § 55-15(b) where the Secretary of State failed to mail the summons and complaint to the corporation's registered office but mailed them to another address, notwithstanding the registered agent had moved to another state and the corporation actually maintained no registered office in this state.

3. **Rules of Civil Procedure § 60.1— relief from judgment—belated motion**

Defendants were entitled to no relief from default judgments under Rule 60(b)(1) on grounds of mistake, inadvertence and excusable neglect where the motions for relief were filed more than a year after the judgments were entered, notwithstanding plaintiff may have deliberately waited more than a year to attempt to collect the judgments to forestall a Rule 60(b)(1) motion.

4. **Rules of Civil Procedure § 60.2— relief from default judgments—void judgment against one defendant—jurisdiction over second defendant**

One corporate defendant was entitled to relief from a default judgment under Rule 60(b)(4) on the ground that the judgment was void where service of process over such defendant was defective. However, the second corporate defendant was not entitled to relief from a default judgment under Rule 60(b)(4) where the trial court had jurisdiction over the parties and the subject matter and had the authority to render the judgment.

5. **Rules of Civil Procedure § 60.2— refusal to set aside default judgments—no abuse of discretion**

The trial court did not abuse its discretion in refusing to set aside default judgments against two corporations under Rule 60(b)(6) for "any other reason justifying relief from the operation of the judgment[s]," notwithstanding the strategy employed by plaintiff to serve process on defendants was calculated to ambush them, where defendant failed for twelve years to maintain a registered agent to receive service of process in this state as required by statute.

Judge PHILLIPS concurring in part and dissenting in part.

APPEAL by defendants from *Lamm, Judge*. Orders entered 13 November 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 9 May 1986.

Reynolds and Stewart by G. Crawford Rippy, III, for plaintiff-appellee.

Morris, Golding, Phillips and Cloninger by James N. Golding for defendant-appellants.

PARKER, Judge.

These actions arise out of a fall allegedly sustained by plaintiff on or about 15 April 1981 at the Hallmark Cafeteria in Innsbrook Mall in Asheville, North Carolina.

The record discloses that in 1972 Hallmark Enterprises, Inc. (herein Hallmark) purchased 80% of the stock of Bailey's Tunnel Road Cafeteria, Inc. (herein Bailey's), which corporation operated a cafeteria in Innsbrook Mall in Asheville, North Carolina, under the name Hallmark Cafeteria. At the time of the purchase, the name and address of the registered agent for both corporations was changed in the Secretary of State's Office to E. O. Hall, 4808 Montclair Avenue, Charlotte, North Carolina. E. O. Hall moved from Charlotte to Spartanburg, South Carolina, sometime in late 1972 or early 1973. Thereafter neither defendant ever maintained a registered agent in North Carolina.

The question before the Court for review in this consolidated appeal is whether the trial court erred in denying motions by defendants Hallmark and Bailey's to set aside default judgments entered against them.

For the reasons which follow, we vacate the judgment entered against defendant Hallmark and affirm the judgment entered against defendant Bailey's.

I. Huggins v. Hallmark Enterprises, Inc.

On 17 September 1982, plaintiff filed a complaint against defendant Hallmark alleging that she fell upon the premises of Hallmark's cafeteria at the Innsbrook Mall in Asheville, North Carolina, on 15 April 1981. Plaintiff alleged that her fall and resulting injuries were caused by a loose floor tile.

The original summons, also issued on 17 September 1982, was directed to E. O. Hall, Agent for Service of Process, 4808 Montclair Avenue, Charlotte, North Carolina. The summons and complaint were sent to the Sheriff of Mecklenburg County on 22 September 1982 for service on defendant. The Sheriff returned the summons and complaint on 17 October 1982, stating that Hallmark was not served because he "did not locate E. O. Hall."

Thereafter, plaintiff sent the summons and complaint to the North Carolina Secretary of State, who accepted the substituted service of process and mailed a copy of the summons and complaint to Hallmark Enterprises, Inc., c/o E. O. Hall, 4808 Montclair Avenue, Charlotte, North Carolina, on 3 November 1982. The summons and complaint were returned by the U.S. Postal Service to the Secretary of State marked "not deliverable as addressed, unable to forward, return to sender."

On 4 January 1983, plaintiff obtained an alias and pluries summons from the Clerk of Court for Buncombe County. This summons was directed to Hallmark Enterprises, Inc., E. O. Hall, 4808 Montclair Avenue, Charlotte, North Carolina. On 20 January 1983, plaintiff served the summons and complaint on the Secretary of State. On 25 January 1983, the Secretary's office mailed a copy of the summons and complaint to Hallmark Enterprises, Inc., c/o Clyde R. Hall, 410 Wallace Building, Salisbury, North Carolina.

On plaintiff's motion, the Clerk of Court for Buncombe County entered default on 15 March 1983. Plaintiff moved for default judgment demanding damages in the sum of $112,683.00, and the Clerk entered Judgment by Default on 28 March 1983 in the sum of $112,683.00.

Subsequent to the entry of this default judgment, it was determined that the Clerk's entry of this default judgment was improper, and that the matter would have to be tried before a jury. An issue as to damages for personal injuries was submitted to a jury on 17 November 1983, and a judgment was entered against defendant on 28 November 1983 in the sum of $61,250.00.

No further action was taken by plaintiff until plaintiff's counsel contacted defendant by phone on 11 July 1985. Thereafter on 8 October 1985, a Notice of Right to Have Exemptions Designated was sent by plaintiff to defendant, c/o E. O. Hall, Regis-

tered Agent, 125 Hall Street, Spartanburg, South Carolina, 29302. Defendant filed a motion and affidavit for relief from judgment and motion to dismiss on 16 October 1985, which motion was heard and denied by Judge Lamm on 13 November 1985. Defendant appealed.

A. The 17 September 1982 Summons

[1] In its first assignment of error, defendant Hallmark contends the trial court erred in finding that service of this summons upon the Secretary of State's office on 3 November 1982 was valid even though no alias or pluries summons had been issued at this time, nor had it been extended by the Clerk's office. We agree.

This Court, in *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157-58, 323 S.E. 2d 458, 461 (1984), stated:

> The summons must be served within thirty days after the date of the issuance of the summons. G.S. 1A-1, Rule 4(c). However, the failure to make service within the time allowed does not invalidate the summons. The action may continue to exist as to the unserved defendant by two methods. First, within ninety days after the issuance of the summons or the date of the last prior endorsement, the plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Secondly, the plaintiff may sue out an alias or pluries summons at any time within ninety days after the date of issue of the last preceding summons in the chain of summonses or within ninety days of the last prior endorsement. G.S. 1A-1, Rule 4(d)(1) and (2). Thus, a summons that is not served within the thirty-day period becomes dormant and cannot effect service over the defendant, but may be revived by either of these two methods. If the ninety-day period expires without the summons being served within the first thirty days or revived within the remaining sixty days, the action is discontinued. If a new summons is issued, it begins a new action. G.S. 1A-1, Rule 4(e).

The record shows that the plaintiff had a summons issued on 17 September 1982, the same day the complaint was filed. Thus, the action did in fact commence. G.S. 1A-1, Rule 3. When the summons was returned unserved by the Mecklenburg County Sher-

iff's Department on 17 October 1982 (within thirty days of its issuance), it became dormant or unservable, but nevertheless was not invalidated according to G.S. 1A-1, Rule 4(c) and was subject to being revived under the two methods under Rule 4(d). However, plaintiff served the original summons upon the Secretary of State's office on 3 November 1982 without having revived it under Rule 4(d). We hold, therefore, that this dormant summons could not and did not subject defendant to the jurisdiction of the court.

B. The 4 January 1983 Alias and Pluries Summons

Defendant Hallmark next argues that the trial judge erred in ruling that Hallmark was properly served with process on 20 January 1983. The original summons was issued in this matter on 17 September 1982. On 4 January 1983, an alias and pluries summons was issued which stated that the last summons was issued on 17 September 1982. This alias summons was served on the Secretary of State on 20 January 1983. Since the alias summons was issued more than ninety days after the date the original summons was issued, it did not comply with G.S. 1A-1, Rule 4(d)(2). Thus, the original summons herein could not serve as a basis for the issuance of an alias or pluries summons necessary to maintain an unbroken continuation of the action.

[2] However, we must also consider G.S. 1A-1, Rule 4(e) which provides:

> When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension [may] be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

Under Rule 4(e), this alias summons was properly issued, but this action is deemed to have commenced against this defendant Hallmark on 4 January 1983.

Although this summons was clearly directed to Hallmark Enterprises, Inc., E. O. Hall, 4808 Montclair Avenue, Charlotte, North Carolina, "[f]or a reason unknown to the Plaintiff-Appellee

the Secretary of State served the alias and pluries summons and the complaint upon the following: Hallmark Enterprises, Inc., c/o Clyde R. Hall, 410 Wallace Building, Salisbury, North Carolina."

In her brief, plaintiff offers the following reasons for the Secretary's actions:

> [T]he Secretary of State's Office knew that it would be fruitless to serve the corporation at the Charlotte address because it had previously attempted to do so with negative results and therefore the Secretary of State decided in good faith to try to serve the corporation in Salisbury with the hope that it would be the correct corporation; or in the alternative someone in the Secretary of State's office simply made an error.

We do not find this argument persuasive.

As stated in *Coble v. Brown*, 1 N.C. App. 1, 5-6, 159 S.E. 2d 259, 263 (1968), "[s]ubstituted or constructive service of process is a radical departure from the rule of common law, and therefore statutes authorizing it must be strictly construed . . . in determining whether effective service under the statute has been made."

With this principle in mind, we must examine G.S. 55-15, which provides:

> (b) Whenever a corporation shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service on the Secretary of State of any such process, notice, or demand shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process, notice or demand. In the event any such process, notice or demand is served on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes from and after the date of such service on the Secretary of State.

Under this statute, to obtain proper service upon a domestic corporation, (i) service must first be made upon the Secretary of State and (ii) the Secretary of State must forward a copy of the summons and complaint to the corporation at its registered office.

The fact is undisputed that on 4 January 1983, the registered office of this defendant corporation as recorded in the Office of the Secretary of State was 4808 Montclair Avenue, Charlotte, Mecklenburg County, North Carolina, 28211. Also undisputed is the fact that the Secretary of State's office, contrary to the mandate in G.S. 55-15(b), failed to mail a copy of this process to this address.

Hallmark concedes in its brief "that had the Secretary of State forwarded the summons and complaint to its then recorded address, such would not have been received." This observation, however correct, does not avail plaintiff. In *Business Funds Corp. v. Development Corp.*, 32 N.C. App. 362, 232 S.E. 2d 215 (1977), this Court discussed the differences between G.S. 55-15 (service upon a domestic corporation) and G.S. 55-146 (service upon a foreign corporation). The latter statute provides that "[s]ervice of process on the foreign corporation shall be deemed complete when the Secretary of State is so served." No such language appears in G.S. 55-15. In fact, G.S. 55-15 provides that any corporation "so served," meaning when copies of the process are mailed to the registered office, shall be in court from and after the date of such service on the Secretary of State. The Court in *Business Funds* further concluded that G.S. 55-15(b) "directs the Secretary of State to forward the process by registered mail, [but] does not require that the defendant corporation receive actual notice." 32 N.C. App. at 368, 215 S.E. 2d at 218. The alias summons herein was not mailed to this defendant's registered office, but was mailed to a different agent and a different office entirely.

Accordingly, plaintiff did not obtain proper service upon defendant under either summons. Since proper service is a prerequisite to personal jurisdiction over defendant, the judgment as to defendant Hallmark is void. *Guerin v. Guerin*, 208 N.C. 457, 181 S.E. 274 (1935).

Further assignments of error relative to the Hallmark case are identical to those discussed below.

II. Huggins v. Bailey's Tunnel Road Cafeteria, Inc.

Plaintiff's action against defendant Bailey's was instituted on 3 February 1984. The allegations were almost identical to those in the complaint against Hallmark, except that plaintiff alleged that her 15 April 1981 fall occurred on the premises of defendant Bailey's cafeteria.

The original summons was issued on 3 February 1984, and was directed to the "Honorable Thad Eure, Secretary of State of North Carolina, Raleigh, North Carolina, 27611, Civil Process Agent for: Bailey's Tunnel Road Cafeteria, Inc., c/o E. O. Hall, Registered Agent, 4808 Montclaire Avenue, Charlotte, North Carolina." This summons was served by the Sheriff of Wake County upon the Secretary of State's office on 9 February 1984. The Secretary's office did forward, by certified mail, a copy of the summons and complaint to Bailey's Tunnel Road Cafeteria, Inc., c/o E. O. Hall, 4808 Montclair Avenue, Charlotte, North Carolina. The summons and complaint were returned by the U.S. Postal Service to the Secretary of State marked "return to sender, not deliverable as addressed, unable to forward."

Plaintiff moved for entry of default on 19 May 1984, and entry of default was entered that day by the Clerk. Judge C. Walter Allen heard the default and inquiry without a jury and entered a default judgment against defendant in the amount of $121,126.00 on 27 June 1984.

No further action was taken by plaintiff until plaintiff's counsel telephoned Mr. Hall on 11 July 1985. A Notice of Right to Have Exemptions Designated was sent by plaintiff to Bailey's Tunnel Road Cafeteria, Inc., c/o E. O. Hall, Registered Agent, 125 Hall Street, Spartanburg, South Carolina, 29302, on 8 October 1985. Defendant thereafter filed a motion and affidavit for relief from judgment and motion to dismiss on 16 October 1985, which was heard and denied by Judge Lamm on 13 November 1985. Defendant appealed.

III. Common Assignments of Error

A. Rule 60(b)(1)

Although two separate judgments were entered in these cases, the judgments are virtually identical.

In their fourth assignment of error, both defendants contend the court erred in making the following conclusion of law:

> 6. That the Defendant filed an action to set aside judgment under 1A-1, Rule 60, under Section (B) on the grounds under Mistake, Inadvertence and Excusable Neglect, and said Motion was not made within one year as required by said Rule 60, and that the Defendant has not shown any grounds to set aside on the basis of Mistake, Inadvertence and Excusable Neglect.

Both defendants moved for relief from the judgments entered in each case pursuant to G.S. 1A-1, Rule 60(b)(1), (4) and (6):

> (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:
>
> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> . . .
>
> (4) The judgment is void;
>
> . . .
>
> (6) Any other reason justifying relief from the operation of the judgment.
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

[3] Plaintiff obtained a default judgment against defendant Hallmark on 28 March 1983. Plaintiff obtained a default judgment against defendant Bailey's on 27 June 1984. Both defendants moved for relief from the judgments on 16 October 1985, a period in excess of one year after the judgments were entered. Thus, plaintiff contends defendants' motions were untimely and defendants are entitled to no relief under G.S. 1A-1, Rule 60(b)(1). We are constrained to agree.

The trial court specifically found "[t]hat plaintiff waited over one year from the date of final judgment before attempting to col-

lect or recover from defendants." Plaintiff obtained default judgments against each corporate defendant, and, in anticipation of a Rule 60(b)(1) motion, deliberately waited over one year to collect under the judgments so that defendants' time had expired for seeking relief from the judgments before putting defendants on notice that default judgments had been entered against them.

The requirement that the motion to set aside the judgment made pursuant to Rule 60(b)(1) be made within one year is mandatory. Accordingly, we hold that the denial of the motion on the grounds delineated in subsection (b)(1) was proper as a matter of law.

Our resolution of this assignment of error makes discussion of defendants' third assignment of error unnecessary since the assignment challenged findings of fact that pertain to Rule 60(b)(1).

B. Rule 60(b)(4)

[4] Defendants moved for relief from the judgments under Rule 60(b)(4) on the basis that the judgments were "void." We have already concluded that service of process over defendant Hallmark was not proper and that judgment was void. The trial court erred in failing to grant this motion as to Hallmark.

A judgment is not void if the court has jurisdiction over the parties and the subject matter and had the authority to render the judgment entered. *Windham Dist. Co. v. Davis*, 72 N.C. App. 179, 323 S.E. 2d 506 (1984). Because none of these essential elements were missing, we are unable to say that the judgment against Bailey's was void as a matter of law.

C. Rule 60(b)(6)

[5] Under Rule 60(b)(6), the court may relieve a party from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment," and that motion needs only to be made "within a reasonable time." Both defendants assert that E. O. Hall became aware of the default judgments on 11 July 1985, and they moved for relief from these judgments on 16 October 1985.

The setting aside of a judgment pursuant to G.S. 1A-1, Rule 60(b)(6) should only take place where (i) extraordinary circum-

stances exist and (ii) there is a showing that justice demands it. This test is two-pronged, and relief should be forthcoming only where both requisites exist. *Baylor v. Brown*, 46 N.C. App. 664, 266 S.E. 2d 9 (1980). In addition to these requirements, the movant must also show that he has a meritorious defense. *Sides v. Reid*, 35 N.C. App. 235, 241 S.E. 2d 110 (1978).

General Statute 1A-1, Rule 60(b)(6) "is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought." *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E. 2d 497, 499-500, *disc. rev. denied*, 309 N.C. 321, 307 S.E. 2d 164 (1983). Our Supreme Court has indicated that this Court cannot substitute "what it consider[s] to be its own better judgment" for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it "probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum*, 305 N.C. 478, 486-87, 290 S.E. 2d 599, 604-05 (1982). Further, "[a] judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980).

With these principles in mind, we are unable to say that the court's discretionary refusal to set aside the judgment "probably amounted to a substantial miscarriage of justice" or was "manifestly unsupported by reason." The strategy employed by plaintiff to serve process on defendants was calculated to ambush them. Bailey's was doing business on a daily basis in Buncombe County, and plaintiff could easily have served Bailey's with process at its place of business in Innsbrook Mall. On the other hand, by failing for twelve years to comply with the provisions of G.S. 55-13 and G.S. 66-68, defendants allowed themselves to be taken. These provisions are designed to inform potential litigants of necessary information. Had defendants complied with these statutes, they could have received proper notice of these lawsuits and protected their interests, thereby avoiding default judgment. Applying the strict standard of review to these facts, we hold that the trial judge did not abuse his discretion.

D. Recovery Against Both Defendants

In their final assignment of error, defendants argue that the trial court erred in permitting recovery against both defendants.

On 28 November 1983, judgment was entered against defendant Hallmark in the sum of $61,250.00. On 27 June 1984, judgment was entered against defendant Bailey's in the sum of $121,126.00. These judgments arose out of injuries sustained by plaintiff when she fell on 15 April 1981.

Because we have concluded that the judgment against defendant Hallmark is void, we need not discuss whether the entry of judgments against both defendants was erroneous.

In summary, the default judgment entered against defendant Hallmark on 28 November 1983 is vacated. The default judgment entered against defendant Bailey's is affirmed.

Judge MARTIN concurs.

Judge PHILLIPS concurs in part and dissents in part.

Judge PHILLIPS concurring in part and dissenting in part.

I concur in affirming the default judgment entered against the defendant Bailey's Tunnel Road Cafeteria, Inc., but dissent from vacating the default judgment entered against the defendant Hallmark Enterprises, Inc., as I am of the opinion that Hallmark was served with process in this case when its statutory process agent, the Secretary of State, was duly served. G.S. 55-15(b) provides:

> *then the Secretary of State shall be an agent of such corporation upon whom any such process, notice, or demand may be served. Service* on the Secretary of State of any such process . . . *shall be made by delivering to and leaving with him, or with any clerk having charge of the corporation department of his office, duplicate copies of such process* . . . . In the event any such process . . . is *served* on the Secretary of State, he shall immediately cause one of the copies thereof to be forwarded by registered or certified mail, addressed to the corporation at its registered office. Any such corporation so served shall be in court for all purposes *from* and *after* the date of such service on the Secretary of State. (Emphasis added.)

Though the explicit statement that service "shall be deemed complete when the Secretary of State is so served" is not contained

therein, as it is in G.S. 55-146(a) with respect to serving foreign corporations, that is what G.S. 55-15(b) plainly provides, it seems to me. The only purpose of a corporation having a process agent is so that service on the principal can be accomplished by serving the agent instead of the principal. Under G.S. 55-15(a) service upon a corporation's *registered agent* is service upon the corporation; and the foregoing provisions of G.S. 55-15(b) are plainly designed to achieve the same result when a corporation's *statutory process agent* is served in the same manner, namely by delivering to the agent "duplicate copies of such process." In this instance Hallmark's statutory process agent was so served. In my opinion the mailing by the Secretary of State, instead of being a part of the service of process, is but an administrative act by the duly served agent calculated to notify the principal that service has been accomplished; and the Secretary of State's failure to again send the mailing to the dead address of Hallmark's former agent was immaterial, since he had learned from the first mailing that Hallmark would not receive notice by it.

CHEMICAL REALTY CORPORATION v. HOME FEDERAL SAVINGS AND LOAN ASSOCIATION OF HOLLYWOOD

No. 8628SC532

(Filed 20 January 1987)

1. **Contracts § 4.2— construction of hotel—purchase of construction loan—no consideration**

In an action for an alleged breach of contract, the trial court correctly concluded that a letter issued by defendant to plaintiff promising to purchase a construction loan made by plaintiff to a third party was not a promise supported by consideration where plaintiff failed to show that the alleged consideration was bargained for, the approval letter itself made no recitation of consideration, and defendant's promise to purchase plaintiff's loan was not converted from a gratuitous promise to one supported by consideration solely by plaintiff's honoring of its obligations pursuant to its own construction loan agreement.

2. **Contracts § 14.2— hotel construction—permanent loan approval letter—construction lender not third party beneficiary**

The trial court correctly concluded that plaintiff construction lender was not a third party beneficiary of defendant's permanent loan commitment where the record did not establish that defendant and the borrower intended by their loan agreement to confer a benefit directly upon plaintiff.

3. Contracts §§ 16, 17.1— hotel construction—permanent loan—conditions precedent—loan commitment not extended

In an action for breach of contract by a short-term construction lender against the anticipated permanent lender, the trial court correctly found and concluded that the obligation to close and fund the permanent loan was subject to express conditions precedent which were not substantially complied with prior to the expiration of the loan commitment, and that neither plaintiff nor the borrower requested an extension of the permanent loan commitment.

APPEAL by plaintiff from *Allen, C. Walter, Judge.* Judgment entered 12 December 1985 in BUNCOMBE County Superior Court. Heard in the Court of Appeals 11 November 1986.

Plaintiff brought this action on 20 December 1976 against defendant to recover damages for an alleged breach of contract. In its complaint, plaintiff claimed that defendant had agreed to a "takeout" or purchase of the plaintiff's construction loan to Landmark Hotel, Inc. (hereinafter Landmark). Plaintiff alleged that it had made a construction loan to Landmark in reliance on defendant's promise to provide the long-term financing of the Landmark Hotel. Defendant refused to make the long-term loan to Landmark after plaintiff had advanced funds under the construction loan. The trial court denied defendant's motion to dismiss for lack of jurisdiction. This order was upheld on appeal.

The case was then tried before the trial court sitting without a jury. After making findings of fact and conclusions of law, the court entered judgment for defendant. Plaintiff appealed. This Court reversed and remanded the judgment of the trial court in *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 65 N.C. App. 242, 310 S.E. 2d 33 (1983), *disc. rev. denied*, 310 N.C. 624, 315 S.E. 2d 689, *cert. denied*, 105 S.Ct. 128 (1984). Reference is made to that opinion for the additional factual background of this case.

We remanded the case because the record presented certain questions of fact which were not adequately addressed in the trial court's order but which had to be resolved before judgment could be properly entered. In particular, we held that on remand the trial court should resolve the following issues by proper findings and conclusions:

> (1) Was there a promise by defendant, supported by consideration, to plaintiff to purchase plaintiff's construction loan?

(2) If defendant made no promise, did defendant's actions provide the basis for plaintiff to become a creditor beneficiary of defendant's permanent loan commitment?

(3) If plaintiff contracted with defendant, or had third party beneficiary status, what were the conditions precedent and material terms that had to be complied with before defendant's duty to plaintiff to perform arose?

(4) Were those terms and conditions substantially complied with?

(5) If Landmark and/or plaintiff had not fulfilled the conditions precedent and material terms on 14 October 1974, did plaintiff timely request defendant to extend the permanent loan commitment beyond 14 October 1974?

(6) If plaintiff did make a timely request to extend the permanent loan commitment, to what extent did plaintiff incur foreseeable and ascertainable damages by defendant's refusal to extend?

We further held that it was unnecessary to order a new trial and that the trial court should consider the case on remand on the existing record.

On remand, the trial court entered an amended judgment for defendant based on findings of fact and conclusions of law addressing the issues set forth above. Specifically, the court concluded that there was not a promise by defendant, supported by consideration, to plaintiff to purchase plaintiff's construction loan. The court further concluded that plaintiff was not a third party beneficiary of defendant's permanent loan commitment. Even assuming that plaintiff contracted with defendant or had third party beneficiary status, the court concluded that defendant's obligation to close and fund its permanent loan was subject to certain express conditions precedent which had not been substantially complied with prior to the expiration of the permanent loan commitment on 14 October 1974. The court also concluded that the permanent loan commitment expired on 14 October 1974 and that, even if an extension had been properly requested, plaintiff suffered no damages as a result of defendant's refusal to extend.

Plaintiff appealed.

Parker, Poe, Thompson, Bernstein, Gage and Preston, by Sydnor Thompson and Fred T. Lowrance; and Herbert L. Hyde, P.A., by Herbert L. Hyde; and Van Winkle, Buck, Wall, Starnes and Davis, by Larry McDevitt, for plaintiff-appellant.

McCoy, Weaver, Wiggins, Cleveland & Raper, by John E. Raper, Jr. and Teresa C. Lee, and Roberts, Stevens & Cogburn, by John S. Stevens and Glenn S. Gentry, for defendant-appellee.

WELLS, Judge.

[1] Plaintiff contends that the court erred in concluding that the undated letter issued by defendant to plaintiff in early April 1973 (hereinafter approval letter) "was not a promise by Home Federal to Chemical, supported by consideration, to purchase its construction loan. . . ." We disagree.

In general,

> [a]n enforceable contract is one supported by consideration. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972) . . . . It is well established that consideration sufficient to support a contract or a modification of its terms consists of "any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee." 302 N.C. at 215, 274 S.E. 2d at 212. Consideration is the "glue" that binds parties together, and a mere promise, without more, is unenforceable. *In re Foreclosure of Owen*, 62 N.C. App. 506, 509, 303 S.E. 2d 351, 353 (1983).

Lee v. Paragon Group Contractors, 78 N.C. App. 334, 337 S.E. 2d 132 (1985), *disc. rev. denied*, 316 N.C. 195, 345 S.E. 2d 383 (1986). Moreover, the Restatement (Second) of Contracts § 71 (1979) provides, in pertinent part, that:

> § 71. Requirement of Exchange; Types of Exchange
>
> (1) To constitute consideration, a performance or a return promise must be bargained for.
>
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation.

"Bargained for" in this context means

> the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration. Here, as in the matter of mutual assent, the law is concerned with the external manifestation rather than the undisclosed mental state: it is enough that one party manifests an intention to induce the other's response and to be induced by it and that the other responds in accordance with the inducement. . . . But it is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain. . . . In such cases there is no consideration and the promise is enforced, if at all, as a promise binding without consideration under §§ 82-94. [Citations omitted.]

Id. at Comment b. In other words, " 'the promise and the consideration must purport to be the motive each for the other, in whole or at least in part; it is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting.' " 17 Am. Jur. 2d Contracts § 92. *See also Foundation, Inc. v. Basnight*, 4 N.C. App. 652, 167 S.E. 2d 486 (1969) (" 'there is a consideration if the promisee, *in return for the promise*, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do. . . .' ") (Emphasis supplied.)

Paragraph 10 of the approval letter expressly provides, in pertinent part, that:

> We have approved, in all respects the First Mortgage Real Estate Note and Deed of Trust, copies of which are attached hereto, and agree that at the appropriate time, as provided in the Commitment, we will purchase said First Real

> Estate Note from you, without recourse, and accept the assignment of said Deed of Trust provided however that the loan is not in default under the terms of our Commitment or our loan documents.

Plaintiff contends that it "gave the following consideration and took the following actions in reliance on and pursuant to [the provisions in the approval letter]," namely: (1) it advanced $90,000 in commitment fees directly to defendant to extend the permanent commitment to 14 October 1974; (2) it supervised construction of the hotel; (3) it obtained title updates from Chicago Title Insurance Company to keep the title insurance in full force and effect; and (4) it advanced approximately 5 million dollars for the construction of the hotel. Plaintiff's argument is essentially that these actions constituted "performance" consideration for defendant's promise to purchase its loan.

We hold, however, that plaintiff has failed to show that the alleged "performance" consideration for defendant's promise was "bargained for" as required by Section 71 of the Restatement.

We initially note that the approval letter, itself, makes no recital of any consideration for defendant's promise. By producing evidence of its own reliance on defendant's promise to purchase its construction loan, plaintiff arguably has shown that its performance, *viz.*, its subsequent action in closing and disbursing its loan, was the motive or inducement for defendant's promise and thus was given "in exchange for" it.[1] But even assuming defendant's promise was the inducement for plaintiff's performance, plaintiff, who has the burden of proof, has not shown expressly that its performance was the inducement for defendant's promise.

Rather, plaintiff essentially argues that it is implicit from its closing and disbursement of the construction loan that defendant "bargained for" this performance when it promised to purchase plaintiff's loan. Plaintiff is suggesting by this argument that the mere evidence that plaintiff honored its obligations pursuant to its own construction loan commitment with Landmark, standing alone, is sufficient to convert defendant's promise to purchase

1. We note that it is even questionable whether defendant's promise was the inducement since plaintiff had already issued a construction loan commitment to Landmark, the borrower, *prior to* defendant's execution of the approval letter.

plaintiff's loan from a gratuitous one to one supported by consideration. To adopt plaintiff's reasoning in this regard would be tantamount to holding that any promise by a permanent lender to purchase the loan of a construction lender was implicitly supported by consideration so long as the construction lender ultimately closed and disbursed its loan. We decline to so hold.

We hold instead that plaintiff has failed to demonstrate that defendant's promise was anything but gratuitous, unsupported by "bargained for" consideration as required by Section 71, and thus unenforceable.[2] Accordingly we hold that the court did not err in concluding that defendant's promise to purchase plaintiff's loan in the approval letter was not supported by consideration.

[2] Plaintiff contends the court erred in concluding that it was not a third party beneficiary to defendant's permanent loan commitment. We disagree.

> "It is well settled in North Carolina that where a contract between two parties is intended for the benefit of a third party, the latter may maintain an action in contract for its breach. . . ." [Citations omitted.] An intended beneficiary, despite a lack of privity, may sue on the contract, either for its performance or damages.

Howell v. Fisher, 49 N.C. App. 488, 272 S.E. 2d 19 (1980), *disc. rev. denied*, 302 N.C. 218, 277 S.E. 2d 69 (1981). The test is whether the parties to the contract intended to confer a benefit directly upon the third party or whether the benefit to the third

2. We note that plaintiff stresses on appeal that it relied on defendant's promise in the approval letter to purchase its construction loan in making its construction loan to Landmark. In this regard, the doctrine of promissory estoppel, a generalized theory of recovery based on reliance, arguably might serve as a substitute for the want of consideration for defendant's promise, thereby rendering this promise enforceable. *See Lee, supra; Wachovia Bank v. Rubish*, 306 N.C. 417, 293 S.E. 2d 749, *reh. denied*, 306 N.C. 753, 302 S.E. 2d 884 (1982). *See, generally*, Restatement (Second) of Contracts Section 90 (1979) and Metzger et al., *The Emergence of Promissory Estoppel as an Independent Theory of Recovery*, 35 Rutgers L. Rev. 472 (1983). However, the parties neither litigated below nor raised and argued on appeal the question of whether promissory estoppel applies to defendant's promise. Our review is limited to questions presented in the briefs. N.C.R. App. P. 28(a). Plaintiff has argued under this assignment of error that defendant's promise was supported by adequate consideration, and we thus have passed upon that question only. *See Swindell v. Overton*, 80 N.C. App. 504, 342 S.E. 2d 391 (1986).

party was merely incidental. *Vogel v. Supply Co.*, 277 N.C. 119, 177 S.E. 2d 273 (1970). The parties' "intent must be determined by construction of the 'terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.'" *Lane v. Surety Co.*, 48 N.C. App. 634, 269 S.E. 2d 711 (1980), *disc. rev. denied*, 302 N.C. 219, 276 S.E. 2d 916 (1981).

> The American Law Institute's Restatement of Contracts provides a convenient framework for analysis. Third party beneficiaries are divided into three groups: *donee* beneficiaries, where it appears that the "purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary"; *creditor* beneficiaries, where "no purpose to make a gift appears" and "performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary"; and *incidental* beneficiaries, where the facts do not appear to support inclusion in either of the above categories. Restatement of Contracts, § 133 (1932). While duties owed to donee beneficiaries and creditor beneficiaries are enforceable by them, Restatement of Contracts §§ 135, 136, a promise of incidental benefit does not have the same effect. "An incidental beneficiary acquires by virtue of the promise no right against the promisor or the promisee." Restatement of Contracts, § 147.

Vogel, supra, "[T]he law in this State as to *direct* third party beneficiaries is synonymous with the Restatement categories of donee and creditor beneficiaries." *Id.* "When a third person seeks enforcement of a contract made between other parties, the contract must be construed strictly against the party seeking enforcement." *Lane, supra.*

In *Exchange Bank and Trust v. Lone Star Life Ins. Co.*, 546 S.W. 2d 948 (Tx. App. 1977), plaintiff-bank brought an action against defendant-insurance company to enforce a loan commitment made by defendant to a corporation involved in land development. Plaintiff had made a short-term loan to the corporate borrower and sought as a third party beneficiary of defendant's loan commitment to require defendant to purchase plaintiff's loan. *Exchange Bank, supra.* Regarding defendant's commitment letter to the corporate borrowers, plaintiff argued that this

letter expressly provides that the personal guaranties of Hadsell and Belew held by [plaintiff] should be assigned to [defendant], that the deed of trust and guaranty agreements executed in connection with the bank's loan were acceptable to [defendant], that the title insurance policy to be furnished by the borrower should contain only the exceptions in the policy previously issued to [plaintiff] in connection with this loan, and that notice that [defendant] would be called on by the borrower to fund the loan would be given either by the borrower or by [plaintiff]. [Plaintiff] argues that the provision for assignment of the guaranties shows an intention that [plaintiff's] note itself should be assigned, and consequently, that the commitment obligated [defendant] to pay the proceeds of the loan directly to [plaintiff] (or to a title company for transmission to [plaintiff]), rather than to the borrower. It also urges the provision allowing notice to be given by the [plaintiff] as evidence of an intention to make [it] a third-party creditor beneficiary.

Id.

However, the Court held:

As the extrinsic summary-judgment proof in this case shows, banks making short-term loans on real estate customarily rely on long-term loan commitments as sources of funds to the borrowers for repayment of the short-term indebtedness, whether or not the short-term lender is named in the long-term commitment, and customarily the proceeds of the long-term loan are transmitted through a title company to the short-term lender. We do not see how naming the short-term lender in this commitment letter materially changes the substance of the transaction. The commitment in question obligates [defendant] to make a loan to the corporate borrower and to disburse the proceeds for the borrower's benefit. Therefore, . . . consummation of the long-term loan depends on the decision of the borrower, and any benefit to the short-term lender is incidental.

The right of a short-term lender to enforce such a commitment when the borrower is unable or unwilling to consummate it should not rest on implication. In this sense, we affirm our statement . . . that the parties to a contract are

> presumed to contract for themselves, and that when a third party asserts rights under it, the intent that it should inure for his benefit must be "clearly apparent," and any doubt should be resolved against such intent. [Citations omitted.]

Id. See also Texas Bank and Trust v. Lone Star Life Ins., 565 S.W. 2d 353 (Tx. App. 1978).

Plaintiff here essentially makes the same argument as the plaintiff in *Exchange Bank, supra.* Specifically, plaintiff argues that defendant knew that the borrower would obtain a construction loan from another lender which defendant would ultimately purchase to effectuate its loan. In this regard, plaintiff emphasizes that defendant extended its loan commitment pursuant to a letter dated 28 March 1973 for the express purpose of "facilitating the closing of the construction loan."

Following the reasoning of *Exchange Bank, supra,* we hold, however, that plaintiff was merely an incidental, rather than direct, beneficiary to defendant's loan commitment. The record here does not establish that defendant and the borrower, Landmark, intended by their loan agreement to confer a benefit directly upon plaintiff. *See Vogel, supra.* Plaintiff's position would confer third party beneficiary status on virtually all short-term lenders in permanent loan commitments. Accordingly, the court properly held that plaintiff was not a third party beneficiary to defendant's permanent loan commitment.

[3] Despite plaintiff's contention to the contrary, even assuming, *arguendo,* that plaintiff was a third party beneficiary to defendant's permanent loan commitment or that the approval letter constituted a valid and enforceable contract supported by adequate consideration, defendant's obligation to close and fund its permanent loan was subject to certain express conditions precedent which had not been substantially complied with prior to the expiration of the permanent loan commitment on 14 October 1974.[3]

3. We note that, as the court concluded that the conditions precedent had not been *substantially* complied with, we need not address the question of whether substantial or strict performance of the conditions was required under these circumstances. *See, e.g., Brown-Marx Assoc., Ltd. v. Emigrant Sav. Bank,* 703 F. 2d 1361 (11th Cir. 1983) for a discussion of this question.

"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 . . . ." *Stonewall Insurance Co. v. Fortress Reinsurers Managers*, 83 N.C. App. 263, 350 S.E. 2d 131 (1986). "A condition precedent is a fact or event, 'occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.' " *Tire Co. v. Morefield*, 35 N.C. App. 385, 241 S.E. 2d 353 (1978). Further,

> In entering into a contract, the parties may agree to any condition precedent, the performance of which is mandatory before they become bound by the contract. . . . The contract "may be conditioned upon the act or will of a third person." . . . Conditions precedent are not favored by the law and a provision will not be construed as such in the absence of language clearly requiring such construction. [Citations omitted.]

Cox v. Funk, 42 N.C. App. 32, 255 S.E. 2d 600 (1979).

In *Cox*, the Court held that the provision "Subject to closing of house at 900 Hawthorne Rd. Sept. 15, 1977" included in the parties' contract for the sale of real property constituted a condition precedent to defendant's promise in the agreement to purchase plaintiff's house. *Cox, supra.* The *Cox* court found that "this condition precedent failed to materialize and, therefore, defendants did not breach a contractual duty" by refusing to close. *Id.*

When the trial court sits without a jury, as it did here, the standard of review on appeal is "whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts." *In re Norris*, 65 N.C. App. 269, 310 S.E. 2d 25 (1983), *cert. denied*, 310 N.C. 744, 315 S.E. 2d 703 (1984).

The court here found and concluded that defendant's obligation to close and fund its permanent loan was subject to several express conditions precedent and that these conditions had not been substantially complied with prior to the expiration of the permanent loan commitment on 14 October 1974.

The first condition precedent which the court identified was that "there be a management contract in effect for the hotel approved by Home Federal." The court then concluded that this condition precedent had not been substantially complied with because "[n]o enforceable management contract was in effect for the hotel which had been approved by Home Federal."

Paragraph 4 of the permanent loan commitment specifically provided: that the loan was "subject to an acceptable management contract to be executed by the borrower and the Hyatt House Hotel Corp." Defendant later agreed to accept Motor Inn Management, Inc. (MIM) as the management company instead of Hyatt. Prior to 14 October 1974 the management contract with MIM collapsed, and neither Landmark nor plaintiff proposed a substitute management company acceptable to defendant.

Following *Cox, supra,* we hold that the court properly concluded that an acceptable management contract in effect for the hotel was a condition precedent to the closing of the permanent loan. We further hold that there was competent evidence to support the finding that no enforceable management contract was in effect for the hotel which had been approved by defendant as of 14 October 1974 and that the court's conclusion that this condition precedent had not been substantially complied with was proper in light of this finding. *See Norris, supra.*

Applying the foregoing analysis regarding the "management contract" condition precedent to the findings and conclusions concerning the remaining conditions precedent, we hold that there was competent evidence to support its findings and its conclusions were proper in light of these findings regarding the following conditions precedent identified by the court, namely:

> (b) That Home Federal be delivered the Permanent Loan Deed of Trust or other security instrument evidencing a valid first lien on the hotel real property to secure a $6,000,000.00 loan evidenced by the First Mortgage Real Estate Note.
>
> (c) That Home Federal be delivered a title insurance policy by a company acceptable to it insuring that the Permanent Loan Deed of Trust was a valid first lien under the laws of the State of North Carolina.

(d) That Home Federal receive written certification from all applicable governmental authorities indicating that the completed project had been accepted by them and that the hotel could be operated and utilized in accordance with the assumptions made in the feasibility report required under the Permanent Loan Commitment.

We further hold that the court properly concluded that the conditions precedent had not been substantially complied with as of 14 October 1974 in that:

(b) Neither Landmark nor Chemical could deliver the Permanent Loan Deed of Trust or other security instrument evidencing a valid first lien on the hotel real property to secure the $6,000,000.00 loan evidenced by the First Mortgage Real Estate Note nor the title insurance policy required to insure same.

(c) Neither Landmark nor Chemical could deliver a Certificate of Completion by the Housing Authority of the City of Asheville terminating its rights of reverter.

Accordingly, we hold that, even assuming, *arguendo*, that plaintiff was a third party beneficiary to defendant's permanent loan commitment or that the approval letter constituted a valid and enforceable contract supported by adequate consideration, defendant still was not obligated to close and fund its permanent loan as neither Landmark nor plaintiff had substantially complied with the foregoing conditions precedent set forth in the permanent loan commitment. *See Stonewall Insurance, supra.*

Despite plaintiff's contention to the contrary, the evidence supports the court's finding that neither plaintiff nor Landmark requested an extension of defendant's permanent loan commitment beyond 14 October 1974, and this finding, in turn, supports the court's conclusion that the commitment expired on 14 October 1974.

Paragraph 8 of the permanent loan commitment expressly provided that:

This commitment will be in full force and effect for a period of one (1) year from this date, subject; however, to the receipt of $60,000.00 not later than May 15, 1972, which fee is

non-refundable. In the event the borrower wishes to extend the commitment for an additional period of time the Association is willing to grant such extention, based on a commitment fee of $30,000.00 for each additional six-month period that such commitment remains in good standing. It is to be specifically understood that such fee must be paid fifteen (15) days prior to the expiration date of the outstanding commitment . . . .

Plaintiff emphasizes that it made a request for an extension on 14 October 1974 at the "closing of the takeout" which never came to pass. Plaintiff does not argue, and the record does not show compliance with the requirement in Paragraph 8 of the permanent loan commitment that the $30,000 commitment fee "must be paid fifteen (15) days prior to the expiration date of the outstanding commitment. . . ." Just as the provisions of the permanent loan commitment, discussed in the "conditions precedent" argument, *supra*, were conditions precedent to defendant's obligation to close its loan, the 15-day requirement in Paragraph 8 was a condition precedent to defendant's obligation to extend its loan commitment beyond 14 October 1974. The court thus properly concluded that "[a]s of October 14, 1974, neither Chemical nor Landmark had satisfied the conditions precedent for obtaining an extension of the [p]ermanent [l]oan [c]ommitment."

Given our disposition of plaintiff's prior appeal, *Chemical Realty, supra*, we do not reach plaintiff's evidentiary arguments. Given our disposition of this appeal, we also do not reach plaintiff's remaining non-evidentiary arguments.

Affirmed.

Judges BECTON and ORR concur.

STATE OF NORTH CAROLINA v. KENNETH MORRISON

No. 8614SC750

(Filed 20 January 1987)

1. **Searches and Seizures § 35— search incident to arrest—removal of items from plain view at crime scene**

In a prosecution of defendant for attempted rape, the trial court did not err in denying defendant's motion to suppress clothing, a knife, and a hammer seized from defendant's apartment where an officer responded to defendant's call for help and went into his apartment; the officer secured what reasonably appeared to be a crime scene; officers arrived while the area was still secured and removed objects in plain view; and the evidence was thus properly admitted into evidence.

2. **Rape and Allied Offenses § 4.3— sexual relationship between prosecutrix and State's witness—no admissibility for impeachment**

In a prosecution for attempted rape, there was no merit to defendant's contention that testimony as to the sexual relationship between the prosecutrix and a State's witness should have been admitted in order to impeach the prosecutrix, since defendant failed to show that testimony of the two witnesses was inconsistent, and the statement sought to be introduced had no direct relation to the issues in the case and was therefore irrelevant.

3. **Rape and Allied Offenses § 4.3— sexual relationship between prosecutrix and State's witness—no admissibility to show bias**

In a prosecution for attempted rape, evidence of a State's witness's sexual relationship with the prosecutrix was inadmissible to show bias since its admission would greatly increase the risk of prejudicing the jury; the prosecutrix had already testified that the two were friends and had dated at one point; and this was enough to support an argument of bias. N.C.G.S. 8C-1, Rule 403.

4. **Rape and Allied Offenses § 4.3— reputation of prosecutrix in community for veracity—testimony of supervisor properly excluded—witness's personal opinion improperly excluded**

The trial court in an attempted rape case did not err in refusing to allow the prosecutrix's supervisor to testify as to prosecutrix's reputation in the community for truth and veracity, since the supervisor testified that she had known the prosecutrix for six or seven months; her opinion of prosecutrix's reputation was predicated on two incidents involving stealing from retail stores; and no showing was made that she was familiar with an appreciable group of people who had an adequate basis upon which to form their opinion of prosecutrix's character for truth and veracity. However, the court did err in excluding the witness's personal opinion of that character where the witness testified that she had formed an opinion based on personal knowledge gained in the course of her position as the prosecutrix's supervisor, but such error did not require reversal because the prosecutrix's testimony was strongly corroborated and the jury had adequate opportunity to judge her credibility on cross-examination. N.C.G.S. 8C-1, Rule 608(a).

5. Rape and Allied Offenses § 5— attempted second degree rape—sufficiency of evidence

Evidence was sufficient to support a conviction of defendant for attempted second degree rape where it tended to show that defendant restrained prosecutrix against her will in her bedroom; he threw her on the bed, choked her, and proceeded to strip off her jeans and panties; he told her, "After I do this, you will be mine"; she remonstrated with him to stop; he lay on top of her and began moving his body over her; and although defendant never tried to pry her legs apart with his hands, prosecutrix testified that "he simply tried to just penetrate me from a straight position on top of me."

APPEAL by defendant from *Herring, Judge.* Judgment entered in DURHAM County Superior Court 20 February 1986. Heard in the Court of Appeals 10 December 1986.

Defendant was indicted on charges of attempted first degree rape in violation of N.C. Gen. Stat. § 14-27.2 and the lesser included offense of attempted second degree rape in violation of G.S. § 14-27.3. Defendant pleaded not guilty, and the matter was heard before a jury. At trial, the State's evidence tended to show the following events and circumstances.

Defendant Kenneth Morrison was a public safety officer with the City of Durham at the time he and prosecutrix Benita Jenkins met. Defendant had asked a neighbor of his, Nate Tanner, if he had a typewriter he could borrow. Mr. Tanner did not own one, but he offered to ask someone he knew—Benita Jenkins—if defendant could borrow hers. When Ms. Jenkins brought the typewriter to Tanner, she was introduced to Morrison. About a week and a half later, Officer Morrison called Ms. Jenkins and asked her for a date; he had gotten her unlisted telephone number by surreptitiously looking in Nate Tanner's address book. She turned him down, but he kept calling her. Finally, thinking to put an end to the persistent calling, she agreed to a late dinner. Defendant picked her up and they went to a restaurant. After dinner, he drove her back to her apartment, and they sat outside in his car and talked. At one point, he grabbed her hand and put it on his penis. She got out of the car and ran into the apartment and told her roommate what had happened. About 10 minutes later, defendant telephoned to ask her for another date. She declined, citing his rude behavior.

Defendant again began calling her repeatedly. The pace picked up on Sunday, 28 April, when he called her so many times

that prosecutrix could not remember the number. Once again, she agreed to meet him in order to put an end to the calls. Defendant came to pick her up at 9:40 wearing dirty sweatclothes; he told Ms. Jenkins he needed to change before dinner. They went by his apartment so he could change; she followed him in rather than waiting alone in the car. She stood in the kitchen talking to defendant who was in the bedroom. At one point, defendant went into the living room, locked the door and came into the kitchen. Defendant grabbed Ms. Jenkins and forced her into the bedroom where he pushed her onto the bed. He told her, "After I do this, you will be mine." He began to choke her; she was sufficiently weakened that he was able to pull her pants and underwear to her knees.

As the struggle proceeded, they fell from the bed to the floor. Ms. Jenkins kicked off her jeans and panties in order to better resist. Defendant fell on top of her, pulled his penis from his sweat pants and tried to penetrate her. She kept her legs tightly together and, since he was holding her neck and shoulders with both hands, he was unable to pry her legs apart.

Sometime during the struggle, Ms. Jenkins managed to get hold of a hammer. When the opportunity arose, she hit defendant in the head with it and ran into the kitchen. He followed, and she grabbed a knife and swung it at him. A towel on the stove caught fire; defendant was distracted and Ms. Jenkins unlocked the door. Defendant threw her clothes to her, and she left.

The struggle was loud and violent enough to have attracted the attention of Durham Public Safety Officer Steven L. Smith, who was at the apartment complex to serve a warrant on another tenant. He saw Ms. Jenkins run screaming from defendant's apartment, carrying clothes and a knife. Officer Smith asked her to drop the knife, and she did. Defendant, who had come out onto the landing of the upstairs apartment, called to the officer, whom he knew, saying, "Steve, I need you. I need help up here." Defendant was covered with blood. Ms. Jenkins began beating on Nate Tanner's door; he opened it and Officer Smith requested that Tanner and his fiancee, who was there at the time, take her inside. In the meantime, defendant had come downstairs to retrieve the knife and then returned to his apartment. Defendant was waiting on the landing outside his door when Officer Smith

came upstairs. Smith then followed defendant inside, through the living room and kitchen to the bathroom where Officer Smith assisted him with his lacerations to the head and fingers. The officer suggested they leave the apartment since it was a crime scene; defendant complied. While inside, Officer Smith saw the defendant pick up a knife from the table and toss it into the kitchen sink. He also observed the furniture in disarray, the hammer, and the burned towel.

A second officer arrived as they left the apartment. He secured the area, and detectives came later and conducted a search of the premises.

Defendant did not testify and offered no evidence pertinent to our disposition of this appeal.

From a judgment of imprisonment entered on the verdict, defendant has appealed.

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

Loflin & Loflin, by Thomas H. Loflin, III, for defendant-appellant.

WELLS, Judge.

In his first assignment of error, defendant contends that the trial court's findings of fact pursuant to defendant's motion to suppress evidence are unsupported by the testimony on *voir dire*. N.C. Gen. Stat. § 1A-1, Rule 28(b)(5) of the N.C. Rules of Appellate Procedure states that "the body of the argument shall contain citations of authority upon which the appellant relies." Since defendant failed to cite authority in support of his argument, we deem this assignment of error to be abandoned. *See Groves & Sons v. State*, 50 N.C. App. 1, 273 S.E. 2d 465 (1980), *cert. denied*, 302 N.C. 396, 279 S.E. 2d 353 (1981).

[1] Defendant next contends that the trial court improperly denied defendant's motion to suppress evidence which Officer Smith first saw as he entered the apartment and which detectives later removed. He denies that his behavior amounted to a waiver of his constitutional rights not to have his apartment searched and items therein seized without a valid search warrant. We disagree.

In *State v. Jolley*, 312 N.C. 296, 321 S.E. 2d 883 (1984), *cert. denied*, 470 U.S. 1051, 105 S.Ct. 1751, 84 L.Ed. 2d 816 (1985), our Supreme Court considered a similar issue. Defendant in that case called the telephone operator and asked that help be sent to the Jolley residence; her husband had been shot. Rescue personnel arrived and proceeded to perform CPR. Deputy Sheriff Summers arrived soon thereafter; he noticed a semi-automatic rifle along with some cartridges and spent shells, propped against a chair, about six feet from the victim. Defendant was kneeling on the kitchen floor, crying. Deputy Summers testified that he felt it would calm her to get away from her husband's body; he helped her outside and into the front seat of the patrol car. The emergency crew left with the victim, and Deputy Summers roped off the residence as a crime scene. He later removed the gun, cartridges and spent shells. Defendant, who presented evidence at trial that the gun went off accidentally, contended on appeal that the trial court erred in admitting the rifle into evidence. In upholding the decision of the trial court, the Supreme Court stated:

> We hold that when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of a crime, and secures the crime scene from persons other than law enforcement officers by appropriate means, all property within the crime scene in plain view which the officer has probable cause to associate with criminal activity is thereby lawfully seized within the meaning of the fourth amendment. Officers arriving at the crime scene thereafter and while it is still secured can examine and remove property in plain view without a search warrant.

Id. In the instant case, Officer Smith testified that, when he first saw defendant, he had come out of his apartment after Ms. Jenkins. Defendant was covered with blood, particularly his face and hands. He said to Officer Smith, "Steve, I need you up here. I need help." Officer Smith quickly checked on Ms. Jenkins, then proceeded to the top of the steps; he followed defendant into the apartment, through the living room, kitchen and bedroom into the bathroom, where he assisted defendant with his lacerations. While inside the apartment, he saw the hammer and also observed the defendant take a knife from the table and toss it into the kitchen sink. Detectives arrived and removed clothing, a knife

and a hammer. Thus, Officer Smith responded to a call for help from the defendant; he secured what reasonably appeared to be a crime scene; officers arrived while the area was still secured and removed objects in plain view. Therefore, the objects were properly admitted into evidence, and this assignment is overruled.

Defendant's next assignment of error contains the nature of the relationship between Ms. Jenkins and State's witness Nate Tanner. Ms. Jenkins denied that she and Mr. Tanner were ever boyfriend and girlfriend. On *voir dire*, Mr. Tanner testified that he and Ms. Jenkins had engaged in sexual intercourse two or three times. Defendant contends that the court erred in ruling that defendant could not elicit on cross-examination the sexual nature of the relationship in order to impeach the testimony of prosecutrix that she did not have a boyfriend-girlfriend relationship and to show bias on the part of Mr. Tanner. We disagree.

[2] We first address defendant's contention that the testimony should be admitted in order to impeach the prosecutrix. Ms. Jenkins testified that she and Mr. Tanner did have a "boy-girl," dating sort of relationship although she denied that they were boyfriend and girlfriend. Mr. Tanner himself testified that the two were never boyfriend and girlfriend although they had in fact slept together. Defendant has failed to show that testimony of the two witnesses was inconsistent. Even if defendant had shown that the statements were inconsistent, the evidence would still be inadmissible since the statement sought to be introduced has no direct relation to the issues in this case and is therefore irrelevant. *See State v. Younger*, 306 N.C. 692, 295 S.E. 2d 453 (1982).

[3] We now turn to the question of whether evidence of Tanner's sexual relationship with prosecutrix is admissible to show bias. Although relevant, evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect. G.S. § 8C-1, Rule 403 of the N.C. Rules of Evidence. Whether or not to exclude evidence under this rule is a matter within the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 340 S.E. 2d 430 (1986). Here, the evidence in question is that of Ms. Jenkins' prior sexual encounters. Although relevant to the issue of Tanner's bias, its admission would greatly increase the risk of prejudicing the jury. Its probative value, on the other hand, is quite weak; prosecutrix herself testified that the two were

friends and at one point had dated. This evidence is enough to support an argument of bias. *See State v. Parker*, 76 N.C. App. 465, 333 S.E. 2d 515, *disc. rev. denied*, 314 N.C. 673, 336 S.E. 2d 404 (1985). Therefore, it was well within the discretion of the trial court to limit testimony to the dating relationship. This assignment is overruled.

Defendant assigns error concerning the trial court's exclusion of testimony as to Ms. Jenkins' character for truth and veracity. The witness, Ms. Hayward, was Ms. Jenkins' supervisor at the Marianne's store where Ms. Jenkins was a cashier. After objection to defense counsel's attempt to elicit testimony as to her knowledge of prosecutrix' reputation for truth and as to her own opinion of her character, a *voir dire* was held. Ms. Hayward testified that Ms. Jenkins was caught stealing in a Sears store and that later she was dismissed from her position with Marianne's for failing to ring up some items she was checking out for a close friend. The court concluded that the witness's "basis for knowledge of reputation for truthfulness is an impermissible basis under the law." Defendant contends that the trial court erred in ruling that Ms. Hayward could testifiy neither as to prosecutrix' reputation in the community for truth and veracity nor to her own personal opinion of that character.

[4] We first address defendant's assertion that the trial court should have allowed Ms. Hayward to testify as to Ms. Jenkins' reputation in the community. N.C. Gen. Stat. § 8C-1, Rule 608(a) of the Rules of Evidence states as follows:

> (a) *Opinion and Reputation Evidence of Character.* The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Our courts have held that, before a witness may testify as to another witness's reputation, a foundation must be laid showing that the testifying witness has sufficient contact with the community to enable him to be qualified as knowing the general reputation of the person in question. *State v. Sidden*, 315 N.C. 539, 340

S.E. 2d 340 (1986); *State v. McEachern*, 283 N.C. 57, 194 S.E. 2d 787 (1973). In the case at bar, Ms. Hayward testified that she has known Ms. Jenkins for six or seven months, and that her reputation was predicated on the two incidents mentioned above. No showing was made that she was familiar with "an appreciable group of people who have adequate basis upon which to form their opinion" of Ms. Jenkins' character for truth and veracity. *State v. McEachern, supra.* The trial court's ruling on this issue was correct.

With the introduction of Rule 608(a) of the Rules of Evidence in 1984, the long-standing North Carolina rule against allowing a witness to testify as to his own opinion of another's character for truth and veracity was abrogated. *See State v. Sidden, supra.* However, our courts have not yet addressed the question of when a witness is qualified to give such an opinion. As our rules are based on the Federal Rules of Evidence, we turn for guidance to decisions of the federal courts which address this issue.

In *U.S. v. Lollar*, 606 F. 2d 587 (5th Cir. 1979), the Fifth Circuit considered whether a foundation need be laid for such opinion testimony. In holding that prior questioning of the opinion witness regarding his knowledge of defendant's reputation was unnecessary, the court held:

> The rule imposes no prerequisite conditioned upon long acquaintance or recent information about the witness; cross-examination can be expected to expose defects of lack of familiarity and to reveal reliance on isolated or irrelevant instances of misconduct or the existence of feelings of personal hostility towards the principal witness.

Id. (*quoting* 3 Weinstein's Evidence § 608[04]). In *U.S. v. Watson*, 669 F. 2d 1374 (11th Cir. 1982), the Eleventh Circuit relied on *Lollar* and further reasoned:

> That opinion testimony does not require the foundation of reputation testimony follows from an analysis of the nature of the evidence involved. The reputation witness must have sufficient acquaintance with the principal witness and his community in order to ensure that the testimony adequately reflects the community's assessment. *Michelson*, 335 U.S. at 478, 69 S.Ct. at 219. In contrast, opinion testimony is

> a personal assessment of character. The opinion witness is not relating community feelings, the testimony is solely the impeachment witness' own impression of an individual's character for truthfulness. Hence, a foundation of long acquaintance is not required for opinion testimony. Of course, the opinion witness must testify from personal knowledge. *See* Fed. R. Evid. 602. But once that basis is established the witness should be allowed to state his opinion, "cross-examination can be expected to expose defects." 3 Weinstein's Evidence § 608[04], at 608-20 (1981).

The court held that the District Court's exclusion of testimony for failure to meet a foundation requirement was error. Among those whose testimony was excluded was the defendant's prior employer, who testified on *voir dire* that he had employed defendant for approximately three months and that he had a bad opinion of defendant's character for truthfulness.

In the case at bar, Ms. Hayward had formed an opinion based on personal knowledge gained in the course of her position as Ms. Jenkins' supervisor. This threshold requirement was all that was needed in order to allow her to testify as to her opinion of the prosecutrix' character for truth and veracity, and the trial court's exclusion of her testimony for failure to meet a requirement was error.

We now decide whether that error requires a reversal of the decision below. In *U.S. v. Watson, supra,* the Fifth Circuit held that error of this type abridges a "fundamental element of due process of law" (right to compulsory process). *Id., quoting Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed. 2d 1019 (1967). In order to find such constitutional error harmless, we must find it harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 705, 87 S.Ct. 824 (1967); *State v. Heard,* 285 N.C. 167, 203 S.E. 2d 826 (1974). Here, although prosecutrix' testimony was crucial to the State's case, her testimony was strongly corroborated by that of the policeman who heard the disturbance and arrived in time to witness Ms. Jenkins flee the apartment with her clothes in hand, screaming hysterically. There is also physical evidence, the hammer and the knife, and the testimony regarding defendant's injuries. In addition, the jury had adequate opportunity to judge Ms. Jenkins' credibility on

cross-examination; the defense attorney questioned her at some length regarding the checkout-line incident and she admitted that she was dismissed from her job as a result. We therefore find that the trial court's error in excluding Ms. Hayward's opinion testimony regarding prosecutrix' character for truth and veracity was harmless beyond a reasonable doubt.

[5] Defendant contends that the trial court improperly denied his motion at the close of the evidence to dismiss the charge of attempted second-degree rape. We disagree.

In order to decide whether there is sufficient evidence in a criminal prosecution to overcome a motion for dismissal, directed verdict or nonsuit the trial court must decide whether there is substantial evidence of each element of the offense charged. *State v. Moser*, 74 N.C. App. 216, 328 S.E. 2d 315 (1985); *State v. Smith*, 300 N.C. 71, 265 S.E. 2d 164 (1980). Substantial evidence is such relevant evidence as a reasonable man might accept as adequate to support a conclusion. *Id.*

G.S. § 14-27.3 defines second-degree rape as (1) vaginal intercourse, (2) with another person, (3) by force and (4) against the will of that person. G.S. § 14-27.6 sets the penalty for attempted second-degree rape, but it does not define "attempt." However, our courts have defined an attempt to commit rape as having the elements of (1) an intent to commit rape, and (2) an overt act done for that purpose which goes beyond mere preparation but falls short of the completed offense. *State v. Moser, supra; State v. Freeman*, 307 N.C. 445, 298 S.E. 2d 376 (1983).

In the case at bar, the prosecutrix testified that defendant restrained her against her will in the bedroom. He threw her on the bed, choked her and proceeded to strip off her jeans and panties; he told her, "After I do this, you will be mine." She remonstrated with him to stop. He lay on top of her and began moving his body over her; although defendant never tried to pry her legs apart with his hands, prosecutrix testified that "he simply tried to just penetrate me from a straight position on top of me." Thus, the trial court could find that there was substantial evidence that defendant intended to have vaginal intercourse with Ms. Jenkins, against her will and by force. Her testimony that he tried to penetrate her from above is clearly substantial evidence of "an overt act . . . which goes beyond mere preparation." For these reasons,

the trial court did not err in denying defendant's motion for a directed verdict. This assignment is overruled.

No error.

Judges PARKER and COZORT concur.

JANE B. LAWSON v. JOEL E. LAWSON

No. 8628DC714

(Filed 20 January 1987)

1. **Rules of Civil Procedure § 10; Husband and Wife § 10— unacknowledged separation agreement—exhibit to complaint—dismissal proper**

In an action for breach of a separation agreement, plaintiff's complaint failed to state a claim upon which relief could be granted and defendant's pre-answer motion on that basis should have been granted where the separation agreement was for all purposes a part of the complaint, was not a matter outside the pleadings, and did not meet the requirements of N.C.G.S. 52-10.1 in that a notarized acknowledgment was not affixed to the agreement. N.C.G.S. 1A-1, Rule 10(c).

2. **Husband and Wife § 10— unacknowledged separation agreement—summary judgment proper**

Summary judgment was correctly granted for defendant in an action to enforce a separation agreement where the original document was not notarized; the attorney who had drafted the agreement had done so on behalf of both parties at their insistence and acted as a scrivener rather than as an attorney; the document was not notarized; and the attorney, who was also a notary, affixed his seal to the document without request from either party after the parties were divorced and after plaintiff instituted this action. The agreement was void *ab initio* and it was impossible for the unauthorized affixation of the acknowledgment to make the agreement valid and enforceable after the parties divorced.

APPEAL by plaintiff from *Harrell, Judge*. Judgment entered 26 February 1986 in District Court, BUNCOMBE County. Heard in the Court of Appeals 29 October 1986.

On 9 October 1985, plaintiff, Jane B. Lawson, instituted this civil action with the filing of a complaint against her former husband, Joel E. Lawson. Plaintiff's complaint alleged in pertinent part that defendant had breached a valid separation agreement

the parties entered into on 8 November 1983. Plaintiff claimed $1,500.00 was due and owing to her as a result of defendant's failure to abide by the terms of the parties' alleged separation agreement. Attached to plaintiff's complaint was a document entitled "Separation Agreement." Paragraph seventeen (17) of the document stated the following:

> XVII COUNSEL'S ADVICE. Both parties hereto have been advised by Gwynn G. Radeker, Attorney at Law, who drafted this Agreement for the parties, that each should seek separate counsel for the purposes of settling the issues between them. The parties hereto have declined to seek such separate counsel and have, rather asked that Gwynn G. Radeker draft this Agreement for them. The Agreement is intended to represent as near as possible, the wishes of both parties and both parties represent that Gwynn G. Radeker is not acting as attorney for either party in this transaction.

The agreement was executed by both parties. However, this document was not notarized.

On 18 December 1985, defendant, pursuant to Rule 12(b), N.C. Rules Civ. P., filed two pre-answer motions: (1) a motion to dismiss on the grounds that plaintiff's complaint failed to state a claim upon which relief may be granted, and (2) a motion for a judgment on the pleadings for the reason "that the pleadings on their face show that the defendant is entitled to a Judgment as a matter of law."

On 9 January 1986, plaintiff filed a motion for summary judgment and served defendant with a notice that said motion would be heard by the court on 20 January 1986. On or about 19 January 1986, counsel for defendant informed the attorney, Gwynn G. Radeker, that the document in question was not notarized. Mr. Radeker, out of the presence of counsel for defendant, without being requested by anyone, proceeded to affix a notarial seal and added the following paragraph to the separation agreement:

> I, Gwynn G. Radeker, a Notary Public of Buncombe County, North Carolina, do certify that Joel E. Lawson and Jane B. Lawson *personally appeared before me this the 14th day of*

November, 1983 and acknowledged the execution of the foregoing instrument.

S/GWYNN G. RADEKER (SEAL)

my commission expires: 2-3-86

(Emphasis supplied.) During discovery by the parties Mr. Radeker was deposed and his deposition was filed with the court. Mr. Radeker's deposition stated, *inter alia*, that he had acted as a scrivener, that he did not act as legal counsel for either party, and that he did not affix his seal and add a paragraph to make the separation agreement a legally enforceable document.

On 4 February 1986, defendant filed and served notices on plaintiff informing her that on 21 February 1986, he would bring on for hearing, (1) his Rule 12(b), N.C. Rules Civ. P. motion to dismiss, filed on 18 December 1985, and (2) his motion for summary judgment filed on 4 February 1986. Defendant also filed an affidavit wherein he stated, *inter alia*, that "[t]he document entitled Separation Agreement attached to plaintiff's complaint was not acknowledged by him to any Notary Public or other Certifying Officer qualified to execute such acknowledgment"; that he had never received "a copy of such document containing any purported acknowledgment"; that "[h]e has not authorized any Notary Public or other Officer to affix an acknowledgment to such document"; and that he was informed and believed that in order for the document to be enforceable it must have been acknowledged contemporaneous with the parties' execution of said document.

On 7 February 1986, plaintiff filed an affidavit stating that on 8 November 1983, the parties had executed a deed of separation "before Gwynn Radeker, who disclosed that he was a Notary Public." Attached to plaintiff's affidavit was a copy of the document attached to plaintiff's complaint. However, added to the document was a notary public certification, affixed on 19 January 1986, by Mr. Radeker, acknowledging that the parties personally appeared before him "this the 14th day of November 1983." Also placed on the document was Mr. Radeker's seal, his signature, and a commission expiration date of 3 February 1986. There was no date to indicate when Mr. Radeker actually affixed his seal and signed the document.

On 26 February 1986, the court granted defendant's motion for summary judgment. Plaintiff appeals.

Long, Parker, Payne & Warren, P.A., by Ronald K. Payne, for plaintiff appellant.

Gum, Hillier & McDaniels, P.A., by Howard L. Gum, for defendant appellee.

JOHNSON, Judge.

The specific issue here is whether a separation agreement, not acknowledged by a Notary Public, filed with plaintiff's complaint and the subsequent filing of a copy of said separation agreement with an unrequested notarial acknowledgment affixed subsequent to the granting of an absolute divorce, and filed in response to defendant's motion for summary judgment raised a material issue of fact. If so the trial court committed reversible error in granting defendant a summary judgment. We conclude that as a matter of law defendant was entitled to a judgment dismissing plaintiff's complaint.

[1] Defendant in the case *sub judice* did not answer plaintiff's complaint which alleged defendant breached the unnotarized separation agreement attached thereto. Defendant utilized a Rule 12(b)(6), N.C. Rules Civ. P., pre-answer motion to challenge the sufficiency of plaintiff's complaint. "A Rule 12(b)(6) motion to dismiss for failure to state a claim is indeed converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E. 2d 611, 627 (1979). However, as noted by the court in *Stanback, supra*, Rule 10(c), N.C. Rules Civ. P., states in pertinent part, *"[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."* Rule 10(c), N.C. Rules Civ. P. (emphasis added). The separation agreement, which was not notarized, therefore, for all purposes was a part of plaintiff's complaint and was not a matter outside of the pleadings. The significance of this procedural aspect is that if a notarized acknowledgment was not affixed to the agreement as required by G.S. 52-10.1, then plaintiff's complaint did fail to state a claim for which relief may be granted and at this stage defendant's pre-answer motion on that basis should

have been granted because the separation agreement alleged in plaintiff's complaint did not meet the requirements of G.S. 52-10.1.

In order for a separation agreement to be valid and legally enforceable the General Assembly, through enactment of G.S. 52-10.1 (1984), has required "that the separation agreement *must* be in writing and acknowledged by both parties before a certifying officer." G.S. 52-10.1 (1984) (emphasis supplied). A person acting in the capacity of a notary public may serve as a certifying officer. G.S. 52-10.

In the controlling case of *Bolin v. Bolin*, 246 N.C. 666, 99 S.E. 2d 920 (1957), the North Carolina Supreme Court stated: "We have *universally required* separation agreements to be executed in conformity with statutory requirements governing contracts between husband and wife." *Id.* at 668, 99 S.E. 2d at 922 (emphasis supplied). A strong argument can be made that a strict adherence to the requirements the General Assembly has deemed proper to impose elevates form over substance. However, the Court in *Bolin, supra*, further stated that it "has uniformly held that a contract between husband and wife, which *must be executed in the manner and form required by G.S. 52-12, is void ab initio* if the statutory requirements are not observed." *Id.* With such express language by the Supreme Court of this State and the plain language of G.S. 52-10.1, we are constrained to require a strict adherence to the statutory formalities required by G.S. 52-10.1.

[2] Here, plaintiff and defendant moved the court for a summary judgment and submitted affidavits in support thereof. In addition to her affidavit, plaintiff submitted a copy of the alleged separation agreement with a notarial acknowledgment affixed subsequent to the filing of her complaint and subsequent to the divorce judgment dissolving the parties' marriage.

Rule 56(c), N.C. Rules Civ. P., authorizes a trial court to grant a 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, N.C. Rules Civ. P. The judge's role is to determine from the forecast of the evidence if there is a material issue of fact that is triable. *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 249 S.E. 2d 727 (1978), *aff'd*, 297 N.C. 696, 256 S.E. 2d 688 (1979).

The effect of an absolute divorce is that "[a]fter a judgment of divorce from the bonds of matrimony, *all rights arising out of the marriage shall cease and determine. . . .*" G.S. 50-11(a). The forecast of the evidence in the case *sub judice* reveals that prior to the parties' divorce, defendant approached Attorney Gwynn Gardiner Radeker and requested that he draft a separation agreement for the parties. Mr. Radeker had previously represented J. D. Lawson and Son, Inc., a corporation in which the parties were principals. Mr. Radeker, after advising the parties that they should seek separate legal counsel, reluctantly agreed to "physically draft the documents for them." Mr. Radeker's affidavit reveals that he is a notary public, and that he disclosed this fact to the parties, but was not requested by either party to notarize the alleged separation agreement. Moreover, Mr. Radeker's affidavit reveals that it was in January 1986, after the parties were divorced and after plaintiff instituted this action when plaintiff's attorney visited his office and requested to see the file on this matter to determine if the original document in question was notarized. Plaintiff's attorney discovered that the original was not notarized. At this time Mr. Radeker without request by either party affixed his seal to the document.

Mr. Radeker stated his reasoning for affixing the notarial seal as follows:

> It was being affixed because I at that stage in my mind said —well, recognizing it did not have it on it, knowing that I was a Notary Public, knowing at the time what I had told the parties, that the best thing at this stage to do would be to affix my seal and reflect the fact that they did sign it in my presence on the 14th day of November.
>
> *I knew at the time I affixed the Seal that Joel Lawson was contesting the enforceability of it* and that Jane Lawson was propounding it as an enforceable document. I also understood that it was in Jane's interest that it be enforceable and in Joel's interest at that point that it not be enforceable.

> Q. So you chose to take some efforts to make it enforceable in January of 1986?
>
> A. No. I recognize that I very possibly could have been called to testify as to what happened that day, to what went on, and actually to testify to the document without any blanks on it, but to say "Are you a Notary Public, did you tell them all those things?"
>
> *I did not affix it to make it a valid document.* I affixed the physical evidence with what I did on it because I felt it was a more straight forward and honest way to do it, because the fact of affixing, I know, would be quite—and I have not tried to hide the fact that I did it very recently and I felt that I would put it on there and have to go before the Court that way because, frankly, I don't know the total legal effect of the affixing that thing that far later. I felt this was the most honest approach to it. *It was not an attempt to make it a legally enforceable document.*

(Emphasis supplied.) There is not a scintilla of evidence that can be found in the record on appeal to support a conclusion that the lack of a notarial seal and acknowledgment was inadvertent or that the parties intended for or requested the same. There is nothing in Mr. Radeker's affidavit to indicate that the parties knew that Mr. Radeker was a notary public before they allegedly signed the document. Mr. Radeker states in his deposition "[b]y way of explanation, I do need to tell you that I told them at the time they signed it that I was a Notary Public." The only discussion of notarization that took place was when Mr. Radeker brought to the parties' attention the need of the same for recordation purposes if the parties wanted to convey real property without the joinder of each other. Mr. Radeker stated in his deposition *"[m]y understanding then* [when plaintiff's attorney approached Mr. Radeker] and my understanding before that was that an unacknowledged Separation Agreement is not an enforceable document. This is also my recollection of the law in November of 1983. When I undertook to prepare this document, I had advised both parties, Jane and Joel, that I was not representing either as their counsel, but that *I was operating as a scrivener."* (Emphasis supplied.)

Defendant's affidavit, *inter alia*, states the following:

2. The document entitled Separation Agreement attached to plaintiff's Complaint *was not acknowledged by him to any Notary Public* or other Certifying Officer qualified to execute such acknowledgment.

3. He was never provided with a copy of such document containing any purported acknowledgment by any officer certified to do so.

4. He was never asked by any Notary or other Certifying Officer if the execution of such document was his free and voluntary act.

5. He has not authorized any Notary Public or other Officer to affix an acknowledgment to such document.

6. Since the execution of the document referred to herein he has not appeared before any Notary Public or other Certifying Officer and acknowledged his signature nor the voluntary execution of such document.

7. He is now advised, informed and believes and therefore alleges that such document, to be enforceable, must have been acknowledged contemporaneous with the execution of the document.

(Emphasis supplied.)

The uncontradicted facts are that prior to the parties' divorce they never had a valid separation agreement. Mr. Radeker attempted to notarize a separation agreement after the parties were divorced; neither party employed Mr. Radeker in his capacity as an attorney or notary public; neither party has ever requested Mr. Radeker to affix a notarial acknowledgment to the alleged separation agreement; the separation agreement alleged in plaintiff's complaint was not acknowledged by a certifying officer; and plaintiff has never moved to amend her complaint. Faced with such facts, we conclude that although the result may appear harsh, after the parties were divorced it was impossible for Mr. Radeker's unauthorized affixation of his acknowledgment to make the alleged separation agreement valid and legally enforceable. The alleged agreement was void *ab initio. Bolin, supra.* E.g. *DeJaager v. DeJaager,* 47 N.C. App. 452, 267 S.E. 2d 399 (1980).

Affirmed.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. CHARLES RAY KIMBRELL

No. 8622SC545

(Filed 20 January 1987)

1. **Criminal Law § 34.2— improper questions about other misconduct—error not prejudicial**

In a prosecution of defendant for being an accessory before the fact to second degree murder, the trial court erred in allowing the State to cross-examine defendant about his knowledge and participation in "devil worshipping" and about his son's attempt to smuggle marijuana to him while defendant was being held in custody, but such errors were not sufficiently prejudicial to warrant a new trial in light of the substantial evidence of defendant's guilt. N.C.G.S. 8C-1, Rules 403, 608(b) and 610.

2. **Homicide § 31.7— accessory before the fact to second degree murder—evidence to prove offense improperly used to prove aggravating factor**

In a prosecution of defendant for being an accessory before the fact to second degree murder, the trial court erred in finding as an aggravating factor that defendant dispensed cocaine to the principals, promised to forgive their drug debts, and furnished them with murder weapons, since this same evidence was necessary to prove the offense itself and could not also be used to prove a factor in aggravation.

Judge BECTON dissenting.

APPEAL by defendant from *Washington, Judge.* Judgments entered 14 November 1985 in DAVIDSON County Superior Court. Heard in the Court of Appeals 18 November 1986.

Defendant was charged and tried on two counts of being an accessory before the fact to second degree murder under N.C. Gen. Stat. § 14-17. The State's evidence tended to show, in pertinent part, that:

From early 1983 through May 1984, James Hunt had been selling cocaine and dilaudids which defendant supplied to him. On five or six occasions defendant asked Hunt if he would like to make some more money by killing someone for him. Defendant ex-

plained that he wanted James to kill Ricky Norman because Ricky owed him a lot of money for drugs.

On 18 May 1984, Hunt and his sister, Donna Hunt, visited defendant's residence to "shoot dope." Defendant was "mad" at James because James owed him approximately $1,200. Defendant nevertheless supplied the Hunts with free narcotics, and the three "shot dope" late into the evening, at which time defendant again raised the subject of killing Ricky Norman. Defendant offered to forgive James' debt of $1,200 if James would kill Norman. Defendant indicated that James should also kill Norman's wife, Pam, if she were present, "because she'd be a witness."

At defendant's behest, James Hunt and his sister went to the Norman residence, armed with a knife supplied by defendant, but they found no one at home. The Hunts returned to defendant's house, where defendant gave James a handgun. The Hunts again went to the Norman residence. The Normans were home this time, and James shot and killed them both. James also took Ricky Norman's wallet, which contained approximately $1,500.

The Hunts were subsequently arrested and agreed to testify against defendant pursuant to plea agreements.

Defendant testified on his own behalf at trial. On cross-examination the State was permitted to question defendant about his knowledge and participation in "devil worship." The State was also permitted to cross-examine defendant about an attempt by defendant's son to sneak marijuana to him in violation of N.C. Gen. Stat. § 14-258.1(a) while defendant was being held in custody.

The jury returned verdicts of guilty of two counts of accessory before the fact to second degree murder. From judgments of imprisonment, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lucien Capone III, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender David W. Dorey, for defendant.

WELLS, Judge.

[1] Defendant contends the court erred in allowing the State to cross-examine him about his knowledge and participation in "devil worshipping." Defendant also contends that the court erred in allowing the State to cross-examine him about his son's attempt to "sneak" or "smuggle" marijuana to him while defendant was being held in custody. For the reasons below, we hold that the court erred in both instances by permitting such questioning, but that these errors were not sufficiently prejudicial to warrant a new trial in light of the substantial evidence of defendant's guilt.

After defendant's arrest, he made a statement while in custody in which he referred to his knowledge of and participation in "black magic" with a group that included Ricky Norman and others. The State's cross-examination of defendant was based, in part, on this prior statement. Defendant's cross-examination proceeded, in pertinent part, as follows:

Q. Have you done any devil worshipping?

A. No, sir.

MR. KLASS: Object.

THE COURT: Overruled.

MR. ZIMMERMAN: Thank you.

Q. Have you ever been to any ceremonies?

A. No, sir.

Q. Have you seen things at night?

A. No, sir.

Q. Birds, hawks, dogs, a number of things?

A. No, sir.

Q. You don't recall telling Special Agent Leggett of the SBI that you saw those things?

A. No, sir.

Q. "I saw a goat head made out of brass in the vision"?

MR. LOHR: Objection.

THE COURT: Overruled.

Q. And you and Luther on Friday the 13th—April, Friday the 13th, you-all were supposed to go to a seance, isn't that right?

A. That's what Bobby Tucker said.

Q. Huh?

A. That's what Curtis Robert Tucker said.

Q. Well, you were supposed to go, weren't you?

MR. LOHR: Objection.

THE COURT: Overruled.

A. I was invited.

THE COURT: You may answer the question.

A. (continuing) I was invited to it, and when I got up on Main Street to go down toward Luther's house I seen some police officers going down towards Luther's, and I kept going straight.

Q. A police officer?

A. I seen two carloads going down towards Luther's.

Q. And of course that scared you?

A. Yes, sir.

. . .

Q. Did you tell them you wanted to show them something that Bob and Luther gave you about some little swords —some little bitty swords, something about they had power?

A. That's what they told me.

MR. LOHR: Objection.

THE COURT: Overruled.

Q. Go ahead. What? Answer the question. You've got to answer the question.

A. I told them about the swords, yes, sir. I wasn't talking about myself, I was explaining about Luther Flynn at the time, if you'll remember.

Q. You had one of these black magic bibles, too, didn't you?

A. No, sir.

MR. LOHR: Objection.

THE COURT: Overruled.

Q. Who had the bible? Who had the bible?

A. Luther Flynn had the bible.

Q. Had he ever read any of it to you?

A. Yes, sir.

MR. LOHR: Objection. Objection.

THE COURT: Overruled.

Q. Were Ricky and Pam Norman involved in this black magic stuff?

A. I don't know, sir.

Q. What did that consist of? Worshipping the devil?

MR. LOHR: Objection.

THE COURT: Overruled.

A. I don't know, sir.

Q. What did that black bible Luther had have to say about it?

MR. LOHR: Objection.

THE COURT: Overruled.

Q. You can answer.

A. It's just a bunch of words. I don't know. I didn't pay any attention to it.

The State contends that this evidence was admissible under N.C. Gen. Stat. § 8C-1, Rule 608(b) of the North Carolina Rules of Evidence, which provides that:

> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The State argues that "defendant's involvement and belief in 'devil-worshipping' is conduct directly related to the issue of his truthfulness since 'devil-worship' is by definition, glorification of the archetypal embodiment of evil and deceit." However, Rule 610 expressly provides that:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced; provided, however, such evidence may be admitted for the purpose of showing interest or bias.

Accordingly, even assuming that this evidence was probative of defendant's veracity as the State contends, it was nevertheless inadmissible under Rule 610 for that purpose. *Cf. State v. Reilly*, 71 N.C. App. 1, 321 S.E. 2d 564 (1984), *aff'd on other grounds*, 313 N.C. 499, 329 S.E. 2d 381 (1985) and 1 Brandis, *North Carolina Evidence* § 55 (1983 Supp.).

The commentary to Rule 610 provides that "[e]vidence probative of something other than veracity is not prohibited by the rule." In this regard the State contends that this evidence was admissible to show motive and identity under Rule 404(b). Specifically, the State contends that this evidence supported its theory that defendant and the Normans "were involved in a group tied together by drug dealings, black magic and other illicit activities, and that defendant was motivated to have the Normans killed

after he was 'cast out' of the group and the Normans interfer[ed] with [his] drug business."

However, even assuming that this evidence was admissible under Rule 404(b) to show motive, "the determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403." *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986).

We hold that this evidence was inadmissible to show motive under Rule 403 in that its potential for undue prejudice to defendant clearly outweighed its nominal probative value. Prior to defendant's cross-examination, the State presented substantial evidence of defendant's primary motivation for having the Normans killed: that Ricky Norman owed defendant money for drugs and was interfering with his drug business. The fact that defendant and the Normans all belonged to a group in which the members participated in "black magic" and from which defendant felt "cast out" does not support defendant's primary motivation for having the Normans killed according to the State's theory in its case in chief. Rather, this evidence, if anything, merely furnished the State with an *additional* possible motive for defendant's actions.

At the same time, as defendant stresses, accusations or insinuations of participation in "devil worship" clearly carry with them a great potential for prejudicial impact on defendant's credibility. This potential for prejudice is evidenced, in part, by the prohibitions established by Rule 610.

The State essentially concedes that evidence of defendant's son's attempt to smuggle marijuana to him was inadmissible under Rule 608(b) but argues that defendant has failed to show prejudicial error. The impermissible cross-examination in this instance and regarding the references to "devil worship" would constitute reversible error if it could be shown that "a reasonable possibility that, had the error[s] in question not been committed, a different result would have been reached. . . ." N.C. Gen. Stat. § 15A-1443(a); *State v. Scott*, 318 N.C. 237, 347 S.E. 2d 414 (1986).

We hold, however, that there is no reasonable possibility that had these errors not been committed, a different result would

have been reached at trial and that the error was harmless in the light of the other evidence properly admitted at the trial. *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986). The State, through the testimony of James and Donna Hunt, presented substantial evidence that defendant was an accessory before the fact in that he was absent from the scene when the killings were committed but he participated in the planning or contemplation of the killings in such a way as to counsel, procure or command the Hunts to commit them. *See State v. Small*, 301 N.C. 407, 272 S.E. 2d 128 (1980).

[2] Defendant contends that the court erred in finding as a non-statutory aggravating factor in sentencing defendant for each conviction that defendant

> dispensed cocaine to the principals, James Clay and Donna Hunt, in substantial quantity while inducing them to kill and murder the two (2) victims; he likewise promised to forgive a debt of approximately $1,200.00 from Clay Hunt and a debt of approximately $600.00 from Donna Hunt; the defendant furnished a knife and a pistol, ".357 Magnum," to the principals to use in the crime; and finally, the principals who were solicited and procured by the defendant committed murder in the act of robbery and without any legal provocation.

Defendant contends that use of this factor to aggravate his sentences for being an accessory before the fact to the murders of Ricky Norman and Pamela Norman is prohibited by N.C. Gen. Stat. § 15A-1340.4(a)(1), which provides that "[e]vidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. . . ." We agree. This evidence clearly was necessary to show that defendant "participated in the planning or contemplation of the crime in such a way as to 'counsel, procure, or command' the principal[s] to commit it." *Small, supra. See also State v. Sauls*, 29 N.C. App. 457, 224 S.E. 2d 702, *rev'd on other grounds*, 291 N.C. 253, 230 S.E. 2d 390 (1976), *cert. denied*, 431 U.S. 916 (1977). (An accessory before the fact is one who furnishes the means to carry on the crime through the agency of or in connection with the perpetrator, who is a confederate, who instigates a crime.)

We have stated previously:

> Basic to the letter and spirit of the Fair Sentencing Act is that circumstances that are inherent in the crime convicted of may not be used as aggravating factors in order to increase the punishment beyond what the Legislature has set for the offense involved. . . . If these sentences could be enlarged because of the same facts that caused them to be established in the first place, the Legislature's judgment in the matter would be of no effect.

State v. Coffey, 65 N.C. App. 751, 310 S.E. 2d 123 (1984).

For the foregoing reasons, we hold that use of this evidence as an aggravating factor to enhance defendant's sentences was improper under G.S. § 15A-1340.4(a)(1). Both cases thus must be remanded for new sentencing hearings. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

In Nos. 85CRS151 and 85CRS152, no error in the trial, remanded for resentencing.

Judge ORR concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Believing the evidence connecting defendant with a sect of devil worshippers, who practiced "black magic," cast spells and used satanic bibles, was irremediably prejudicial, I dissent.

In this case, the relative veracity of the State's two accomplice witnesses and the defendant was critical. Both the two co-defendants turned state's evidence confessed to murdering and robbing the Normans. Both were admitted drug addicts with prior criminal records. I cannot confidently assume that they would have been more worthy of belief that defendant absent the overreaching by the District Attorney whose questions were designed to arouse the passion and prejudice of the jury. I, therefore, believe the error was harmful, not harmless.

STATE OF NORTH CAROLINA v. BRUCE DAVID STROHAUER

No. 865SC415

(Filed 20 January 1987)

1. **Criminal Law § 34.3— testimony that defendant in jail for other offense—no prejudice**

In a prosecution for larceny and safecracking in which defendant's wife was the prosecution's main witness, the trial court did not err by denying defendant's motion for a new trial where the wife, asked during cross-examination about the length of an affair with another party, replied that she had seen the man while her husband was in prison.

2. **Criminal Law § 98.1— emotional and tearful testimony—no corrective action—no error**

The trial court did not err in a prosecution for safecracking, felonious breaking and entering, and felonious larceny by not taking corrective action after the chief prosecution witness's tearful and emotional reading of a letter she had written to defendant.

3. **Safecracking § 5; Larceny § 10— punishment for both—no violation of double jeopardy**

Punishment for larceny and safecracking did not violate double jeopardy where defendant was charged with larceny for carrying away a safe and with safecracking for removing a safe for the purpose of stealing, tampering with and ascertaining the contents of the safe. N.C.G.S. 14-89.1. N.C.G.S. 14-72(a).

APPEAL by defendant from *Winberry, Judge*. Judgment entered 21 November 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 17 November 1986.

On 16 September 1985, defendant was indicted on charges of felonious breaking and entering, felonious larceny, felonious possession of stolen property and safecracking. At trial, the prosecution's main witness was the defendant's wife, Donna Lynn Strohauer. She testified that her husband called her at work sometime in the middle of July and asked her if she would pick him up at the house of Toby Hinson. When Ms. Strohauer arrived, Hinson's wife was the only one there. Defendant and Toby Hinson arrived later and defendant handed his wife a "wad" of money. Both couples then went to the Strohauers' apartment where defendant said that he and Toby Hinson had robbed Bill Thornton's house and had taken a safe, a gun, and a pouch of money.

Later that week, Ms. Strohauer found a gun in her home which had been hidden underneath a mattress. Ms. Strohauer called Crimestoppers and reported her husband's burglary, then she deposited the gun in a dumpster behind a shopping center. She later made a written statement to the police and gave them a screwdriver used in the burglary and some two dollar bills which her husband had given her. At trial, Mr. Thornton identified the gun and the marked bills as coming from his house.

Defendant was found guilty of safecracking, felonious breaking and entering, and felonious larceny. From this judgment, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Kathryn L. Jones, for the State.

Murchison, Taylor & Shell, by Michael Murchison, for defendant appellant.

ARNOLD, Judge.

[1] During cross-examination of Ms. Strohauer, defendant's attorney questioned her as to the length of an affair she had with another party. She responded, "I seen him a couple of weeks while my husband was in prison." The last part of her statement concerning her husband's criminal record was unresponsive to the question and contained evidence tending to show that defendant had committed a prior offense. The State cannot offer such evidence because it is logically irrelevant to proving the crime with which defendant is currently charged. *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954); *State v. Moore*, 51 N.C. App. 26, 275 S.E. 2d 257 (1981).

The trial court, however, immediately instructed the jury not to consider the witness's answer in any way. In *State v. Young*, 302 N.C. 385, 275 S.E. 2d 429 (1981), our Supreme Court held that where there was an unresponsive answer disclosing that defendant had committed a prior murder, and the trial court gave an immediate instruction that the statement should not be considered, the trial court did not err in denying defendant's motion for a mistrial where the evidence of defendant's guilt was overwhelming and uncontradicted.

In the case *sub judice*, the evidence was overwhelming and uncontradicted. Defendant's wife testified that her husband admitted doing the acts with which he was charged. The gun found by defendant's wife and the money given to her by defendant were identified by Mr. Thornton as being items stolen from his home. The trial court did not err in denying defendant's motion for a new trial based on the unresponsive answer.

[2] Next defendant argues that the trial court committed reversible error by allowing the chief prosecution (State's) witness's tearful and emotional reading of a letter over defendant's objection. Defendant's contention on this matter is that defendant was severely prejudiced by Ms. Strohauer's "emotional display" while reading a letter that she had written to her husband. As she read the letter, she became increasingly tearful and had to pause twice before continuing. Defendant claims that the trial judge should have taken steps to eliminate any prejudice.

In support of his argument, defendant cites *State v. Dais*, 22 N.C. App. 379, 206 S.E. 2d 759 (1974).

State v. Dais, however, is not controlling here. In *Dais*, the court had to call a short recess because the rape victim involved in the case was crying and so emotionally upset that she could not regain her composure. During the recess, the victim's father assaulted the defendant while several of the jurors were present. Also, several jurors saw an ambulance arrive and at least one juror saw the victim leave in the ambulance.

The Court of Appeals held that the trial court corrected any possible prejudice from this activity by polling the jury as to their ability to remain impartial. *Id.* The emotional reading of the letter in the case *sub judice*, however, did not rise to the level of events in *Dais*. It was not necessary for the judge to take such action.

[3] Defendant next contends that the trial court erred by imposing judgment on both the larceny and safecracking offenses since the offense of safecracking as charged in the indictment is not a separate offense from that of felonious larceny. Defendant argues that punishment for both offenses constitutes double jeopardy under the North Carolina and United States Constitutions. We disagree.

The essential elements required for a conviction of larceny are that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently. *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982); G.S. 14-72(a). The essential elements of the crime of safecracking are listed in G.S. 14-89.1:

> (a) A person is guilty of safecracking if he unlawfully opens, enters, or attempts to open or enter a safe or vault:
>
> (1) By the use of explosives, drills, or tools; or
>
> (2) Through the use of a stolen combination, key, electronic device, or other fraudulently acquired implement or means; or
>
> (3) Through the use of a master key, duplicate key or device made or obtained in an unauthorized manner, stethoscope or other listening device, electronic device used for unauthorized entry in a safe or vault, or other surreptitious means; or
>
> (4) By the use of any other safecracking implement or means.
>
> (b) A person is also guilty of safecracking if he unlawfully removes from its premises a safe or vault for the purpose of stealing, tampering with, or ascertaining its contents.

Defendant Strohauer was charged with felonious larceny by the following indictment:

> [T]he defendant named above unlawfully, willfully, and feloniously did steal, take and carry away a safe from the residence containing documents and money in the amount of $5,500.00, one (1) Remington 243 w/scope, one (1) 22 Single Shot the personal property of William Thornton having a value of $6,676.00 dollars, pursuant to the commission of felonious breaking and entering. . . .

The relevant section of the safecracking indictment reads:

> [O]n or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did remove a safe from the premises of Wil-

liam Thornton . . . for the purpose of stealing, tampering with *and* ascertaining the contents of said safe. (Emphasis added.)

Defendant argues that his convictions of both felonious larceny, for taking the safe and its contents with the intent to deprive the owner permanently, and safecracking, for the removal of the safe for the purpose of stealing its contents, placed him in double jeopardy because the crimes as charged in these indictments are the same offense.

The Double Jeopardy Clause of the North Carolina and United States Constitutions protect against (1) a second prosecution after acquittal for the same offense, (2) a second prosecution after conviction for the same offense, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969); *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986). Where successive prosecutions are involved, the Double Jeopardy Clause protects the individual from being subjected to further expense, embarrassment and a feeling of anxiety that he or she may be tried again for the same offense even though innocent. *Gardner* at 452, 340 S.E. 2d at 707 (*citing People v. Robideau*, 419 Mich. 458, 355 N.W. 2d 592, *reh'g denied*, 420 Mich. 1201, 362 N.W. 2d 219 (1984)).

Different interests are involved, however, where the prosecution is for the same offense in a single trial. The issue is one of multiple punishments not successive proceedings. Defendant's only interest is that he not be subjected to more punishment than the legislature intended. Double jeopardy does not prohibit multiple punishments for the same offenses where both are tried at the same time and the legislature clearly intended them to be punished separately. *Id.* at 455, 340 S.E. 2d at 709. The Double Jeopardy Clause restrains the prosecutor and the court, but not the legislature. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed. 2d 187 (1977). Legislative intent is determinative on this issue. *Id.* at 452, 340 S.E. 2d at 707 (*citing People v. Robideau*, 419 Mich. 458, 355 N.W. 2d 592, *reh'g denied*, 420 Mich. 1201, 362 N.W. 2d 219 (1984)).

Defendant correctly points out that the general rule in North Carolina for determining whether certain crimes are separate and distinct offenses is based on *Blockburger v. U.S.*, 284 U.S. 299, 52

S.Ct. 180, 76 L.Ed. 306 (1932). The rule states that in order to show separate and distinct offenses, there must be proof of an additional fact required for each conviction. It is not enough to show that one crime requires proof of a fact that the other does not. Each offense must include an element not common to the other. *Id.*; *State v. Murray*, 310 N.C. 541, 313 S.E. 2d 523 (1984); *State v. Gardner*, 315 N.C. 444, 340 S.E. 2d 701 (1986); *State v. Brown*, 308 N.C. 181, 301 S.E. 2d 89 (1983); *State v. Perry*, 305 N.C. 225, 287 S.E. 2d 810 (1982); *State v. Glenn*, 51 N.C. App. 694, 277 S.E. 2d 477 (1981). Producing evidence that only one of the crimes requires proof of an additional fact would seem only to show a lesser included offense.

In the present case, the safecracking indictment was worded in a way that seems to require roughly the same elements as larceny. As written, each indictment does not require proof of an additional fact which the other does not.

The *Blockburger* test, however, is not dispositive on the issue of legislative intent in single prosecution cases. When utilized, the *Blockburger* test, "may be rebutted by a clear indication of legislative intent; and, when such intent is found, it must be respected, regardless of the outcome of the application of the *Blockburger* test." *Gardner* at 455, 340 S.E. 2d at 709.

As noted, the application of the *Blockburger* test in the present case does not produce evidence of separate offenses. Therefore, the statutes are next examined to see if they explicitly authorize multiple punishments. Since no such explicit authorization is found, the *Gardner* test for determining legislative intent must be applied. *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986). When the question of multiple punishments for two convictions in the same trial is the only concern, the *Gardner* test states that the traditional means for determining legislative intent "include the examination of the subject, language, and history of the statutes." *Gardner* at 461, 340 S.E. 2d at 712.

It is important to note that the language taken from the safecracking statute and used in the indictment in the present case was not added until 1977. 1977 N.C. Sess. Laws Ch. 1106. Before this addition, there was no question that felonious larceny and safecracking were separate offenses. Our judiciary had always treated them as such. *See State v. Ball*, 277 N.C. 714, 178 S.E. 2d

377 (1971); *State v. Johnson*, 7 N.C. App. 53, 171 S.E. 2d 106 (1969).

Therefore, the determining factor is whether upon amending G.S. 14-89.1 the legislature intended to continue to impose multiple punishments for both felonious larceny and safecracking. The legislature's stated purposes for amending G.S. 14-89.1 were ". . . to clarify the elements of the crime of safecracking, make it apply when the safe or vault is unlawfully opened without the use of force, and extend the crime to cover haulaways." 1977 N.C. Sess. Laws Ch. 1106.

Nowhere among these stated purposes did the legislature mention abolishing the clearly established treatment of safecracking and felonious larceny as separately punishable offenses. Such a deviation from the historical treatment of these crimes as separately punishable offenses would have been the most substantial change created by the amendment and would have been foremost in the legislature's list of purposes.

In addition to the fact that such intent is absent from the legislature's list of purposes, it is important to note that after the 1977 amendment, the judiciary continued to impose multiple punishments for the offenses. *See State v. Thompson*, 73 N.C. App. 60, 325 S.E. 2d 646 (1985) (where the indictment for safecracking was identical to the indictment in the case *sub judice*). If the legislature had intended to abolish separate punishment for these crimes, they easily could have responded to the judicial interpretation of the statute and addressed the matter in the nine years since the amendment was enacted.

We conclude that the legislature clearly intended felonious larceny and safecracking to remain separately punishable offenses. Defendant, at a single trial, may be convicted of both crimes as charged in the indictments.

Defendant's last contention is that the trial court erred in denying his motion for dismissal on the grounds that the State's evidence was insufficient as a matter of law to support conviction. After a careful examination of the record, we find defendant's last contention to be without merit.

For the reasons set forth above, we find

No error.

Judges JOHNSON and EAGLES concur.

DUKE UNIVERSITY v. ROBERT L. STAINBACK, ELIZABETH STAINBACK AND INVESTOR'S CONSOLIDATED INSURANCE COMPANY

No. 8614SC542

(Filed 20 January 1987)

1. **Appeal and Error § 55— judgment on the pleadings denied—no review on appeal from final judgment in trial on merits**

Denial of a motion for judgment on the pleadings is not reviewable on appeal from a final judgment in a trial on the merits.

2. **Estoppel § 4.3— recovery of medical costs—pleading of statute of limitations—equitable estoppel**

In an action to recover for the costs of medical care rendered to defendant's son, the trial court did not err in finding that defendant was equitably estopped from pleading the statute of limitations as a bar to plaintiff's cause of action where the trial judge found that defendant's attorney made statements to plaintiff which caused plaintiff reasonably to believe that it would receive payment once the case between defendant and his insurer was decided, and plaintiff therefore failed to commence this action until the other action was complete and plaintiff was informed by defendant's counsel that he would not pay the bill.

Judge ORR dissenting.

APPEAL by defendant from *Wiley F. Bowen, Judge.* Judgment entered 1 October 1985 in Superior Court, DURHAM County. Heard in the Court of Appeals 22 October 1986.

Powe, Porter and Alphin, P.A., by Edward L. Embree III and Bryan E. Lessley, for plaintiff appellee.

Bobby W. Rogers for defendant appellant.

BECTON, Judge.

Plaintiff, Duke University Medical Center (Duke) sought to recover medical expenses for services rendered to Robert L. Stainback, Jr., from his parents, Robert L. and Elizabeth Stainback, and their insurer, Investor's Consolidated Insurance Com-

pany (Investor's). The trial judge found Robert L. Stainback liable for the entire balance due, notwithstanding that the statute of limitations may have run against Duke's claim, because Stainback was equitably estopped from pleading the statute of limitations as a bar. Stainback appeals. We affirm.

I

Robert L. Stainback, Jr. was admitted to Duke on 21 May 1977 for treatment of injuries sustained in a bicycle-automobile accident. He was nine years old at the time. His father, Robert L. Stainback was legally responsible for his son's medical bills and, in addition, signed a written statement accepting personal responsibility for the costs.

The medical expenses amounted to $42,812.90. The Midsouth Insurance Company paid $2,000 on the bill in June 1978. Stainback, himself, paid a total of $8,584.95 with his last payment credited on 1 November 1979. The balance of $32,227.95 was not paid.

Stainback was also insured by Investor's. However, Investor's denied coverage and refused to pay any portion of the bill. Stainback initiated suit against Investor's on 2 August 1978. He was represented by Bobby Rogers. Judgment was entered for Stainback on 13 May 1982 for $39,606.90, plus interest. Although Duke was aware of the suit between Stainback and Investor's, it neither joined nor intervened in that suit.

The following factual findings to which Stainback takes exception were nonetheless supported in the record. On 15 August 1978 Bobby Rogers informed Duke by letter that suit had been filed against Investor's. Also in the summer of 1978, Rogers told Duke that he was attempting to secure payment by Investor's of the balance of Stainback's bill and that he "would keep Duke informed of the situation."

Mr. Rogers advised a Duke representative by telephone on 26 October 1983 that he would not pay the bill. Duke initiated this action on 18 November 1983.

II

[1] Stainback first assigns as error the trial court's denial of his motion for judgment on the pleadings. Like motions for summary

judgment and failure to state a claim for relief, a motion for judgment on the pleadings is an interlocutory order and is not appealable. *Erickson v. Starling*, 235 N.C. 643, 71 S.E. 2d 384 (1952). Also, denials of motions for summary judgment and failure to state a claim are not reviewable on appeal from a final judgment on the merits. *Harris v. Walden*, 314 N.C. 284, 333 S.E. 2d 254 (1985) (Denial of motion for summary judgment not reviewable after case decided on the merits.); *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 340 S.E. 2d 755 (1986) (Denial of motion for failure to state a claim not reviewable on appeal after case decided on the merits.). The rationale for nonreviewability after a trial on the merits is that the purpose of these preliminary motions—to bring litigation to an early decision on the merits when no material facts are in dispute—can no longer be served after there has been a trial. To grant review of these denials "would allow a verdict reached after a presentation of all the evidence to be overcome by a limited forecast of the evidence." *Harris*, at 286, 333 S.E. 2d at 256. A similar rationale applies to denials of motions for judgment on the pleadings. The purpose of judgment on the pleadings is to avoid an unnecessary trial when an affirmative defense bars suit. Thus, permitting review of a denial after a judgment on the merits would allow a preliminary assertion of an affirmative defense to overcome a judgment reached after a full examination of the equities involved at trial. We hold that denial of a motion for judgment on the pleadings is not reviewable on appeal from a final judgment in a trial on the merits.

[2] Stainback's final assignment of error—that the trial court committed reversible error in finding that he was equitably estopped from pleading the statute of limitations as a bar to Duke's cause of action—is the only issue properly before this Court. Stainback had a contractual obligation to pay Duke. The parties agreed in their briefs that Stainback made payments on 9 January 1978 and 1 November 1979. North Carolina General Statute Section 1-52(1) (1983) provides that a three-year statute of limitations is applicable to an action based on breach of contract. Stainback failed to make any payment for more than four years prior to Duke initiating this action. We therefore find that the three-year statute of limitations has run and would bar Duke's claim.

However, the doctrine of equitable estoppel may be invoked, in a proper case, to prevent a defendant from relying on the statute of limitations. *See Nowell v. Great Atlantic and Pacific Tea Company*, 250 N.C. 575, 108 S.E. 2d 889 (1959); *Servomation Corp. v. Hickory Construction Co.*, 70 N.C. App. 309, 318 S.E. 2d 904 (1984). "The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him. . . . Its compulsion is one of fair play." *McNeely v. Walters*, 211 N.C. 112, 113, 189 S.E. 2d 114, 115 (1937). "Actual fraud, bad faith, or an intent to mislead or deceive is not essential to invoke the equitable doctrine of *estoppel in pais.*" *Watkins v. Motor Lines*, 279 N.C. 132, 139, 181 S.E. 2d 588, 593 (1971). Rather "it is sufficient that the debtor made representations which misled the creditor, who acted upon them in good faith, to the extent that he failed to commence action within the statutory period." *Watkins*, 279 N.C. at 139, 181 S.E. 2d at 593 (1971) quoting 51 Am. Jur. 2d, Limitation of Actions, Sec. 433.

In the case *sub judice* there are specific findings, supported by competent evidence, of conduct by Stainback's attorney which was designed to mislead Duke. The trial judge, as trier of fact, found that Stainback's attorney made statements to Duke which caused Duke to reasonably believe it would receive payment once the case between Stainback and Investor's was decided. Stainback's final assignment of error is without merit.

We affirm.

Judge WELLS concurs.

Judge ORR dissents.

Judge ORR dissenting.

The facts of this case are insufficient in my opinion, as a matter of law, to apply the doctrine of equitable estoppel. A review of the record finds only two instances in which the defendant's attorney, Rogers, communicated with plaintiff, Duke University. In June of 1978, Rogers told Duke that he was attempting to secure payment to his client by Investor's of the balance of Stainback's bill and that he "would keep Duke informed of the situation."

Secondly, on 15 August 1978, defendant's attorney informed Duke by letter that suit had been filed against Investor's.

These two incidents are clearly inadequate to support the majority's holding that Stainback was equitably estopped from pleading the statute of limitations. Likewise, there is no evidence or finding of fact to support the trial court's conclusion that the actions of Stainback's attorney justifiably induced Duke to refrain from suing Stainback or to believe that they would be paid from the proceeds of the lawsuit against Investor's.

The essential elements of an equitable estoppel are set forth in *Yancey v. Watkins*, 2 N.C. App. 672, 163 S.E. 2d 625 (1968) (quoting *Boddie v. Bond*, 154 N.C. 359, 70 S.E. 824 (1911)) as follows:

> 1. Words or conduct by the party against whom the estoppel is alleged, amounting to a misrepresentation or concealment of material facts.
>
> 2. The party against whom the estoppel is alleged must have knowledge, either actual or implied, at the time the representations were made, that they were untrue.
>
> 3. The truth respecting the representations so made must be unknown to the party claiming the benefit of the estoppel at the time they were made and at the time they were acted on by him.
>
> 4. The party estopped must intend or expect that his conduct or representations will be acted on by the party asserting the estoppel, or by the public generally.
>
> 5. The representations or conduct must have been relied and acted on by the party claiming the benefit of the estoppel.
>
> 6. The party claiming the benefit of the estoppel must have so acted, because of such representations or conduct, that he would be prejudiced if the first party be permitted to deny the truth thereof.

2 N.C. App. at 674-75, 63 S.E. 2d at 626-27.

In the case *sub judice*, there is no evidence of a misrepresentation. Stainback's attorney on two occasions informed Duke

about *what* was happening in regard to Stainback's efforts to collect the insurance proceeds. Those statements attributed to the attorney, Rogers, neither misrepresent the situation nor conceal any material fact. According to the record, there is no evidence that Rogers or Stainback at any time asked Duke to forego its right to sue Stainback within the time frame of the applicable statute of limitations or promised to pay Duke from any insurance proceeds collected from the suit. Nor is there evidence in the record of Duke relying on the alleged misrepresentations to their detriment.

Even under the standard set forth in *Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971), cited by the majority, there is insufficient evidence from which the trial court could have found that Rogers' representations misled Duke, who acted upon them in good faith to the extent that Duke failed to commence the action within the statutory period.

It would appear that invoking the doctrine of equitable estoppel in this case as a means of avoiding the statute of limitations hinges upon the successful recovery of insurance proceeds by Stainback. Would the majority still hold that Duke is entitled to a judgment based on equitable estoppel had Stainback been unsuccessful in recovering insurance proceeds or recovered the exact amount which he, personally, had previously paid Duke?

Statutes of limitation are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action." *Congleton v. City of Asheboro*, 8 N.C. App. 571, 573, 174 S.E. 2d 870, 872 (1970).

The evidence showed that after 9 July 1980, Duke made no effort to collect this account from anyone. There was obviously ample opportunity prior to the running of the statute of limitations for Duke to protect its rights. However, Duke failed to pursue any such course of action. As the trial court's findings of fact point out, ". . . Duke made no effort to intervene or otherwise join in Stainback's action against Investor's to protect its [Duke's] interests."

Equitable estoppel must rest in part on a misrepresentation, a concealment of a material fact or a misleading statement upon

which the creditor relied—not the successful efforts by a debtor to collect insurance proceeds due him. Duke sat on its right to sue and must bear the burden of failing to pursue the matter in a timely and appropriate fashion. Equitable estoppel should not apply in this case and Duke's claim should have been dismissed.

ROGER LONG, EMPLOYEE/PLAINTIFF v. MORGANTON DYEING & FINISHING CO., EMPLOYER, AND OLD REPUBLIC INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 8610IC555

(Filed 20 January 1987)

1. **Master and Servant § 65.1— workers' compensation—hernia—failure of employee to show pain**

Plaintiff's testimony that he experienced muscular "strain" after the appearance of a lump in his groin and that, about a month after his accident, he began to feel "sick to [his] stomach" was insufficient to prove that his hernia was accompanied by "pain" as required by N.C.G.S. § 97-2(18)(c).

2. **Master and Servant § 65.1— workers' compensation—hernia—failure to show pain—no causal connection between hernia and accident**

The Industrial Commission did not err in concluding that plaintiff failed to establish a causal connection between his hernia and his injury by accident, since without a finding of pain, there could be no causal connection between the hernia and the injury even if the Commission was otherwise convinced that the hernia was caused by an accident arising out of and in the course of employment.

Judge JOHNSON dissenting.

APPEAL by plaintiff-employee from the Opinion and Award of the North Carolina Industrial Commission filed 6 March 1986. Heard in the Court of Appeals 11 November 1986.

This is a workers' compensation case where plaintiff seeks to recover for a hernia. Plaintiff had worked in defendant's packing department for about five years. On 22 January 1985, at the request of his supervisor, plaintiff began temporarily working at a different job. That position required him to lift rolls of cloth which were much heavier than the ones that his usual job required him to lift. The next day, plaintiff noticed a lump in his groin area. He suffered no pain, however, and continued to work in that capacity for another two weeks before returning to his

usual job. It was not until approximately a month after the lump first appeared that plaintiff became nauseated and sought treatment.

Plaintiff's doctor diagnosed the lump as a direct inguinal hernia. After it was successfully treated, plaintiff filed this claim for workers' compensation. After a hearing, the deputy commissioner found that although plaintiff had sustained an injury by accident, he had failed to show that the hernia was accompanied by pain. Consequently, the deputy commissioner concluded that plaintiff failed to establish a causal connection between his hernia and the injury by accident. Plaintiff appealed to the full Commission, which affirmed the deputy commissioner.

McMurray & McMurray, by Martha McMurray, for the plaintiff-appellant.

Patton, Starnes, Thompson & Aycock, by Thomas M. Starnes, for the defendant-appellees.

EAGLES, Judge.

[1] In reviewing decisions of the Industrial Commission, we are limited to determining whether the findings of the Commission are supported by competent evidence and whether those findings justify its legal conclusions. *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 308 S.E. 2d 485 (1983), *disc. review denied*, 310 N.C. 309, 312 S.E. 2d 652 (1984). Plaintiff argues that the Commission's finding that he failed to prove that his hernia was accompanied by pain is unsupported by the evidence and that the finding does not justify the Commission's conclusion that there was no causal connection between defendant's hernia and the accident. Plaintiff has failed to show where there is any error in the Commission's decision. Therefore, we must affirm.

G.S. 97-2(18) provides that, in all claims for compensation for hernia resulting from an injury by accident, the claimant *must* prove to the satisfaction of the Commission:

(a) That there was an injury resulting in a hernia;

(b) That the hernia appeared suddenly;

(c) That it was *accompanied by pain*;

(d) That the hernia immediately followed an accident; and

(e) That the hernia did not exist prior to the accident for which compensation is claimed. G.S. 97-2(18). [Emphasis added.]

To recover compensation, a plaintiff must prove the existence of each of the above five elements. *Hensley v. Cooperative*, 246 N.C. 274, 98 S.E. 2d 289 (1957). The absence of any one of them will result in the denial of compensation. *Lutes v. Tobacco Co.*, 19 N.C. App. 380, 198 S.E. 2d 746 (1973).

Here, the Commission found that plaintiff failed to prove that his hernia was accompanied by any pain. An examination of the record reveals that there is competent evidence to support that finding. Plaintiff testified that, after the lump appeared, he experienced muscular "strain" while lifting the 75-100 pound rolls of cloth at work and that about a month after the accident he began to feel "sick to my stomach." He contends that this testimony is sufficient to constitute proof of "pain." While we agree with plaintiff that the feeling of pain is subjective and that an employee need not necessarily use the term "pain" before compensation may be awarded, plaintiff's testimony here clearly does not satisfy the mandatory requirement of G.S. 97-2(18)(c).

Although plaintiff testified that he felt sick to his stomach, he also stated that it "really never hurt." Furthermore, the muscle strain which he alluded to was, according to his own testimony, unrelated to his hernia. In fact, plaintiff stated that the muscle strain was the same kind of strain anyone feels when lifting a heavy object. Therefore, neither the general feeling of nausea nor the muscle strain which plaintiff described in his testimony can be equated with "pain" as that term is used in G.S. 97-2(18)(c). Since plaintiff never testified that he suffered any pain, the Commission's finding that he failed to prove that his hernia was accompanied by pain is supported by competent evidence.

[2] Plaintiff also argues that the Commission erred in concluding that he failed to establish a causal connection between his hernia and his injury by accident. More specifically, plaintiff states that, even without a finding of pain, he established a causal connection by proving to the satisfaction of the Commission that the hernia was a result of the accident. Plaintiff contends that the showing

of pain is not necessary under a liberal construction of the statute where the Commission is otherwise satisfied as to causation. We agree that the statute must be liberally construed. *McMahan v. Supermarket*, 24 N.C. App. 113, 210 S.E. 2d 214 (1974). We also agree that the record indicates that the Commission believed that plaintiff's hernia was, in fact, caused by his accident at work. Nevertheless, the Commission properly found that no causal connection was established, as required by G.S. 97-2(18).

Here, the statute is unambiguous in requiring that each of the five listed elements must be proven before compensation may be awarded. Where a statute is clear, there is no reason for judicial construction and courts must give the statute its plain meaning. *News and Observer v. State; Co. of Wake v. State; Murphy v. State*, 312 N.C. 276, 322 S.E. 2d 133 (1984). The statute, in effect, defines what constitutes a causal connection for purposes of a hernia injury and, when any one of the statute's elements is not proven, a causal connection does not exist. *See, Lutes v. Tobacco Co., supra*; 1B Larson, The Law of Workers' Compensation Section 39.71 (1986). This is true even if the Commission is otherwise convinced that the hernia was caused by an accident arising out of and in the course of employment. Plaintiff's failure to prove the hernia was accompanied by pain requires that his claim be denied.

Affirmed.

Judge ARNOLD concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority opinion. In upholding the Commission's decision (Commissioner Clay dissenting) the majority opinion correctly states our standard of review and the burden of proof plaintiff must carry in order to receive compensation. I agree with the majority opinion that "the record indicates that the Commission believed that plaintiff's hernia was, in fact, caused by his accident at work." However, I disagree with the majority's conclusion that "the Commission properly found that no causal connection was established, as required by G.S. 97-2(18)."

Deputy Commissioner Page found as fact, *inter alia*, as follows:

> 6. On January 22, 1985, plaintiff's normal work routine was interrupted and plaintiff thereby sustained an injury. Plaintiff's hernia appeared the following day but was not accompanied by any pain until approximately six weeks following the date of injury.

The majority opinion by the Full Commission states: "[w]hile it appears obvious from the medical evidence in this matter that the hernia complained of by the Plaintiff arose out of his employment, we are unable to award compensation in the face of a clear and unequivocal requirement in the statute which remains unsatisfied in this matter."

I fully agree with Commissioner Clay's dissent on the basis that the facts of this case dictate that when the statute is construed liberally plaintiff's testimony about the "strain" he felt should be sufficient to establish the "pain" required by G.S. 97-2(18) *when there is no question that plaintiff's injury was sustained in the course of his employment.* My understanding of the technical requirements of G.S. 97-2(18) is that they serve the purpose of insuring that only valid claims may be filed pursuant to G.S. 97-2(18). There is no question that plaintiff is asserting a valid claim inasmuch as Deputy Commissioner Page and the Full Commission concluded, and the evidence fully supports, that plaintiff sustained his injury in the course of his employment.

Commissioner Clay, in his dissent, appropriately includes a statement of the purpose of the Workers' Compensation Act as follows: "[t]he Workers' Compensation Act is to be construed liberally to effectuate the broad intent of the Act to provide compensation for employees sustaining an injury arising out of and in the course of the employment, and no technical or strained construction should be given to defeat this purpose." *See generally, Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 2d 591 (1930). In the case *sub judice*, plaintiff honestly, and obviously without any prior "coaching," described the circumstances of his injury. The Commission concedes that plaintiff was injured in the course of his employment. But for the lack of plaintiff's use of the magic word "pain" he would have been compensated. Moreover, expert testimony established that pain is not universally experi-

enced when a hernia occurs. However, plaintiff's hernia was accompanied by pain, according to the findings made by Commissioner Page, but this pain was not experienced by plaintiff until six weeks after his injury. Plaintiff repeatedly testified that the hernia made him feel sick and further testified that the hernia "felt like somebody hit me in the stomach." Since plaintiff sustained his injury in the course of employment he is entitled to compensation. The technical construction of the Workers' Compensation Act utilized by the Commission to deny compensation to plaintiff was error as a matter of law. I vote to reverse and remand to the Commission to render an award of compensation in plaintiff's behalf.

THE AMERICAN MARBLE CORPORATION v. RONALD LEE CRAWFORD, AND DEAN HUNTER, D/B/A QUALITY MARBLE COMPANY

No. 8623SC726

(Filed 20 January 1987)

1. **Master and Servant § 11.1; Unfair Competition § 1— covenant not to compete —unfair trade practices statutes inapplicable**

The trial court properly dismissed defendant's counterclaim which alleged that a covenant not to compete, as used by plaintiff, was an unfair trade practice pursuant to N.C.G.S. § 75-1.1 *et seq.*, since employer-employee relationships do not fall within the intended scope of that statute.

2. **Master and Servant § 13— interference with employment contract—summary judgment improper**

The trial court erred in granting summary judgment against defendant's claim for wrongful or malicious interference with contractual rights where defendant's evidence tended to establish that a valid contract existed between him and a third person; plaintiff had knowledge of such contract; plaintiff intentionally induced the third person not to perform his contract with defendant; plaintiff's acts caused defendant actual damages; and plaintiff acted without justification in that plaintiff was seeking to enforce a covenant not to compete from the parties' employment contract which was legally invalid as an unreasonable restraint of trade.

3. **Master and Servant § 12— interference with employee's obtaining other employment—punitive damages claimed—summary judgment improper**

The trial court erred in entering summary judgment against defendant on his claim for punitive damages where the evidence tended to show that plaintiff had a "side agreement" with defendant employer to drop defendant employer from its suit for breach of a covenant not to compete in exchange for

defendant employer's promise not to rehire defendant employee; plaintiff obtained a preliminary injunction restraining defendant employee from working for defendant employer, but plaintiff never followed through on the injunction by posting the required bond; and the jury could thus reasonably infer willful, oppressive or reckless conduct in wanton disregard of defendant's rights warranting damages for the purpose of punishing plaintiff and deterring others from committing similar acts.

APPEAL by defendant Ronald Lee Crawford from *Hyatt, Judge*. Judgment entered 25 February 1986 in YADKIN County Superior Court. Heard in the Court of Appeals 11 December 1986.

Plaintiff American Marble Corporation is a corporation engaged in the manufacture and sale of cultured marble products. Defendant Ronald Lee Crawford began working as an employee for American Marble in January of 1984. Crawford signed an employment contract which included a covenant not to compete. In July 1984, Crawford voluntarily left American Marble and began working for defendant Dean Hunter d/b/a Quality Marble Company pursuant to an oral contract of employment.

American Marble brought this action against defendants on 8 August 1984 seeking *inter alia* to enjoin Crawford "from working for or engaging in any activity on behalf of, defendant, Dean Hunter. . . ." On the same day, the court granted American Marble's motion for a temporary restraining order restraining Crawford from working for Quality Marble. This order expired on 20 August 1984. The trial judge subsequently granted a preliminary injunction and required plaintiff to post a $12,000 bond pursuant to N.C. Gen. Stat. § 1A-1, Rule 65(c). Plaintiff failed to post the required bond, and a written preliminary injunction order was never proffered for signature.

According to the affidavit of N. Lawrence Hudspeth, III, attorney for Dean Hunter, Dean Hunter signed a consent order prior to 20 August 1984 whereby he "would be dropped from the case provided that he agree not to rehire Ronald Crawford, or any other former American Marble Corp. employees, at any time." Hudspeth "was led to believe that [American Marble] signed the consent order but found out some time later that [it] had declined to do so."

Defendant Crawford filed an answer which raised several counterclaims. By his first counterclaim, Crawford alleged that

the covenant not to compete constituted an unfair trade practice under N.C. Gen. Stat. § 75-1.1 and that he thus was entitled to treble damages and attorney's fees pursuant to G.S. § 75-16 *et seq.* Crawford also alleged in two additional counterclaims that American Marble wrongfully interfered with his contractual rights and that such interference entitled him to compensatory and punitive damages.

The court granted plaintiff American Marble's motion for summary judgment dismissing all of defendant Crawford's counterclaims. Plaintiff's action was tried before the trial court sitting without a jury. The court concluded that the covenant not to compete was an unreasonable restraint of trade and thus was invalid. Accordingly, it entered judgment for defendants.

Defendant Crawford appealed from the court's entry of summary judgment dismissing all of his counterclaims.

White and Crumpler, by G. Edgar Parker, Robin J. Stinson and Christopher J. Beal, for plaintiff-appellee.

Legal Aid Society of Northwest North Carolina, Inc., by J. Griffin Morgan and Susan Gottsegen, for defendant-appellant Ronald Lee Crawford.

WELLS, Judge.

Defendant Crawford (hereinafter defendant) contends that the court erred in entering summary judgment against his claim that plaintiff violated N.C. Gen. Stat. § 75-1.1 and that he thus was entitled to treble damages under G.S. § 75-16. We disagree.

[1] Defendant's counterclaim alleged that the "covenant not to compete, as used by the plaintiff, is an unfair trade practice pursuant to [G.S.] § 75-1.1 *et seq.*" We have held previously that "employer-employee relationships do not fall within the intended scope of G.S. § 75-1.1 . . . ." *Buie v. Daniel International*, 56 N.C. App. 445, 289 S.E. 2d 118, *disc. rev. denied*, 305 N.C. 759, 292 S.E. 2d 574 (1982). As defendant's counterclaim involves such a relationship, we hold, following *Buie*, that it lies outside the scope of G.S. § 75-1.1. Accordingly, we hold that the court did not err in entering summary judgment against this claim.

[2] Defendant contends the court improperly entered summary judgment for plaintiff regarding his claim that plaintiff wrongfully interfered with his contractual rights. We agree.

In general,

> In order to prevail when moving for summary judgment, the moving party must establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law when all factual inferences arising from the evidence are taken in the light most favorable to the nonmoving party. *Speck v. North Carolina Dairy Foundation, Inc.*, 311 N.C. 679, 319 S.E. 2d 139 (1984).

Uzzell v. Integon Life Ins. Corp., 78 N.C. App. 458, 337 S.E. 2d 639 (1985). One who procures the discharge of an employee by malicious or wanton interference may be liable to that employee in an action for damages. *See Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). *See also* 45 Am. Jur. 2d Interference § 47. To establish such a claim defendant must prove: (1) that a valid contract existed between him and a third person; (2) that plaintiff had knowledge of such contract; (3) that plaintiff intentionally induced the third person not to perform his contract with defendant; (4) that plaintiff acted without justification; and (5) that the outsider's acts caused the defendant actual damages. *Childress v. Abeles*, 240 N.C. 667, 84 S.E. 2d 176 (1954). The facts here, when viewed in the light most favorable to defendant, clearly establish the first three elements and the fifth element for defendant's action. The central question is whether there is a genuine issue of material fact as to the element of justification. *See Uzzell, supra.*

In general, " '[o]ne is privileged purposely to cause another not to perform a contract, or enter into or continue a business relation, with a third party by in good faith asserting or threatening to protect properly a legally protected interest of his own which he believes may otherwise be impaired or destroyed by the performance of the contract or transaction.' " *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971), *quoting* Restatement of Torts § 773. Further, the question of justification for procuring a breach of contract or interference with another's employment is ordinarily a question of fact for the jury. *See* Annot., 26 A.L.R. 2d 1227.

We hold that defendant has forecast sufficient evidence to establish that plaintiff acted without justification in that plaintiff was seeking to enforce a covenant not to compete from the parties' employment contract which was legally invalid as an unreasonable restraint of trade. Accordingly, we hold that the court erred in granting summary judgment against defendant's claim for wrongful or malicious interference with contractual rights.

Ordinarily, the issue, on remand, regarding the "without justification" element would be whether plaintiff's actions constituted a good faith assertion to protect a legally protected interest which plaintiff believed might otherwise be impaired or destroyed by the performance of defendant's employment contract with Dean Hunter. *See Kelly, supra.* However, as the parties have already fully litigated the question of the validity of the covenant not to compete in the determination of plaintiff's original action, plaintiff, on remand, will be collaterally estopped from contesting the fact that this covenant is legally invalid as an unreasonable restraint of trade. *See King v. Grindstaff*, 284 N.C. 348, 200 S.E. 2d 799 (1973). The remaining question for the "without justification" element on remand, then, will be as follows: Whether plaintiff, even though it was in fact not protecting a legally protected interest (since the covenant not to compete was invalid), still acted in the good faith belief that it was protecting a legally protected interest which it believed might otherwise be impaired or destroyed by the performance of defendant's employment contract with Dean Hunter.

Defendant contends that his second counterclaim also included a claim for recovery of damages pursuant to N.C. Gen. Stat. § 1A-1, Rule 65(e), and that the court erred in failing to conclude that he was entitled to such damages as a matter of law. Rule 65(e) provides that an order or judgment dissolving an injunction or restraining order may include an award of damages against the party procuring the injunction. Despite defendant's suggestion to the contrary, he does not expressly assert a claim for damages under Rule 65(e) in any of his counterclaims. The record also reveals no motion by defendant for such damages. We thus do not reach the merits of defendant's contention. We note instead that defendant may seek leave to amend his counterclaim pursuant to G.S. § 1A-1, Rule 15(a) to assert an additional claim for such damages.

[3] Defendant contends the court improperly entered summary judgment against his claim for punitive damages. We agree.

"As a general rule, punitive damages are recoverable only when the tortious conduct which causes the injury partakes of or is accompanied by some element of aggravation such as 'fraud, malice, gross negligence, insult,' or 'when the wrong is done willfully, or under circumstances of rudeness or oppression, or in a manner which evidences a reckless and wanton disregard of the plaintiff's rights.' " *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 77 N.C. App. 475, 335 S.E. 2d 335 (1985), *disc. rev. denied*, 316 N.C. 193, 341 S.E. 2d 570 (1986), *quoting Baker v. Winslow*, 184 N.C. 1, 113 S.E. 570 (1922). "Punitive damages are awarded in addition to compensatory damages for the purpose of punishing the wrongdoer and deterring others from committing similar acts." *Id.*

We hold that the evidence here, viewed in the light most favorable to defendant, is sufficient to establish a claim for punitive damages. Specifically, from the evidence of plaintiff's "side agreement" with defendant Dean Hunter to drop Hunter from its suit in exchange for Hunter's promise not to rehire Crawford and the evidence that plaintiff did not follow through on its preliminary injunction by posting the required bond, a jury could find or reasonably infer willful, oppressive or reckless conduct in wanton disregard of defendant's rights warranting damages "for the purpose of punishing [plaintiff] and deterring others from committing similar acts." Accordingly, we hold that the court erred in entering summary judgment against defendant's claim for punitive damages.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES NEWCOMB

No. 8615SC262

(Filed 20 January 1987)

Searches and Seizures § 26— search warrant—confidential informant—no showing of credibility—affidavit insufficient to show probable cause

A warrant to search defendant's premises was invalid where the affidavit offered in support thereof gave no information which would tend to show that the confidential informant's statement upon which it was based was credible; furthermore, the State was not entitled to have the evidence admitted under the "good faith exception" to the exclusionary rule where the officer affiant took no reasonable steps to comply with the Fourth Amendment of the U. S. Constitution in that he failed to provide the magistrate with sufficient information from which to find probable cause, failed to conduct any independent investigation, and provided a bare bones affidavit, and the warrant was issued by a magistrate who asserted that her job was to find probable cause and she had done so in each of the approximately 300 warrant applications made to her.

APPEAL by defendant from *Farmer, Judge.* Judgment entered 25 September 1985 in Superior Court, ALAMANCE County. Heard in the Court of Appeals 27 August 1986.

Attorney General Lacy H. Thornburg, by Assistant Attorney General John H. Watters, for the State.

Hemric, Hemric & Hemric, P.A., by H. Clay Hemric, Jr., for defendant appellant.

BECTON, Judge.

Defendant, Charles Newcomb, was indicted for maintaining a dwelling used for keeping and selling marijuana, manufacturing and possessing marijuana with intent to sell or deliver, and possessing drug paraphernalia with intent to use, in violation of N.C. Gen. Stat. Secs. 90-108(a)(7), 90-108(a)(1), and 90-113.22 (1983) respectively. Defendant filed motions to suppress the evidence on both North Carolina statutory and State and Federal Constitutional grounds. The trial court found no substantial violation of North Carolina statutes. And although the trial court found that the search warrant was issued without probable cause, the trial court determined that the police officer who applied for and executed the warrant acted in good faith and refused to suppress the evidence. Defendant appeals. We reverse.

I

The trial court made the following findings of fact. On 21 March 1985 Officer R. D. Cockman executed the affidavit for a search warrant. The affidavit contained the following sworn statement by Officer Cockman:

> This applicant swears to the following facts to establish probable cause for the issuance of a search warrant: I, the undersigned applicant, have been a law enforcement officer for more than three years with the Alamance County Sheriff's Department. During this time I have received extensive training including Basic Law Enforcement Officer's Certification and Advanced Criminal Investigation courses presented through the North Carolina Justice Academy. During the last year I have been involved in several investigations concerning drug offenses in Alamance County. Within the past five days from March 21, 1985, the person who I will refer to as "He," regardless of the person's sex, contacted me. This person offered his assistance to the City-county vice unit in the investigation of drug sales in the Burlington-Alamance County area. This person told myself [sic] that he had been inside the residence described herein being Rt. 8, Box 122, Lot #82 County Club Mobile Home Park, Burlington, where he observed a room filled with marijuana plants. He stated that the suspect Charles Wayne Newcomb was maintaining the plants. This applicant confirmed the identity of the suspect to be Charles Wayne Newcomb. This information obtained [sic] through D.M.V. records through vehicle registration. This applicant further checked with Duke Power Company and found this residence to have Charles Wayne Newcomb listed as the current occupant. Based on these facts and this information, this applicant requests that this search warrant be issued for the search of the premises described.

Magistrate Sandra Herring found probable cause based on the foregoing affidavit and issued a search warrant on 21 March 1985. The magistrate had been trained regarding the requirements for a probable cause determination. Defendant's residence was searched on 23 March 1985. Evidence was seized as a result.

Officer Cockman "unintentionally and inadvertently" failed to state the reason the informant was reliable and the time the

informant's observations were made. He had previously been trained in the preparation of affidavits and had prepared four or five in obtaining search warrants. He spent three hours preparing the affidavit. No one else reviewed the affidavit. Officer Cockman stated that he thought the affidavit was "true and valid." He made no prior investigation of defendant or his residence.

II

Defendant assigns as error the trial court's: (1) admission of Officer Cockman's testimony regarding matters supporting probable cause that were not contained in his affidavit; (2) exclusion of testimony from Magistrate Herring regarding similar search warrant cases; (3) denial of defendant's various motions to suppress the evidence; and (4) denial of defendant's motion to identify the confidential informant.

Defendant failed to argue his first two assignments of error in his brief. They are therefore deemed abandoned in accordance with Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. We turn now to defendant's remaining assignments of error.

III

Defendant contends that the evidence was seized in violation of his right, under the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution, to be free from unreasonable searches and seizures, because Officer Cockman entered his home without a valid warrant. He maintains that the trial court correctly found the warrant invalid under the *Gates* "totality of the circumstances" test. *Illinois v. Gates*, 462 U.S. 213, 76 L.Ed. 2d 527 (1983). He argues, however, that the trial court erred in forgiving the invalidity of the warrant under the "good-faith exception" to the exclusionary rule. *United States v. Leon*, 468 U.S. 897, 82 L.Ed. 2d 677 (1984). We agree with defendant.

Under *Gates*, the totality-of-the-circumstances test includes a consideration of the contents of the informant's statement as well as independent investigations or corroboration of details. The test is no longer limited to mere consideration of reliability, veracity, and credibility as was formerly the case. Later, in *Massachusetts v. Upton*, 466 U.S. 727, 80 L.Ed. 2d 721 (1984) the Court indicated

that the totality-of-the-circumstances approach in *Gates* was a completely new, less technical model for determining probable cause.

North Carolina expressly adopted the reasoning of the U.S. Supreme Court in *Gates* and *Upton* to questions arising under Article I, Section 20 of the Constitution of North Carolina in *State v. Arrington*, 311 N.C. 633, 319 S.E. 2d 254 (1984). Consequently we need not engage in a dual analysis of North Carolina and United States Constitutional search and seizure law. The precedent we look to applies equally to both issues.

In *Arrington* the North Carolina Supreme Court examined the validity of a search warrant in which the affiant failed to state that the information therein came from personal knowledge of a reliable source. In upholding the warrant, the Court heeded closely the admonitions of the *Upton* Court which cautioned against a de novo scrutiny of the basis for a search warrant and urged deference to the magistrate's determination. The *Arrington* Court considered as significant other circumstances such as the corroboration of the informant's story by a second informer and the fact that the informer admitted, against his penal interest, to having purchased a controlled substance from the defendant.

In the case before us, the record is devoid of any circumstances that tend to make the informant's statement credible. The information he supplied is sparse. His statement gives no details from which one could conclude that he had current knowledge of details or that he had even been inside the defendant's premises recently. The affidavit contains a mere naked assertion that the informant at some time saw a "room full of marijuana" growing in defendant's house. The informant was not acting against his penal interest. Neither is there any indication that he had supplied previous information that proved helpful to the police. Officer Cockman made no attempt to corroborate the informant's story. He did nothing more than verify that defendant lived in the house. We hold that there was not sufficient information on which to find probable cause. The usual deference we give to a magistrate's decision is undeserved in this case.

We turn now to the question whether the State is entitled to have the evidence admitted under the "good faith exception" to the exclusionary rule. In *State v. Welch*, 316 N.C. 578, 342 S.E. 2d

789 (1986), the North Carolina Supreme Court adopted the *Leon* "good faith exception" to the exclusionary rule. The *Leon* exception permits the admission of otherwise excludable evidence when the "officer [takes] every reasonable step to comply with the fourth amendment." In *Welch* the officer took a blood sample from the defendant without securing a search warrant. In lieu of a search warrant the officer obtained a nontestimonial identification order by a superior court judge. The North Carolina Supreme Court refused to apply the exclusionary rule stating "to apply the rule [in that case] would not serve to discourage police misconduct and would only defeat justice for no good reason."

Unlike *Welch* and *Leon*, in the case at bar, the officer took no reasonable steps to comply with the fourth amendment. We cannot condone or excuse his negligence. When the officer fails to provide the magistrate with sufficient information from which to find probable cause, fails to conduct any independent investigation, provides a bare-bones affidavit, and a warrant is issued by a magistrate who, according to the record, asserts that her job is "to find probable cause," and has found probable cause in each of the approximately 300 warrant applications, we find the good faith exception particularly inappropriate.

IV

Defendant next contends that the evidence was obtained as a result of a substantial violation of the provisions of Chapter 15A of the North Carolina General Statutes by the magistrate. Because of our disposition that the seizure violated the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution, we need not and do not reach this issue. In any event the trial court failed to make findings of fact to support its conclusion that there was not a substantial violation of Chapter 15A as required by N.C. Gen. Stat. Sec. 15A-977(d) (1983).

In view of the foregoing analysis it is not necessary to address defendant's remaining assignment of error regarding the identity of the confidential informant.

Reversed.

Judges JOHNSON and COZORT concur.

W. A. DAVIS REALTY, INC., D/B/A W. A. DAVIS MILLING COMPANY v. WAKELON AGRI-PRODUCTS, INC.

No. 8518SC1093

(Filed 20 January 1987)

Contracts § 27.2; Sales §§ 5, 6— sale of wheat—breach of contract—breach of implied and express warranties—negligence—directed verdict improper

In an action to recover for losses allegedly sustained because defendant supplied plaintiff with "sick wheat" instead of sound, wholesome Number 2 milling wheat, the commodity bargained for, plaintiff's evidence was sufficient to support claims for breach of contract, breach of express and implied warranties and negligence where plaintiff offered evidence tending to show that "sick wheat" caused plaintiff's flour to make defective biscuits to the dissatisfaction of its customers and its own pecuniary loss; defendant made several different deliveries of "sick wheat" to plaintiff during the period involved; "sick wheat" is a rare condition and thus not likely to be found in every supplier's bin or delivery; defendant stored all the wheat involved in the same bin over the winter, a storage practice which often results in "sick wheat"; much of defendant's wheat was converted into biscuits within 10 days after it was delivered to plaintiff; about 10 days or so after defendant's first delivery of wheat to plaintiff, its customers began to complain about plaintiff's flour not making satisfactory biscuits and the complaints continued during the rest of the month; and during the period from 3 April through 1 May, defendant's deliveries amounted to 1,065,200 pounds while those of all other suppliers amounted to only 387,075 pounds, 200,000 pounds of which were delivered by one supplier on one day, 16 April—too late to be the cause of the complaints which had already been received and which were received during the several days that followed. N.C.G.S. 25-2-313, 25-2-314, and 25-2-315.

APPEAL by plaintiff from *Davis, James C., Judge.* Judgment entered 17 May 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 4 March 1986.

Plaintiff milling company, which produces self-rising flour at its High Point mill and sells it to certain fast food restaurants, sued to recover losses allegedly sustained because during the month of April 1980 defendant supplied it with "sick wheat"—wheat with a dead or deteriorating wheat germ that is not suitable for self-rising flour—instead of sound, wholesome U. S. Department of Agriculture grade Number 2 milling wheat, the commodity bargained for. The theories asserted for relief were breach of express warranty, breach of implied warranty, breach of contract, and negligence. At the end of plaintiff's evidence the court directed a verdict against all claims and entered judgment for defendant.

Viewed in its most favorable light plaintiff's evidence in pertinent part was to the following effect: During the month of April, 1980 plaintiff bought 1,015,530 pounds of wheat from defendant, all of which was supposed to be grade Number 2 according to U.S. Department of Agriculture standards. Under those standards wheat is graded according to the percentage of defective kernels and foreign material that it contains and Number 2 wheat contains no more than 5% total defects. Throughout the month of April defendant delivered wheat to plaintiff's mill in trailer load lots, each of which weighed approximately 43,000 pounds; deliveries were made almost daily, and sometimes twice a day, and all the wheat so delivered had been stored in the same bin since the preceding November. Upon receiving a delivery of wheat plaintiff usually milled it into baking flour that day or the next and immediately delivered the flour to its customers, among which were Fast Food Merchandisers (Hardees), Burlington Distributors, Inc. (Biscuitville), Mayberry Distributing and the Biscuit Shoppe. Upon delivery the flour was usually put in the customers' warehouses where it stayed for two or three days before being delivered to a restaurant, where it stayed on the shelf for five or six days before being made into biscuits. Plaintiff's biggest customer, Fast Food Merchandisers, usually maintained no more than two or three days' inventory in its warehouse, but in a lot of instances had no inventory at all and their trucks were waiting for plaintiff's truck to arrive. About the middle of April plaintiff's biscuit-making customers began complaining that the flour sent them was not producing acceptable biscuits; their complaints, which continued through the rest of the month, were that the biscuits would not rise, and were gray in color. Of the wheat that plaintiff received and milled that month over 75% of it was supplied by defendant and during the period between 18 April and 28 April, when most of the complaints were made, more than 90% of the wheat plaintiff milled was received from the defendant. As the complaints increased plaintiff had several different deliveries of defendant's wheat tested by State Agriculture Department inspectors. On 25 April 1980 local inspectors tested two trailer loads of wheat that defendant had delivered that day; one load had 24.6% total defects and was rejected, the other load had 7.9% total defects, but was kept and used by combining it with higher grade wheats. Two samples of wheat from deliveries defendant made on 28 April were sent to the State Department of

Agriculture in Raleigh and the official grain inspector found one sample had 15.1% total defects and was Number 5 wheat, and the other had 38.8% total defects. An inspection at plaintiff's mill of a delivery made 30 April revealed that the wheat was musty and had 34.6% total defects, as well as an off odor. An Agriculture Department inspector, who either made or was familiar with all the inspections, described 95% of the defective kernels found as "sick wheat," which is rarely found in Number 2 wheat. An expert in cereal chemistry testified that: "Sick wheat" is the result of poor storage conditions; is a degenerative process in which the germ and then the remainder of the wheat kernel die; is not easily detected; is a condition where the germ dies, creating a dead organism which is difficult to store; and that flour milled from "sick wheat" loses the gas retention ability that permits flour products to rise and the products baked from "sick wheat" can be gray in color. Plaintiff did not have tests made on any wheat received from its other suppliers; and defendant did not test or inspect the wheat it delivered to plaintiff, either to insure that it was grade Number 2 wheat or that it was not "sick wheat." Plaintiff had to take back the defective flour that its customers still had and replace it with flour obtained from other suppliers; and because of the defective flour supplied them some of plaintiff's best customers stopped buying flour from it altogether.

Womble, Carlyle, Sandridge & Rice, by Keith W. Vaughan and Robert C. Dortch, Jr., for plaintiff appellant.

Henson, Henson & Bayliss, by Perry C. Henson and Paul D. Coates, for defendant appellee.

PHILLIPS, Judge.

Quite clearly, it seems to us, plaintiff's evidence, when viewed in its most favorable light, *West v. Slick*, 313 N.C. 33, 326 S.E. 2d 601 (1985), makes out a *prima facie* case on all the claims asserted. That the grade or quality of goods bought and sold can be contracted for is rudimentary; and that an agreement as to the grade or quality of goods bought and sold can be the basis for an express warranty is expressly provided by statute. G.S. 25-2-313. The main thrust of plaintiff's evidence is that defendant contracted or expressly warranted to provide Number 2 milling wheat, a commodity with few defective kernels, and breached its obligation

by supplying wheat of an inferior standard that contained a high percentage of defective kernels. The same evidence, along with evidence that defendant knew that plaintiff was milling wheat into flour for human consumption and was relying upon defendant to furnish wheat suitable for that purpose, supports the claims that defendant made and breached the implied warranty of merchantability, G.S. 25-2-314, and the implied warranty of fitness for a particular purpose, G.S. 25-2-315. Under the circumstances recorded whether these warranties were made or breached were questions of fact, not law. *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E. 2d 588 (1982). And the evidence that Wakelon stored the wheat involved over the winter, a practice that can cause "sick wheat," and did not inspect it prior to shipment is some evidence at least that it failed to use reasonable care in supplying plaintiff with a product free from hidden defects. *Wilson v. Lowe's Asheboro Hardware, Inc.*, 259 N.C. 660, 131 S.E. 2d 501 (1963). Nor was plaintiff contributorily negligent as a matter of law because it did not inspect the earlier deliveries received from defendant. The evidence does not indicate that plaintiff knew or should have known of defendant's storage practices until near the end of the month when the customers' complaints were being investigated; nor does it indicate that in the exercise of due care plaintiff was required to inspect for this rare condition before accepting the different shipments delivered. The inspection described by the evidence required more than just looking at the wheat; it involved peeling the bran from the surface area of the germ; and whether such an inspection should have been made is also a question of fact, not law.

Plaintiff's evidence is also sufficient to support but not require a finding that defendant's breaches and negligence proximately caused at least some of the damage that plaintiff's evidence tends to show was sustained. That the evidence does not exclude the possibility that other suppliers also supplied it with "sick wheat" during the period involved is not fatal to plaintiff's claims as defendant maintains. To have a jury pass on its case plaintiff was not required to show to a scientific certainty that defendant's defective merchandise was the sole cause of the damage claimed; it only had to show that defendant's product *probably caused* some of the damage sustained. *Stanback v. Stanback*, 297 N.C. 181, 254 S.E. 2d 611 (1979); 9 Strong's Index 3d,

Negligence Secs. 9 and 10 (1977). This the plaintiff did by presenting evidence indicating the following: That "sick wheat" caused plaintiff's flour to make defective biscuits to the dissatisfaction of its customers and its own pecuniary loss; that defendant made several different deliveries of "sick wheat" to plaintiff during the period involved; that "sick wheat" is a rare condition, and thus not likely to be found in every supplier's bin or delivery; that defendant stored all the wheat involved in the same bin over the winter, a storage practice that often results in "sick wheat"; that much of defendant's wheat was converted into biscuits within ten days after it was delivered to plaintiff; that about ten days or so after defendant's first delivery of wheat to plaintiff its customers began to complain about plaintiff's flour not making satisfactory biscuits and the complaints continued during the rest of the month; and that during the period from April 3rd through May 1st Wakelon's deliveries amounted to 1,065,200 pounds and those of all the other suppliers amounted to only 387,075 pounds, 200,000 pounds of which were delivered by one supplier, Central Soya, on one day, April 16th—too late to be the cause of the complaints that had already been received and the complaints that were received during the several days that followed.

Vacated and remanded for a new trial.

Judges ARNOLD and EAGLES concur.

PAUL B. COCKMAN v. PPG INDUSTRIES AND THE HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 8610IC571

(Filed 20 January 1987)

1. Master and Servant §§ 65.2, 72— workers' compensation—permanent partial disability or total disability—election of remedy by employee

The opinion and award of the Industrial Commission must be vacated where the Commission acted under a misapprehension of the law in feeling that it was bound to award benefits for permanent partial disability under N.C.G.S. § 97-31(23) for plaintiff's back injury and that it could not award benefits under N.C.G.S. § 97-29 for total disability, since N.C.G.S. § 97-29 and § 97-31 are alternate sources of compensation for an employee who suffers a

disabling injury which is also included as a scheduled injury, and the injured worker is allowed to select the more favorable remedy.

2. **Master and Servant § 94.1— workers' compensation—reversal of Deputy Commissioner—new findings by Commission required**

When the Industrial Commission is about to reverse the decision of the Deputy Commissioner, the better practice is for the Commission to make all the findings and conclusions rather than to adopt the findings and conclusions of the hearing officer.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 20 February 1986. Heard in the Court of Appeals 12 November 1986.

This is a workers' compensation case wherein plaintiff seeks compensation for an injury arising out of an accident which occurred on 15 November 1983. Following a hearing on 28 May 1985, Deputy Commissioner Henry Burgwyn issued an opinion and award in which he found the following pertinent facts:

1. Plaintiff, age 58, was injured by accident on November 15, 1983. As a result of this injury, plaintiff went to see Dr. Thomas Presson, orthopaedic surgeon, on November 18, 1983.

2. Dr. Presson conducted an examination of the plaintiff who was experiencing severe pain and muscle weakness and diagnosed an acute ruptured disc. A subsequent CT scan confirmed this diagnosis at the L4-L5 level. On November 23, 1983, Dr. Presson performed surgery.

3. After the surgery the plaintiff received physical therapy, heat and some exercise. The surgery and subsequent treatment did not have the desired effect and the plaintiff continued to experience pain and discomfort.

4. Finally, by April of 1984 the pain had become so severe that Dr. Presson felt compelled to perform a second operation. In this operation a substantial amount of scar tissue was removed from the plaintiff's nerve roots. The plaintiff was given medication, a back brace and physical therapy.

5. The plaintiff continued to receive medical treatment through 1984, however his symptoms did not abate. These symptoms included severe pain in the back along with numb-

ness, pain and a burning sensation in the legs. The plaintiff was unable to stoop or squat, make quick movements, lift or even sit for more than a few hours without experiencing physical problems. Frequently the plaintiff was compelled by his discomfort to lie on the floor and in general, physical activity of any strenuous nature, compelled him to rest for hours and on occasion, days in order to recover.

6. The plaintiff was referred by Dr. Presson to Mike Hums, a vocational rehabilitation person with the Department of Human Resources, who worked briefly with the plaintiff in an effort to create a program for assisting the plaintiff in a return to the work force. Mr. Hums felt there was some reasonable expectation plaintiff could be returned to the work force; however, this was not based on medical knowledge nor did Mr. Hums have the opportunity to really evaluate the plaintiff's situation and devise a plan to help him return to work.

7. In addition to treating the plaintiff, Dr. Presson suggested that a series of tests be performed by Dr. Grubb in Chapel Hill. The purpose of these tests was to attempt to ascertain if additional surgical intervention or other medical techniques might be helpful to the plaintiff. After discussing this with Dr. Grubb, the plaintiff concluded that the type of the proposed testing and potential surgery offered only a marginal hope for improvement of his situation and therefore, declined to proceed with the additional testing.

8. The plaintiff's symptoms at the time of the hearing included pain in his back and legs, numbness and burning in his legs and the inability to lift objects or sit for long periods of time. The plaintiff's physical activity is limited to some walking and the most elementary of household chores. He has not worked since November 15, 1983.

9. The plaintiff is a high school graduate who lacks the education to do clerical work. Plaintiff was employed by the defendant as a truck driver.

10. In January 1985 Dr. Presson assigned the plaintiff a 20 percent permanent partial disability rating to his back. However, subsequently by letter Dr. Presson elaborated on

this rating and provided additional insight into the plaintiff's condition concluding that the plaintiff as a whole was 100 percent disabled. The 20 percent rating by Dr. Presson in August of 1985 was limited to the plaintiff's back impairment. In addition, the plaintiff has a substantial amount of impairment to his legs. The plaintiff has weakness, numbness and pain throughout his body, particularly in his back and legs. Sitting, lifting, bending, stooping and sudden movements are practically, if not functionally, impossible for the plaintiff to perform. The symptoms which the plaintiff suffers impairs the use of his extremities causing the plaintiff to be unable to work and earn any wages. The plaintiff is totally and permanently disabled.

11. The plaintiff reached maximum medical improvement on September 10, 1984 and had been temporarily totally disabled from November 15, 1983 through that date. Plaintiff's average weekly wage is $382.41 resulting in a compensation rate in excess of the maximum rate which is $248.00. The plaintiff has been paid $11,982.65 in compensation benefits for temporary total disability.

Based upon these findings, the Deputy Commissioner concluded that plaintiff was permanently and totally disabled and awarded him benefits pursuant to G.S. 97-29. From this order defendants appealed to the Industrial Commission.

On appeal the Commission adopted as its own Findings of Fact Nos. 1 through 9 of the Deputy Commissioner and made the following additional findings and conclusions:

10. The Plaintiff has a 20% disability to his back, for which he is entitled to compensation.

11. The Plaintiff was temporarily totally disabled from 15 November 1983 until 10 September 1984, the date on which he reached maximum medical improvement. The Plaintiff has been paid $11,982.65 in compensation benefits for his temporary total disability.

12. The Plaintiff's average weekly wage is $382.41, which is sufficient to result in a compensation rate in excess of the maximum rate in effect at the time of his injury, $248.00.

Based upon the foregoing Findings of Fact, the Industrial Commission made the following conclusions of law:

> 1. As a result of the injury by accident on 15 November 1983, the Plaintiff was temporarily totally disabled from 15 November 1983 until 10 September 1984. The Plaintiff has been compensated correctly for his period of temporary total disability.
>
> 2. The Plaintiff is entitled to compensation at the rate of $248.00, beginning 11 September 1984, and continuing for sixty weeks thereafter.

From this opinion and award, plaintiff appealed.

Turner, Rollins, Rollins & Clark, by Elizabeth O. Rollins and Clyde T. Rollins, for plaintiff, appellant.

Tuggle Duggins Meschan & Elrod, P.A., by Richard L. Vanore and Joseph F. Brotherton, for defendants, appellees.

HEDRICK, Chief Judge.

We must consider this case in light of our Supreme Court's decision in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986). In *Whitley*, the Court specifically overruled *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978). In *Perry*, the Supreme Court had stated:

> 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 93-4, 249 S.E. 2d at 401 (emphasis original). In *Whitley*, the Supreme Court decided that G.S. 97-29 and G.S. 97-31 were alternate sources of compensation for an employee who suffers a disabling injury which is also included as a scheduled injury. The Court stated that "[t]he injured worker is allowed to select the

more favorable remedy, but he cannot recover compensation under both sections. . . ." *Id.* at 96, 348 S.E. 2d at 340.

[1] It is obvious that in the present case, the Commission felt that it was bound to award benefits to the employee under G.S. 97-31(23) and that it could not award benefits under G.S. 97-29. Because it is clear that the Commission acted under a misapprehension of the law, the opinion and award must be vacated and this cause remanded for the Commission to determine whether claimant is entitled to recover benefits for total disability pursuant to G.S. 97-29 or benefits for permanent partial disability under G.S. 97-31.

Upon remand the Commission must determine whether the employee is totally disabled because of the injury to his back as that term is defined in *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978). If the Commission does find and conclude from the evidence that the claimant is totally disabled because of the injury to his back it must award benefits under G.S. 97-29. If on the other hand the Commission finds and concludes from the evidence that the claimant suffers only a permanent partial disability, it will find the degree of disability and award benefits according to the schedule set out in G.S. 97-31. We point out that there is evidence in the record from which the Commission could find that the claimant is totally disabled or that he is not permanently disabled but that he suffers a degree of permanent partial disability to his back.

[2] We are advertent that Findings of Fact Nos. 8 and 9 made by the Commission by way of adopting the same findings of the Deputy Commissioner might arguably be sufficient to support an ultimate finding or conclusion of total disability. We, however, point out that these findings do not refer to the wage earning capacity of the claimant, an essential element of total disability. Moreover, the further finding and conclusion made by the Commission that the claimant suffered a 20% disability to his back is in conflict with Findings of Fact Nos. 8 and 9. We caution the Commission of the dangers inherent in adopting as its own any findings of the Deputy Commissioner when it, the Full Commission, is about to reverse the decision of the Deputy Commissioner. The better practice would be for the Commission to make all of the findings and conclusions, rather than taking the shortcut of

adopting the findings and conclusions of the hearing officer. Indeed the Commission is charged with the responsibility of making the findings and conclusions. To do so would demonstrate that the Commission has carefully evaluated the evidence in the record.

For the reasons stated, the opinion and award dated 20 February 1986 is vacated, and the cause is remanded to the Industrial Commission to make new findings and conclusions and enter the appropriate award. If the Commission deems it necessary it may on its own motion, pursuant to the provisions of G.S. 97-85, receive further evidence from which it may draw its findings and conclusions and enter the proper award.

Vacated and remanded.

Judges MARTIN and COZORT concur.

STATE OF NORTH CAROLINA v. DAVID W. GAINEY

No. 8626SC391

(Filed 20 January 1987)

1. **Automobiles and Other Vehicles § 3.3— driving while license revoked—improper impeachment questions—defendant not prejudiced**

In a prosecution of defendant for driving while his license was revoked and unlawful towing, defendant failed to show prejudice in the trial court's error in permitting impeachment of defendant by allowing the introduction of evidence that defendant had been convicted of offenses which did not provide for punishment in excess of 60 days, since defendant admitted the offenses charged in this case.

2. **Automobiles and Other Vehicles § 3— driving while license revoked—defense of necessity—insufficiency of evidence**

In a prosecution of defendant for driving while his license was revoked and unlawful towing, the trial court was not required to instruct on the defense of necessity where defendant claimed that his car broke down on a busy highway; it was necessary to move the vehicle immediately, but he could not afford the time or money to have it towed; he attempted to push the car with his van but was stopped by a highway patrolman; the car was then pushed off the road without defendant being behind the wheel of the car or the van; and defendant thus had several legal alternatives available so that the necessity defense was inapplicable.

State v. Gainey

APPEAL by defendant from *Friday, Judge*. Judgment entered 18 February 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 28 August 1986.

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

Moore, Van Allen, Allen & Thigpen by Robert C. Ervin for defendant appellant.

COZORT, Judge.

Defendant was charged upon proper indictments issued 3 August 1985 charging him with (1) driving while his license was revoked, G.S. 20-28; and (2) unlawful towing in violation of G.S. 20-123(b). Defendant was convicted of driving while his license was revoked and given a suspended six-month sentence. The defendant was put on supervised probation for two years, unsupervised probation for one year, ordered to pay a fine and costs, and ordered not to operate a motor vehicle in North Carolina until he is licensed by the Division of Motor Vehicles. On appeal of his conviction defendant alleges as assignments of error (1) that the trial court erred in permitting impeachment of the defendant, by introduction of prior offenses with punishment of less than sixty days in violation of the sixty-day provision of G.S. 8C-1, Rule 609; and (2) that the trial court erred in failing to instruct the jury on the defense of necessity. We find no error.

On 3 August 1985, the defendant and his wife and son went to pick up a 1974 Ford Mustang which had stopped running the day before at a car wash on Monroe Road in Charlotte, North Carolina. They were riding in a 1976 Chevrolet van. After working on the Mustang, the defendant got it to start. Defendant's wife drove the Mustang out of the car wash lot and defendant's son followed her in the van until the Mustang cut off on Eastway Drive, a four-lane road. Defendant's son stopped the van behind the car. The car and van were stopped in the right-hand lane on a hill with a forty-five mile per hour speed limit.

The defendant and his son tried unsuccessfully to push the car up the hill into a driveway. The defendant testified he could not repair the car as he had earlier because it would have required crawling underneath the car. Defendant, whose license had

been revoked, began driving the van to push the Mustang up Eastway Drive. His wife was steering the Mustang, and his son rode with him in the van.

Highway Patrol Officer Alvin Jeffrey Taylor, who had been stopped in the left-hand lane of Eastway Drive waiting for another car to turn left, saw the van push the Mustang past his patrol car. He turned on his blue light and pulled the defendant over to the side of the road. Patrolman Taylor then gave defendant a citation for driving while his license was revoked, G.S. 20-28, and unlawful towing, G.S. 20-123(b).

After Trooper Taylor stopped traffic on Eastway Drive, the Mustang was pushed off the road without the defendant being behind the steering wheel.

[1] Defendant's first assignment of error is that the trial court erred in permitting impeachment of the defendant by allowing the introduction of evidence that defendant had been convicted of offenses which did not provide for punishment in excess of sixty days, in violation of G.S. 8C-1, Rule 609, which was prejudicial to the defendant under G.S. 8C-1, Rule 403. While the State concedes the admission of the evidence concerning the convictions (failure to follow a truck route and improper turning) was improper under G.S. 8C-1, Rule 609, it argues that the error is not prejudicial to the defendant.

In *State v. Milby*, 302 N.C. 137, 273 S.E. 2d 716 (1981), the standard for prejudicial error is set out as follows:

> It is well-established that the burden is on the appellant not only to show error but also to show that he suffered prejudice as a result of the error. *E.g., State v. Chapman*, 294 N.C. 407, 241 S.E. 2d 667 (1978). The test for prejudicial error is whether there is a reasonable possibility that the evidence complained of contributed to the conviction, G.S. 15A-1443 (1978), not whether the appellate court is able to conclude beyond a reasonable doubt that the evidence was harmless to the rights of a defendant. The latter standard is appropriately invoked only in matters of constitutional dimension. *State v. Heard & Jones*, 285 N.C. 167, 203 S.E. 2d 826 (1974).

Id. at 142, 273 S.E. 2d at 720.

In this case the defendant admits driving the van while his license was revoked in violation of G.S. 20-28. No prejudice has been shown by the defendant. We find the admission of the evidence did not prejudice the defendant.

Defendant also contends that the admission into evidence of three other convictions, two for driving while impaired and one for hit and run, was error because the defendant was unfairly prejudiced by the admission of the evidence, citing G.S. 8C-1, Rule 403. For the reasons expressed in the preceding paragraph, we find no merit to defendant's contention.

[2] Defendant's last assignment of error concerns the trial court's failure to instruct the jury on the law of the defense of necessity. The State and defendant contend, and we agree, that the necessity defense has not been considered in North Carolina cases thus far. Nonetheless, the defendant argues the trial judge's refusal to instruct the jury on the necessity defense stripped the defendant of a meritorious defense.

In defining necessity as a defense, Black's Law Dictionary 929 (rev. 5th ed. 1979) states: "A person is excused from criminal liability if he acts under a duress of circumstances to protect life or limb or health in a reasonable manner and with no other acceptable choice." In discussing the applicability of this defense, LaFave and Scott state:

> The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is justified in violating it. Under such circumstances he is said to have the defense of necessity, and he is not guilty of the crime in question—unless, perhaps, he was at fault in bringing about the emergency situation, in which case he may be guilty of a crime of which that fault is an element.

LaFave and Scott, Criminal Law Sec. 50 at 381 (1972).

The United States Supreme Court recognized the necessity defense in *United States v. Bailey*, 444 U.S. 394 (1980), and qualified its use as follows:

> Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. LaFave & Scott 379.

Id. at 410.

We do not have to reach the issue of whether the defense of necessity should be recognized in North Carolina because the evidence in this case clearly does not meet the requirements of this defense. The defendant here had several legal alternatives available. Defendant argues he had no choice but to drive the Mustang in order to remove it from the road. However, the evidence clearly shows the Mustang was finally moved off the roadway without defendant being behind the steering wheel. Defendant also argues that a tow truck was not practical because of the immediacy of the situation and that he could not afford a tow or to have his car worked on by others. This claim of practicability and economic necessity does not meet the standard set out for the necessity defense.

The trial court's refusal to instruct the jury on the necessity defense was proper. We find no error.

No error.

Judges BECTON and JOHNSON concur.

STATE OF NORTH CAROLINA v. STURGIS JACKSON WHITE

No. 865SC791

(Filed 20 January 1987)

1. Automobiles § 126.3— breathalyzer test results—sufficiency of breath samples—sequential testing requirement of statute complied with

Defendant was not entitled to have breathalyzer test results suppressed on the ground that the operator did not get his results from two consecutively

administered tests as required by N.C.G.S. § 20-139.1(b3)(2)a, since the time of the first reading was 11:15 a.m. and it showed an alcohol concentration of .20; defendant then gave two "puffs" of breath which were insufficient to give a reading; defendant then at 11:26 a.m. gave a second adequate sample which showed a concentration of .19; and the statute requiring sequential testing was thus complied with.

2. **Arrest and Bail § 3.8— warrantless arrest—driving while impaired—probable cause**

An officer's warrantless arrest of defendant was entirely legal and proper where the officer, based upon his own observation, had probable cause to believe defendant was intoxicated; based upon the statement of the security guard who had called the police, the officer had probable cause to believe defendant had driven in that intoxicated state; defendant's car was nearby; and knowing defendant had come and gone once already, the officer had probable cause to believe that defendant would get back in his car and drive in an intoxicated condition.

3. **Automobiles § 126.2; Constitutional Law § 76— breathalyzer test—no violation of right against self-incrimination**

There was no merit to defendant's contention that breathalyzer test results should have been suppressed on the ground that N.C.G.S. § 20-16.2, mandating a 12-month license suspension for refusal to submit to a breathalyzer test, is unconstitutional because it coerces a defendant to give self-incriminating evidence, since chemical analysis of breath is not evidence which is testimonial or communicative in nature.

APPEAL by defendant from *Lake, Judge.* Judgment entered 18 February 1986 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 16 December 1986.

Appellant was found guilty on 9 October 1985 in District Court to driving while impaired. He appealed to the Superior Court for trial *de novo.* On *voir dire* before Judge James R. Strickland on 10 February 1986, defendant made four pre-trial motions challenging his arrest and the breathalyzer results. After his motions were denied, defendant pleaded guilty before Judge I. Beverly Lake, Jr., on 18 February to driving while impaired. He was sentenced to twenty-four hours in jail as a Level Five offender. Defendant appeals pursuant to G.S. 15A-979(b).

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

R. Theodore Davis, Jr., for defendant-appellant.

PARKER, Judge.

[1] Defendant first assigns as error the denial of his motion to suppress the results of the breathalyzer tests administered to him on the day of his arrest. The grounds for his motion were that the breathalyzer operator did not get his results from two consecutively administered tests, as required by G.S. 20-139.1(b3)(2)a.

The evidence on *voir dire* revealed that defendant was asked to give a breath sample by blowing hard into the machine. He did this, and the machine measured a blood alcohol concentration of 0.20. When asked to give a second sample, defendant "puffed" into the machine, according to the testimony of the chemical analyst who administered the test. The machine failed to give a result and indicated that the breath sample had been insufficient. Defendant was again asked to give a breath sample and again it was insufficient. The analyst then warned defendant that another failure to give an adequate sample would be considered a willful refusal to submit to the breathalyzer. Defendant then gave a sufficient sample and a reading of 0.19 was obtained.

Appellant argues that because of the two insufficient breath samples between the two readings, the readings should have been inadmissible. General Statute 20-139.1(b3) reads, in relevant part:

> (b3) Sequential Breath Tests Required.—By January 1, 1985, the regulations . . . governing the administration of chemical analyses of the breath must require the testing of at least duplicate sequential breath samples. Those regulations must provide:
>
> . . .
>
> (2) That the test results may only be used to prove a person's particular alcohol concentration if:
>
> a. The pair of readings employed are from consecutively administered tests; and
>
> b. The readings do not differ from each other by an alcohol concentration greater than 0.02.

Defendant relies on the phrase "sequential breath samples" of the first paragraph of subsection (b3). The State argues that

under subparagraph (2)a, there were "consecutively administered tests," as the machine automatically rejects insufficient breath samples and, therefore, no "tests" were conducted on those samples.

The purpose underlying requiring at least two tests is to ensure accuracy of the readings. *See* J. Drennan, *The Safe Roads Act of 1983: A Summary and Compilation of Statutes Amended and Affected by the Act* Ch. V, § A (1983). Sequential tests are required to minimize the time between tests. There are several factors beyond the control of either the accused or the breathalyzer operator which can affect the accuracy of the readings, such as body temperature of the accused, extraneous alcohol in the mouth of the accused, physical exercise or hyperventilation, even the humidity and barometric pressure in the testing room. *See generally* Mason and Dubowski, *Breath-Alcohol Analysis, Uses, Methods, and Some Forensic Problems*, 21 Journal of Forensic Sciences 9 (1976). Requiring sequential tests is one way of minimizing the effect these various factors could have on the accuracy of the breathalyzer readings by reducing the time between the two required samples.

In the findings of fact made by the trial court below, the time of the first reading was 11:15 a.m., and the time of the second reading was 11:26 a.m. The first reading showed an alcohol concentration of .20 and the second showed a concentration of .19. Because these readings were taken from "consecutively administered tests" on adequate breath samples given within eleven minutes of one another, and because the readings are within .01 of one another, the statute requiring sequential testing was, in our view, complied with in this case. To hold otherwise would allow an accused to thwart the testing process by deliberately giving insufficient breath samples.

[2] Defendant's second assignment of error is that the trial court erred in denying his motion to suppress the breathalyzer results as the fruit of an illegal arrest. The evidence on *voir dire* showed that the Wilmington police had been called to the North Carolina Film Studio twice concerning a trespass and communicating threats. The defendant, identified by the Film Studio security guard, had gone by the time the officer arrived the first time. The second time, twenty minutes later, defendant was still there when the officer arrived. The studio security guard advised the officer

that defendant had driven into the studio parking lot and was again making threats. The officer approached defendant and, seeing that he was obviously intoxicated, placed him under arrest for driving while impaired.

General Statute 15A-401(b)(2) allows a law enforcement officer to make a warrantless arrest of "any person who the officer has probable cause to believe . . . [h]as committed a misdemeanor, and . . . [m]ay cause physical injury to himself or others, or damage to property unless immediately arrested." Based upon his own observation, the officer had probable cause to believe defendant was intoxicated. Based upon the statement of the security guard, the officer had probable cause to believe defendant had driven in that intoxicated state. Further, defendant's car was nearby and, knowing defendant had come and gone once already, the officer had probable cause to believe that defendant would get back in his car and drive in an intoxicated condition. Therefore, defendant's arrest was entirely proper and legal. The assignment of error is overruled.

[3] The third assignment of error raised by defendant is that the trial court erred in denying his motion to suppress the breathalyzer results on the grounds that G.S. 20-16.2, mandating a twelve-month license suspension for refusal to submit to a breathalyzer, is unconstitutional, in that it coerces a defendant to give self-incriminating evidence. Both the United States Supreme Court and our state Supreme Court have held that chemical analyses of blood or breath are not within the protection of the Fifth and Fourteenth Amendments to the U.S. Constitution, or Article I, Section 23 of the North Carolina Constitution. *See Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed. 2d 908 (1966); *State v. Howren*, 312 N.C. 454, 323 S.E. 2d 335 (1984). The rationale underlying these holdings is that such chemical analyses are not evidence which is "testimonial" or "communicative" in nature. *Howren, supra.* Our Supreme Court has applied the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 23 of the North Carolina Constitution coextensively. *See State v. Strickland*, 276 N.C. 253, 173 S.E. 2d 129 (1970). The assignment of error is overruled.

Defendant's next assignment of error is that the testing officer did not give him the proper warnings under *Miranda v. Ari-*

zona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), prior to administering the breathalyzer. However, as breathalyzer results are not testimonial evidence, it has been held that the *Miranda* warnings are not required prior to administering a breathalyzer. *Howren, supra.*

By his next assignment of error, defendant contends that his case should have been dismissed as he alleges he was denied a speedy trial as defined in The Speedy Trial Act, G.S. 15A-701, *et seq.* The record is devoid of any indication that defendant moved the trial court prior to trial or entry of a guilty plea to dismiss the case for violations of the Act. Therefore, defendant has waived his right to dismissal under the statute. G.S. 15A-703(a). The assignment of error is overruled.

Defendant's remaining assignments of error have been brought forth by counsel, without supporting authority, asking this Court to review the record relating to the assignments for error on its face. After carefully reviewing the record and briefs, we conclude that there is no merit in these assignments of error and they are overruled.

Defendant's contentions have been carefully considered, and we conclude that they are without merit. Therefore, his guilty plea was properly entered and accepted. The judgment is

Affirmed.

Judges WELLS and MARTIN concur.

JAMIE TAYLOR T/A TAYLOR'S AUTO SALES v. ROBERT A. JOHNSON T/A B.J.'S AUTO SALES AND THE NORTH RIVER INSURANCE COMPANY

No. 863DC604

(Filed 20 January 1987)

Automobiles § 6.5— parties as joint venturers—no seller-purchaser relationship—no recovery on bond

Parties who were engaged in a short-term business deal for joint profit with contributions of effort from each and risks taken by each were joint venturers rather than seller and purchaser so that plaintiff could not recover under a bond obtained in order to meet the requirements of N.C.G.S. § 20-288.

Taylor v. Johnson

APPEAL by plaintiff from *Rountree, Judge*. Judgment entered 16 January 1986 in PITT County District Court. Heard in the Court of Appeals 13 November 1986.

Plaintiff Jamie Taylor filed this action against defendants Robert Johnson and the North River Insurance Co., the company by which Johnson was bonded as a licensed automobile dealer. Plaintiff sought recovery of $6,108.07 for the amount given Johnson for a car, later confiscated by the police, and for repairs plaintiff performed. A default judgment was entered against defendant Johnson. The case against North River went to trial.

Plaintiff's evidence tended to show the following events and circumstances. At the time this cause of action arose, plaintiff owned and operated Taylor's Auto Sales and Evans Street Auto Service, a repair business. Defendant Johnson was a licensed automobile dealer doing business as B.J.'s Auto Sales. In 1983, Johnson began bringing used cars to Taylor's repair shop for minor repairs. Plaintiff and defendant also knew each other from automobile auctions which they had attended.

In early 1983, Johnson approached Taylor with an idea for a business arrangement. Taylor agreed to sign as a guaranty on a loan from First State Bank to defendant Johnson. The note was to be secured by the title to a 1982 Camaro, and the proceeds were to be used to purchase and repair a wrecked Blazer and a wrecked Cadillac. Taylor, whose shop was to do the repairs, would split with Johnson any profits made after the cars were sold and the loan repaid.

On 2 February 1983, plaintiff and defendant went to the First State Bank and arranged a loan for $9,500; plaintiff guaranteed payment of defendant's note and defendant gave the bank the title to the Camaro as collateral. Defendant soon sold the Camaro; he obtained the title from the bank and transferred it to the buyer. Defendant paid off part of the note with the proceeds. On 24 February, defendant and plaintiff obtained a second loan of $9,500 using the same procedure as before. Defendant paid off the first loan and bought the Blazer and Cadillac with the remainder; the bank held the titles. The Blazer was repaired and sold as planned, and defendant made a partial payment on the note with the proceeds.

On 21 April, defendant tried to obtain the title to the Cadillac by offering payment of $4,500 to the bank which would have left a balance of more than $1,000 unsecured except for plaintiff's guaranty. The bank refused and called plaintiff, demanding payment in full. On 28 April, plaintiff and defendant drove to the bank in the Cadillac; it was the first time plaintiff had seen the car. Inside the bank, plaintiff gave defendant a check for $5,623.54, the total amount due on the note. He, in turn, paid off the note and signed the title to the Cadillac over to the plaintiff. This transfer was notarized by a bank employee.

Now in possession of the Cadillac, plaintiff made minor repairs and lined up a potential buyer. However, on 6 May 1983, the Cadillac was discovered by Inspector W. E. Brinson to be stolen: the confidential vehicle numbers of the Cadillac were those of a car reported stolen and did not match those on its own dash or its title. Inspector Brinson seized the Cadillac and had warrants issued for the arrest of defendant Johnson. The whereabouts of Johnson were still unknown at the time of trial.

At the close of plaintiff's evidence, defendant North River Ins. Co. made a motion for a directed verdict. The trial court denied the motion but granted a directed verdict when defendants renewed the motion. Plaintiff appealed.

James M. Roberts for plaintiff-appellant.

Battle, Winslow, Scott & Wiley, P.A., by Robert L. Spencer, for defendant-appellee.

WELLS, Judge.

Plaintiff contends that the trial court erred in directing a verdict against him in his suit to recover on the bond. 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 that 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.*

The threshold issue is whether plaintiff is a member of the class of people whom the bond was designed to protect. The pertinent part of the bond stated that North River Ins. Co., as a surety, is bound

> to the people of the State of North Carolina to indemnify any person who may be aggrieved by fraud, fraudulent representation or violation by said Principal, salesmen, or representatives acting for such Principal within the scope of employment of such salesmen or representatives of any of the provisions of Article 12, Chapter 20 of the North Carolina General Statutes in the amount of $15,000 for each supplemental place of business, within this State at which motor vehicles are sold. . . .

This section is almost verbatim the language of a bond construed by this Court in *Triplett v. James*, 45 N.C. App. 96, 262 S.E. 2d 374, *disc. rev. denied*, 300 N.C. 202, 269 S.E. 2d 621 (1980). There, as in the case at bar, the bond referred on its face to Article 12, Chapter 20. The *Triplett* court reasoned that, although the contract purported to indemnify "any person" aggrieved by fraud, the bond was clearly obtained in order to meet the requirements of G.S. 20-288. That statute states in pertinent part:

> Any purchaser of a motor vehicle who shall have suffered any loss or damage by any act of a motor vehicle dealer that constitutes a violation of this Article shall have the right to institute an action to recover against . . . the surety.

The leading case concerning the definition of "purchaser" as expressed in G.S. § 20-288 is *Fink v. Stallings 601 Sales*, 64 N.C. App. 604, 307 S.E. 2d 829 (1983). In that case, Citicorp, a secured party with an interest in defendant's inventory of motor homes, sought to recover under defendant's surety bond when defendant sold a motor home but did not remit the amount owed to Citicorp. This Court noted that, "where words of a statute have not acquired a technical meaning, they must be construed in accordance with their common and ordinary meaning unless a different meaning is indicated." (Citations omitted):

> The common meaning of "purchaser," as defined in Webster's Third New International Dictionary (1968), is "one that acquires property for a consideration (as of money)." Although

> Citicorp did have an interest in the 1979 motor home, it cannot be said that it *acquired* the vehicle. Citicorp never took possession of the motor home. It was never issued a certificate of title in its own name. Registration cards and license plates were never issued to Citicorp. All Citicorp had was a security interest. We hold that Citicorp is not a 'purchaser' under the common and ordinary meaning of the word, and is, therefore, not entitled to recover under G.S. § 20-288.

Id. Although, in the case at bar, the plaintiff's testimony indicated that he tendered money to Johnson and received the title in return, the relationship of the parties was primarily that of joint venturers rather than seller-purchaser: Taylor and Johnson engaged in a short-term business deal for joint profit, with contributions of effort from each and risks taken by each. *See Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453 (1968). As a joint venturer, Taylor is not a purchaser "under the ordinary meaning of the word" and therefore cannot recover on the bond secured to comply with G.S. § 20-288. Since our finding on this issue precludes recovery, we need not address plaintiff's other arguments. The order of the trial court is

Affirmed.

Judges BECTON and ORR concur.

HARRY G. SMITH v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 8624SC797

(Filed 20 January 1987)

1. Insurance § 130— fire insurance—failure to comply with proof of loss requirement—good cause—no prejudice to insurer—no relief from obligation to pay

Failure of an insured to comply with the proof of loss requirements of a fire insurance policy, if it was for "good cause" and did not prejudice the insurer, will not relieve the insurer of its obligation to pay on the policy. N.C.G.S. § 58-180.2.

2. Insurance § 130— fire insurance—compliance with proof of loss requirement

In an action to recover on a fire insurance policy, plaintiff's allegations that he submitted a sworn proof of loss statement which set forth that his

losses were in excess of the policy limits sufficiently brought plaintiff within the purview of N.C.G.S. § 58-180.2 so that plaintiff was not required to reply to defendant's answer, since plaintiff's allegations that his losses exceeded the policy limits would suggest that plaintiff believed that the omitted information was irrelevant, and the clear implication was that defendant could not have been harmed by plaintiff's failure to include irrelevant information.

3. Insurance § 130— fire insurance—proof of loss form filed by insured—burden of proof on insurer to show substantial harm

Testimony by plaintiff that he filled out a proof of loss form according to the instructions he received was sufficient to enable the jury to find that plaintiff, at least subjectively, had good cause for failing properly to file the proof of loss statement, and the burden of proof was then upon defendant to show that it was substantially harmed by plaintiff's failure to complete the proof of loss statement as required by the policy.

Judge JOHNSON dissenting.

APPEAL by plaintiff from *Gray, Judge*. Judgment entered 12 March 1986 in Superior Court, AVERY County. Heard in the Court of Appeals 30 October 1986.

This is an action for breach of a fire insurance contract. The evidence at trial showed that on 12 February 1981, a fire destroyed plaintiff's house. The house was covered by a homeowner's policy issued by defendant, North Carolina Farm Bureau Mutual Insurance Company. Plaintiff notified defendant of the fire and submitted a statement entitled "Sworn Statement in Proof of Loss." The proof of loss statement submitted was incomplete in that it failed to include such things as the actual cash value of the property at the time of the loss, the total amount of the loss being claimed, and the time and origin of the loss. The statement, though incomplete, was signed and sworn to on 9 March 1981 and sent to defendant through plaintiff's attorney, apparently within the 60 day time period prescribed in the policy. The defendant did not pay plaintiff's claim.

As a result of defendant's failure to pay, on 10 February 1984 plaintiff filed this action, alleging breach of contract and damages in the amount of $120,000. In his complaint, plaintiff stated that he filed a sworn proof of loss statement on a form provided by defendant, which set forth that the actual cash value of his losses exceeded the policy limits. Defendant's answer contained several defenses, including plaintiff's failure to file the proof of loss statement as required by the policy. Plaintiff did not file any pleading in response to defendant's answer.

After an initial mistrial, the case was tried a second time on 10 March 1986. At the close of plaintiff's evidence defendant moved for a directed verdict. That motion was denied. Defendant then rested its case without offering any evidence and renewed its directed verdict motion. This time the trial court granted defendant's motion.

Glover & Petersen, by James R. Glover, for the plaintiff-appellant.

Morris, Golding, Phillips & Cloninger, by William C. Morris, Jr. and Thomas R. Bell, Jr., for the defendant-appellee.

EAGLES, Judge.

Plaintiff argues that there was a question for the jury regarding whether his recovery was barred by his failure to comply with the policy's proof of loss requirements and that the trial court erred in granting defendant's motion for a directed verdict. We agree.

[1] G.S. 58-176(c) sets out the terms which must be included in the kind of fire insurance policy involved here. One of those provisions requires the insured to submit to the insurer a sworn proof of loss statement containing certain information within 60 days of the loss. Admittedly, plaintiff has failed to comply fully with that provision; but that failure is not necessarily fatal to plaintiff's case. G.S. 58-180.2 provides that:

> In any action brought to enforce an insurance policy subject to the provisions of this Article, any party claiming benefit under the policy may reply to the pleading of any other party against whom liability is sought which asserts as a defense, the failure to render timely proof of loss as required by the terms of the policy that such failure was for good cause and that the failure to render timely proof of loss has not substantially harmed the party against whom liability is sought in his ability to defend. The issues raised by such reply shall be determined by the jury if jury trial has been demanded. G.S. 58-180.2.

Therefore, the failure of an insured to comply with the proof of loss requirements, if it was for "good cause" and did not prejudice the insurer, will not relieve the insurer of its obligation to pay on

the policy. *See Brandon v. Insurance Co.*, 301 N.C. 366, 271 S.E. 2d 380 (1980).

[2] Defendant argues, however, that G.S. 58-180.2 is not applicable because plaintiff did not reply to defendant's answer as the statute requires. Defendant cites *Vernon v. Crist*, 291 N.C. 646, 231 S.E. 2d 591 (1977) in support of the view that the statute's language that plaintiff "may reply" means that plaintiff "must" reply. In *Vernon*, the court held that Rule 7(a) of the North Carolina Rules of Civil Procedure, which states that a plaintiff "may" file a reply alleging the doctrine of last clear chance to a defendant's affirmative defense of contributory negligence, requires some pleading alleging the doctrine since, under Rule 8(d), affirmative defenses are treated as denied or avoided only if a responsive pleading is neither required nor permitted. Because G.S. 58-180.2 allows a responsive pleading, defendant contends that plaintiff was required to file such a reply before availing himself of the statute's benefits.

Assuming *arguendo* that the analysis used in *Vernon* is controlling here, we nevertheless find that plaintiff sufficiently pleaded the provisions of G.S. 58-180.2. The court in *Vernon* held that a reply alleging last clear chance was not necessary if the complaint alleged facts which gave rise to the doctrine. *See also Exum v. Boyles*, 272 N.C. 567, 158 S.E. 2d 845 (1968). Similarly, if plaintiff's complaint here contained allegations sufficient to bring it within the purview of G.S. 58-180.2, no reply was necessary.

Rule 8 of the North Carolina Rules of Civil Procedure provides the general rules of pleadings. G.S. 1A-1, Rule 8. Rule 8 was intended to liberalize pleading requirements by adopting the concept of "notice pleading," thereby abolishing the more strict requirements of "fact pleading." *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Therefore, a pleading is sufficient if it gives notice of the events and transactions and allows the adverse party to understand the nature of the claim and to prepare for trial. *Henry v. Deen*, 310 N.C. 75, 310 S.E. 2d 326 (1984). Pleadings must be liberally construed to do substantial justice, *Givens v. Sellars*, 273 N.C. 44, 159 S.E. 2d 530 (1968); G.S. 1A-1, Rule 8(f), and must be fatally defective before they may be rejected as insufficient. *Oil Co. v. Richardson*, 271 N.C. 696, 157 S.E. 2d 369 (1967). Once a complaint gives general notice of the matter being pleaded, the

defendant must rely on other procedures, such as discovery, to further define the issues and prepare for trial. *Childress v. Forsyth County Hospital Auth.*, 70 N.C. App. 281, 319 S.E. 2d 329 (1984), *disc. rev. denied*, 312 N.C. 796, 325 S.E. 2d 484 (1985).

Applying those principles here, we hold that plaintiff's complaint sufficiently alleged the provisions of G.S. 58-180.2. Plaintiff alleged that he submitted a sworn proof of loss statement which set forth that his losses were in excess of the policy limits. On the proof of loss statement, plaintiff failed to include, among other things, the actual cash value of the property at the time of the loss, the "whole loss and damage," and the "amount claimed." Plaintiff's allegation that his losses exceeded the policy limits would suggest that plaintiff believed that the omitted information was irrelevant since defendant, if liable, is obligated to pay only up to those limits if, in fact, the losses did exceed them. The clear implication is that defendant could not have been harmed by plaintiff's failure to include irrelevant information.

We believe plaintiff's allegations are sufficient to bring the issue of substantial harm before the trial court. In fact, it would be difficult for plaintiff to more specifically allege a lack of substantial harm since all of the facts relating to the issue seem to be peculiarly within the knowledge of the insurer. A conclusory allegation that defendant was not harmed is not required. G.S. 58-180.2 was intended to benefit the insured, not the insurer. The statute is entitled "Bar to defense of failure to render timely proof of loss." When it was adopted in 1973, our case law held that failure to strictly comply with the terms of a fire insurance policy resulted in an absolute forfeiture of the right to recover. *See Boyd v. Insurance Co.*, 245 N.C. 503, 96 S.E. 2d 703 (1957); *Gardner v. Insurance Co.*, 230 N.C. 750, 55 S.E. 2d 694 (1949). Where the legislature has adopted a statute to achieve a specific aim, the courts must construe it to effectuate that purpose. *Realty Co. v. Bank Co.*, 296 N.C. 366, 250 S.E. 2d 271 (1979). Consequently, we interpret the statute to require no more technical pleadings than the principles of notice pleading would otherwise require. Under those principles, plaintiff's complaint was sufficient to invoke the statute. Therefore, the issue of substantial harm to defendant was a proper one for trial.

[3] Having found that the provisions of G.S. 58-180.2 were applicable, we must now determine whether defendant nevertheless was entitled to a directed verdict. In making that determination the essential question becomes which party has the burden of proof under the statute. While the statute is silent as to which party has the burden of proof regarding the issues of "good cause" and substantial harm, these questions were addressed under only slightly different circumstances in *Great American Insurance Co. v. C. G. Tate Construction Co.*, 303 N.C. 387, 279 S.E. 2d 769 (1981) (*Great American I*). There, overruling a long line of cases which had followed a strict contractual approach in interpreting liability insurance contracts, the court held that an insured's failure to comply with the notice requirements of a liability insurance policy did not result in a forfeiture of the insured's rights under the policy if the failure was in good faith and the insurer was not materially prejudiced in its ability to investigate and defend. The court further held that the burden of showing prejudice was on the insurance company once the insured carried its burden of showing "good faith" in his failure to properly notify the insurance company.

In placing the burden of showing prejudice on the insurer, the *Great American I* court reasoned that an insurer's expertise in investigating claims allowed it to recognize and prove prejudice, while the insured would be in a disproportionately more difficult position if he were required to prove the absence of prejudice. The court also believed that such a rule would encourage the insurer to make a prompt, preliminary investigation once it received the tardy notification.

The reasoning of *Great American I* is equally applicable here. The expertise lies with the insurer, not the insured. Additionally, receipt of an incomplete proof of loss statement would indicate to the insurance company that there might be some problem with the claim. The insurer would then be encouraged to make a prompt investigation to protect its interests. Moreover, as noted, G.S. 58-180.2 was intended to benefit the insured by relieving the hardship which had resulted from the courts' strict contractual approach. An interpretation placing the burden on the insured to show an absence of prejudice to the insurance company would run contrary to the statute's purpose.

Before the burden of showing substantial harm may be placed on the insurer, however, the insured must prove to the jury that his actions were for "good cause." *Brandon v. Insurance Co., supra.* This is consistent with the holding in *Great American I* that the insured's proof of good faith is a prerequisite to the insurer's burden of showing prejudice. We note that the phrase "good cause" is not a precise term. *See In re Watson*, 273 N.C. 629, 161 S.E. 2d 1 (1968). Consequently, we must discern its meaning from the context in which it is used. *In re Kirkman*, 302 N.C. 164, 273 S.E. 2d 712 (1981). In doing so, we again analogize this situation to that in *Great American I.* Although the court did not explicitly define "good faith" there, it did so, after retrial, in *Great American Insurance Co. v. C. G. Tate Construction Co.*, 315 N.C. 714, 340 S.E. 2d 743 (1986) (*Great American II*). There the court held that, in the context of the *Great American I* decision, "good faith" must be measured subjectively and determined through a two-part inquiry: (1) whether the insured was aware that the events which took place could lead to a claim under the policy, and (2) whether the insured knowingly or purposely failed to provide the required information. Accordingly, we believe that *Great American II* is analogous and that, in the context of G.S. 58-180.2, "good cause" is broad enough to include subjective good faith as defined there.

Examining the record before us, we cannot say, as a matter of law, that plaintiff failed to carry his burden of showing "good cause." A trial court may grant a directed verdict for a defendant only when the evidence, taken in the light most favorable to the plaintiff, is insufficient to support a verdict for the plaintiff. *Snow v. Duke Power Co.*, 297 N.C. 591, 256 S.E. 2d 227 (1979). Plaintiff testified that he filled out the proof of loss form according to the instructions he received. This is sufficient to enable a jury to find that plaintiff, at least subjectively, had good cause for failing to properly file the proof of loss statement. Therefore, lack of good cause on the part of plaintiff could not have been a basis for granting a directed verdict.

Plaintiff sufficiently pleaded the issues of good cause and substantial harm. The plaintiff also carried his burden of showing "good cause." It was then incumbent upon defendant to show that it was substantially harmed by plaintiff's failure to complete the proof of loss statement as required by the policy. Since there was

no evidence of prejudice, the directed verdict for defendant was erroneous.

Reversed and remanded for new trial.

Judge ARNOLD concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent from the majority opinion. I disagree with the majority's interpretation of the precedential effect of the holding in *Great American I* on the case *sub judice*.

The majority opinion stated that the Court in *Great American I* "held that an insured's failure to comply with the notice requirements of a liability insurance policy did not result in a forfeiture of the insured's rights under the policy if the failure was in good faith and the insurer was not materially prejudiced in its ability to investigate and defend." The issue decided and the Court's holding in *Great American I* is narrower than the majority opinion indicates.

The Court in *Great American I* held "that an unexcused delay by the insured in giving notice to the insurer of an accident does not relieve the insurer of its obligation to *defend* and *indemnify* unless the delay operates materially to prejudice the insurer's ability to investigate and defend." *Great American Ins. Co. v. C. G. Tate Constr. Co.*, 303 N.C. 387, 390, 279 S.E. 2d 769, 771 (1981) (emphasis supplied). I believe that the Court in *Great American I* held the foregoing mindful of the "injuries sustained by innocent members of the public." *Id.* at 395, 279 S.E. 2d at 774. Moreover, the case *sub judice* does not involve an innocent third party, an insurer's ability to defend the insured, or the insurer's obligation to indemnify. Plaintiff submitted a *woefully* inadequate proof of loss form which raises an entirely different issue than that stated by the Court in *Great American I, id.*, at 390, 279 S.E. 2d at 771. I therefore vote to affirm.

STARKEY SHARP v. LINDA R. SHARP

No. 861DC839

(Filed 20 January 1987)

1. **Divorce and Alimony § 30— equitable distribution—hearing not required immediately after entry of divorce**

N.C.G.S. § 50-21(a) does not require that a hearing for equitable distribution must immediately follow entry of an absolute divorce.

2. **Divorce and Alimony § 30— equitable distribution—severance from divorce action—no substantial right affected**

The trial court's severance of a divorce action from defendant's claim for equitable distribution did not affect a substantial right of defendant, since N.C.G.S. § 50-20(a) effectively provides for the "freezing" of the marital estate as of the date of the parties' separation.

3. **Divorce and Alimony § 13— absolute divorce—parties living separate and apart—allegations sufficient**

There was no merit to defendant's contention that plaintiff's complaint was fatally defective and therefore could not support a judgment of absolute divorce because he failed to allege that the parties lived separate and apart for one year since the complaint did make such an allegation; the allegations were admitted by defendant; and plaintiff produced uncontradicted evidence in support of each allegation.

APPEAL by defendant from *Beaman, Judge.* Judgment entered 14 April 1986 in District Court, DARE County. Heard in the Court of Appeals 7 January 1987.

Plaintiff filed this action seeking an absolute divorce from defendant on grounds of one year's separation. In her answer, defendant admitted the allegations of the complaint and asserted a counterclaim for equitable distribution of the parties' marital property. Thereafter, plaintiff moved, pursuant to G.S. 1A-1, Rule 42(b), for severance of his claim for absolute divorce from defendant's counterclaim. The motion was allowed over defendant's objection. A separate trial was held upon plaintiff's claim for absolute divorce and judgment was entered granting him an absolute divorce from defendant. Defendant appeals.

Shearin & Archbell, by Roy A. Archbell, Jr., for plaintiff appellee.

D. Keith Teague, P.A., by D. Keith Teague, for defendant appellant.

MARTIN, Judge.

Defendant assigns as error the granting of plaintiff's motion for separate trials of his claim for absolute divorce and defendant's claim for equitable distribution of the marital property. She also contends that the complaint was insufficient to support the court's judgment granting plaintiff an absolute divorce. Neither of her claims has any merit.

Defendant first contends that the trial court erred in severing the issue of absolute divorce and proceeding to trial on that issue alone. Whether or not there should be a severance of issues is within the sound discretion of the trial court, and its decision with respect to separate trials will not be disturbed absent an abuse of that discretion, or a showing that the severance prejudices a substantial right. *Ashley v. Delp*, 59 N.C. App. 608, 297 S.E. 2d 905 (1982), *disc. rev. denied*, 308 N.C. 190, 302 S.E. 2d 242 (1983). Defendant contends both that the trial court's order in the present case was an abuse of discretion and that it prejudiced her substantial rights.

[1] Defendant seems to argue that the order for severance was contrary to law, and therefore an abuse of discretion, because G.S. 50-21(a) and our decision in *Capps v. Capps*, 69 N.C. App. 755, 318 S.E. 2d 346 (1984) require that the issue of distribution of marital property be resolved *immediately* following the decree of absolute divorce. We construe neither the statute nor *Capps* as imposing such a requirement.

G.S. 50-21(a) states in pertinent part that

> . . . an equitable distribution of property shall follow a decree of absolute divorce. A party may file a cross action for equitable distribution in a suit for an absolute divorce, or may file a separate action instituted for the purpose of securing an order of equitable distribution. . . . The equitable distribution may not precede a decree of absolute divorce.

The plain language of the statute clearly provides that the equitable distribution of marital property must follow a decree of absolute divorce. The distribution proceedings may be instituted as a cross action or in a suit altogether separate from the divorce action. The statute does not require, nor are we aware of any appellate cases construing the statute as requiring, that the distri-

bution hearing must be held immediately following entry of the absolute divorce. *Capps, supra,* in holding that equitable distribution proceedings must precede determinations of alimony and child support, simply states that "when properly demanded, [equitable distribution] must be granted upon the divorce decree being entered. . . ." *Capps* at 757, 318 S.E. 2d at 348. This statement cannot, and should not, be construed to impose an immediacy requirement on the proceedings.

[2] Defendant's further argument that the trial court's severance of the divorce hearing affected a substantial right is equally unpersuasive. She asserts that the severance would permit the plaintiff to dispose of his interests in contested property thereby defeating the court's power to distribute those assets. G.S. 50-20(a) effectively provides for the "freezing" of the marital estate as of the date of the parties' separation. Marital assets, distributed thereafter, are valued as of that date. Attempts by one or both spouses to deplete the marital estate or dispose of marital property after the date of separation but before distribution may be considered by the court when making the division, and any conversion of marital property for individual purposes may be charged against the acting spouse's share. G.S. 50-20 (c)(11a); *Mauser v. Mauser,* 75 N.C. App. 115, 330 S.E. 2d 63 (1985); *Talent v. Talent,* 76 N.C. App. 545, 334 S.E. 2d 256 (1985). These assignments of error are overruled.

[3] Defendant next contends that plaintiff's complaint was fatally defective and therefore cannot support a judgment of absolute divorce because he failed to allege that the parties lived separate and apart for one year with the intention by at least one of them that the separation be permanent. Defendant further asserts that the trial court improperly found as a fact that the parties had the requisite intent because it was a matter outside the scope of the pleadings. We disagree.

G.S. 50-6 provides, in pertinent part:

> Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months.

The complaint in this action alleged that plaintiff had been a resident of the State for more than six months prior to the institution of the action, that the parties had been married, and that they had thereafter separated and lived separate and apart for more than a year before the commencement of the action. The allegations were admitted by defendant and, at the hearing, plaintiff produced uncontradicted evidence in support of each of them. The establishment of these allegations by proof entitles the plaintiff to an absolute divorce. *Taylor v. Taylor*, 225 N.C. 80, 33 S.E. 2d 492 (1945).

Affirmed.

Judges WELLS and PARKER concur.

JOSIANNE L. LAUMANN v. DEBRA LEE PLAKAKIS AND ADAMS-MILLIS CORPORATION

No. 8618SC738

(Filed 20 January 1987)

Negligence § 57.11— outlet store—parking lot across street—injury to customer on street—duty of store owner

In an action to recover for personal injuries sustained by plaintiff when she was struck by a car while crossing a busy street between defendant corporation's place of business and its parking lot designated for customers, the trial court properly dismissed plaintiff's complaint against the corporation, since defendant was under no duty to provide for a crossing guard, warning lights, or other traffic control devices over a city street; defendant was under no duty to warn of the hazard of jaywalking across a busy thoroughfare, an obvious and not hidden danger; and defendant's duty to keep its premises reasonably safe was inapplicable because plaintiff was injured on a city street and not defendant's premises.

APPEAL by plaintiff and defendant from *Washington, Judge*. Judgment entered 14 February 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 December 1986.

Plaintiff was injured on 14 May 1982 when she was struck by a car driven by defendant Debra Lee Plakakis. At the time, plaintiff was crossing English Road in High Point, a busy, three-lane,

one-way thoroughfare. She was crossing from defendant Adams-Millis Corporation's outlet store, where she had just made a purchase, to a parking lot owned by the corporation which was designated for customer parking. There were no crosswalks or warning signs or lights of any sort where plaintiff crossed.

Alleging negligence, plaintiff sued both the defendant driver, Plakakis, and Adams-Millis Corporation. Defendant Plakakis filed a crossclaim against Adams-Millis in which she alleged that the latter's negligence had superseded hers, thereby entitling her to indemnification from defendant corporation, or alternatively, Adams-Millis' negligence had at least contributed to plaintiff's injuries, thereby entitling Plakakis to contribution from defendant corporation.

Adams-Millis Corporation answered denying the allegations contained in the complaint and crossclaim. Defendant corporation moved the trial court to dismiss the complaint and crossclaim against it pursuant to G.S. 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The trial judge granted the motion as to both plaintiff's complaint and defendant Plakakis' crossclaim, and dismissed Adams-Millis Corporation from the lawsuit. Both plaintiff and defendant Plakakis appeal.

The Law Firm of Joe D. Floyd, P.A., by Philip R. Skager for plaintiff-appellant.

Smith Helms Mulliss and Moore by Timothy Peck for defendant-appellee.

No brief for defendant-appellant.

PARKER, Judge.

We note first with respect to the purported appeal of defendant-appellant Debra Lee Plakakis that she has failed to perfect her appeal by the complete failure to note any exceptions or assignments of error in the record as required by N.C. Rule App. Proc. 10(a). She has also failed to comply with N.C. Rule App. Proc. 28 by not filing a brief with this Court. Therefore, the appeal of defendant-appellant Plakakis is hereby dismissed.

We turn now to plaintiff's sole assignment of error, namely the granting of defendant corporation's motion to dismiss. In rul-

ing on a motion to dismiss under Rule 12(b)(6), a court is concerned only with the law of a claim, not the facts alleged to support the claim. *Renwick v. News and Observer*, 310 N.C. 312, 312 S.E. 2d 405, *cert. denied*, 469 U.S. 858, 105 S.Ct. 187, 83 L.Ed. 2d 121 (1984). The allegations of the complaint are taken as true and only if it affirmatively appears that plaintiff would be entitled to no relief under any facts which could be presented should the motion be granted. *Id.*

Plaintiff alleges in her complaint that Adams-Millis Corporation is liable for her injuries as it knew that customers of its factory outlet frequently crossed English Road at the point where she crossed and failed to take any action to make the area safe by installation of warning signs, lights or a crosswalk. Plaintiff further alleges that the defendant corporation had encouraged patrons of its store to cross at the place where she crossed by erecting a fence around the parking lot. According to plaintiff's allegations, the only opening in the fence through which both cars and pedestrians entered and exited the parking lot was onto English Road; from this opening the nearest traffic signal was sixty feet away. At some earlier point in time, there had been another means of ingress and egress onto a different less heavily traveled street.

We agree with the trial court that the allegations fail, as a matter of law, to state a claim upon which relief can be granted. A business owner has the duty to use ordinary care to keep his premises reasonably safe for his business invitees and to warn his invitees of any hidden dangers, *e.g.*, *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E. 2d 245 (1979), and this duty extends to a parking lot provided by the owner for the use of the invitees. *Id.* However, there are no allegations in plaintiff's complaint which could support any conclusion that an unsafe condition in defendant corporation's parking lot caused plaintiff's accident. The unsafe condition which resulted in plaintiff's injury was the busy street over which appellee had no control.

The duty to provide for traffic control on public streets in a municipality is charged by statute to the city. *See* G.S. 160A-296 (a); G.S. 160A-300. Defendant corporation had no duty to provide for a crossing guard, warning lights or other traffic control devices over a city street. Further, the corporation was under no

duty to warn of the hazard of jaywalking across a busy thoroughfare, an obvious, not a hidden danger. *See Spell v. Contractors*, 261 N.C. 589, 135 S.E. 2d 544 (1964).

Plaintiff also alleged that defendant corporation negligently maintained its business premises and parking lot. Plaintiff, however, was not injured on defendant corporation's business premises or parking lot. She was injured in the street. The allegedly offending fence around the parking lot did not force pedestrians to cross English Road at the point where plaintiff crossed. Even if the fence were not there, customers of defendant corporation's store would still have to cross English Road.

A business owner is not an insurer of the safety of his customers. *See Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 638, 281 S.E. 2d 36, 38 (1981). The duty owed by the business owner to his customers to keep his premises reasonably safe is extensive, but it only applies when the customer is on the business premises, or where the defendant through some affirmative action created the dangerous condition. *See, e.g., Dunning v. Forsyth Warehouse Co.*, 272 N.C. 723, 158 S.E. 2d 893 (1968). *See also Ellsworth v. Colorado Beverage Co.*, 150 Colo. 19, 370 P. 2d 159 (1962) and *Brandt v. Great Atlantic & Pacific Tea Co.*, 11 N.J. Super. 528, 78 A. 2d 598 (1951).

Nothing in plaintiff's complaint could support a finding that Adams-Millis breached its duty to plaintiff to keep its own premises safe. The motion to dismiss under Rule 12(b)(6) was properly granted.

Dismissed in part; affirmed in part.

Judges WELLS and MARTIN concur.

BARRIE M. MILLER v. MAX F. FERREE, BETSY R. FERREE, RUSSELL F. FERREE, DR. HENRY C. LANDON, III, BARBARA S. LANDON AND FERREE, CUNNINGHAM AND GREY, P.A., SUCCESSOR TO MAX F. FERREE, P.A.

No. 8623SC731

(Filed 20 January 1987)

Attorneys at Law § 5.1; Rules of Civil Procedure § 8.1— legal malpractice—damages specifically stated—dismissal without prejudice

In an action for legal malpractice where plaintiff violated N.C.G.S. § 1A-1, Rule 8(a)(2) by stating specifically the amount of compensatory and punitive damages sought, the trial court did not abuse its discretion by dismissing without prejudice and taxing the costs to plaintiff, rather than dismissing with prejudice, since the record did not disclose evidence of any other actions by plaintiff which would so aggravate the effect of his violation of the rule as to render it flagrant.

APPEAL by defendants Max F. Ferree, Russell F. Ferree and Ferree, Cunningham and Gray, P.A., from *DeRemus, Judge.* Order entered 19 May 1986 in Superior Court, WILKES County. Heard in the Court of Appeals 11 December 1986.

In the complaint filed in this action, plaintiff alleged, *inter alia,* that defendants Max F. Ferree and Russell F. Ferree, who are attorneys and at all times relevant were members of defendant professional association or its predecessor, committed various acts of legal malpractice, some of which were intentional and others of which were negligent, in connection with their representation of plaintiff in certain real estate transactions. In the *ad damnum* clause of the complaint, plaintiff sought compensatory damages of $53,500.00 from these defendants and punitive damages of $500,000.00. In addition, plaintiff sought various equitable relief against all defendants and sought compensatory damages for breach of contract from defendants Landon.

In their answers, defendants Max F. Ferree, Russell F. Ferree and Ferree, Cunningham and Gray, P.A., included motions to dismiss the action pursuant to G.S. 1A-1, Rule 41(b) for plaintiff's failure to comply with G.S. 1A-1, Rule 8(a)(2), which provides that "in all professional malpractice actions . . . wherein the matter in controversy exceeds . . . ten thousand dollars . . . the pleading shall not state the demand for monetary relief, but shall state

that the relief demanded is . . . in excess of ten thousand dollars . . . ."

After hearing the motions, the trial court concluded that plaintiff had violated Rule 8(a)(2) and ordered, as sanctions for the violation, that plaintiff's action against defendants Max F. Ferree, Russell F. Ferree and Ferree, Cunningham and Gray, P.A., be dismissed without prejudice. The court further ordered that upon payment of all costs of the action the plaintiff would be permitted to institute a similar action against those defendants within one year. Defendants appealed.

Flanary & Davies, by Kenneth T. Davies, for plaintiff appellee.

Moore, Willardson & Lipscomb, by Larry S. Moore, for defendant appellants Max F. Ferree and Russell F. Ferree.

E. James Moore for defendant appellant Ferree, Cunningham and Gray, P.A.

MARTIN, Judge.

We note initially that defendants' appeal is properly before us. "[A] judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal . . . ." *Gower v. Insurance Co.*, 281 N.C. 577, 580, 189 S.E. 2d 165, 168 (1972).

The appealing defendants contend that the trial court, upon finding plaintiff in violation of G.S. 1A-1, Rule 8(a)(2), should have dismissed his action against them with prejudice, and that its order dismissing the suit without prejudice and permitting the plaintiff to institute a similar action against them within one year should be reversed. We affirm.

It is clear that a dismissal with prejudice, pursuant to Rule 41(b), is an available sanction for a plaintiff's violation of Rule 8(a)(2). *Harris v. Maready*, 311 N.C. 536, 319 S.E. 2d 912 (1984). It is not, however, the only available sanction and should be applied "only when the trial court determines that less drastic sanctions will not suffice." *Id.* at 551, 319 S.E. 2d at 922. The determination of whether to dismiss for violation of the rule, and whether such a

dismissal should be with prejudice so as to bar a subsequent action, involves the exercise of judicial discretion.

The trial court found that "sanctions less than a dismissal without prejudice are inappropriate in this action." This finding indicates that the court considered the various sanctions available and determined that a dismissal without prejudice, taxing plaintiff for the costs of the action up to the time of dismissal, was a sufficiently severe sanction. Appellate courts should not disturb the trial court's exercise of discretion unless the challenged action is "manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E. 2d 58, 63 (1980).

In *Schell v. Coleman*, 65 N.C. App. 91, 308 S.E. 2d 662 (1983), *disc. rev. denied, appeal dismissed*, 311 N.C. 763, 321 S.E. 2d 145 (1984), plaintiff's complaint prayed for damages for legal malpractice of $1,950,000.00. In addition, plaintiff aggravated the Rule 8(a)(2) violation by causing adverse radio and newspaper publicity, informing the N.C. Department of Insurance about the lawsuit, and causing the defendant to be served in open court. Under those circumstances, this court held that plaintiff's violation of Rule 8(a)(2) was so flagrant that the trial court's refusal to dismiss his suit amounted to an abuse of discretion.

The factors which aggravated the Rule 8(a)(2) violation in *Schell* are not present in this case. Although it appears from the exhibits filed in this Court that at least three newspaper articles have appeared in *The Journal-Patriot* of North Wilkesboro and *The Elkin Tribune* concerning the lawsuit, none of the articles or the headlines associated with them were of such a nature as to sensationalize the amount of damages claimed by plaintiff. Indeed, the main thrust of the articles involved the factual allegations and denials of the parties rather than the amount of damages sought. Had plaintiff complied with Rule 8(a)(2) the content of the articles would not have been appreciably different. The record does not disclose evidence of any other actions by plaintiff which would so aggravate the effect of his violation of the rule as to render it flagrant. We consequently decline to hold that the trial court's decision to dismiss this action without prejudice, rather than with prejudice, was "manifestly unsupported by reason" so as to constitute an abuse of discretion.

Affirmed.

Judges WELLS and PARKER concur.

J. D. STREET, INDIVIDUALLY AND JASON DONT STREET, BY AND THROUGH HIS GUARDIAN AD LITEM, J. D. STREET v. GLENN MOFFITT AND WIFE, OLA MAE MOFFITT

No. 8624SC841

(Filed 20 January 1987)

Negligence § 59.3— child as licensee of defendants' tenants—injury from lawn mower—duty of landowner

In an action to recover for personal injuries sustained by the minor plaintiff when he was struck by a lawn mower operated by defendants' tenant, the trial court properly entered summary judgment for defendants where the child was a licensee of defendants' tenant; there was no evidence of any willful or wanton negligence in that defendants did not increase any hazard to the child; and the higher measure of care required when young children are involved was inapplicable where there was nothing in the record to indicate that defendants knew the minor plaintiff was on their property.

APPEAL by plaintiffs from *Lamm, Judge.* Judgment entered 26 June 1986 in Superior Court, MITCHELL County. Heard in the Court of Appeals 30 October 1986.

This is a civil action instituted with the filing of a complaint on 5 August 1985 by J. D. Street, individually and as *guardian ad litem* for the minor plaintiff, Jason Dont Street. Glenn Moffitt and his wife, Ola Mae Moffitt were named as defendants.

Plaintiffs' complaint alleged, *inter alia,* that defendants owned a farm; that Terry Byrd and his wife, Jane Byrd resided on the premises of that farm in a garage apartment; that defendants owned a power lawn mower with a completely exposed rotary blade; that on 2 July 1984 defendants furnished said lawn mower to Jane Byrd to cut the grass on defendants' premises; and that while the minor plaintiff was visiting the Byrds, and while Jane Byrd was operating the lawn mower, the minor plaintiff while riding a three wheel bicycle, slid into the grass so as to come into contact with the exposed blade which cut off one of his toes and severely injured his right foot, ankle, and leg. Plaintiffs

claimed that "[s]olely by reason of said negligence [providing a defective and dangerous lawn mower] of defendants, plaintiffs have been damaged in the sum of more than $25,000.00 for personal injuries."

On 8 October 1985, defendants filed a motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted, and an answer to plaintiffs' complaint. Defendants asserted that even if they were negligent, their negligence was not the proximate cause of plaintiffs' injuries. Defendants averred that it was Jane Byrd who was negligent in using a power mower while children were playing on the property, and in her failure to properly supervise the children. Defendants also asserted as a defense the negligence of the minor plaintiff's parents "in that they left Jason with Jane Byrd when they knew or should have known that Jane Byrd would be using the lawn mower in question, failed to warn or caution Jason not to play around said lawn mower and failed to warn or caution Jane Byrd not to use said lawn mower near the children."

On 27 May 1986, defendants filed a motion for summary judgment. On 9 July 1986, the court granted defendants' motion for summary judgment. Plaintiffs appeal.

G. D. Bailey and J. Todd Bailey, for plaintiff appellants.

Moore, Willardson & Lipscomb, by William F. Lipscomb, for defendant appellees.

JOHNSON, Judge.

The only issue we must address is whether there was a material issue of fact presented by the parties' pleadings and affidavits such that it constituted reversible error for the trial court to conclude that defendants were entitled to a judgment as a matter of law. We conclude that the forecast of evidence submitted by the parties does not present a material triable issue of fact and accordingly we affirm the trial court's judgment.

We are advertent to the well known principle that summary judgment is a drastic remedy. *First Fed. Sav. & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972). The granting of summary judgment is appropriate when the forecast of the evidence discloses that there is no genuine issue as to

any material fact and that a party is entitled to a judgment as a matter of law. *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980). Ordinarily summary judgment is not appropriate in negligence cases. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972). However, summary judgment is appropriate if it is established that the alleged negligence of a defendant was not the proximate cause of a plaintiff's injury. *Hale v. Duke Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265, *cert. denied*, 297 N.C. 452, 256 S.E. 2d 805 (1979).

In order to determine the liability, if any, of defendants for the minor plaintiff's injuries we must first determine the nature of defendants' duty to the minor plaintiff. Any such duty owed by a landlord is determined by the visitor's status. *See Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154 (1959). In the case at bar the minor plaintiff was a social guest of defendants' tenants, Terry and Jane Byrd. On that basis the minor plaintiff's status may be established as a licensee as to the tenant. *See Haddock v. Lassiter*, 8 N.C. App. 243, 174 S.E. 2d 50 (1970) (citing *Murrell v. Handley*, 245 N.C. 559, 96 S.E. 2d 717 (1957)). Moreover, even though the minor plaintiff may have been injured in a common area his status is that of a licensee. *See generally Andrews v. Taylor*, 34 N.C. App. 706, 239 S.E. 2d 630 (1977) (a visitor who drowned in a swimming pool while visiting a tenant was a licensee and the only duty owed by the owner to that licensee was the duty to refrain from injuring him willfully or through wanton negligence and from doing any act which increases the hazard to the licensee while he is on the premises). In the case *sub judice*, we find no evidence of any willful or wanton negligence. There is nothing in the record on appeal to indicate that defendants increased any hazard to the minor plaintiff. Thus, we are unable to find any evidence that defendants breached a duty to the minor plaintiff.

Plaintiffs rely upon *Anderson v. Butler*, 284 N.C. 723, 202 S.E. 2d 585 (1974), for their assertion that a higher measure of care is required when young children are involved. However, the Court in *Anderson, supra*, stated that "[i]f the owner, while the licensee is on the premises exercising due care for his own safety, is actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased danger, the owner will be liable for injuries sustained as a result

of such *active or affirmative negligence.*" *Anderson, supra,* at 729, 202 S.E. 2d at 589 (emphasis supplied). As defendants in their brief are quick to point out, there is nothing in the record on appeal to indicate that they knew the minor plaintiff was on their property. It is undisputed that Jane Byrd was the only person who knew that the children were on the premises and in spite of that fact decided to mow the lawn with a lawn mower that she knew was defective.

For reasons stated hereinabove, the judgment is

Affirmed.

Judges ARNOLD and EAGLES concur.

BETTY ANN LENNON v. RONALD W. WAHLER

No. 8610DC646

(Filed 20 January 1987)

Appeal and Error § 7— validity of consent judgment—trial court's finding not binding—defendant not aggrieved—no right to appeal

Where the parties entered into a separation agreement which provided that defendant would pay all of his children's college expenses, a subsequent consent judgment dealing with an arrearage in alimony also stated that it was agreed between the parties that defendant would assist in paying for college educations, defendant later refused plaintiff's request for payment of tuition, defendant promptly paid a tuition bill sent directly to him by the college, and the trial court found that defendant therefore had not breached the separation agreement, defendant did not have a right to appeal based on the trial court's additional conclusion that the consent judgment was without force and effect as to the terms regarding education contained in the separation agreement.

APPEAL by defendant from *Payne, Judge.* Judgment entered 13 January 1986 in WAKE County District Court. Heard in the Court of Appeals 19 November 1986.

On 29 March 1978, Ronald Wahler and Betty Wahler (now Lennon) executed a separation agreement and were subsequently divorced. Several provisions of the agreement provided for the support and education of their two children, Anne Elizabeth Wah-

ler, born 9 January 1967, and Todd Joseph Wahler, born 22 April 1971. Included in the agreement was the following provision:

> Husband hereby agrees that he will pay all costs of tuition, room, board, fees and reasonable spending money for the children born of the marriage to attend a college or university for a period of four years.

In addition, the parties agreed that Mrs. Wahler would be paid alimony. On 6 February 1980, Mrs. Wahler filed a complaint alleging that Dr. Wahler had breached the terms of the separation agreement by refusing to pay Mrs. Wahler alimony. On 20 June 1980, summary judgment was entered in favor of Mrs. Wahler. The parties' attorneys began negotiations regarding payment of the arrearage; they also discussed other issues. A consent judgment was entered on 14 November 1980. Paragraph 6 of the decretal portion of the consent order states:

> It is also agreed between the parties that the Defendant shall assist in the payment of expenses for college educations of the said minor children.

The trial court did not refer to payment of college expenses in its findings of fact.

In the spring and summer of 1985, Anne Elizabeth Wahler made plans to attend Wingate College. On 29 July 1985, Mrs. Lennon filed a complaint alleging that she had notified Dr. Wahler that the tuition payment was due and that he had refused to pay. Plaintiff sought specific performance of that part of the separation agreement requiring Dr. Wahler to pay all the children's college costs. Dr. Wahler asserted the defense that the consent judgment modified the terms of the separation agreement to require only that defendant *assist* in the payment of college expenses. In late summer of 1985, Wingate College sent Dr. Wahler a bill for tuition and room and board for his daughter, which he promptly paid.

The matter was heard on 11 December 1985. Testimony of plaintiff and the affidavit of her attorney indicated that plaintiff did not intend for the consent judgment to modify that part of the separation agreement concerning college expenses. Evidence from the defense indicated that Dr. Wahler and his attorney intended to alter the requirement that he be responsible for the entire

amount. The court concluded that the separation agreement was valid and enforceable and that the later consent order neither incorporated nor modified the separation agreement. However, the court also found that the defendant was not in breach of the agreement and plaintiff was not entitled to the relief requested. Defendant appealed.

Sullivan & Pearson, P.A., by Mark E. Sullivan and Rose H. Stout, for plaintiff-appellee.

Donald H. Solomon and Leigh L. Leonard for defendant-appellant.

WELLS, Judge.

The question before the trial court was whether defendant breached the terms of the separation agreement. Since that issue was answered in defendant's favor and all plaintiff's requests for relief were thereby denied, the threshold issue here is whether defendant has a right to appeal based on the trial court's additional conclusion that the consent order is without force and effect as to the terms regarding education contained in the separation agreement.

In *Roberts v. Akins*, 261 N.C. 735, 136 S.E. 2d 111 (1964), our Supreme Court addressed a similar issue. In that case, the plaintiffs instituted action to enjoin the defendants from computing in a certain manner the selling time allotted to warehouse firms. In their response to an order to show cause, defendants argued that plaintiffs were estopped by judgments entered in the U.S. District Court for the Eastern District of North Carolina. The matter was heard, and the trial court entered an order finding that plaintiffs were asserting rights not previously exercised; the court then denied the plaintiffs' motions and discharged the rule against defendants to show cause. However, the court went on to consider the defendants' estoppel argument; it found that the plaintiffs were not bound by the judgment of the U.S. District Court. Defendants excepted to that portion of the order and appealed. The Supreme Court dismissed the appeal, stating:

> PER CURIAM. The only question before Judge Nimocks was whether plaintiffs should be granted temporary injunctive relief "for the year 1963." It was decided in favor of

defendants. Hence, defendants were not aggrieved by Judge Nimocks' order and their purported appeal must be dismissed. [Citations omitted.]

With reference to defendants' exception to the court's expression of opinion and ruling with reference to defendants' plea of estoppel, it seems appropriate to say: Judge Nimocks' *decision* was not based on this ruling. Moreover, any ruling by Judge Nimocks with reference to defendants' plea of estoppel would have significance only for the purpose of resolving the question then before him. The judge presiding at the final hearing is not bound by said ruling but will decide *de novo* all questions with reference to defendants' said plea. Hence, it does not appear defendants are prejudiced by the portion of Judge Nimocks' order to which they excepted.

Roberts v. Akins, supra.

In this case, the trial court stated in its conclusions of law:

1. That the Separation Agreement of March 29, 1978 is a valid and enforceable instrument executed by the parties.

2. That the consent order of November 10, 1980 neither incorporated nor modified the terms of the Separation Agreement.

3. The defendant is not in breach of the Separation Agreement, and the plaintiff has failed to demonstrate that she is entitled to an order of specific performance or any other relief under the terms of the contract.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff's request for relief is denied.

Although the finding that the defendant is not in breach of the separation agreement follows those concerning the validity of the consent order, its order denying plaintiff's request for relief is not *based* on defendant's argument that the separation agreement is not valid. Plaintiff's cause of action was premature; the court found as a matter of fact that defendant paid his daughter's expenses "promptly" when the college submitted a bill in August. To the extent that the court did take into account defendant's assertion that the separation agreement was invalid, it was—as in

Roberts—"significant only for the purpose of resolving the question then before him," i.e., whether defendant was in breach of the separation agreement. The trial court's conclusions to which defendant objects do not decide the question of the validity of the questioned portion of the consent order and would not be binding on any court in any future litigation concerning the separation agreement. *Id.* Defendant is therefore not an "aggrieved party" within the meaning of N.C. Gen. Stat. § 1-271. *Carawan v. Tate*, 304 N.C. 696, 286 S.E. 2d 99 (1982); *Coburn v. Timber Corp.*, 260 N.C. 173, 132 S.E. 2d 340 (1963) and the appeal must therefore be dismissed.

Dismissed.

Judges BECTON and ORR concur.

JACQUELINE T. HARVEY v. RALPH W. HARVEY

No. 8617DC206

(Filed 20 January 1987)

APPEAL by plaintiff from *McHugh, Judge*. Order entered 27 November 1985 in District Court, ROCKINGHAM County. Heard in the Court of Appeals 26 August 1986.

C. Orville Light for plaintiff-appellant.

J. Hoyte Stultz, Jr., for defendant-appellee.

PARKER, Judge.

In this action for divorce, a decree for absolute divorce was entered on 8 September 1983 with the issues of alimony, child custody and support and equitable distribution to be heard at a later date. The issues of alimony and equitable distribution came on for hearing on 12 January 1984 and 12 July 1984 and a judgment was signed and filed 24 September 1985. Thereafter on 2 October 1985 plaintiff filed a motion for rehearing. On 27 November 1985, an order was entered denying the motion for new trial or rehearing. Plaintiff gave notice of appeal from this order; plaintiff did not appeal the 24 September 1985 judgment.

Plaintiff not having appealed from the 24 September 1985 judgment, the only possible exception preserved for review was exception no. 7 relating to denial of the motion for rehearing. *See Hamlin v. Austin*, 49 N.C. App. 196, 270 S.E. 2d 558 (1980). Plaintiff, however, set forth no argument or authority in support of this exception in her brief. Accordingly, this exception is deemed abandoned pursuant to Rule 28(b)(5) of the N.C. Rules of Appellate Procedure and the appeal is

Dismissed.

Judges ARNOLD and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 20 JANUARY 1987

DAW v. COOPER OIL CO. No. 8610IC775	Ind. Comm. (893623) (040042)	Affirmed in part, reversed in part and remanded.
FLOYD v. COX No. 863SC658	Pitt (85CVS474)	Affirmed
GIBBS v. GIBBS No. 862DC712	Hyde (85CVD39)	No Error
HUBBARD v. GATHINGS No. 8620DC704	Anson (83CVD233)	No Error
IN RE COX No. 8619DC634	Randolph (85J126)	Affirmed
IN RE DORTY No. 8614DC854	Durham (80-J-27)	Affirmed
IN RE FORECLOSURE OF ROCHESTER No. 8619SC580	Randolph (85SP324)	Appeal Dismissed
IN RE HODGE No. 8627DC332	Lincoln (82 J 15) (82 J 16)	Affirmed
IN RE HOWARD No. 865DC1021	New Hanover (84-J-0029)	Dismissed
KWAN-SA YOU v. ROE No. 8614SC529	Durham (83CVS1462)	Dismissed
McCAIN v. GHIDORZI CONST., INC. No. 8615SC771	Orange (85CVS719)	Dismissed
MORRIS v. THE REGATTA GROUP & ALLRED CORP. No. 8626SC678	Mecklenburg (85CVS11838)	Appeal Dismissed
MULLIS v. MULLIS No. 8623DC614	Ashe (84CVD56)	Reversed
NASH GENERAL HOSPITAL, INC. v. BAUGHAM (FUQUAY) No. 867DC753	Nash (86CVD13)	Affirmed
NEESE v. NEESE No. 8618DC550	Guilford (84CVD5825)	Vacated and Remanded

PLANT v. PLANT No. 8622DC898	Alexander (84CVD159)	Appeal Dismissed
RIVERSIDE BUILDING SUPPLY CO. v. BURKE INS. & REALTY CO. AND EDS No. 8617SC768	Surry (83CVS163)	Burke Ins. & Realty—Reversed and Remanded. EDS Federal Corp.—Appeal Dismissed.
STATE v. BORDERS No. 8621SC602	Forsyth (85CRS56358) (85CRS56359) (85CRS56361)	No Error
STATE v. BROWN No. 8616SC632	Scotland (85CRS5423)	No Error
STATE v. COMSTOCK No. 862SC581	Tyrrell (85CRS820)	No Error
STATE v. DULA No. 8625SC761	Catawba (86CRS1092)	No Error
STATE v. GIBBS No. 868SC588	Lenoir (85CRS8013)	No Error
STATE v. HARDIN AND STATE v. HARDIN No. 8616SC255	Robeson (85CRS12444) (85CRS12268)	No Error
STATE v. HARRIS No. 863SC856	Pitt (86CRS2143)	No Error
STATE v. HOOVER No. 8619SC752	Randolph (85CRS13855)	No Error
STATE v. HUDSON No. 8613SC787	Brunswick (84CRS2909)	No Error
STATE v. JACKSON No. 8621SC669	Forsyth (85CRS59348)	No Error
STATE v. McGURDY No. 8623SC763	Wilkes (86CRS21)	No Error
STATE v. NORRIS No. 8610SC751	Wake (85CRS66773)	No Error
STATE v. RANKINS No. 861SC707	Perquimans (85CRS691) (85CRS692)	No Error
STATE v. ROARY No. 8626SC600	Mecklenburg (85CRS30547)	No Error
STATE v. STURGILL No. 8626SC746	Mecklenburg (85CRS81466)	No Error

STATE v. SWINK No. 8627SC608	Lincoln (85CRS7981)	No Error
STATE v. TAYLOR No. 8626SC801	Mecklenburg (84CRS84639) (84CRS84640)	No Error
STATE v. WALKER No. 8626SC635	Mecklenburg (85CRS66576) (85CRS66578)	No Error
STATE v. WALLER No. 8618SC853	Guilford (86CRS34696)	Remanded for Resentencing
STATE v. WREN No. 8612SC833	Cumberland (79CRS51764)	Appeal Dismissed
WELLS v. FIRST PRESBYTERIAN CHURCH No. 8610IC711	Ind. Comm. (030854)	Affirmed
WICKES CORP. v. ACTION HOMES AND HODGE; EVERHART v. HODGE & ACTION HOMES No. 8619DC698	Rowan (85CVD1317) (85CVD1451)	Affirmed
YOUNCE v. YOUNCE No. 8625DC615	Caldwell (81CVD1177)	Affirmed

STATE OF NORTH CAROLINA v. DALTON WOODROW WORTHINGTON AND JOHNNY LEE WARREN

No. 863SC344

(Filed 3 February 1987)

1. **Criminal Law § 169.3— evidence of entrapment—excluded—admitted elsewhere—no error**

The trial court did not err in a prosecution for multiple drug-related offenses where the court refused to permit defendant Warren to present evidence of entrapment by testifying on direct examination about the substance of conversations with the State's informant. There was no prejudice because the excluded evidence was otherwise placed before the jury. N.C.G.S. 15A-1443(a).

2. **Narcotics § 4.2— entrapment—question for jury**

Defendant Warren's motion to dismiss multiple drug-related charges based on entrapment was properly denied where an SBI agent initiated contact with defendant through an informant only after receiving information from the informant that defendant dealt in cocaine; defendant readily participated in the transactions after being contacted by the agent, suggesting a meeting place and requesting a cut of the cocaine from the first transaction; defendant and the agent discussed larger transactions and all further contacts between them were conducted without the informant's participation; and the only hesitancy defendant expressed involved his concern that the SBI agent might be a law enforcement officer. Although defendant testified to the contrary, the evidence presented a question of fact for the jury.

3. **Indictment and Warrant § 9.3; Narcotics § 2— conspiracy to sell and deliver cocaine—indictment—surplusage**

An indictment charging conspiracy to sell and deliver cocaine charged the offense with sufficient clarity to confer subject matter jurisdiction where the indictment alleged that defendant "unlawfully, willfully, and feloniously did . . . conspire . . . to unlawfully, willfully and feloniously did sell and deliver . . . a controlled substance . . . ." The underscored "did" was obvious surplusage and irrelevant to an otherwise properly alleged charge.

4. **Criminal Law § 126— disjunctive verdict—no error**

A verdict of guilty of conspiracy to sell and deliver cocaine was not defective where the verdict sheet referred to the charge of conspiracy with "Dalton Woodrow Worthington, Sr. and/or Patricia Ann Newby." The trial court carefully instructed the jury that each of their verdicts must be unanimous, and the unanimity requirement was repeated upon the court's later inquiry of the jurors as to their progress in deliberations.

5. **Narcotics § 4— cocaine—evidence of weight—sufficient**

The evidence in a prosecution for cocaine trafficking was sufficient to take to the jury the question of whether the white powder in question weighed 28

grams or more as required by N.C.G.S. 90-95(h)(3) where an SBI chemist testified that the substance weighed 28.15 grams before laboratory analysis and that a small amount had been consumed during analysis, and two weights taken during the trial both registered less than 28 grams.

6. Narcotics § 4— cocaine—evidence of weight—separate bags combined

The evidence presented a question for the jury as to whether defendant Warren possessed a mixture of cocaine weighing 28 grams or more where an SBI chemist testified that the white powder was contained in three separate bags when he received it; that he removed the powder from the separate bags and combined it into one bag; and that the one bag contained 70 grams of a cocaine mixture.

7. Criminal Law § 102.6— prosecutor's argument—codefendant labeled drug king—no prejudice

There was no prejudice in a prosecution for multiple drug-related offenses from the prosecutor's characterization of a codefendant as a "dope king" where the characterization was made only once and in light of the evidence with respect to the quantities of cocaine, money and other drug paraphernalia found during the search of the codefendant's residence.

8. Narcotics § 4— conspiracy to traffic—evidence sufficient

There was sufficient evidence to submit to the jury the issue of defendants' guilt of conspiracy to traffic in more than 200 grams of cocaine where defendant Warren repeatedly referred to "his man," the manner in which "his man" would like to arrange a drug deal, and "his man's" ability to transact a half-pound cocaine deal; one-hundred dollar bills from the money the SBI agent used to purchase the cocaine were found in the possession of each of the defendants; defendant Warren's name and telephone number were recorded in a notebook discovered in defendant Worthington's residence; and the notebook appeared to contain a record of payments and balances for dated transactions.

9. Conspiracy § 3— conspiracy to possess and conspiracy to sell and deliver—one agreement, one conspiracy

Judgments for conspiracy to possess cocaine were arrested where defendants were also convicted of conspiracy to sell and deliver cocaine, which necessarily encompassed possession. Defendants could only be convicted of one conspiracy because there was only one agreement which encompassed both the possession and the sale of cocaine; it is the number of separate agreements rather than the number of substantive offenses which determines the number of conspiracies.

10. Criminal Law § 102.6— trafficking in cocaine—prosecutor's argument—improper—no prejudice

In a prosecution for multiple drug-related offenses, the prosecutor's argument that defendants could have escaped the mandatory sentencing provisions for trafficking in cocaine by substantially assisting the State in the prosecution of others was improper because it was without evidentiary basis and because it amounted to an impermissible comment on defendants' exercise of their rights to remain silent; however, the error was harmless due to the overwhelming evidence of defendants' guilt. N.C.G.S. 90-95(h)(5).

State v. Worthington

APPEAL by defendants from *Hight, Judge.* Judgments entered 16 January 1985 in Superior Court, PITT County. Heard in the Court of Appeals 10 November 1986.

A Pitt County Grand Jury returned true bills of indictment charging defendant Johnny Lee Warren with multiple drug related offenses arising out of his alleged sales of cocaine to an undercover law enforcement officer on 6 September 1984 and on 10 September 1984. A true bill of indictment was also returned charging defendant Dalton Woodrow Worthington with three related offenses involving cocaine which were alleged to have occurred on 10 September 1984. The State's motion for joinder of offenses and defendants was allowed.

The State's evidence tended to show that SBI Agent Ray E. Jackson was working in an undercover capacity in Pitt County in September 1984. Acting in response to information obtained from an informant, Samuel Vines, and with Vines' assistance, Agent Jackson arranged a meeting with defendant Warren on the afternoon of 6 September 1984 for the purpose of purchasing an ounce of cocaine. Warren arrived at the prearranged time and place accompanied by Vines. Warren told Agent Jackson that he had no cocaine left and would need some money "up front" to get the cocaine. After some discussion, Agent Jackson gave Warren $2,200 and another meeting was arranged for delivery of the cocaine.

After Warren left to obtain the cocaine, he was followed by officers who observed him go to a residence which was later determined to be that of defendant Worthington. Warren went into the residence, remained approximately fifteen minutes, and then left, proceeding to the place where he had arranged to meet Agent Jackson. Warren gave Agent Jackson a plastic bag containing white powder, later analyzed as 28.15 grams of 47% cocaine. Warren and Agent Jackson had discussions concerning Jackson's purchase of a half-pound of cocaine and agreed that Agent Jackson would call Warren on the following Sunday, 9 September.

On 9 September Agent Jackson telephoned Warren and they discussed an additional purchase of cocaine on the following day. On 10 September, Jackson contacted Warren and Warren stated that he would be "ready to do the deal" for a half pound of cocaine in about an hour. Warren agreed to meet Agent Jackson in Jackson's motel room. At approximately 1:00 p.m., Warren and

his girlfriend, Patricia Ann Newby, went to the motel. While the girlfriend waited in the car, Warren went inside Jackson's room and asked him for $13,000, the agreed price for the cocaine. Warren proposed to deliver the cocaine to Jackson at another place. Jackson refused to conduct the transaction in that manner and, after substantial discussion, Jackson agreed to give Warren $5,000 to take to his source in order to get two ounces of cocaine as the first part of the half-pound. The $5,000 consisted of $100 bills which previously had been photocopied in order to record the serial numbers.

When Warren left the motel with his girlfriend, he was again kept under surveillance by law enforcement officers. He drove to Worthington's residence and went inside. After approximately 35 minutes, Warren left the Worthington residence and drove back to Agent Jackson's motel room, where he gave Jackson three plastic bags containing white powder. The white powder was later analyzed as weighing a total of 70 grams and containing 34% cocaine. Warren then asked for the balance of the $13,000 so that he could complete the half-pound deal. At that point, Warren was placed under arrest. He was searched and one of the $100 bills given to him earlier by Agent Jackson was found in his possession.

Shortly after Warren's arrest, officers went to Worthington's residence and, pursuant to a search warrant, searched the premises and Worthington's automobile. The officers found and seized plastic bags of cocaine weighing, respectively, 31 grams, 767 grams, and 14 grams; $4,900 of the same currency Jackson had given Warren, $28,450 in other currency, and a wide variety of other drug paraphernalia and equipment.

Defendant Worthington neither testified nor offered evidence. Defendant Warren testified that he had been shot in March 1984 and was disabled as a result of the shooting. He was in need of money when Samuel Vines contacted him about finding cocaine for Agent Jackson, and he agreed to help Vines, who was his cousin, because he owed Vines money. He denied any previous involvement with cocaine, denied any knowledge of or agreement with defendant Worthington, and testified that the person from whom he had purchased the cocaine was younger than Worthing-

ton. He also testified that Agent Jackson had offered him $1,000 to arrange the half-pound purchase.

The jury found both defendants guilty of all charges as follows:

Defendant Worthington

84CRS16844—Count 1—Guilty of possession of in excess of 400 grams of cocaine. (10 September 1984.)

Count 2—Guilty of conspiracy to possess 200 grams or more, but less than 400 grams of cocaine. (10 September 1984.)

Count 3—Guilty of conspiracy to sell and deliver 200 grams or more, but less than 400 grams of cocaine. (10 September 1984.)

Defendant Warren

84CRS17732—Count 1—Guilty of possession of 28 grams or more, but less than 200 grams of cocaine. (6 September 1984.)

Count 2—Guilty of sale and delivery of 28 grams or more, but less than 200 grams of cocaine. (6 September 1984.)

84CRS17733 Guilty of transporting 28 grams or more, but less than 200 grams of cocaine. (6 September 1984.)

84CRS17734—Count 1—Guilty of possession of 28 grams or more, but less than 200 grams of cocaine. (10 September 1984.)

Count 2—Guilty of sale and delivery of 28 grams or more, but less than 200 grams of cocaine. (10 September 1984.)

Count 3—Guilty of conspiring to possess 200 grams or more, but less than 400 grams of cocaine. (10 September 1984.)

Count 4—Guilty of conspiring to sell and deliver 200 grams or more, but less than 400 grams of cocaine. (10 September 1984.)

84CRS16843	Guilty of transporting 28 grams or more, but less than 200 grams of cocaine. (10 September 1984.)

Both defendants were sentenced to the applicable mandatory minimum sentence provided by G.S. 90-95(h)(3) for each offense and fined. The sentences were ordered to run concurrently. Both defendants appeal.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Joan H. Byers, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender David W. Dorey, for defendant appellant Worthington.

Public Defender Robert L. Shoffner, Jr., for defendant appellant Warren.

MARTIN, Judge.

By separate assignments of error, defendant Warren contends that one of the indictments was fatally defective, that the trial court erred in certain of its evidentiary rulings, and that certain of the charges against him should have been dismissed because the State's evidence was insufficient to establish his guilt. He also contends that the defense of entrapment was established as a matter of law, requiring dismissal of all charges against him. Both defendants challenge the sufficiency of the evidence to sustain their convictions for conspiracy. They also contend that remarks by the District Attorney during his closing argument to the jury entitle them to a new trial. We have carefully considered each of their joint and several contentions and conclude that, although certain errors occurred at the trial, the errors were not prejudicial to the defendants' rights to a fair trial and do not require that a new trial be awarded. However, because the trial court permitted each defendant to be convicted of two separate conspiracies upon evidence of only one scheme or agreement, we arrest judgment as to each defendant's conviction for conspiracy to possess 200 grams or more, but less than 400 grams, of cocaine.

I

DEFENDANT WARREN'S ASSIGNMENTS OF ERROR

A.

[1] Defendant Warren contends that he was prevented from presenting his full defense of entrapment because the trial court refused to permit him to testify, on direct examination, concerning the substance of certain conversations between himself and Samuel Vines, the State's informant. Through his testimony as to the content of these conversations, defendant sought to establish that Vines induced him to find the cocaine by offering to forgive repayment of a loan which Vines had made to him and by telling him that he would be paid for finding the cocaine. The State concedes that Vines' statements were not hearsay and were admissible to show that the statements were made and that by reason of the statements, defendant did the acts alleged. *See State v. Brockenborough*, 45 N.C. App. 121, 262 S.E. 2d 330 (1980). The State contends, however, that the excluded evidence was otherwise placed before the jury and therefore defendant Warren was not prejudiced by its exclusion. We agree with the State.

"Where evidence of similar import to that which was improperly excluded is admitted at other times in the trial, the exclusion will not be held to be prejudicial error." *State v. Smith*, 294 N.C. 365, 377, 241 S.E. 2d 674, 681 (1978). Although the State's objections to Warren's testimony were initially sustained, Warren was later permitted to testify: that Vines had contacted him three times before he met with Agent Jackson; that Vines knew he was disabled and in financial difficulty; that upon his initial refusal of Vines' request that he sell cocaine Vines reminded him of the $100 which Vines had loaned him; that Vines made all the arrangements for Warren's initial meeting with Agent Jackson and paid for his gas to go to that meeting; and that Vines forgave the $100 when Warren sold the first drugs to Agent Jackson. Defendant Warren has failed to show that he was prejudiced by the court's exclusion of his testimony concerning these conversations with Vines during his direct testimony. *See* G.S. 15A-1443(a).

B.

[2] Defendant Warren next contends that he was entitled to a dismissal of all the charges against him because the defense of en-

trapment was shown as a matter of law. Entrapment is the inducement of a person to commit a criminal offense not contemplated by that person, for the mere purpose of instituting a criminal action against him. *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975).

To establish the defense of entrapment, it must be shown that (1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant. *State v. Walker*, 295 N.C. 510, 246 S.E. 2d 748 (1978). The defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials. *State v. Hageman*, 307 N.C. 1, 296 S.E. 2d 433 (1982). The defendant has the burden of proving entrapment to the satisfaction of the jury. *Id.*

Ordinarily, the issue of entrapment is a question of fact to be resolved by the jury. *Stanley, supra.* Only when "the undisputed evidence discloses that an accused was induced to engage in criminal conduct that he was not predisposed to commit" can we hold as a matter of law that the defendant was entrapped. *Hageman* at 30, 296 S.E. 2d at 450. Predisposition may be shown by the defendant's ready compliance, acquiescence in, or willingness to cooperate in the proposed criminal plan. *Hageman, supra.*

In the present case, the State presented ample evidence from which the jury could infer defendant Warren's predisposition to deal in cocaine. Agent Jackson initiated contact with Warren through Vines only after receiving information from Vines that Warren dealt in cocaine. Once contacted by Agent Jackson, Warren readily participated in the transactions, suggested the meeting place and requested a cut of the cocaine from the first transaction. He and the agent discussed larger transactions and all further contacts between them were conducted without Vines' participation. The only hesitancy which Warren expressed to Agent Jackson involved Warren's concern that Jackson might be a law enforcement officer. Warren's own testimony was contrary, suggesting that he was induced by Vines to participate in the crimes and that he would not have done so absent his financial condition and the persuasion practiced upon him by Vines. Thus,

the evidence presented a question of fact for the jury on the issue of entrapment and defendant's motion to dismiss was properly denied.

C.

[3] Defendant Warren next contends that the indictment charging him with conspiracy to sell and deliver cocaine in excess of 200 grams but less than 400 grams failed to state the charged offense with sufficient clarity to confer subject matter jurisdiction on the court. The portion of the fourth count of the indictment in case No. 84CRS17734 to which he assigns error reads as follows:

> [O]n or about the 10th day of September, 1984, . . . the defendant . . . unlawfully, willfully and feloniously did . . . conspire with Dalton Woodrow Worthington and Patricia Ann Newby . . . to unlawfully, willfully, and feloniously did sell and deliver to R. E. Jackson a controlled substance, to wit: in excess of 200 grams but less than 400 grams of cocaine . . . . (Emphasis added.)

He raises this issue for the first time on appeal.

Defendant Warren asserts that the underscored word "did" renders meaningless the allegations of conspiracy contained in the count. He argues that because a conspiracy is an agreement to do a *future* unlawful act, it cannot properly be alleged by use of the *past tense*. He contends that the improper use of the past tense invalidates the indictment. We disagree.

A bill of indictment "is sufficient if it charges the offense in a plain, intelligible and explicit manner . . . . Allegations beyond the essential elements of the crime sought to be charged are irrelevant and may be treated as surplusage." *State v. Taylor*, 280 N.C. 273, 276, 185 S.E. 2d 677, 680 (1972). We find the inclusion of the underscored "did" to be obvious surplusage and irrelevant to the otherwise properly alleged charge. This assignment of error is overruled.

D.

[4] In connection with this same count of the bill of indictment in case number 84CRS17734, defendant Warren contends that the

verdict was defective. He bases his contention upon the wording of the verdict sheet which was submitted by the court as follows:

> As to the charge of conspiring with Dalton Woodrow Worthington, Sr. and/or Patricia Ann Newby on or about September 10, 1984, to sell and deliver to R. E. Jackson 200 grams or more, but less than 400 grams of Cocaine, we, the jury, by unanimous verdict find the defendant: . . . .

Defendant contends that the verdict is defective because there is the possibility that some jurors found a conspiracy with Worthington and others found a conspiracy with Newby.

Our Supreme Court has held that a defendant's right to a unanimous verdict was not violated where the underlying felonies upon which a felony murder conviction could be based were submitted in the disjunctive, *State v. McDougall*, 308 N.C. 1, 301 S.E. 2d 308, *cert. denied*, 464 U.S. 865, 104 S.Ct. 197, 78 L.Ed. 2d 173 (1983), or where the requisite felonious intent for a conviction of burglary was submitted in the disjunctive. *State v. Jordan*, 305 N.C. 274, 287 S.E. 2d 827 (1982). In the present case, the trial court carefully instructed the jurors that each of their verdicts must be unanimous, and the unanimity requirement was repeated upon the court's later inquiry of the jurors as to their progress in deliberations. We hold that the instructions were adequate to insure that defendant's right to a unanimous verdict was not violated.

E.

Defendant Warren next assigns error to the denial of his motions to dismiss the substantive trafficking offenses, claiming that the State failed to present substantial evidence that the amount of cocaine involved in each transaction met the statutory requirement for guilt of a trafficking offense. We will discuss separately his contentions with respect to each transaction.

6 September 1984

[5] Defendant Warren first asserts that the State's evidence with respect to the 6 September 1984 offenses failed to show that the white powder in question weighed 28 grams or more as required by G.S. 90-95(h)(3). His contention is based on the testimony of the SBI chemist.

SBI Chemist Allcox testified that he conducted laboratory tests on the white powder Agent Jackson purchased from defendant Warren on 6 September 1984. He stated that, prior to conducting any tests, he weighed the powder and found it to weigh 28.15 grams. He went on to testify that a small amount of the powder was consumed during his laboratory analysis, but he could not state precisely how much had been consumed. He further testified that he used an analytic balance scale that weighs to the closest ten-thousandth of a gram and that the scale was checked and found to be accurate a month after the testing. His laboratory tests determined that the white powder was a cocaine mixture.

During trial, Agent Allcox was asked to re-weigh the white powder purchased from defendant Warren on 6 September 1984. Two weights were taken, both of which registered less than 28 grams. Defendant asserts that these conflicts in the evidence were grounds for dismissal of the charges.

In ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, give the State the benefit of every reasonable inference to be drawn, and resolve all contradictions in favor of the State. *State v. Bullard*, 312 N.C. 129, 322 S.E. 2d 370 (1984). Resolving the conflicts in the evidence in favor of the State, we find that Agent Allcox's testimony that the substance weighed 28.15 grams before lab analysis was clearly sufficient to take to the jury the question of whether the white powder weighed 28 grams or more. This assignment of error is overruled.

10 September 1984

[6] As to the second transaction, defendant Warren contends that the State failed to present substantial evidence that the white powder which he delivered to Agent Jackson consisted, in its original form, of a cocaine mixture weighing 28 grams or more. We disagree.

The chemist testified that the white powder upon which the 10 September trafficking charges were based was contained in three separate plastic bags when he received it from Agent Jackson on 12 September 1984. He further testified that it was removed from the separate bags and combined into one bag prior to

analysis. His laboratory analysis revealed that the bag contained 70 grams of a cocaine mixture. Defendant Warren contends that the agent's mixing of the contents of the three separate bags precludes the State from presenting sufficient evidence of requisite drug quantity. He argues that, prior to the mixing, two of the bags may have contained nothing but a cutting agent while the third bag may have contained a quantity of cocaine insufficient to support the trafficking offense charged. We are not persuaded by this argument.

In *State v. Teasly*, 82 N.C. App. 150, 346 S.E. 2d 227 (1986), a large quantity of white powder in a sealed plastic bag was found on a shelf at the defendant's residence. A smaller quantity of white powder was discovered on a glass table approximately 18 inches away from the shelf. An officer, while conducting a search pursuant to a search warrant, combined the two substances in the large plastic bag. This court held that, on the evidence presented, it was for the jury to decide whether the defendant possessed the requisite quantity of cocaine to support a conviction for cocaine trafficking.

In *State v. Horton*, 75 N.C. App. 632, 331 S.E. 2d 215, *cert. denied*, 314 N.C. 672, 335 S.E. 2d 497 (1985), the contents of six tinfoil packets were combined by a laboratory agent for analysis. Combined, they contained 6.65 grams of heroin. Notwithstanding defendant's contention that all of the heroin could have been in one packet, this court held the evidence sufficient to support a conviction for heroin trafficking of the combined quantity.

Pursuant to *Teasly* and *Horton*, we hold that it was for the jury to decide whether defendant Warren possessed a mixture of cocaine weighing 28 grams or more. This assignment of error is overruled.

F.

[7] In his final separate assignment of error, defendant Warren complains of the District Attorney's characterization, in his jury argument, of the codefendant, Worthington, as a "dope king." It is interesting that Worthington has not objected to the characterization nor assigned it as error on appeal. Even so, we have reviewed the prosecutor's argument to determine if it was unfairly prejudicial to defendant Warren. In light of the evidence with

respect to the quantities of cocaine, money and other drug paraphernalia found during the search of Worthington's residence, we cannot say that the characterization, although uncomplimentary to Worthington, was unsupported by the evidence or was unfairly prejudicial to defendant Warren. *See State v. Kirkley*, 308 N.C. 196, 302 S.E. 2d 144 (1983); *State v. Bailey*, 49 N.C. App. 377, 271 S.E. 2d 752 (1980). Moreover, as the characterization was made only one time, we discern no reasonable possibility that a different result would have been reached as to either defendant had the argument not been made. G.S. 15A-1443(a). This assignment of error is overruled.

II

DEFENDANTS' JOINT ASSIGNMENTS OF ERROR

A.

[8] Both defendants challenge the sufficiency of the State's evidence to support their convictions of engaging in a criminal conspiracy to traffic in cocaine on 10 September 1984.

A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. *State v. Bell*, 311 N.C. 131, 316 S.E. 2d 611 (1984). In a prosecution for conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understanding will suffice to withstand defendant's motion to dismiss. *State v. Baize*, 71 N.C. App. 521, 323 S.E. 2d 36 (1984), *disc. rev. denied*, 313 N.C. 174, 326 S.E. 2d 34 (1985). The existence of a conspiracy may be established by direct or circumstantial evidence, although it is generally "established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Abernathy*, 295 N.C. 147, 165, 244 S.E. 2d 373, 384 (1978), *quoting State v. Whiteside*, 204 N.C. 710, 169 S.E. 711 (1933).

In the present case, there was sufficient evidence to submit to the jury the issue of defendants' guilt of conspiracy to traffic in more than 200 grams of cocaine. Although the State presented no direct evidence of an express agreement between the defendants, reasonable inferences can be drawn from the evidence indicating that defendant Warren and defendant Worthington had a mutual,

implied understanding that Warren would arrange the sale of a half-pound of cocaine to Agent Jackson and that Worthington would supply that amount of cocaine. Warren repeatedly referred to "his man," the manner in which "his man" liked to arrange a drug deal, and "his man's" ability to transact a half-pound cocaine deal. One-hundred dollar bills from the money Agent Jackson used to purchase the cocaine were found in the possession of each of the defendants. Warren's name and telephone number were recorded in a notebook discovered in Worthington's residence. The notebook appeared to contain a record of payments and balances for dated transactions. Viewed in the light most favorable to the State, the evidence presented was sufficient to take the issue of conspiracy to the jury.

B.

[9] Each defendant, however, was convicted of engaging in multiple conspiracies, the existence of which was predicated on different substantive crimes. Defendant Worthington was convicted, in the second count of the bill of indictment in 84CRS16844, of conspiring to possess more than 200 grams, but less than 400 grams of cocaine, and in the third count of the same bill of indictment, of conspiring to sell a like amount of cocaine. In 84CRS17734, defendant Warren was convicted of conspiring to possess the cocaine, and in the fourth count, of conspiring to sell it.

According to the evidence presented, there was only one agreement which encompassed both the possession of the cocaine and its sale, in the amount alleged, to Agent Jackson. It is the number of separate agreements, rather than the number of substantive offenses agreed upon, which determines the number of conspiracies. *Sanderson v. Rice*, 777 F. 2d 902 (4th Cir. 1985); *cert. denied*, 106 S.Ct. 1226 (1986); *State v. Rozier*, 69 N.C. App. 38, 316 S.E. 2d 893, *cert. denied*, 312 N.C. 88, 321 S.E. 2d 907 (1984). Accordingly, each defendant may be convicted of only one conspiracy. Since the conspiracy to sell and deliver the cocaine to Agent Jackson necessarily encompassed possession of the substance, we arrest judgment as to defendant Worthington's conviction of conspiracy to possess 200 grams or more, but less than 400 grams, of cocaine, as alleged in the second count in 84CRS16844, and arrest judgment as to defendant Warren's conviction of conspiracy to

possess 200 grams or more, but less than 400 grams, of cocaine, as alleged in the third count of the bill of indictment in 84CRS 17734. The prison sentences imposed in connection with the judgments entered upon those convictions were made to run concurrently with other sentences of equal or greater length, imposed as a result of other convictions which we do not disturb, therefore defendants' prison sentences are not affected. However, the fines imposed by the judgments which we have arrested must be stricken.

C.

Since we must arrest judgment as to each defendant's conviction of conspiracy to possess 200 grams or more, but less than 400 grams, of cocaine on 10 September 1984, we need not consider or discuss defendants' other assignments of error with respect to those convictions.

D.

[10] Finally, both defendants contend that they are entitled to a new trial because the court permitted the district attorney, over objection, to make an improper argument to the jury. We agree with defendants that the argument complained of was improper and their objections should have been sustained. The error, however, does not entitle them to a new trial.

During their jury arguments, counsel for both defendants referred to the mandatory sentencing provisions of G.S. 90-95(h), arguing the harshness of those provisions and inviting the jurors to acquit the defendants or convict them of lesser offenses in order to avoid the mandatory sentences. Worthington's counsel read the statute to the jurors, including G.S. 90-95(h)(5), which permits the sentencing judge to impose a lesser sentence upon finding that a defendant has provided "substantial assistance" in connection with the prosecution of others involved in the offenses. After reading the statute, Worthington's counsel argued, *inter alia*:

> Now, there was another section in there that says it can be suspended if he renders substantial assistance or testifies against a co-defendant, or does this or does that. I read that to you and you can hear that. But there is no evidence in this case of that.

In response to these arguments, the district attorney repeated the reading of G.S. 90-95(h)(5) to the jurors and continued his argument as follows:

> All either one of these men would have had to do is help the State of North Carolina locate and apprehend these people that are bringing this cocaine into the United States.
>
> MR. SHOFFNER: Objection. I'm going to move for a mistrial. I don't think that's proper, to go into that. These people have got a right to plead not guilty and have a jury trial despite the . . .
>
> THE COURT: Overruled. And the motion is denied.
>
> MR. VINCENT: Same motion on behalf of the defendant Worthington.
>
> THE COURT: Is that as to the motion for mistrial?
>
> MR. VINCENT: Yes, sir.
>
> MR. HAIGWOOD: As I was saying, these men have had every opportunity to get out from under the mandatory minimum sentence set forth in this statute by providing assistance to the State of North Carolina in apprehending people above them or below them.

The foregoing argument was improper for two reaons. First, there was no evidentiary basis for the district attorney's argument that either defendant had the information necessary to avail himself of the provisions of G.S. 90-95(h)(5) or that either of them had had an opportunity to render assistance and had declined to do so. Although counsel must be allowed wide latitude in jury argument, the control of which is largely within the discretion of the presiding judge, counsel may not go beyond the record and argue incompetent matters or matters not in evidence or reasonably inferable therefrom. *State v. Lynch*, 300 N.C. 534, 268 S.E. 2d 161 (1980).

More importantly, however, the argument, in our view, amounted to an impermissible comment upon defendants' exercise of their rights to remain silent, guaranteed by Article 1, Section 23 of the North Carolina Constitution and by the Fifth and Fourteenth Amendments to the Constitution of the United States. *See*

Doyle v. Ohio, 426 U.S. 610, 49 L.Ed. 2d 91, 96 S.Ct. 2240 (1976); *State v. Lane*, 301 N.C. 382, 271 S.E. 2d 273 (1980). The district attorney's argument clearly called attention to, and adversely commented upon defendants' apparent decisions not to make post-arrest statements incriminating themselves in order to take advantage of the leniency provisions of G.S. 90-95(h)(5). We hold that defendants' constitutional rights to be free from compelled self-incrimination include the right to choose, without risk of being penalized before a jury, between the exercise of those rights and the potential benefits which may later inure through a waiver of the rights and the rendition of assistance as provided in the statute.

Not every violation of a constitutional right, however, requires a new trial. "Some constitutional errors are deemed harmless in the setting of a particular case, not requiring the automatic reversal of a conviction, where the appellate court can declare a belief that it was harmless beyond a reasonable doubt." *State v. Taylor*, 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972). This standard has been adopted by statute:

> A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

G.S. 15A-1443(b). Thus, constitutional error is deemed prejudicial unless there is no reasonable possibility that the error might have contributed to the conviction. *Lane, supra.*

Applying the foregoing standards to the facts of the present case, we see no reasonable possibility that the statement complained of could have led to the conviction of either defendant. Our Supreme Court has held that overwhelming evidence of guilt may render constitutional error harmless. *State v. Brown*, 306 N.C. 151, 293 S.E. 2d 569, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d 642, 103 S.Ct. 503 (1982). Defendant Warren engaged in two face-to-face cocaine sales to Agent Jackson. He was followed on each occasion to Worthington's residence, and returned directly from the residence with the cocaine. Money from the second transaction was found on his person at the time of his arrest. When the officers searched Worthington's residence, they found a substan-

tial amount of cocaine, drug paraphernalia and the balance of the money with which Agent Jackson had paid for the cocaine. Thus, we declare our belief that the trial court's error in overruling defendants' objection to the improper remark of the district attorney was harmless beyond a reasonable doubt due to the overwhelming evidence of defendants' guilt of the offenses for which they were convicted. *See State v. Hooper*, 318 N.C. 680, 351 S.E. 2d 286 (1987).

III

In summary, we conclude that judgment must be arrested as to each defendant's conviction of conspiracy to possess 200 grams or more, but less than 400 grams, of cocaine. Otherwise, we hold that no error prejudicial to defendants occurred at their trial.

Defendant Worthington's Appeal:

Case 84CRS16844—Counts 1 and 3—No error
Count 2—Judgment arrested

Defendant Warren's Appeal:

Case 84CRS17732—No error

Case 84CRS17733—No error

Case 84CRS17734—Counts 1, 2 and 4—No error
Count 3—Judgment arrested

Case 84CRS16843—No error

Chief Judge HEDRICK and Judge COZORT concur.

IN THE MATTER OF: CALVIN WAYNE JACKSON, JR., JUVENILE

No. 8627DC647

(Filed 3 February 1987)

1. Infants § 20; Schools § 4— juvenile court—authority to direct order to school board

Fundamental fairness did not prohibit the trial court in a juvenile delinquency proceeding from entering an order directed to a county school board

merely because the school board was not formally made a party to the proceeding.

2. **Infants § 20; Schools § 10— suspended student—alternative educational program—no authority in juvenile court to order**

When a student has been lawfully suspended or expelled from the public school system pursuant to N.C.G.S. 115C-391 and the school system has not provided a suitable alternative educational forum, the juvenile court has no authority to order a county school board to place the student in an appropriate school program absent a voluntary reconsideration or restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system.

3. **Schools § 10— suspended student—alternative educational program—no duty by school system**

The public school system has no obligation to provide an alternative educational program for students suspended for misconduct.

ON writ of certiorari to review order entered by *Langson, Judge*. Order entered 23 January 1986 in District Court, GASTON County. Heard in the Court of Appeals 19 November 1986.

Garland & Alala, P.A., by James B. Garland, Julia M. Shovelin, and Elizabeth G. Sarn, for petitioner appellant Gaston County Board of Education.

Joseph B. Roberts, III, P.A., by Stephen T. Gheen, for respondent appellee.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Martha E. Johnston for Governor's Advocacy Council for Persons with Disabilities, amicus curiae.

Daniel D. Addison for Governor's Advocacy Council for Children and Youth, amicus curiae.

BECTON, Judge.

This appeal concerns the validity of an order of Gaston County District Court Judge Larry L. Langson directing the petitioner, Gaston County Board of Education, to place the respondent, Calvin Wayne Jackson, Jr., in an appropriate school program after Calvin Jackson had been suspended from the Gaston County public schools. The issues presented involve the extent of the district court's authority in making dispositions pursuant to the North Carolina Juvenile Code, Articles 41-59 of

Chapter 7A of the General Statutes, and the responsibility of the public schools toward students who have been lawfully suspended or expelled. For the reasons discussed hereafter, we conclude that the challenged order was improperly entered, and therefore we reverse.

I

Calvin Wayne Jackson, Jr. was suspended from the Gaston County school system on 7 October 1985 for the remainder of the 1985-86 school year, as a result of having physically assaulted a student and a teacher and verbally and profanely threatening another teacher. The suspension was upheld on appeal by a hearing board of the Gaston County Board of Education.

Beginning 9 October 1985, three juvenile petitions were filed against Calvin charging him with simple assault, breaking and entering with intent to commit larceny, larceny of a firearm, and carrying a concealed weapon. Proceedings were instituted and heard pursuant to provisions of the North Carolina Juvenile Code. Jackson was apparently adjudicated a delinquent by juvenile court Judge Langson. In an order continuing the dispositional hearing to 23 January 1986, Judge Langson indicated his intent that Calvin "be placed in some type of public school situation," and ordered the Gaston County Board of Education to appear at the proceeding "to present a plan that would be of benefit both to the school and the Respondent."

Representatives of the Board, including legal counsel and school personnel, appeared at the hearing where Judge Langson questioned them regarding Calvin's suspension and attempted to involve the school system in developing an educational program for Calvin. The Board contended that the school system did not have a suitable program for Calvin or funds to implement one. Following the hearing, during which the Board declined to propose a plan, the court ordered the Gaston County School System to immediately "place the Respondent, Calvin Jackson, Jr., in whatever type of school program the School System deems appropriate."

Among the court's numerous findings of fact is the finding that Calvin had been legally suspended due to his fighting and aggressive behavior, and the further finding that in suspending

Calvin, the School Board had complied with the procedures set forth in N.C. Gen. Stat. Sec. 115C-391(c) (1983). The court concluded as a matter of law:

> (1) THAT pursuant to General Statute [Sec.] 7A-516(3), 7A-646, and 7A-649(a)(b) [sic] the Court has the authority to decide if it is in the Respondent's best interest to attend a Public School Facility in his County.
>
> (2) THE COURT CONCLUDES AS A MATTER OF LAW that it is in the particular Respondent's best interest that he attend some type of School Program, so he is not left to his own devices until the school year commencing in August, 1986 starts.
>
> (3) THE COURT FURTHER CONCLUDES AS A MATTER OF LAW that regardless of whether or not G.S. 115(c) -391(c) has been complied with, the Public School System has an obligation to school age children to provide some type of forum to the Juveniles, so that they are not left free to roam at will.
>
> (4) THE COURT FURTHER CONCLUDES AS A MATTER OF LAW that the particular forum to be provided to the Respondent shall be left totally up to the Gaston County School System, it merely being the intention of the Court that the Juvenile be allowed to attend some Facility where he can partake of some program and in some way learn how to be a more productive citizen.

The Board of Education appealed the order and sought a temporary stay which was granted by this Court 20 March 1986. On 3 April 1986 this Court allowed the Board's petitions for writ of supersedeas and writ of certiorari. Thereafter, this Court granted motions of the Governor's Advocacy Council for Persons with Disabilities and the Governor's Advocacy Council on Children and Youth to file *amicus curiae* briefs in support of the respondent.

II

At the outset we note that this case is technically moot inasmuch as Calvin Jackson's suspension from the Gaston County schools terminated at the end of the 1985-86 school year. However, the case is similar to that category of cases which federal courts, in determining the existence of federal jurisdiction

in otherwise moot cases, term "capable of repetition yet evading review." *See, e.g., Moore v. Ogilvie*, 394 U.S. 814, 23 L.Ed. 2d 1 (1969). Children involved in delinquency proceedings are frequently guilty of misconduct at school and thus subject to school board disciplinary proceedings as well. Until the conflict between a school system's right to suspend students for misconduct and the juvenile court's authority to fashion sensitive and appropriate dispositions which include provision for the educational needs of adjudicated delinquent juveniles is resolved, it is not improbable that the Gaston County Board of Education or other local school boards will be repeatedly subject to orders like the one in the case *sub judice*. Because a suspension pursuant to G.S. Sec. 115C-192(c) can never be longer than the balance of the school year, the effect of an order overriding the suspension may always be of too short a duration to allow full litigation of the issues prior to its expiration. Consequently, we exercise our discretion to decide the issues presented.

III

[1] As a further preliminary matter, we reject the Board's contention that because the Board was not a party to the juvenile proceeding, the Court lacked jurisdiction to enter its order. Specifically, the Board argues that an order addressing a person not a party to the action violates principles of fundamental fairness and due process.

Many of the dispositive alternatives available to the juvenile court under the Juvenile Code must be implemented through third parties—generally agencies of the state or county. *See* N.C. Gen. Stat. Secs. 7A-647, -648, and -649. In *In re Brownlee*, 301 N.C. 532, 272 S.E. 2d 861 (1981), our Supreme Court recognized that many of these alternatives are not self-executing, and, without the grant of authority in G.S. Sec. 7A-647 to charge costs of certain care to the county, would be "empty and unworkable." *Id.* at 553-54, 272 S.E. 2d at 874. Likewise, many of these provisions would be unworkable if the Court lacked authority to order local public agencies to assist in implementing its dispositions in otherwise appropriate cases.

The School Board, in this case, had adequate notice of the action and its potential implications for the Board and was given an opportunity to be heard at the dispositional hearing. Under these

circumstances, we conclude that fundamental fairness did not prohibit the Court from entering an order directed at the Board merely because the Board was not formally made a party to the proceeding.

IV

The School Board further contends that the Court's order violates the Separation of Powers clause of the North Carolina Constitution. We summarily reject this argument without discussion.

V

The determinative issues in this case, arising from the court's first and third conclusions of law, are: (1) whether the Juvenile Code authorizes district courts to require public school attendance by an expelled or suspended juvenile, and (2) whether the public school system is legally obligated to provide an alternative forum for such students.

A

[2] 1. The District Court concluded that N.C. Gen. Stat. Secs. 7A-516(3), -646, and -649(8)(b) (1981) granted it the authority to require Calvin Jackson to attend a public school facility in his county. The Board maintains that (1) the Court erred in its construction of these provisions of the Juvenile Code and their relationship to N.C. Gen. Stat. Sec. 115C-391 which authorizes the suspension from school of students who willfully violate school conduct policies, and (2) the Court thus exceeded its authority under the Juvenile Code in ordering the Board to place Calvin Jackson in a public school program when Calvin had been legally suspended and no appropriate alternative educational program existed for suspended students.

G.S. Sec. 7A-516 and -646 are general statements of the purposes and policies behind the Juvenile Code which indicate that the Court, in making dispositions, should consider the needs of the child, the family, and the public and should utilize appropriate community resources whenever possible. G.S. Sec. 7A-649, which sets forth dispositional alternatives available "in the case of any juvenile who is delinquent," allows a judge to place the juvenile on probation and require as a condition of probation "[t]hat the juvenile attend school regularly." G.S. Sec. 7A-649(8)(b).

Proper construction of statutes requires that individual portions be examined within the context of the whole law 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). Having reviewed the above provisions in the context of the entire Juvenile Code, we conclude that the Court exceeded its statutory authority in entering the challenged order.

First, despite the expansive discretion and flexibility granted to district courts for fashioning suitable dispositions for delinquent juveniles, the Code limits treatment through community based services to what is consistent with the protection of public safety. G.S. Sec. 7A-516(1) and (3). The court must weigh not only the needs of the child but also the best interests of the state. *In re Brownlee* at 553, 272 S.E. 2d at 874. Calvin Jackson was before the juvenile court on serious charges including carrying a concealed weapon. He had a history of aggressive behavior at school which led his principal to conclude that Calvin posed "a serious threat to . . . students and staff." The judge himself acknowledged that Calvin should not be returned to the regular classroom. There is no evidence or any finding of fact to support the court's determination that Calvin could be safely returned to any public school program.

Second, although the court carefully, and quite properly, avoided dictating any specific program for Calvin, leaving the choice of forum to the School Board, the record indicates that no suitable program existed. Thus, the order's practical effect was to require creation of a new program and a resultant reallocation of school resources. In *In re Wharton*, 305 N.C. 565, 290 S.E. 2d 688 (1982) our Supreme Court held that a juvenile court exceeded its authority under the Juvenile Code by ordering a county Department of Social Services to "implement the creation of a foster home" for a juvenile and others like him. We interpret the relevant Juvenile Code provisions and the *Wharton* opinion to limit the district court's authority in juvenile dispositions to utilization of currently existing programs or those for which the funding and machinery for implementation is in place.

Finally, and most significantly, a special limitation upon the court's authority exists when, as in the present case, the juvenile

involved has been lawfully suspended from the public school system. Local boards of education are required by G.S. Sec. 115C-391(a) (1983) to adopt policies governing student conduct and procedures for suspension or expulsion of students. G.S. Sec. 115C-391(c) expressly authorizes a school principal, with the prior approval of the superintendent, to suspend, for a period not to exceed the time remaining in the school year, a student who willfully violates conduct policies. These statutes are a part of the comprehensive scheme set forth in Chapter 115C of the General Statutes for the operation of our public elementary and secondary schools.

The Legislature, in granting to judges the authority to require school attendance under the Juvenile Code, did not consider the potential conflict with G.S. Sec. 115C-391 or the effect of a lawful suspension upon that authority. However, statutes which deal with the same subject matter must be construed in *pari materia* and be harmonized, if possible, to give effect to each. *In re Brownlee* at 549, 272 S.E. 2d at 871. Irreconcilable ambiguities should be resolved so as to effectuate the legislative intent. *State ex rel. Comm'r of Insurance v. North Carolina Rate Bureau*, 300 N.C. 381, 400, 269 S.E. 2d 547, 561, *reh. denied*, 301 N.C. 107, 273 S.E. 2d 300 (1980). We find no indication in G.S. Sec. 115C-391 of legislative intent to limit in any way a school board's right to suspend from its educational system a student who has come within the jurisdiction of the juvenile court. Nor do we find within the Juvenile Code any legislatively granted authority to interfere with a school's disciplinary procedures. The court's authority to require regular school attendance does not necessarily mean *public* school attendance. Yet, the effect of the challenged order in this case is to overrule the Board's decision to suspend Calvin Jackson.

The public school system is unquestionably one of the most important community based resources available for addressing the problems of juveniles. Furthermore, the Juvenile Code evidences a legislative intent that, in juvenile dispositions, district courts shall, whenever possible, utilize community based services and accommodate the educational needs of delinquent juveniles. We agree with Respondent's assertion that the courts may ordinarily, under appropriate circumstances, order a delinquent juvenile placed within a local public school system. Nevertheless,

we hold that when a student has been lawfully suspended or expelled pursuant to G.S. Sec. 115C-391 and the school has not provided a suitable alternative educational forum, court-ordered public school attendance is not a dispositional alternative available to the juvenile court judge, absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system.

2. The Respondent improperly relies upon statutes requiring the education of children with certain "special needs" as defined by G.S. Sec. 115C-109 (Cum. Supp. 1985) as support for the proposition that the authority of local boards of education to suspend students may be limited. G.S. Sec. 115C-112 (1983 & Cum. Supp. 1985) prohibits a local education agency from initiating its normal disciplinary procedures when a child with "special needs" exhibits behavior which would otherwise result in suspension for more than 10 days and the misconduct is caused by the special needs.

No one questions the authority of a juvenile court judge to order the public school placement of a child already determined to have special needs who is suspended in violation of this statute. Moreover, a juvenile court judge who has reason to believe that a child has special needs which have been overlooked by school personnel may, upon sufficient findings of fact, order that the child be evaluated and suitably placed if determined to have special needs. However, every child with behavioral or disciplinary problems does not have special needs within the purview of the statute. Nor was it ever suggested in the court below that Calvin Jackson might be a "special needs" child. We need not address the issue further since it was raised only on appeal and is before us primarily upon the *amicus curiae* brief of the Governor's Advocacy Council for Persons with Disabilities.

B

[3] The District Court's evaluation of its authority under the Juvenile Code was plainly influenced by its own determination that the public school system has an obligation to provide an alternative forum for suspended students "so that they are not left free to roam at will." The court apparently derived that obligation from the right to an education established by Article IX, Section 2 of the Constitution of North Carolina. However, as

this Court stated in *Fowler v. Williams*, 39 N.C. App. 715, 718, 251 S.E. 2d 889, 891 (1979), "[t]he right to attend school and claim the benefits of the public school system is subject to lawful rules prescribed for the government thereof." A student's right to an education may be constitutionally denied when outweighed by the school's interest in protecting other students, teachers, and school property, and in preventing the disruption of the educational system. As a general rule, a student may be constitutionally suspended or expelled for misconduct whenever the conduct is of a type the school may legitimately prohibit, and procedural due process is provided. Reasonable regulations punishable by suspension do not deny the right to an education but rather deny the right to engage in the prohibited behavior. *See Craig v. Buncombe Co. Board of Education*, 80 N.C. App. 683, 343 S.E. 2d 222 (1986).

The public schools have no affirmative duty to provide an alternate educational program for suspended students in the absence of a legislative mandate. Rapp, Education Law, Vol. 2, Sec. 9.06(3)(d) (1986). The grant of authority to suspend or expel in N.C. Gen. Stat. Sec. 115C-391 is not expressly limited to suspensions from the regular classroom but contemplates suspension from the entire system. Furthermore, G.S. Sec. 115C-391(d), which allows a child with "special needs" to be expelled under limited circumstances, provides that: "Notwithstanding the provisions of G.S. 115C-112 [prohibiting suspension of children with 'special needs'], a local board of education *has no duty* to continue to provide a child with special needs, expelled pursuant to this subsection, with any special education or related services during the period of expulsion." (Emphasis added.) This language represents a clear legislative recognition that under certain circumstances a child may lose his right to benefit from *any* public school program.

We understand Judge Langson's concern that suspended students should not be left without supervision. In cases like this one, in which school officials have determined that a student's misconduct precludes his placement in any existing public school program, but the juvenile court concludes that the likelihood of future extreme misconduct is not great enough to justify commitment to a training school, there is an overwhelming lack of rea-

sonable alternatives for effective placement. However regrettable the existence of this void, a court may not overcome it by fiat.

The school system is the primary societal institution affecting the lives of school-age youth and can potentially play a key role in delinquency prevention and intervention. Kurtz & Lindsey, *A School-Juvenile Court Liaison Model for the Prevention of Juvenile Delinquency*, Juv. & Fam. Ct. J., Winter 1985-86, at 9. Consequently, in-school citizenship education, which helps to mold and perpetuate societal norms and values, which reduces students' tendencies to resort to violence,[1] and which help students learn how to become effective, responsible, participating citizens in a pluralistic, democratic society, should be the joint goal of our juvenile courts and school systems. Communication and cooperation between courts and school authorities is thus critical for juvenile courts to effectively address the problems of troubled youth. Judge Langson's effort to enlist the cooperation of the Gaston County School in devising a suitable disposition for Calvin Jackson is commendable. Judge Langson was obviously aware that 65% of America's crime, including 30% of the violent crime, is committed by juveniles;[2] that, here in North Carolina, approximately 20% of those arrested for the most serious crimes are under 18;[3] that a student in grade school is statistically more likely to spend time later in a correctional institution than in college;[4] that an appropriate education is not nearly as expensive as the alternative, considering the fact that the average education level for all prisoners in North Carolina is the 6th grade;[5] and that the Calvin Jacksons of this State should not be left free to roam

1. The teaching of values in school reduces students' tendencies to resort to violence, enhances their understanding of our legal system, and helps them develop more constructive attitudes toward it. *See* Report: Office of Juvenile Justice and Delinquency Prevention, 1981.

2. Address by Terrel Bell, Secretary, Department of Education, at the National Conference on Law-Related Education, October 21, 1982, Washington, D.C.

3. Report to The Governor's Executive Cabinet on Juveniles by Attorney General Rufus L. Edmisten, February 19, 1982.

4. *See* Calla Smorodin and Linda Riekes, Why Teach About Law? Here's What You'll Need To Make The Case, ABA-LRE Project Exchange, Vol. 1, No. 1, Spring 1981.

5. Report: Citizens Commission on Alternatives to Incarceration, p. 7, Fall, 1982.

at will. Notwithstanding these grim statistics, a juvenile court judge does not have the power to legislate or to force school boards to do what he thinks they should do. Our legislature did not impose upon the public schools or other agency a legal obligation to provide an alternative forum for suspended students, and a court may not judicially create the obligation.

VI

Pursuant to Rule 10(a) of the Rules of Appellate Procedure, the question presented for our review is whether the order below is supported by the findings of fact and conclusions of law. For the reasons discussed, we have determined that the district court's conclusions of law regarding its authority under the Juvenile Code and the responsibility of the public schools toward suspended students are not supported by the record and relevant legal authority. Consequently, we conclude that the order was erroneously entered and therefore we reverse.

Reversed.

Judges WELLS and ORR concur.

BRENDA F. O'CONNOR, DONALD W. O'CONNOR AND JENNIFER RENEE CUMMINGS, A MINOR, BY HER GUARDIAN AD LITEM, BRENDA F. O'CONNOR v. CORBETT LUMBER CORPORATION

No. 865SC601

(Filed 3 February 1987)

Master and Servant § 34.2; Convicts and Prisoners § 2— work release inmate—no liability by employer for crimes

An employer does not owe a duty to protect third persons from the criminal acts of a work release inmate acting outside the scope of his employment. Therefore, defendant employer was not liable on the theory of negligent supervision of a work release inmate employee for personal injury and property damage allegedly caused by the inmate's rape and other crimes committed against a third person which did not occur on the employer's premises.

APPEAL by plaintiffs from *Stevens, Judge*. Judgment filed 24 February 1986 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 12 November 1986.

This is a civil action for personal injury and property damage allegedly caused by defendant's negligent supervision and control of a work release inmate employee.

The essential facts are:

On 11 September 1979 Ronald Hammond was convicted of felony assault with a deadly weapon on a police officer and misdemeanor assault on a female. He was sentenced to the State Department of Corrections (DOC) for a term of three to five years on the felony and one to two years on the misdemeanor, to be served consecutively. In August 1980 Hammond was transferred to the New Hanover minimum security unit in Wilmington. In March 1981 Hammond was approved by the Parole Commission for work release. In April 1981 Hammond was elevated to Level IV Classification which enabled him to participate in the work release program. Through the program, Hammond was employed by defendant Corbett Lumber Company and began work on 16 April 1981.

At that time, it was the policy of the New Hanover prison unit, approved by the DOC area administrator, to allow prisoners on work release who worked within a close proximity to the prison unit to walk unescorted to and from work. Corbett Lumber Company was considered by prison officials to be within walking distance of the unit. Hammond was permitted to walk along Blue Clay Road to and from work each day. The route routinely taken bordered a residential neighborhood where plaintiffs lived.

On 20 July 1981 Hammond checked out of the prison at 7:00 a.m. and walked to work at Corbett Lumber. He was expected to return to the prison unit by 4:30 p.m. On two occasions that morning, Hammond informed his supervisor that he felt ill and wanted to return to the prison unit. Samuel David Mitchell, Hammond's supervisor at Corbett Lumber Company, testified he telephoned the prison unit and reported that Hammond was returning. According to the statement of the unit chief, Sam Stallings, correctional officer Darrell Brake recalled receiving a call sometime between 12:00 noon and 1:45 p.m. from a supervisor of inmates on a work release job that an inmate was coming in early, giving the name of the inmate and the work site. He recalled relaying the information to Officer Mellor, the control officer in charge of keeping up with the prisoner count and the keys. Officer Mellor had

no recollection of the message. On further inquiry Brake could not remember the inmate's name, the supervisor's name or the name of the work site. Brake did remember that it was a work site where the inmates walk to and from work because he recalled having had no questions about the inmate returning to the unit.

By deposition, Laura Overstreet, a DOC program assistant with responsibilities in the work release program at the unit, testified that another officer at the unit, Sergeant Donald Lee, had received a call from Corbett Lumber Company about Hammond coming in early. The call was transferred to Bobby Roberts, a program supervisor at the unit.

After leaving Corbett Lumber, Ronald Hammond did not return to the prison unit. Sometime between 12:30 p.m. and 3:00 p.m. he broke into plaintiffs' house at 234 Jamaica Drive, just off Blue Clay Road. Brenda O'Connor (then Brenda Cummings) left work that day at approximately 3:00 p.m. and drove to a nursery school to pick up her daughter. They arrived home at 234 Jamaica Drive approximately 3:15 p.m. Upon entering the house Brenda O'Connor was grabbed from behind by Hammond and thrown against the wall. Shortly thereafter, Donald O'Connor (who was then Brenda O'Connor's fiance) entered the house. During the next several hours, until approximately 6:00 p.m., Brenda O'Connor was assaulted and raped by Hammond in the presence of her fiance and minor daughter. Before leaving, Hammond took money from Brenda O'Connor's wallet, her ring and some other jewelry. He then took the keys to Mrs. O'Connor's car and drove away.

Plaintiffs filed their complaint on 16 July 1984 alleging that defendant was negligent in permitting Hammond to leave the work site without proper supervision and without properly notifying the prison unit or requiring prison officials to "properly secure the person of Hammond under the existing circumstances." Defendant's motion for summary judgment was granted by the trial court. Plaintiffs appeal.

Ellis, Hooper, Warlick, Waters & Morgan by John Drew Warlick, Jr. and James L. Nelson for plaintiff-appellants.

White & Allen, by John R. Hooten, John C. Archie and John M. Martin for defendant-appellee.

EAGLES, Judge.

By their sole assignment of error plaintiffs contend that the trial court erred in allowing summary judgment for the defendant.

Plaintiffs seek to recover damages based on defendant's independent negligence in supervising and controlling the work release inmate employee. Plaintiffs do not contend that defendant is liable for the negligence of its inmate employee under the doctrine of *respondeat superior*. Summary judgment for the defendant in a negligence action is proper where the evidence fails to show negligence on the part of the defendant. *Hale v. Power Co.*, 40 N.C. App. 202, 252 S.E. 2d 265 (1979). Strictly speaking, the concept of negligence is composed of two elements: legal duty and a failure to exercise due care in the performance of that legal duty. *Barnes v. Caulbourne*, 240 N.C. 721, 83 S.E. 2d 898 (1954). Due care always means the care an ordinarily prudent person would exercise under the same or similar circumstances when charged with a legal duty. What is meant by legal duty, however, varies according to subject matter and relationships. *Id.* What is negligence is a question of law and when the facts are not disputed, the court must say whether negligence does or does not exist. *Hudson v. Transit Co.*, 250 N.C. 435, 108 S.E. 2d 900 (1959).

Since the facts are not disputed here, the question before us is whether an employer owes a duty to protect third persons from the criminal acts of a work release inmate employee acting outside the scope of his employment. This is a case of first impression in North Carolina. Our research reveals that only one other state has addressed the issue. In *Roberson v. Allied Foundry & Machinery Co.*, 447 So. 2d 720 (Ala. 1984), a convenience store cashier brought a negligence action against the employer of two work release inmate employees who robbed and assaulted her. The plaintiff asserted that the employer had a duty to supervise its work release employees so as to protect plaintiff from their criminal actions. Plaintiff argued that a "special relationship exists between an employer and his work release employees by virtue of the fact that they are state inmates, with criminal propensities" and asked the Alabama Supreme Court to adopt a rule of "special duty" on the part of employers who hire work release

inmates to supervise and control those employees outside the scope of their employment. *Id.* at 722.

The Alabama Supreme Court declined to adopt the "special duty" rule, finding no authority or justification for the premise that a special relationship exists between an employer and its work release inmate employees sufficient to impose a duty to supervise the work release employees outside the scope of their employment. *Id.* at 723.

> Work release inmates are certified to the employer by the State Board of Corrections to be "non-dangerous." Also, employers are instructed by the Board to treat work release employees in the same manner as other employees and to apply the same policies with them as with other employees. Except with regard to a few restrictions imposed by the Board on employers and work release employees, those employees stand in the same relationship with their employers as non-inmate employees. We cannot justify a finding of a special relationship in this case on the bare fact that work release employees are state inmates.

Id. at 722. Further, the court believed that its decision was consistent with the general rule that "one has no duty to protect another from criminal attack by a third party." *Id.* at 722-23.

As a general rule "[n]o person owes a duty to anyone to anticipate that a crime will be committed by another, and to act upon that belief." 57 Am. Jur. 2d *Negligence* Section 63 (1971). However, a duty to afford protection of another from a criminal assault or willful act of violence of a third person may arise, at least under some circumstances, if that duty is voluntarily assumed. *Id.* In the situation of employer-employee relationships under the doctrine of *respondeat superior* an employer may be held liable for the criminal act of his employee if the act was authorized by the employer prior to its commission, ratified after its commission, or committed within the scope of the employment. 53 Am. Jur. 2d *Master and Servant* Section 445 (1970). For employees' criminal acts not authorized, ratified or committed within the scope of employment, employers have been held independently liable under the doctrine of negligent hiring or retention of incompetent or unfit employees. See generally Annot., 48 A.L.R. 3d 359 (1973) and cases cited therein. There the theory of

liability is that the employer's negligence is a wrong to third persons, entirely independent of the employer's liability under the doctrine of *respondeat superior. Id.*

Here, plaintiffs argue independent liability but not on the basis of any theory of negligent hiring or retention. Instead plaintiffs argue that by accepting work release prisoners as employees, the defendant employer also accepts the duty and responsibility to control and supervise these prisoners while they are away from the prison unit. Plaintiffs rely on a Department of Corrections work release pamphlet entitled: "WORK RELEASE A Summary of Guidelines for Employers." The pamphlet which is distributed to all work release employers states that the "intent of the work release law is that the inmate be under supervision when outside the prison facility. When the inmate is actively engaged in the work release program, this supervision must be provided by the employer."

We agree with plaintiffs that employers of work release inmates do take on the responsibility to supervise those inmates while on the job. The DOC pamphlet provides ten specific guidelines to assist employers in understanding the responsibility of both the employer and the inmate in the work release program. Guideline #3 specifically provides that inmates must be observed on an hourly basis:

> 3. The inmate is to be under supervision of the employer, a foreman, or a civilian working at a similar job at all times. The inmate is not to be assigned to any position where observation cannot occur at least on an hourly basis.

However, we do not agree with plaintiffs that when an employer hires a work release inmate, nothing else appearing, the hiring employer's responsibility to supervise the inmate employee extends to activity outside the inmate employee's scope of employment.

Guideline #2 provides that an inmate is not to leave the job site for any reason unless authorized to do so by prison officials. In the event the nature of the job requires the inmate to leave the job site or the employer desires to change the work schedule, *the employer* should make suitable arrangements with prison officials. Guideline #4 states that in the event work ceases before

the end of the shift, the inmate is to return immediately and directly to the prison unit. If scheduled transportation is not available, *the employer* or his representative should call the prison and ask for transportation. In the event there is reason to believe that an inmate has left the job site without authorization or has escaped, *the employer* is directed to notify the officer in charge of the prison facility immediately. Other guidelines tell employee inmates that they are not to possess or use alcoholic beverages or controlled substances; not to leave the state; not to operate any motor vehicles unless authorized by prison officials; not to receive any visitors and not to engage in any improper activity.

Nothing in the guidelines suggests that an employer takes on any duty or responsibility to control or supervise the inmate employee when he is not on the job or at the job site. The employer is obliged only to notify prison officials if the work schedule changes, if the inmate employee is to leave the job site before the end of the shift or in the case of escape or unauthorized absence. In the event of any one of these occurrences, the employer's responsibility is limited to notifying the prison officials in charge. Indeed, from the testimony in the record taken from prison officials' depositions the employer has no authority to control a work release inmate by way of arrest. If an employee leaves the job site without authorization or escapes, the employer should not go after the inmate or try to stop him from leaving.

Transportation of work release inmates to and from work is the responsibility of the Department of Corrections. "The Department of Correction is responsible for the actual placement of inmates on the work release program and for their housing, transportation and supervision, as well as for the collection and disbursement of all monies earned by them." 5 N.C. Admin. Code 4E Section .0107 (1981). Pamphlet Guideline #1 states that the inmate is to proceed each work day directly from the place of confinement to the work site by "the approved route and method of transportation." Guideline #4 provides that at the end of the work day or shift the inmate is "to return immediately and directly to the place of confinement." In this case the "approved route and method of transportation" for Ronald Hammond was for him to walk *to and from* work on a route that took him by the residential neighborhood where plaintiffs resided. The DOC area administra-

tor approved the policy which allowed inmates to walk to and from work and the route Ronald Hammond took was approved by prison officials.

To support their argument that employers have a duty to control inmates outside the scope of their employment, plaintiffs rely on Restatement (Second) of Torts Section 319 (1965) and *Semler v. Psychiatric Institute*, 538 F. 2d 121 (4th Cir. 1976). Restatement (Second) of Torts Section 319 provides as follows:

> One who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm.

Comment *a* states that this rule applies to two situations: (1) where "the actor has charge of one or more of a class of persons to whom the tendency to act injuriously is normal" and (2) where the "actor has charge of a third person who does not belong to such a class but who has a peculiar tendency" to act injuriously and the actor knew of this peculiar tendency. We do not believe that the facts presented in this case fall into either one of these two situations. Section 319 does not apply to the facts of this case because Section 317 specifically states the conditions under which an employer has the duty to control the conduct of an employee acting outside the scope of his employment:

> A master is under a duty to exercise reasonable care so to control his servant *while acting outside the scope of his employment* as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Here, however, the employee's criminal act did not occur while on the employer's premises or while the employee was using the employer's property and hence, no duty to control the employee acting outside the scope of his employment may be imposed under this section of the Restatement.

In *Semler v. Psychiatric Institute, supra,* a negligence action was brought against a psychiatric institute and a psychiatrist to recover damages for the death of a girl killed by a Virginia probationer while an outpatient at the institute. The probationer received a 20 year sentence for abduction, suspended on the condition that he be confined to the institute for treatment until released by the court. After some time, the doctor in charge placed the probationer on out-patient status without court approval or release. The Fourth Circuit held that the special relationship created by the probation order imposed a duty on the defendants to protect the public from reasonably foreseeable harm at the hands of the probationer. 538 F. 2d at 125. Relying somewhat on Section 319, the court found that section to measure a "custodian's" duty by the standard of reasonable care and that the standard was defined by the probation order. *Id.*

Here, there is nothing in the record to establish any "custodial" duty on the part of the work release employer. Upon Hammond's conviction in 1979 he was placed in the custody of the Department of Corrections. G.S. 148-6. As stated earlier, the Department is responsible for placement, housing, transportation and supervision of work release inmates. 5 N.C. Admin. Code 4E Section .0107. When inmates enter the work release program they remain "under the actual management, control and care of the Department." G.S. 148-6. Factual distinctions between this case and *Semler, supra,* make it unpersuasive here.

Like the Alabama Supreme Court in *Roberson, supra,* we too decline, on these facts, to adopt a rule that requires employers of work release inmates to supervise and control the inmate employees outside the scope of their work release employment. Here Ronald Hammond was approved and recommended for work release by the Department of Corrections. As part of the approval process he was psychologically tested and cleared as pos-

ing no danger to society. Except for the restrictions imposed on employers as stated in the work release pamphlet guidelines, work release inmates stand in the same relationship with their employers as non-inmate employees. Indeed, employers are instructed to treat work release inmates the same as they treat non-inmate employees with respect to the duties given to them.

It is clear from the record that Hammond was observed at least on an hourly basis by his supervisor while on the job. On the day in question, Hammond twice informed his immediate supervisor that he was sick and wished to return to the unit. The supervisor called the prison unit and informed the officer who answered that Hammond was ill and was returning to the unit. The inmate guidelines contained in the work release pamphlet do not specify procedures to be followed when an inmate is ill. However, Guideline #4 states that if work ceases before the end of the shift, the inmate is to return immediately to the prison unit. "If scheduled transportation is not available, the employer or his representative should call the prison and ask for transportation." Here there was no "scheduled transportation" because at the end of every work shift Hammond walked back to the unit. The program assistant in charge of work release at the New Hanover prison unit testified that if an inmate became ill on the job, the employer was to call the prison unit and inform them of the illness. If the inmate was too sick to return by the approved method of transportation, the unit would arrange to pick him up. If the inmate was not too sick to return by the approved method of transportation, the inmate was expected to return by that approved method. In the case of an inmate who walked to and from work, if he was not too sick to walk then he was expected to walk back to the unit.

Based on the record before us, we are not persuaded that defendant employer here owed a legal duty to the plaintiffs to protect them from the criminal acts of its work release inmate employee. Since defendant Corbett Lumber Company owed no duty to the plaintiffs, summary judgment was appropriate.

Affirmed.

Judges ARNOLD and JOHNSON concur.

HAYWOOD N. WILDER, EMPLOYEE, PLAINTIFF v. BARBOUR BOAT WORKS, EMPLOYER, AND HOME INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 8610IC715

(Filed 3 February 1987)

1. **Master and Servant § 68.4— prior injury—N.C.G.S. 97-33—not applicable**

In a workers' compensation case, N.C.G.S. 97-33 did not apply where plaintiff's preexisting condition did not stem from epilepsy, or from an injury received in the armed services or in the course of other employment, and where plaintiff had received no compensation for the prior injury.

2. **Master and Servant § 69— workers' compensation—prior injury—not limited to recovery for permanent partial disability**

A workers' compensation claimant who had previously had a total knee replacement and who later injured that knee in an on-the-job accident was not limited to recovery for permanent partial disability under N.C.G.S. 97-31 and could receive compensation for total disability under N.C.G.S. 97-29.

3. **Master and Servant § 69— workers' compensation—partial disability of leg—total disability for work**

The evidence in a workers' compensation case showed plaintiff to be totally and permanently unable to earn the wages he was receiving at the time of his injury where plaintiff was 59 years old and had a third grade education, and plaintiff's doctor rated the permanent partial disability of the left leg at 15% but testified that plaintiff was totally disabled for a laboring type of job and "probably all gainful work that he's qualified."

4. **Master and Servant § 69.2— workers' compensation—prior injury—total disability—compensable**

A workers' compensation plaintiff's entire disability was compensable even though a normal person may not have been disabled to that extent, where plaintiff had had knee replacement surgery after a 1977 injury; plaintiff returned to work after a six-month healing period in 1977 and performed his duties satisfactorily until he reinjured the knee in 1983; plaintiff's doctor rated the disability to the left leg after the 1983 injury at 45%, with 15% attributable to the 1983 injury, and the incapacity for work as total; and plaintiff's doctor testified that there was a greater risk of damage with a second prosthesis due in part to extra bone damage during surgery and that replacement of the prosthesis might be impossible if damage were to recur, resulting in amputation.

APPEAL by plaintiff from the Industrial Commission. Judgment entered 14 April 1986. Heard in the Court of Appeals 16 December 1986.

Plaintiff Haywood Wilder received an award for temporary total disability from defendant Barbour Boat Works for a work-

related injury. The parties were unable to agree as to whether the injury resulted in total disability or permanent-partial disability, and requested a hearing. Deputy Commissioner John Charles Rush heard the case on 10 October 1985. Only plaintiff and his orthopedic surgeon, Dr. Harold M. Vandersea of New Bern, testified at the hearing. The evidence tended to show the following events and circumstances.

Plaintiff was 59 years old at the time of the accident and had a third-grade education. He had been employed by defendant Barbour for 39 years; his duties as a dock master involved physical labor. On 14 December 1983, plaintiff injured his left knee in an on-the-job accident. That same knee had been operated on before; in 1977, Dr. Vandersea performed a total knee replacement. The 1983 injury necessitated removal of the old prosthesis and its replacement with a new model. The surgery caused additional damage to the surrounding bone and further weakened the knee area. Dr. Vandersea estimated that the original damage to the knee in 1977 caused a 30% permanent physical impairment of the left leg, and the second knee replacement in 1983 caused an additional 15% impairment for a total permanent impairment of 45%. It was also Dr. Vandersea's opinion that plaintiff was totally disabled from all work involving physical labor and "probably all gainful work [for which] he's qualified."

On one point, the testimony of the two witnesses diverges. Plaintiff ascribed his original knee replacement in 1977 to a job-related injury. Dr. Vandersea, however, testified that a chronic condition rather than an acute injury necessitated the original surgery. It is undisputed that plaintiff never filed a workers' compensation claim for that injury.

The deputy commissioner found as a fact that the plaintiff sustained a 30% permanent physical impairment of his left leg as a result of the 1977 leg condition and a 15% permanent physical impairment of the left leg as a result of the 14 December 1983 accident, for a total permanent physical impairment of the left leg of 45%. The deputy commissioner concluded as a matter of law that, as a result of the 15% permanent partial disability of plaintiff's left leg due to his work-related injury, plaintiff was entitled to compensation at the rate of $173.33 per week for 30 weeks in accordance with N.C. Gen. Stat. 97-31. Plaintiff appealed to the

Full Industrial Commission; the majority found that G.S. 97-33 obligated defendants to pay only that part of the impairment—15%—caused by the 1983 injury. The Commission also affirmed the entire opinion of the deputy commissioner and upheld its award. From this denial of compensation for permanent and total disability, plaintiff appealed.

Wheatley, Wheatley, Nobles and Weeks, P.A., by Stevenson L. Weeks, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Edward W. Hedrick, for defendant-appellant.

WELLS, Judge.

[1] The first issue before this Court is whether the Full Commission erred in finding that the provisions of G.S. 97-33 "show unequivocally that the defendants are obligated to pay only for the disability caused by this accident."

The Industrial Commission is the sole arbiter of issues of fact. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E. 2d 682 (1982). Our review is limited to a determination of whether the Commission's findings are supported by any competent evidence and whether its conclusions of law are supported by those findings. *Id.*

G.S. 97-33 provides:

> If an employee is an epileptic, or has a permanent disability or has sustained a permanent injury in service in the army or navy of the United States, or in another employment other than that in which he received a subsequent permanent injury by accident, such as specified in G.S. 97-31, he shall be entitled to compensation only for the degree of disability which would have resulted from the later accident if the earlier disability or injury had not existed.

The purpose of the statute is to prevent double recovery. *Pruitt v. Knight*, 289 N.C. 254, 221 S.E. 2d 355 (1976).

In the case at bar, it is unclear whether the original knee replacement in 1977 was due to a chronic condition or was precipitated by a work-related injury during that year; the plaintiff and

Dr. Vandersea gave different versions of its cause and the deputy commissioner did not resolve the issue in his findings of fact. However, Section 33 cannot apply on either view of the facts. Plaintiff's condition stems neither from epilepsy nor from an injury received in the armed services or in the course of other employment, and since plaintiff has received no compensation for the injury, his case does not fall within the provisions of Section 33. *Pruitt, supra.*

[2] In addition to its conclusion that G.S. 97-33 precluded recovery for more than 15% disability, the Full Commission adopted the deputy commissioner's opinion in its entirety. Plaintiff assigns error to the deputy commissioner's conclusion that plaintiff is entitled to compensation only for permanent partial disability in accordance with G.S. 97-31 and plaintiff asserts that he is totally disabled within the meaning of G.S. 97-29 and is therefore entitled to recovery under those provisions of the statute. We agree.

The threshold issue is whether G.S. 97-31 precludes recovery under any other provision of the statute. That Section provides in pertinent part:

> In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, *and shall be in lieu of all other compensation,* including disfigurement . . . .

(Emphasis ours.) In *Perry v. Furniture Co.*, 296 N.C. 88, 249 S.E. 2d 397 (1978), our Supreme Court addressed the issue in a case where plaintiff had sustained a 50% loss of the use of his back and was "probably disabled from any useful occupation." The Court found the phrase "in lieu of all other compensation" determinative and held that, where all of a plaintiff's injuries are included in the schedule set out in Section 31, he 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.* In *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E. 2d 214 (1985), the Court made inroads into its rule in *Perry*, but the question was not squarely presented until the recent case of *Whitley v. Columbia Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986). There plaintiff had permanent partial disability of both hands and

was totally disabled as a result. The Supreme Court discussed the history of the "in lieu of" clause, and found that it was originally enacted to prevent compensation for both loss and disfigurement of body parts. The Court reasoned that allowing recovery under Section 29 posed no conflict with the fundamental premise behind that provision, and indeed furthered the purpose of the Act itself to compensate for lost earning ability. Thus, the *Whitley* Court held that Section 29 "is an alternative source of compensation for an employee who suffers an injury which is also included in the schedule" and ruled that the worker may select the more favorable remedy. *Perry* was overruled to the extent that it held otherwise. Following *Whitley*, we hold that plaintiff is not limited to recovery under Section 31.

[3] We now consider whether plaintiff is entitled to recover for total disability under Section 29. Plaintiff contends that the deputy commissioner erred in finding plaintiff to be permanently partially disabled and in apportioning plaintiff's award on the basis of the disability ratings assigned to the two knee injuries. Plaintiff argues that the accident materially aggravated his pre-existing infirmity such that he is now totally disabled and contends that he should recover for the entire extent of that disability. We first consider the extent to which plaintiff is disabled.

Section 29 provides in pertinent part:

> Except as hereinafter otherwise provided, where the incapacity for work resulting from the injury is total, the employer shall pay or cause to be paid, as hereinafter provided, to the injured employee during such total disability a weekly compensation equal to sixty-six and two-thirds percent (66⅔%) of his average weekly wages, but not more than the amount established annually to be effective October 1 as provided herein, nor less than thirty dollars ($30.00) per week.
>
> In cases of total and permanent disability, compensation, including reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or care of rehabilitative services shall be paid for by the employer during the lifetime of the injured employee. If death results from the injury then the employer shall pay compensation in accordance with the provisions of G.S. 97-38.

The term "disability" is itself defined in Section 2(9):

> (9) Disability.—The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

Courts interpreting the meaning of disability have emphasized that diminished earning capacity, and not physical infirmity, is used to gauge disability. *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265 (1951). In *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978), plaintiff suffered a fall in the course of her employment. Her physician testified at the hearing that spinal cord damage from the fall resulted in incomplete use of her extremities. He rated plaintiff's physical disability at 50% and further testified that plaintiff was "wholly incapable of resuming her former employment as a laborer." Another doctor testified that plaintiff suffered a 40% disability to the neurological system. He also estimated that there were "some gainful occupations that someone with this degree of neurological problem could pursue." The presiding deputy commissioner found that plaintiff had suffered 45% permanent partial disability and awarded her a percentage of her weekly salary for 135 weeks pursuant to Section 31(23). The Full Industrial Commission and the Court of Appeals affirmed, and plaintiff petitioned for certiorari to the Supreme Court.

Writing for a unanimous court, Justice Huskins found no support for the conclusion that plaintiff suffered no more than a 45% loss of the use of her back. The evidence was uncontradicted that the damage to the nervous system affected all her extremities with loss of sensation. The Court remanded the case, holding that an award must compensate a claimant for *all* injuries received in an accident. *Id.*

The *Little* Court also addressed issues likely to recur in further proceedings. Emphasizing that the appropriate criterion for determination of disability is a finding of plaintiff's own incapacity for work, the Court found that the Commission erred in relying on a statement by one of the physicians that "there are some gainful occupations that someone with this degree of disability could pursue":

> Uncontradicted evidence establishes that she is over fifty years of age, somewhat obese, has an eighth grade education, and at the time of her accident had been working as a laborer earning less than $2.00 per hour. The relevant inquiry under G.S. 97-29 is not whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff herself has such capacity.

Id. In the case at bar, the deputy commissioner found as a matter of law that plaintiff's total permanent physical impairment of the left leg is 45%. The deputy commissioner made no finding as to plaintiff's disability to earn wages; rather, he made the award on the basis of Dr. Vandersea's rating of 15% permanent partial disability of the left leg. However, Dr. Vandersea testified as follows:

> Q. . . . do you have an opinion satisfactory to yourself with a reasonable degree of medical certainty as to whether or not Mr. Wilder would be totally disabled to work at a laboring type job?
>
> MR. HEDRICK: Objection.
>
> THE COURT: Overruled. You may answer.
>
> A. Yes, sir, I do have an opinion.
>
> Q. (Mr. Weeks) And what is your opinion?
>
> A. My opinion is he is totally disabled from that type of work and probably all gainful work that he's qualified.

This uncontroverted evidence establishes that plaintiff—whom the court found to be 59 years old and to have a third-grade education—is totally disabled within the meaning of the statute. Although the impairment rating of his left leg is only 45%, that figure, as the *Little* Court pointed out, is not dispositive of the question of disability to earn wages. The evidence showed plaintiff to be totally and permanently unable to earn the wages he was receiving at the time of his injury. We now consider whether and to what extent plaintiff's 1983 work-related injury caused his disability.

[4] In *Anderson v. Northwestern Motor Co., supra,* our Supreme Court first addressed the issue of disability compensation where a

prior condition and a work-related injury combine to disable a claimant. The Court held that, where the claimant

> . . . suffers a personal injury by accident arising out of and in the course of his employment, and such injury materially accelerates or aggravates the preexisting disease or infirmity and thus proximately contributes to the death or disability of the employee, the injury is compensable, even though it would not have caused death or disability to a normal person.

Id. As the parties in the instant case have apparently agreed that the 1983 injury arose out of and in the course of plaintiff's employment, we do not address that issue here, but move directly to the question of causation.

Whether the injury materially aggravated the existing infirmity is once again to be determined with reference to the claimant's capacity or incapacity for work. Just as a medical disability rating may be apportioned between two causes, so may the degree of incapacity to work be a function of two completely separate causes. As Judge, later Justice, Britt noted in *Pruitt v. Knight Publishing Co.*:

> There is a distinction between a preexisting impairment independently producing all or part of final disability, and a preexisting condition acted upon by a subsequent aggravating injury which precipitates disability.

27 N.C. App. 254, 218 S.E. 2d 876 (1975), *rev'd on other grounds*, 289 N.C. 254, 221 S.E. 2d 355 (1976). This principle was later relied upon in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981), to award a claimant recovery for only part of her total disability. In that case, plaintiff contracted byssinosis as a result of her employment with Burlington Industries; she also suffered from such non-work-related conditions as phlebitis, varicose veins and diabetes. The Industrial Commission found that 55% of plaintiff's ability to work and earn wages was due to her lung disease caused at least in part by her employment, with the remaining 45% caused independently by her other infirmities. Despite some evidence to the contrary, the majority of the Court affirmed the decision of the Commission, citing testimony by two doctors that at least half of her incapacity to work—as opposed to

her medical disability rating—was independent of her work-related problems and not aggravated by them.

The *Morrison* Court, however, was careful to distinguish the case before it from previous holdings. One situation beyond the scope of its narrow holding was set out by the Court as follows:

> (2) When a pre-existing, *nondisabling, non-job-related* condition is aggravated or accelerated by an accidental injury arising out of and in the course of employment or by an occupational disease so that disability results, then the employer must compensate the employee for the entire resulting disability even though it would not have disabled a normal person to that extent.

Id. In such a case, where an injury has aggravated an existing condition and thus proximately caused the incapacity, the relative contributions of the accident and the pre-existing condition will not be weighed. *Anderson v. A. M. Smyre Co.*, 54 N.C. App. 337, 283 S.E. 2d 433 (1981).

In the case at bar, the only medical testimony was that given by Dr. Vandersea. He testified that the disability rating to plaintiff's left leg was 45%, with 15% attributable to the 1983 injury, but that his incapacity for work was total. Although Dr. Vandersea never specifically testified as to the relative contributions of plaintiff's 1977 and 1983 conditions to his incapacity to work, his testimony indicates that the 1983 injury materially aggravated the earlier one. Dr. Vandersea stated that there is a greater risk of damage with the new prosthesis than there would be were it plaintiff's first replacement. This likelihood was due in part to the extra bone damage during the second surgery. In addition, Dr. Vandersea testified that, if the damage were to recur, replacement of the prosthesis might—depending on the damage to the bone—be impossible and amputation would be necessary. That the 1983 injury materially aggravated plaintiff's condition is further shown by the fact that plaintiff's job performance was unaffected by the 1977 injury; after a 6-month healing period, he returned to his original duties and performed them satisfactorily until his injury some six years later. Thus, the evidence clearly indicates that plaintiff's 1983 injury aggravated a latent condition and therefore proximately contributed to his total disability. Although a normal person may not have been disabled to that ex-

tent, the entire disability is compensable. *See Anderson v. Smyre, supra.*

Because the Industrial Commission failed to take into consideration the abundance of uncontradicted evidence that plaintiff is permanently and totally disabled and that this disability was the result of a work-related injury which aggravated an existing infirmity, we remand the case for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges MARTIN and PARKER concur.

DENNIS MARTIN, ADMINISTRATOR OF THE ESTATE OF DAVID MARTIN, DECEASED, PLAINTIFF v. SOLON AUTOMATED SERVICES, INC.; INTERNATIONAL DRYER CORP.; UNITED TECHNOLOGIES CORP.; ESSEX GROUP, INC.; HAMILTON STANDARD CONTROLS, INC.; FENWAL CORP.; BLOUNT PETROLEUM CORP.; PARGAS OF FARMVILLE, N.C., INC.; REGINALD MORTON FOUNTAIN AND SAMUEL ANDERSON MCCONKEY, D/B/A VILLAGE GREEN APARTMENTS, DEFENDANTS

ANNA DELL WATTS, PLAINTIFF v. SOLON AUTOMATED SERVICES, INC.; INTERNATIONAL DRYER CORP.; UNITED TECHNOLOGIES CORP.; ESSEX GROUP, INC.; HAMILTON STANDARD CONTROLS, INC.; FENWAL CORP.; BLOUNT PETROLEUM CORP.; PARGAS OF FARMVILLE, N.C., INC.; REGINALD MORTON FOUNTAIN AND SAMUEL ANDERSON MCCONKEY, D/B/A VILLAGE GREEN APARTMENTS, DEFENDANTS

Nos. 8610SC621 and 8610SC782

(Filed 3 February 1987)

Bills of Discovery § 6— failure to comply with discovery order—sanctions—no abuse of discretion

The trial court did not abuse its discretion in an action arising from an LP gas explosion at an apartment complex by ordering appellants' defenses stricken, the payment of plaintiffs' attorney fees, and that appellants supply further answers to interrogatories. It was clear that appellants were subject to the imposition of sanctions because they had been ordered to supply further answers to certain interrogatories by 22 August 1985; appellants did not even make an effort to provide answers until 9 January 1986, five days before appellants' motion for sanctions was scheduled to be heard; the sanctions imposed were somewhat severe, but were among those expressly authorized by

statute; and appellants' rights to due process and trial by jury were not denied. N.C.G.S. 1A-1, Rule 37.

Judge GREENE concurring.

APPEAL by defendants Essex Group, Inc., and Hamilton Standard Controls, Inc., from *Bailey, Judge*. Orders entered 16 January 1986 and 30 May 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 5 January 1987.

On 2 March 1983, an LP gas explosion at the Village Green Apartments in Greenville, North Carolina, destroyed a portion of an apartment building. David Martin was killed and Anna Watts was injured. Anna Watts and Dennis Martin, who is the administrator of David Martin's estate, as well as several other parties filed twenty-two lawsuits arising out of the explosion. On 15 June 1984, the present cases were consolidated with fifteen other cases for discovery purposes. Pursuant to the consent decree, plaintiffs filed several sets of interrogatories and requests for documents.

On 13 May 1985, plaintiffs moved to compel further answers to interrogatories. On 23 July 1985, Judge Bailey entered an order which, in pertinent part, directed appellants to provide additional answers to twelve interrogatories no later than 22 August 1985. No answers were forthcoming. On 6 November 1985 plaintiffs filed another motion to compel discovery and a motion for sanctions against appellants. Some answers were filed on 6 January 1986. Another motion to compel discovery and for sanctions was filed on 13 January 1986.

Unrecorded hearings were held on these motions on 14 January 1986, and on 16 January 1986, Judge Bailey entered an order in which he concluded that appellants had violated the provisions of his 23 July 1985 order, that they had violated the provisions of the Rules of Civil Procedure and the Consent Order and that there was no justification for their failure to comply. Based upon the findings and conclusions, the court ordered the defenses of appellants stricken, ordered the payment of attorney's fees to plaintiffs' counsel and ordered appellants to supply further answers to the interrogatories.

On 24 January 1986, appellants filed a "motion for reconsideration, amendment and relief from order." On 30 May 1986,

Judge Bailey entered an order denying this motion. From this order, appellants also gave notice of appeal. After the records were filed in these cases, appellants filed motions to consolidate and petitions for writ of certiorari to review the orders appealed from. The appellees filed a motion to dismiss the appeal. The motion to consolidate was allowed, and the petitions and the motion to dismiss were referred to the panel assigned to hear the proposed appeal in the cases.

Rodman, Holscher, Francisco & Peck, P.A., by David C. Francisco and Edward N. Rodman; and Maupin Taylor Ellis & Adams, P.A., by Thomas W. H. Alexander, and Richard M. Lewis, for defendants, appellants.

Thorp, Fuller & Slifkin, P.A., by William L. Thorp, Anne R. Slifkin and Margaret E. Karr, for plaintiffs, appellees.

Taft, Taft & Haigler, by Thomas F. Taft, Kenneth E. Haigler and Robert H. Hochuli, Jr., for Amicus Curiae.

HEDRICK, Chief Judge.

Defendants, Essex Group, Inc. [hereinafter Essex], and Hamilton Standard Controls, Inc. [hereinafter Hamilton], seek review of various interlocutory orders. In our discretion, we allow defendants' petitions to review the 16 January 1986 and the 30 May 1986 orders of Judge Bailey on their merits.

Appellants contend that the court's 16 January 1986 order imposing sanctions should be reversed for the following reasons: (a) because the order is based on findings and conclusions not supported by the record; (b) because the record does not support the court's finding that the appellants failed to provide complete discovery responses; (c) because the record does not support the court's conclusion that the appellants willfully violated the 23 July 1985 order; and (d) because the record does not support the court's finding that the appellants demonstrated an unwillingness to cooperate with other parties during discovery. Appellants also argue that the order should be reversed: (a) because the sanctions imposed were not just; (b) because the court failed to follow the appropriate legal standards; (c) because the court failed to consider alternative sanctions; and (d) because the severity of the sanction of striking the defenses of appellants was "grossly dis-

proportionate to the seriousness of any misconduct." Finally appellants contend that the order should be reversed because it violated their constitutional rights to due process and trial by jury. We disagree and affirm the trial court's orders.

G.S. 1A-1, Rule 37 in pertinent part provides:

> (2) . . . If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
>
> d. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> e. Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in subdivisions a, b, and c of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the

> order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

It is clear from the record that appellants were dilatory and disobeyed the order of the trial court to provide further answers to the interrogatories. On 23 July 1985, Judge Bailey signed an order directing appellants to supply further answers to certain interrogatories by 22 August 1985. Appellants did not even make an effort to provide answers until 9 January 1986, five days before plaintiffs' motion for sanctions was scheduled to be heard. Thus, it is clear that appellants were subject to the imposition of sanctions for violation of the court's previous orders.

There is evidence in the record to support the trial court's findings of fact and these findings of fact support the court's conclusions of law. Thus, the only issue which we must determine is whether the sanctions imposed were proper. As we stated in *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 727, 251 S.E. 2d 885, 888, *disc. rev. denied*, 297 N.C. 304, 254 S.E. 2d 921 (1979),

> . . . the discovery rules "should be constructed liberally" so as to substantially accomplish their purposes. *Willis v. Duke Power Co.*, 291 N.C. at 34, 229 S.E. 2d at 200. The administration of these rules lies necessarily within the province of the trial courts; Rule 37 allowing the trial court to impose sanctions is flexible, and a "broad discretion must be given to the trial judge with regard to sanctions." 8 Wright & Miller, *Federal Practice and Procedure: Civil* Sec. 2284, at 765 (1970). *See also* 4A Moore's Federal Practice, 37.03 [2.-7] (2d Ed. 1978).

Even though the sanctions imposed were somewhat severe, they were among those expressly authorized by the statute; thus, we cannot hold that they constitute an abuse of discretion absent specific evidence of injustice caused thereby. *First Citizens Bank v. Powell*, 58 N.C. App. 229, 292 S.E. 2d 731 (1982), *aff'd*, 307 N.C. 467, 298 S.E. 2d 386 (1983). We have reviewed appellants' contentions for evidence of injustice caused by Judge Bailey's order, and in view of the specific facts of this case we are unable to find any abuse of discretion in the trial court's actions. Finally, we conclude that the trial court's order did not deny appellants' right to

due process or trial by jury. In view of our holding that the 16 January 1986 order was properly entered we need not address appellants' arguments regarding errors allegedly made in ruling upon their motion to reconsider. All outstanding motions and petitions not specially allowed by this opinion are hereby denied. The orders dated 16 January 1986 and 30 May 1986 are hereby

Affirmed.

Judges JOHNSON and GREENE concur.

Judge GREENE concurring.

While I agree with the majority in substantially every respect, one conclusion of the majority merits elaboration. As the majority upholds the validity of Judge Bailey's sanctions order, it concludes it need not address any errors made in the disposition of defendants' "motion to reconsider." This conclusion, without more, incorrectly implies a valid sanctions order conclusively establishes the validity of an order denying the sanctions order's reconsideration. The majority fails to consider the principle that a change in circumstance after entry of an order may warrant modifying, setting aside or otherwise reconsidering even a valid order.

In his discretion, Judge Bailey imposed sanctions, struck defendant's defenses, but reserved damages for trial. Therefore, Judge Bailey's sanctions order was a discretionary interlocutory order. *See Stone v. Martin*, 69 N.C. App. 650, 653, 318 S.E. 2d 108, 110 (1984). After the sanctions order, defendants first moved to amend or set aside the order under North Carolina Rules of Civil Procedure 52(b) and 60(b). However, as the sanctions order was interlocutory, defendants' motion would not lie. N.C. Gen. Stat. Sec. 1A-1, Rules 52(b), 60(b); *see O'Neill v. Southern Nat. Bank*, 40 N.C. App. 227, 230-31, 252 S.E. 2d 231, 234 (1979). Defendants amended their motion to allege that "changed circumstances" required Judge Bailey's order be modified.

It is true that other judges could set aside or modify Judge Bailey's interlocutory order as a result of changed circumstances. *See State v. Duvall*, 304 N.C. 557, 562, 284 S.E. 2d 495, 499 (1981); *Calloway v. Ford Motor Co.*, 281 N.C. 496, 502, 189 S.E. 2d 484, 488 (1972); *Stone*, 69 N.C. App. at 652, 318 S.E. 2d at 110.

However, defendants argued Judge Bailey (not another judge) should modify the sanctions order if defendants showed "changed circumstances." As Judge Bailey originated the sanctions order, he would normally have complete discretion, irrespective of changed circumstances, to set aside or modify his order during the term at which the order was entered:

> "The general power of the court over its own judgments, orders and decrees in both civil and criminal cases, during the existence of the term at which they are first made, is undeniable. Until the expiration of the term the orders and judgments of the court are *in fieri*, and the judge has power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice. . . .

[Citations omitted] *Chriscoe v. Chriscoe*, 268 N.C. 554, 557, 151 S.E. 2d 33, 35 (1966) (quoting *State v. Godwin*, 210 N.C. 447, 449, 187 S.E. 560, 561 (1936)). However, Judge Bailey entered his sanctions order on 16 January 1986 and heard the motion for reconsideration on 30 May 1986. As over four months passed after the sanctions order's entry, I assume the original term of the order had expired before Judge Bailey heard the reconsideration motion. Therefore, Judge Bailey no longer had complete discretion to modify his order. Instead, he was permitted to alter the order only upon "changed circumstances."[1] *See Stone*, 69 N.C. App. at 653, 318 S.E. 2d at 110-11.

1. I note the likelihood defendants' notice of appeal divested Judge Bailey of jurisdiction to set aside or modify his sanctions order. *See Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E. 2d 879, 880 (1971). However, there are two pertinent exceptions to the general rule that a pending appeal divests the trial court of jurisdiction to enter subsequent orders: (1) notwithstanding the appeal, the trial court can modify or set aside its order during the term at which the order is entered; (2) the trial judge may adjudge the appeal abandoned and thereby re-vest himself with jurisdiction. *Id.* As noted above, the "term" exception is not applicable since the term had expired. However, as the jurisdiction issue has been raised by neither party and as the record does not reflect the facts necessary to determine abandonment, I do not address the question whether Judge Bailey had jurisdiction to hear motions for reconsideration made after defendants had given notice of appeal. As defendants' motion for reconsideration was originally brought under Rules 52(b) and 60(b), I note notice of appeal does not divest the trial court's jurisdiction to entertain motions to amend findings under Rule 52(b). *Parrish v. Cole*, 38 N.C. App. 691, 248 S.E. 2d 878 (1978). However, notice of appeal does divest the trial court of jurisdiction to hear motions under Rule 60(b). *Wiggins*, 280 N.C. at 110-11, 184 S.E. 2d at 881-82.

I would hold Judge Bailey did not abuse his discretion in ruling no changed circumstances warranted modification of his sanctions order. The only changed circumstance offered by defendants was their beleaguered "compliance" with Judge Bailey's discovery and sanctions orders after Judge Bailey struck their defenses: this evidence demonstrates a change of heart, not circumstance.

The "changed circumstances" upheld in *Stone* are relevant to this case. In *Stone*, a trial judge had entered sanctions under Rule 37 and struck the defendants' answer. Defendants had refused to answer discovery requests based on their reasonable interpretation of existing case law. After sanctions were imposed, appellate decisions subsequently restricted the scope of defendant's alleged privilege. Coupled with the defendant's willingness to comply after these adverse decisions, the change in law was deemed a significantly changed circumstance. 69 N.C. App. at 653, 318 S.E. 2d at 111.

The "changed" circumstances in the instant case do not rise to the level upheld by this Court in *Stone*. The defendants in *Stone* stood willing to comply with discovery as the result of a changed circumstance, the change in law. Defendants here argue their alleged willingness to comply is itself the changed circumstance. Such an interpretation invites improper manipulation of the "changed circumstances" standard. To strike Judge Bailey's sanctions simply because defendants belatedly make effort to comply would reward their delay of discovery. This defeats the purpose of sanctions under N.C.R. Civ. P. 37(b). Therefore, Judge Bailey had ample discretion to rule no legally significant circumstances had changed.

Accordingly, though I believe the majority should have considered the disposition of defendants' motion for reconsideration, I concur in the result as I find no error in Judge Bailey's disposition.

C. E. COCHRAN AND WIFE, HAZEL A. COCHRAN, AND DAVID S. WHITE AND WIFE, JEAN C. WHITE v. JOSEPH WILLIAM KELLER, III

No. 8629DC867

(Filed 3 February 1987)

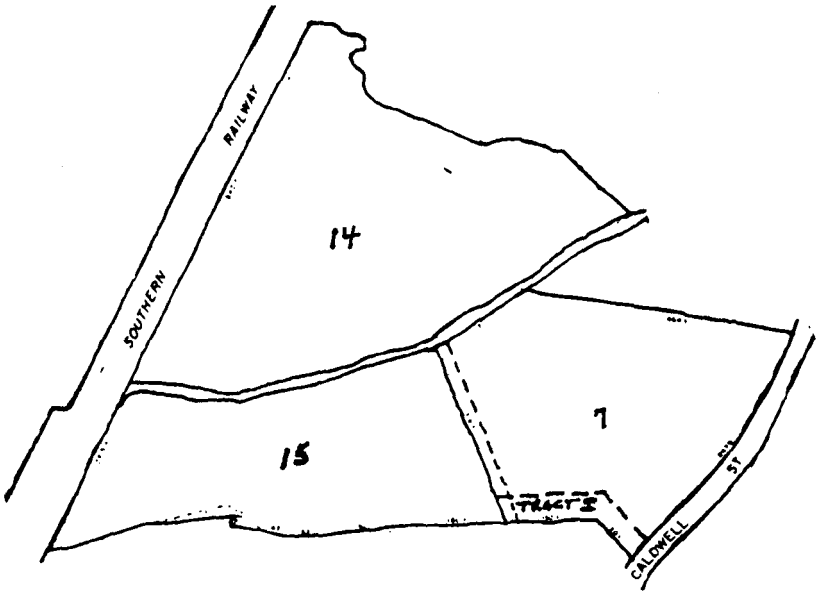
Easements § 7.1— appurtenant easement—identity of dominant tract—jury question

The trial court erred in directing a verdict for plaintiffs in an action to establish an appurtenant easement in a 40-foot right-of-way across defendant's land where a 1963 easement deed to plaintiffs' predecessor granted a 40-foot right-of-way across the land now owned by defendant "for the purpose of ingress and egress to property purchased by the grantee from the Breese heirs" and an intersecting 22-foot right-of-way "for the purpose of ingress and egress to the property of the grantee"; plaintiffs' predecessor owned 2 parcels of land in 1963 but purchased only one of them from the Breese heirs; the metes and bounds description of the 40-foot right-of-way did not describe a tract attached or contiguous to the parcel obtained from the Breese heirs; the parcel now owned by plaintiffs was not purchased by their predecessor from the Breese heirs; and a latent ambiguity presenting a jury question thus existed as to whether the 40-foot right-of-way was created to benefit the parcel owned by plaintiffs.

APPEAL by defendant from *Hix, Judge.* Judgment entered 13 February 1986 in District Court, TRANSYLVANIA County. Heard in the Court of Appeals 30 October 1986.

Plaintiffs instituted this action alleging ownership of an easement across defendant's land and seeking damages for defendant's alleged trespass upon this easement. Defendant answered denying plaintiffs' ownership of an easement across his property and affirmatively alleging adverse possession, the statute of limitations and abandonment.

To assist in understanding the location of the specific parcels of land involved, and the disputed easement itself, a map taken from Transylvania County Tax Map BRE-05-2, plaintiffs' exhibit A, is set out:



Parcel number 7, consisting of approximately four acres is owned by the defendant Joseph Keller. Parcel number 15 consisting of 3.94 acres is owned by the plaintiffs, C. E. Cochran and wife as tenants by the entirety in a nine-tenths undivided interest and David S. White and wife as tenants by the entirety in a one-tenth undivided interest. Parcel 14 consisting of 5.79 acres is owned by James C. Boozer who is not a party to this action.

Plaintiffs' evidence shows that all three parcels were at one time owned by Cornelia E. Breese. In 1901 she conveyed these three parcels (including some additional unrelated parcels) to members of the Breese family (hereinafter referred to as "the Breese heirs"). In 1925, W. E. Breese and wife, R. W. Breese, conveyed Parcel 15 to Purity Products Company. W. E. Breese and wife were not named grantees in the 1901 deed from Cornelia

Breese and the record does not reflect how they obtained title to Parcel 15. However, plaintiffs' ownership of Parcel 15 is not in dispute.

By deed dated 4 November 1953 the Breese heirs conveyed Parcel 7 to Loe Taylor. On 28 November 1953 Loe Taylor conveyed to the Breese heirs, who then owned Parcel 14, a "right of way for road" 24 feet wide across the northern margin of Parcel 7 leading from Caldwell Street to Parcel 14.

On 6 July 1955, following the dissolution of Purity Products, Purity's shareholders conveyed Parcel 15 to Carl McCrary. On that same date, Carl McCrary obtained title to Parcel 14 by deed from the Breese heirs. This deed included the "road right of way" conveyed by deed from Loe Taylor to the Breese heirs in favor of Parcel 14. It has been stipulated that the 6 July 1955 deed from the Breese heirs to Carl McCrary is the only deed of record from the Breese heirs to Carl McCrary.

On 22 February 1963 Fred C. Hunter and wife Gladys C. Hunter (defendant's predecessors in title), who then owned Parcel 7, conveyed two tracts of land to Carl McCrary. Tract I described a "right-of-way 40 feet in width for the purpose of ingress and egress to property purchased by the grantee [Carl McCrary] from the Breese heirs located in the Town of Brevard and adjoining the lands of the grantors [Parcel 7]." From the description given, the Tract I right-of-way extended from Caldwell Street across the southernmost portion of Parcel 7 to the southernmost corner of Parcel 15. (See map.) Tract II described a "right-of-way 22 feet in width for the purpose of ingress and egress to the property of the grantee [Carl McCrary]." From the description given, this right-of-way extends the length of Parcel 7 along the boundary between Parcels 7 and 15 intersecting Tract I. (See map.) On the same date, 22 February 1963, Carl McCrary and wife, Mary Jane McCrary, relinquished all of their right, title and interest in the 24 foot wide easement extending from Parcel 14 to Caldwell Street which had been previously created by the deed from Loe Taylor to the Breese heirs dated 28 November 1953.

Following Carl McCrary's death, his heirs, Mary Jane McCrary (widow), Martha McCrary McGuire (daughter), and Thomas King McCrary (son), conveyed Parcels 14 and 15 to Hazel McCormick. The deed, dated 10 November 1970, included the two rights-

of-way created by the 1963 deed from Fred C. Hunter and wife to Carl McCrary. On the same day, 10 November 1970, Hazel McCormick conveyed Parcel 15 to Martha M. McGuire. The deed included a "right-of-way 40 feet in width for the purpose of ingress and egress to the property purchased by the Grantee from the Breese heirs." The description of this right-of-way was taken from the 1963 deed from Fred C. Hunter and wife to Carl McCrary. Also, on 10 November 1970, Hazel McCormick conveyed Parcel 14 to Mary Jane McCrary. This deed also included the same 40 foot wide right-of-way and an additional "right-of-way 22 feet in width for the purpose of ingress and egress to the property of the Grantee" as described in the 1963 deed from Fred C. Hunter and wife to Carl McCrary.

On 23 April 1979 the heirs of Mary Jane McCrary, Thomas King McCrary (son) and Martha M. McGuire (daughter), conveyed Parcel 14 to James C. Boozer. The deed included a "right-of-way 40 feet in width running from the Eastern margin of [Parcel 14] to U.S. Highway 64," and a conveyance of "all right, title and interest of the Grantors in and to a right-of-way running from [Parcel 14] across the lands of Robert Brown, property known as Brevard Motor Lodge to Caldwell Street."

On 12 August 1982 Martha M. McGuire conveyed Parcel 15 to the plaintiffs. The deed included "a right of way for a road forty feet in width leading from North Caldwell Street to [Parcel 15]" as set out in the deed from Hazel McCormick to Martha McGuire dated 10 November 1970.

Defendant obtained title to Parcel 7 following numerous mesne conveyances beginning with the 1901 deed from Cornelia Breese to the Breese heirs. One of them, a 6 October 1964 deed from Fred C. Hunter and wife to Jack L. Botts and wife conveying Parcel 7, is relevant here. This deed followed the 1963 deed from Fred C. Hunter and wife to Carl McCrary which created the two subject rights of way across Parcel 7. In the deed from the Hunters to the Bottses the description excepts the two subject rights of way. All subsequent deeds conveying Parcel 7 also except these two rights of way including defendant's deed from Robert W. Brown and wife dated 1 November 1973.

Plaintiffs filed their complaint on 11 August 1983 claiming ownership of "a certain right-of-way 40 feet in width and leading

from North Caldwell Street" to Parcel 15 as described in their deed from Martha M. McGuire dated 12 August 1982. Plaintiffs alleged that for several years the defendant and his predecessors in title had "caused mobile homes to be parked in said right-of-way as permanent residences, and have paid rent for the [use of the] right-of-way in this manner." Plaintiffs further alleged that since 1973 defendant had failed to pay rent, that the plaintiffs had demanded that the mobile homes be removed but that the defendant has refused to move them.

On 11 February 1986 James C. Boozer and wife conveyed to the plaintiffs by non-warranty deed "a right-of-way for a road 40-feet in width leading from North Caldwell Street to (Parcel 15)." As the deed explains, "some question has arisen as to whether Thomas King McCrary and Martha M. McGuire had conveyed to James C. Boozer all of their interest in the right-of-way referred to in the deed to [plaintiffs]," and that "James C. Boozer desires to convey, by non-warranty deed, a non-exclusive right-of-way along the property."

The case was tried before a jury. At the close of all the evidence both parties moved for a directed verdict. The trial court granted plaintiffs' motion on the issue of existence, location and ownership of the easement and adverse possession. Defendants' motion for directed verdict was denied. The only issue submitted to the jury was the question of whether plaintiffs had abandoned their easement. The jury returned a verdict in favor of the plaintiffs on the issue of abandonment and defendant appeals.

Ramsey, Hill, Smart, Ramsey & Pratt by Michael K. Pratt for plaintiff-appellees.

Prince, Youngblood & Massagee by Sharon B. Ellis for defendant-appellant.

EAGLES, Judge.

I

Defendant assigns error to the trial court granting plaintiffs' motion for a directed verdict on the basis that "as a matter of law, the language of [the] easement is not ambiguous and that [the] easement is appurtenant to the lands of Plaintiffs." Defendant contends that the easement is not appurtenant to the lands of

the plaintiffs but appurtenant to the lands of James C. Boozer and that the trial court should have directed a verdict in defendant's favor on this issue. Alternatively, defendant argues that the language of the easement is ambiguous and that the trial court erred in not submitting the issue to the jury. We agree that the language creating the easement is ambiguous and the trial court erred in directing a verdict for plaintiffs on this issue.

A trial court may grant a directed verdict in favor of the party with the burden of proof when the credibility of that party's evidence is manifest as a matter of law. *Bank v. Burnette*, 297 N.C. 524, 256 S.E. 2d 388 (1979). This means that the evidence must so clearly establish the facts in issue such that no reasonable inferences to the contrary can be drawn. *Id.* In *Burnette* the court listed three recurrent situations where credibility is manifest.

> (1) Where non-movant establishes proponent's case by admitting the truth of the basic facts upon which the claim of proponent rests.
>
> (2) Where the controlling evidence is documentary and non-movant does not deny the authenticity or correctness of the documents.
>
> (3) Where there are only latent doubts as to the credibility of oral testimony and the opposing party has "failed to point to specific areas of impeachment and contradictions."

Id. at 537-38, 256 S.E. 2d at 396.

Here the controlling evidence is documentary, consisting of deeds in plaintiffs' and defendant's chains of title. The disputed easement was created by express grant from Fred C. Hunter and wife to Carl McCrary in 1963. It is not disputed that the deed creates an appurtenant easement. An appurtenant easement is one created for the purpose of benefiting particular land. P. Hetrick, Webster's Real Estate Law in North Carolina Section 306 (rev. ed. 1981). It requires two tracts of land owned by two different persons. The dominant tract is the tract benefited by the easement. The servient tract is the tract burdened by the easement for the benefit of the dominant tract. *Id.* An appurtenant easement is attached to and passes with the dominant tract. The easement cannot exist separate from the dominant tract and

as a result cannot be conveyed separate from land to which it is appurtenant. *Id.* An appurtenant easement created by express grant must be described with reasonable certainty including a description of the dominant and servient tracts to be benefited and burdened. *Id.* at section 311.

An easement deed is a contract. *Lovin v. Crisp*, 36 N.C. App. 185, 243 S.E. 2d 406 (1978). When such contracts are plain and unambiguous their construction is a matter of law for the courts. *Id.* Here the easement deed is not plain and unambiguous. Tract #1 describes a right-of-way 40 feet in width for the purpose of ingress and egress to the property purchased by Carl McCrary from the Breese heirs. It has been stipulated by the parties that only Parcel 14 (now owned by James C. Boozer) was purchased by Carl McCrary from the Breese heirs. While this description in and of itself is not ambiguous, the metes and bounds description does not describe a tract of land attached to or contiguous to Parcel 14. It describes a 40 foot wide tract of land extending from Caldwell Street along the southern boundary of Parcel 7 to Parcel 15. At the time of the easement deed Carl McCrary did own Parcel 15 but he did not acquire it from the Breese heirs. Parcel 15 was purchased from the stockholders of Purity Products Co.

To further complicate matters, Tract #2 describes "a right of way 22 feet in width for the purpose of ingress and egress *to the property of the grantee* [Carl McCrary]" (emphasis added) which could include either Parcel 14 or Parcel 15 or both. However, the metes and bounds description provides for a 22 foot wide strip of land, intersecting and overlapping one end of Tract #1 and extending the length of the boundary between Parcels 15 and 7 to Parcel 14.

An instrument creating an easement should describe with reasonable certainty the easement created *and* the dominant and servient tracts to be benefited and burdened. *Hensley v. Ramsey*, 283 N.C. 714, 199 S.E. 2d 1 (1973). The description in the 1963 deed is sufficiently certain to permit location of the easement itself and identification of the servient tract (Parcel 7). However, there exists a latent ambiguity in the description with respect to the identification of the dominant tract. It is not clear from the language of the 1963 easement deed that, as a matter of law, Tract #1 was created to benefit Parcel 15 owned by the plaintiffs.

It is not clear whether the parties to the conveyance intended to create one easement or two, or whether they intended to benefit all of the lands then owned by the grantee Carl McCrary or just Parcel 14. A latent ambiguity "will not be held to be void for uncertainty but parol evidence will be admitted to fit the description to the thing intended." *Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E. 2d 484, 485 (1942). From the evidence presented at trial there exists a genuine issue of fact as to which property the parties to the deed intended to benefit. A genuine issue of fact must be tried by a jury unless the right is waived. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). The question of intent is one for the jury and in order to ascertain that intent it is necessary to look at the subject matter involved, the situation of the parties at the time of the conveyance and the purpose sought to be accomplished. *Shingleton v. State*, 260 N.C. 451, 133 S.E. 2d 183 (1963). *See Communities, Inc. v. Powers, Inc.*, 49 N.C. App. 656, 272 S.E. 2d 399 (1980).

The credibility of plaintiffs' evidence is not manifest as a matter of law. While the controlling evidence is documentary and the authenticity of these documents is not disputed, they do not clearly establish that the easement was created to benefit plaintiffs' property. Disputed factual issues remain to be resolved by a jury. Accordingly, we hold that the trial court erred in directing a verdict on this issue in plaintiffs' favor.

II

Defendant assigns error to the trial court granting a directed verdict in favor of plaintiffs on the issue of adverse possession. At this point we cannot decide the issue raised by this assignment of error. The propriety of the trial court's ruling on the adverse possession issue depends upon how the question of which tract of land is the dominant tract is resolved. We have reviewed defendant's remaining assignments of error and find no prejudicial error.

Reversed and remanded for a new trial.

Judges ARNOLD and JOHNSON concur.

In the Matter of Appeal of Butler

IN THE MATTER OF: THE APPEAL OF MR. AND MRS. ALGERNON L. BUTLER, JR., MR. AND MRS. JOHN C. BYRNES, DR. AND MRS. JOSEPH M. JAMES, MR. AND MRS. EMERSON WILLARD, MRS. MARY H. WHITTED, MR. HENRY B. PESCHAU, JR., MR. AND MRS. VAN REID, MS. ELEANOR LEGRAND HERVEY, MR. AND MRS. EDWIN L. WEST, JR., MS. ELIZABETH PARSLEY, MR. AND MRS. HARRIS M. NEWBER, MR. AND MRS. HUGH ALEXANDER MCEACHERN, MR. AND MRS. LEMUAL L. DOSS, JR., MR. AND MRS. J. W. WHITTED, MS. ROSEMARY HADEN, MR. AND MRS. HAROLD DOBBINS, MRS. VERA P. BROUSE, MR. ADRIAN HURST, MR. AND MRS. JAMES W. FERGER, DR. JOHN W. ORMAND, JR., ET UX., FROM THE DECISION OF THE NEW HANOVER COUNTY BOARD OF EQUALIZATION AND REVIEW OF JUNE, 1984

No. 8610PTC826

(Filed 3 February 1987)

1. Constitutional Law § 23.3; Taxation § 25.4— property tax reappraisal—no denial of due process

Taxpayers were not denied due process where New Hanover County conducted its octennial appraisal of real property as of 1 January 1983; all of appellants' lands were assigned a base value of $20,000 per acre, adjusted by a schedule of values; a Notice of Valuation Change was mailed on 5 April which incorrectly stated that the tax values were increased due to changes or improvements in the real estate and gave the taxpayers seven days to appeal by calling the tax office; those who called were informed that the reappraisal resulted from a computer programming error and that they could contest the reappraisal before the New Hanover County Board of Equalization and Review; appellants appeared before the board on 16 April to object to the reevaluation of their property; the board made no ruling but scheduled further hearings on 21 May and for June; and a second notice was sent on 20 April to clarify a 5 April notice. All of the appellants responded within the seven-day period required by the first notice and were subsequently informed that the county was relying on a clerical error to justify the reappraisal; the second notice clarified the first and continued the hearing so that each taxpayer had approximately 30 days written notice of the general grounds for reappraisal; there is no indication that the taxpayers ever requested additional time in which to conduct discovery or prepare their appeals; and the proceeding before the Property Tax Commission was conducted *de novo* six months after the county board's final decision, enabling the taxpayers to present their entire case again. N.C.G.S. 105-287.

2. Taxation § 25.9— property tax—clerical error—county's right to reappraise—burden of proof

The Property Tax Commission did not err by refusing to impose on the county the burden of proving facts necessary to establish its legal authority to conduct a reappraisal where there was a clerical error in the original appraisal. N.C.G.S. 105-287(b).

In the Matter of Appeal of Butler

3. Taxation § 25.9— property tax—clerical error—reappraisal lawful

The evidence was sufficient, reviewed under the whole record test, to support the Property Tax Commission's conclusion that a reappraisal was lawful because a clerical error caused an undervaluation. N.C.G.S. 105-287.

APPEAL by taxpayers from the Order of the North Carolina Property Tax Commission. Order entered 18 February 1986 in WAKE County. Heard in the Court of Appeals 13 January 1987.

Algernon L. Butler, Jr. for taxpayer-appellants.

New Hanover County Attorney's Office, by Robert W. Pope, Kenneth G. Silliman, and Wanda M. Copley, for New Hanover County, appellee.

BECTON, Judge.

In this action, twenty taxpayers owning real property in the Masonboro Sound area of New Hanover County challenged the county's authority to conduct, in 1984, a reappraisal of their property which resulted in the assignment of higher tax values than those previously assigned in the county's 1983 general octennial appraisal. The taxpayers appeal from a final decision of the North Carolina Property Tax Commission sitting as the State Board of Equalization and Review which upheld the reappraisal on the grounds of a clerical error and manifest injustice in the previous appraisal. We affirm.

I

The octennial appraisal of real property was conducted by New Hanover County (the County) as of 1 January 1983, as required by N.C. Gen. Stat. Sec. 105-286 (1979). During this appraisal, all of the lands subject to this appeal (located on Masonboro Sound along the Intracoastal Waterway) were assigned a base value of $20,000 per acre which was adjusted by a schedule of values formula that varied with the acreage in each tract. In April 1984 the County tax appraisers revised the values for forty-six sound-front properties by assigning to each tract a $60,000 per acre value for "homesite" acreage and a $20,000 per acre adjusted value for the residual acreage in each tract.

On 5 April 1984 a computer-generated "Notice of Valuation Change" was mailed by the County Tax Department to each of

the 46 affected property owners. The notices incorrectly stated that the tax values were increased "[d]ue to changes or improvements to [the taxpayer's] real estate during 1983," and instructed that notice of appeal be given by calling the tax office within seven days. Those taxpayers who responded within the seven-day period were informed that the reappraisal resulted from correction of a computer programming error which had caused an incorrect appraisal and that they could contest the reappraisal before the New Hanover County Board of Equalization and Review (the Board) on 16 April 1984.

Twenty of the affected taxpayers (the appellants herein) appeared before the Board on 16 April 1984 to object to the off-year revaluation of their property. The Board made no ruling on that date but scheduled further meetings for 21 May 1984 and 4 June 1984. The Board also directed the Tax Department to send a second notice to clarify the misleading 5 April notice.

On 20 April 1984 the Tax Administration mailed to each of the 46 affected property owners a second notice which stated, in part:

> . . . this notice serves to clarify your recent appraisal notice and your right to be heard. Notice resulted from our correction of improper appraisals as authorized by North Carolina General Statute 105-287.

The notice further informed the recipients of their right to appeal to the Board and of the 21 May and 4 June meeting dates. The twenty taxpayers (appellants) responded to the second notice and were heard at the 4 June meeting, after which the Board upheld the reappraisal.

The taxpayers then appealed to the North Carolina Property Tax Commission (the Commission) contending that: (1) the County lacked statutory authority to reappraise their property in a non-appraisal year, (2) the notification procedure utilized by the County violated due process, and (3) even if the reappraisal was authorized, the individual appraisals were not conducted in accordance with the provisions of N.C. Gen. Stat. Sec. 105-317. At the hearing before the Commission on 18 December 1984, the issues were limited, by stipulation of the parties, to whether the County lawfully reappraised the taxpayers' property in a non-

appraisal year due to a "clerical error" or "manifest injustice" in the prior appraisal within the meaning of N.C. Gen. Stat. Secs. 105-287(b)(5) and (9). The taxpayers expressly preserved their appeals on the valuation of their individual properties.

Prior to the hearing of evidence and after argument from counsel, the Commission ruled that the taxpayers should bear the burden of proof on the issues before it. The primary evidence was testimony of the County's Appraisal Supervisor, Mr. Bethune, which tended to show that the primary raw data for the 1983 appraisal consisted of actual sales data and acreage factors marked on a "land pricing map" used by the appraisers; that County appraisers had been generally instructed to split out a one-acre homesite for each tract and assign to it a greater value than that assigned to the residual acreage; that the appraisers were not bound by those instructions, however; that the land pricing map reflected this dual valuation for some properties in the Masonboro Sound area but not for others; that the map indicated an intent to assign a uniform base value of $60,000 per acre to the lands subject to this appeal with no "split-out" for homesite acreage; and that an error in coding the information from the map into the County's computer resulted in the assignment of a $20,000 per acre value instead. Mr. Bethune further testified that, had he personally conducted the appraisal he would have assigned a value of $60,000 per acre for a homesite and $20,000 for the residual acreage as was done in the reappraisal. Regarding the issue of "manifest injustice," Mr. Bethune testified that the erroneous valuation at $20,000 per acre resulted in a "gross undervaluation."

Taxpayer Algernon Butler testified that he was told by the tax office that the County's error consisted of its failure to split out a homesite in these particular tracts. The taxpayers also offered testimony of Mr. Butler regarding the uniqueness of the sound-front properties as well as a summary of known sales in the area by which they sought to show that the 1983 valuation was fair and thus not manifestly unjust. In an order entered 18 February 1986, the Commission upheld the County's off-year reappraisal, concluding as a matter of law that a clerical error was committed during the 1983 appraisal resulting in improper figures which were manifestly unjust at the time of the appraisal within the meaning of G.S. 105-287(b)(5) and (9).

On appeal to this Court, the taxpayers now renew their due process argument and contend further that the Commission erred in placing the burden of proof on the taxpayers and in making findings of fact and conclusions of law not supported by the evidence.

II

N.C. Gen. Stat. Sec. 105-345.2 (1985) is the controlling judicial review statute for appeals from the Property Tax Commission. *In re McElwee*, 304 N.C. 68, 74, 283 S.E. 2d 115, 120 (1981). Subsection (b) of that statute provides in part:

> The court may . . . reverse or modify the decision [of the Commission] if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

G.S. Sec. 105-345.2(c) provides that the court shall review the whole record and take due account of the rule of prejudicial error.

III

[1] We first consider whether the notice of reappraisal was sufficient to satisfy due process. Although the Commission failed to expressly state, as it should have, in its findings or conclusions, that the taypayers were afforded due process, that determination is inherent in its conclusion of law that the reappraisal was lawful. Thus, the issue is whether that conclusion is in violation of constitutional provisions or made upon lawful proceedings pursuant to G.S. Sec. 105-345.2(b)(1) and (3). *See In re McElwee*, 304 N.C. at 81, 283 S.E. 2d at 124. The taxpayers argue that the initial

computer-generated notice was misleading and allowed an inadequate time in which to respond, and that the second notice did not sufficiently clarify or particularize the reasons for the reappraisal.

N.C. Gen. Stat. Sec. 105-287 does not specify the type or timing of notice to be given to a taxpayer whose property is reappraised pursuant to its provisions. Due process merely requires that notice, considering the time, the general wording, and the method of publication be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *See In re McElwee* at 81, 283 S.E. 2d at 123 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 2d 865, 873 (1950)).

In our view, the taxpayers have been afforded ample opportunity to voice their objections to the reappraisal. Any inadequacy of the initial 5 April notice has not prejudiced the taxpayers and, in any event, was cured by the second notice. All of the appellants responded within the abbreviated 7-day period required by the first notice and have been informed since that time that the County was relying on a clerical error to justify the reappraisal. Furthermore, the second notice, mailed on 20 April 1984, clarified the earlier notice and continued the hearings to 21 May and 4 June, so that each taxpayer had approximately 30 days written notice of the general grounds for reappraisal prior to further hearings. The record contains no indication that the taxpayers ever requested additional time in which to conduct discovery or prepare their appeal.

Moreover, the proceeding before the Property Tax Commission was conducted *de novo* some six months after the County Board's final decision, enabling the taxpayers to present their entire case again. Unquestionably the taxpayers, by that time, knew and were prepared to contest the precise grounds asserted by the County for the off-year revaluation. Under these circumstances we conclude that the taxpayers were not denied due process merely because the 20 April notice failed to state the grounds for the reappraisal with greater particularity.

IV

[2] We next address the taxpayer's contention that the Commission erred in refusing to impose upon the County the burden of

proving facts necessary to establish its legal authority to conduct the reappraisal, *i.e.*, that the properties were "last appraised at an improper figure as the result of a clerical error," G.S. Sec. 105-287(b)(5) and were "last appraised at a figure that . . . was manifestly unjust at the time so appraised," G.S. Sec. 105-287(b)(9).

N.C. Gen. Stat. Sec. 105-287(b) provides that: "All real property that meets the following requirements *shall* be reappraised in years in which no general appraisal or reappraisal is being conducted in the county. . . ." (Emphasis added.) Like the octennial appraisal statute, G.S. Sec. 105-286, this statute thus imposes upon the County an affirmative duty to reappraise property in a non-appraisal year whenever it determines that any of the enumerated circumstances exists. We ascertain no legislative intent that a county be required to bear a particular burden of establishing its authority to reappraise in off years. To the contrary, our Supreme Court has stated that:

> "All presumptions are in favor of the correctness of tax assessments. The good faith of tax assessors and the validity of their actions are presumed." [Citation omitted.] As a result of this presumption, when such assessments are attacked or challenged, the burden of proof is on the taxpayer to show that the assessment was erroneous. [Citation omitted.]

In re Amp, Inc., 287 N.C. 547, 562, 215 S.E. 2d 752, 761-62 (1975). *See also In re McElwee* at 75, 283 S.E. 2d at 120.

Ordinarily taxpayer appeals involve challenges to the actual valuation of property. *See, e.g., In re Amp.* This is apparently a case of first impression in that the taxpayers are challenging instead the County's right to reappraise, evidently in hopes of avoiding twenty separate hearings on the actual values assigned. The taxpayers have admitted that they would bear the burden of proof if they were contesting the tax values assigned pursuant to a lawful appraisal. In our opinion, the taxpayers also bear the burden of proof when a reappraisal has been conducted because of a clerical error in the original appraisal, and the taxpayers may not shift the burden of proof to the County merely by appealing on different grounds. Accordingly, we hold that the Commission's refusal to impose the burden of proof on the County was not a reversible error of law.

V

[3] Finally, the taxpayers maintain the Commission's conclusions of law regarding the lawfulness of the off-year reappraisal are based upon erroneous findings of fact. In its findings of fact, the Commission determined that the County's intention in the original 1983 octennial appraisal was to split out a homesite in each of the tracts which were revalued in 1984 and to assign two values: $60,000 per acre for homesite acreage and $20,000 per acre for the residual acreage. Based on our review, using the "whole record" test, we conclude that the evidence does not support these findings. Instead, our review shows that the original intent of the appraisers was not to split out a homesite from the lands in question but rather to value the tracts at a flat $60,000 per acre adjusted according to the size of each tract. However, the "whole record" test allows us to uphold the final decision of the Commission if its conclusions of law are supported by the evidence, despite an immaterial error in its findings of fact. Here, the precise original intent of the appraisers is not the critical, determinative question. The relevant inquiry is whether that intent failed to be implemented due to a clerical error, resulting in an improper valuation. Applying the "whole record" test, we conclude that the land pricing maps and other exhibits, and the expert testimony of the Appraisal Supervisor provide "competent, material, and substantial evidence" in support of the Commission's conclusion that the reappraisal was lawful because a clerical error caused an undervaluation.

Only one of the nine grounds for reappraisal enumerated in G.S. Sec. 105-287 need exist in order for a county to lawfully conduct a reappraisal in a non-appraisal year. Having determined that the evidence supported the existence of a clerical error, we thus need not review the Commission's conclusion that the reappraisal was also lawful based on "manifest injustice" in the 1983 valuation.

VI

For the foregoing reasons, the decision of the North Carolina Property Tax Commission is

Affirmed.

Judges JOHNSON and PHILLIPS concur.

SUSAN MCBRIDE, EMPLOYEE v. PEONY CORPORATION, EMPLOYER, AND AETNA CASUALTY & SURETY COMPANY, CARRIER

No. 8610IC481

(Filed 3 February 1987)

1. **Master and Servant § 60.4— workers' compensation—supervisor's errand—company sponsored gathering—findings supported by evidence**

In a workers' compensation case arising from an injury incurred when plaintiff and a supervisor stopped on the way to a company gathering to look at a trailer for rent for the supervisor's brother, the evidence supported the Industrial Commission's findings that plaintiff and her supervisor had had an argument which resulted in plaintiff announcing she was quitting, that one purpose of the trip was to make up for the earlier incident and alleviate office tensions, and that plaintiff was instructed by her employer to stop the car to look at the trailer.

2. **Master and Servant § 60.4— special errand—dual purpose—injury compensable**

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff sustained an injury arising out of and in the course of her employment and was entitled to benefits where plaintiff was injured while running errands for her supervisor on the way to a company gathering. The trip was compensable under the special errand and dual purpose rules.

APPEAL by defendants from Full Commission. Opinion and Award entered 26 November 1985. Heard in the Court of Appeals 25 September 1986.

J. Tyrone Browder for plaintiff appellee.

Smith, Helms, Mulliss & Moore by Caroline Hudson for defendant appellants.

COZORT, Judge.

Plaintiff suffered a broken ankle when she slipped while walking down a hill with her employment supervisor to look at a trailer the supervisor thought her brother might be interested in renting. The accident occurred at about 4:00 p.m. while the plain-

tiff and her supervisor, who was the president of the defendant corporation, were on their way to have a few drinks "to get things back on a good working relationship" after a recent dispute at the work place and also to celebrate the supervisor's birthday, plaintiff's birthday, and the birthday of another employee. The North Carolina Industrial Commission, in a 2-1 decision, concluded that plaintiff sustained the injury arising out of and in the course of her employment and is entitled to benefits under the Workers' Compensation Act. We affirm.

The employer has brought forward five assignments of error for our consideration. Four of the assignments contend that the Commission erred in its findings of fact. The fifth, and most significant, assignment of error is that the Commission erred as a matter of law in concluding that the injury was compensable under the Act.

The only witnesses at the hearing were plaintiff and her supervisor. Plaintiff's testimony tended to show the following:

Plaintiff was hired on 26 June 1984 by Elaine Sommer, the president of Peony Corporation, to work as a keypunch operator for Peony. All of the work was done at Ms. Sommer's home in Germanton, where the business of the employer took place. Plaintiff's normal work week was 30 hours; she worked from 8:00 a.m. to 6:00 p.m. on Tuesday, Wednesday and Thursday.

On Tuesday, 31 July 1984, plaintiff reported for work at Ms. Sommer's home at 8:00 a.m. She and Ms. Sommer had a disagreement that morning and plaintiff quit her job. Ms. Sommer called plaintiff later that day and asked her to return to work. Plaintiff returned to work the next day around noon and finished out that day, working approximately six hours. Sometime during that afternoon, Sommer suggested they go out the next afternoon for drinks at Darryl's. This outing was planned to celebrate the birthdays of plaintiff, Sommer, and another Peony Corporation employee. Plaintiff and Sommer planned to leave work around 4:00 p.m. on Thursday. Sommer told plaintiff to make arrangements with her husband or a babysitter to care for plaintiff's young child. Sommer also told plaintiff that she would be paid for her regular hours, 8:00 a.m. to 6:00 p.m.

The next day, Thursday, plaintiff reported to work at 8:00 a.m. and continued to work until approximately 3:00 or 3:15 p.m. Sommer's husband, who was going to meet them at Darryl's called and wanted Sommer and plaintiff to stop at Hanes Mall (in Winston-Salem) and pick up some of the Sommers' vacation slides. Sommer asked plaintiff to drive so Sommer could ride home that night with her husband. They left Sommer's home in plaintiff's car at approximately 3:15 or 3:20 p.m. At Sommer's request, plaintiff stopped at the Germanton post office so that Sommer could check for mail. On the way to Winston-Salem, going in the direction of Hanes Mall to pick up Sommer's vacation slides, they passed a sign that said "trailer for rent." Sommer asked plaintiff to turn the car around to go look at the trailer because her brother was moving to town and needed a place to live.

Plaintiff then turned the car around and returned to the area where the trailer was located. At Sommer's request, plaintiff got out of the car and started walking with Sommer towards the trailer. Plaintiff slipped in a wet or muddy area and fell, injuring her ankle. The accident occurred a little after 4:00 p.m. Sommer then drove plaintiff to Sommer's home, where she called plaintiff's husband to come get her. About 6:00 p.m., plaintiff went to Med-First in Winston-Salem for treatment. Surgery was performed on her ankle the next day.

Plaintiff did not return to work. She received a paycheck for the week in question covering only 14 hours. Plaintiff never cashed the check.

Plaintiff testified that while she worked for Peony she had made one other trip away from the work place. Sommer had asked plaintiff about different campsites and swimming areas in anticipation of her brother's visit. Plaintiff and Sommer left Sommer's home around 2:00 or 3:00 p.m. one afternoon so that plaintiff could show Sommer a swimming area near plaintiff's home. Plaintiff testified she was paid regular wages through 6:00 p.m. for that day.

Sommer testified that she is president of Peony Corporation, a business services company providing tax work and other accounting functions. Plaintiff had an absenteeism problem which they had discussed several times. Plaintiff was never paid for

hours she did not work. Out of her six weeks of employment, plaintiff worked a 30-hour week only twice.

Sommer testified that the trip to the swimming area took place on a day that plaintiff was not scheduled to work. They looked at possible office space that afternoon and were together about four and a half hours. Plaintiff was not paid for those hours.

Sommer testified that the invitation to Darryl's was very impromptu and open-ended. She never told plaintiff she would be paid for the time they were at Darryl's. According to Sommer, it never came up in the discussion. They left her home a little before 4:00 p.m. to go to Darryl's. Plaintiff offered to drive because she owed Sommer some money for a cassette.

Sommer testified that stopping at the trailer was in no way connected with the Peony Corporation business. She also testified she did not ask plaintiff to get out of the car to see the trailer.

Sommer testified that the incident of Tuesday, 31 July 1984, was not really an argument. She lost her temper after telling plaintiff to stay away from the machine on three occasions. Plaintiff left, without quitting, and later returned; and they patched up their differences. When plaintiff returned to work the next day, she proposed going to get drinks to celebrate all the birthdays, an informal gathering to cement the relationships of all who worked at Peony. She was eager to get things back on a good working relationship.

The Commission concluded that plaintiff's injury arose out of and in the course of her employment, and ordered that the case be reset to determine all issues pertaining to compensation and other benefits due the plaintiff.

[1] We first turn to employer's first three assignments of error challenging certain findings of fact made by the Commission. Our scope of review is:

> Under the provisions of G.S. 97-86, the Industrial Commission is the fact finding body and the rule under the uniform decisions of this Court is that the findings of fact made by the Commission are conclusive on appeal, both before the Court of Appeals and in this Court, if supported by competent evidence. This is so even though there is evidence

which would support a finding to the contrary. (Citations omitted.)

> In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision.

Inscoe v. Industries, Inc., 292 N.C. 210, 216, 232 S.E. 2d 449, 452 (1977); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950).

Hansel v. Sherman Textiles, 304 N.C. 44, 49-50, 283 S.E. 2d 101, 104 (1981).

The employer first argues that the Industrial Commission erred in finding that the plaintiff and Ms. Sommer had an argument on 31 July 1984 which resulted in the plaintiff's announcing that she was quitting. Plaintiff testified that she quit on Tuesday morning. Sommer testified that they had a disagreement, that she lost her temper with plaintiff, and that plaintiff left. This evidence supports the challenged finding.

In the second assignment of error, employer argues the Commission erred in finding that one of the purposes of the trip to Darryl's was to make up for the incident on July 31 and to alleviate office tensions. Sommer testified that both she and plaintiff were eager to get things back to a good working relationship. She also testified that the invitation to Darryl's was open and impromptu. Sommer testified that the informal gathering was to cement the relationships of all who worked at Peony. We find no merit to employer's argument.

Employer's third assignment of error alleges the Industrial Commission erred in finding that the plaintiff was injured in a fall on the way to a company gathering and that the plaintiff was instructed or directed by her employer to stop the car to look at the trailer. Plaintiff testified that she stopped the car at Sommer's direction. Sommer testified that all three people who worked at Peony would be at Darryl's for drinks. The challenged

finding is supported by the evidence, and we thus find no merit to employer's argument.

[2] Having found that there is competent evidence to support the challenged findings, we now turn to the major issue in this case, the employer's contention that the Industrial Commission erred in concluding that the plaintiff sustained an injury arising out of and in the course of her employment and is entitled to benefits under the Workers' Compensation Act. To receive benefits under workers' compensation for accidental injury, an injured employee must prove that the injury arose out of the employment and that it occurred in the course of employment. G.S. 97-2(6); *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251-52, 293 S.E. 2d 196, 198 (1982); *Fortner v. J. K. Holding Company*, 83 N.C. App. 101, 103, 349 S.E. 2d 296, 297 (1986). Each of these elements has a distinct meaning and both must be satisfied. "The 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." *Hoyle, supra*, at 251, 293 S.E. 2d at 198.

The Supreme Court, in *Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 292, 328 S.E. 2d 282, 285-86 (1985), *quoting Hoffman v. Truck Lines, Inc.*, 306 N.C. 502, 506, 293 S.E. 2d 807, 809-10 (1982) stated:

> "[w]hether an injury arose out of and in the course of employment is a mixed question of law and fact, and where there is evidence to support the Commissioner's findings in this regard, we are bound by those findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E. 2d 676, 678 (1980). An appellate court is, therefore, justified in upholding a compensation award if the accident is "fairly traceable to the employment as a contributing cause" or if "any reasonable relationship to employment exists." *Kiger v. Service Co.*, 260 N.C. 760, 762, 133 S.E. 2d 702, 704 (1963). In other words, compensability of a claim basically turns upon whether or not the employee was acting for the benefit of his employer "to any appreciable extent" when the accident occurred. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 452, 85 S.E. 2d 596, 600 (1955). Such a determination depends largely upon the unique facts of each particular case, and, in close cases, the benefit of the doubt concerning this issue should be given to the employee

in accordance with the established policy of liberal construction and application of the Workers' Compensation Act. *See Watkins v. City of Wilmington*, 290 N.C. 276, 225 S.E. 2d 577 (1976); *Harden v. Furniture Co.*, 199 N.C. 733, 155 S.E. 728 (1930).

The facts of this case indicate that plaintiff was on a "special errand" for her employer. The "special errand" rule provides that an employee is entitled to benefits under Workers' Compensation if he is injured while performing a special duty or errand for the employer. *See Powers v. Lady's Funeral Home*, 57 N.C. App. 25, 30-32, 290 S.E. 2d 720, 723-25, *rev'd*, 306 N.C. 728, 295 S.E. 2d 473 (1982). Plaintiff was on her way to a company gathering with her supervisor when she was asked to run several errands for Sommer—*i.e.* to go by the post office, to go by the mall to pick up pictures of Sommer's vacation, and to turn the car around and go look at the "trailer for rent."

The employer argues the trip was solely for personal reasons and the two women were acting as friends. The Industrial Commission adopted the Deputy Commissioner's finding that "one of the reasons for this meeting was to alleviate office tensions." That reason is clearly of substantial benefit to the employer. This trip also qualifies as compensable under the dual purpose rule, as stated in *Humphrey v. Laundry*, 251 N.C. 47, 51, 110 S.E. 2d 467, 470 (1959):

> "The test in brief is this: If the work of the employee creates the necessity for travel, such is in the course of his employment, though he is serving at the same time some purpose of his own. . . . If however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel was then personal, and personal the risk."

Getting all employees together to celebrate birthdays and cement relationships is a business purpose. Thus, while there were also personal reasons for the trip, the resulting injury is compensable.

The remaining assignment of error by employer alleges that the Industrial Commission erred in finding that the plaintiff has

not returned to work as a result of her injury. Since the Commission has correctly ordered the case reset to be heard on *all* issues pertaining to compensation and benefits, we need not consider that issue at this time.

The Opinion and Award of the Industrial Commission is

Affirmed.

Judges PHILLIPS and PARKER concur.

STATE OF NORTH CAROLINA v. CRAIG RAYMOND KNOLL

No. 8610SC424

(Filed 3 February 1987)

1. **Arrest and Bail § 7; Automobiles and Other Vehicles § 125— driving while impaired—statutory right of access to counsel and friends**

In a prosecution for driving with a blood alcohol level of .10 or more, defendant was denied his statutory right of access to counsel and friends where the district court judge found that the magistrate failed to inform defendant of the general circumstances under which he could secure pretrial release as required by N.C.G.S. 15A-511(b) and failed to determine conditions of pretrial release in accordance with N.C.G.S. 15A-533(b) and 534(c).

2. **Arrest and Bail § 7— driving while impaired—denial of access to counsel and friends—prima facie prejudice rule inapplicable**

Application of a *per se* prejudice rule because of the statutory denial of access to counsel and friends is inappropriate in cases involving a violation of N.C.G.S. § 20-138.1(a)(2), driving with an alcohol concentration of .10 or more. Rather, a defendant must show that significant evidence helpful to his defense was lost as a result of the denial of his statutory right of access.

3. **Arrest and Bail § 7— driving while impaired—denial of access to friends and counsel—no prejudice**

There was no prejudice in a prosecution for driving with a blood alcohol level of .10 or more where defendant was denied his statutory right of access to counsel and friends but defendant's blood alcohol level was .30 and alone constituted sufficient evidence to convict defendant. The district court's application of the *per se* prejudice rule of *State v. Hill*, 277 N.C. 547, was not supported by findings indicating what, if any, evidence bearing on the issue of guilt or innocence was lost.

4. Automobiles and Other Vehicles § 126.4— intoxilyzer test—right to second test

In a prosecution for driving with a blood alcohol concentration of .10 or more, the evidence was inconclusive and inadequate to support the trial court's finding of fact that defendant was prejudiced when, after blowing a .30 on the first test, defendant asked "May I please take this test again?" and was told no. The uncontradicted evidence was that defendant was advised orally and in writing of his right to obtain a second test and it was not clear whether the officer's refusal to permit defendant to take the test again was a permissible denial of a request to have the State administer a second test or a denial of defendant's statutory right to have an independent test.

APPEAL by the State from *Farmer, Judge*. Order entered 19 February 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 17 September 1986.

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

Crumpler & Scherer, by William B. Crumpler and Sally H. Scherer, for the defendant appellee.

ORR, Judge.

Defendant, Craig Raymond Knoll, was charged with a violation of N.C.G.S. § 20-138.1, driving with an alcohol concentration of 0.10 or more. The district court dismissed the charge against defendant and the superior court affirmed the dismissal on the grounds that defendant was denied his constitutional and statutory rights of access to counsel and friends after being arrested.

This Court is faced with two issues for consideration. First, was there a substantial violation of defendant's constitutional and statutory right of access to counsel and friends. We hold that defendant's statutory right of access to counsel and friends was, in fact, substantially violated. The second issue to be determined is whether the trial court erred in dismissing the charge against defendant based upon a *per se* rule of prejudice. As to that contention, we hold that the trial court's ruling was in error.

Defendant was stopped by a Raleigh police officer at 1:15 p.m. on 17 April 1984 and was charged with driving while impaired. Defendant was taken to the Wake County Courthouse where, at approximately 2:31 p.m., he took the intoxilyzer test. The results showed defendant's alcohol concentration to be 0.30.

A magistrate set defendant's bond at $300.00. Around 4:00 p.m. defendant made several requests to phone his father. Defendant stated that he was allowed to call his father around 5:00 p.m. Defendant's father claimed that the magistrate told him over the phone that his son could not be released until 11:00 p.m. Defendant's father, therefore, did not come to the station immediately but did post bond for his son, sometime later that night.

I.

[1] There are three statutes that are applicable to the issue of whether there was a substantial violation of defendant's statutory right of access to counsel and friends. N.C.G.S. § 15A-511(b) states in part:

> (b) Statement by the Magistrate.—The magistrate must inform the defendant of:
>
> (1) The charges against him;
>
> (2) His right to communicate with counsel and friends; and
>
> (3) The general circumstances under which he may secure release under the provisions of Article 26, Bail.

N.C.G.S. § 15A-533(b) reads in applicable part:

> (b) A defendant charged with a noncapital offense must have conditions of pretrial release determined, in accordance with G.S. 15A-534.

N.C.G.S. § 15A-534(c) reads in pertinent part:

> (c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of the evidence against the defendant; . . . whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; . . . and any other evidence relevant to the issue of pretrial release.

The district court judge in the case *sub judice* found as a fact that the magistrate failed to inform defendant of the general cir-

cumstances under which he could secure pretrial release as required by N.C.G.S. § 15A-511(b) and failed to determine conditions of pretrial release in accordance with N.C.G.S. §§ 15A-533(b) and 534(c). The district court further found that, but for these statutory deprivations, defendant could have secured release from jail and access to friends and family.

Because the record is void of any evidence to the contrary, this Court is bound by those factual findings of the district court. *Fast v. Gulley*, 271 N.C. 208, 211, 155 S.E. 2d 507, 509 (1967) (findings of fact by the trial court which are supported by competent evidence are conclusive on appeal). This Court, therefore, finds that defendant was substantially deprived of his statutory rights as set forth above. Having found a substantial violation of defendant's statutory rights, we do not reach the question of whether a violation of his constitutional rights occurred.

II.

[2] Next, we address the issue of whether the trial court erred in finding that defendant's case was irreparably prejudiced by the substantial deprivation of statutory rights and thus the only appropriate remedy was the dismissal of the charge against defendant. *See State v. Shadding*, 17 N.C. App. 279, 282-83, 194 S.E. 2d 55, 57, *cert. denied*, 283 N.C. 108, 194 S.E. 2d 636 (1973) (noting that failure to afford defendant remedy for a violation of N.C.G.S. § 20-16.2 would render the statute meaningless).

No case should be dismissed for the violation of a defendant's statutory rights unless, at the very least, these violations cause irreparable prejudice to the defendant's preparation of his case. *See State v. Curmon*, 295 N.C. 453, 457, 245 S.E. 2d 503, 505 (1978) ("A mere technical error will not entitle a defendant to a new trial; rather, it is necessary that the error be material and prejudicial.").

In regard to this second issue, the State contends that the district court erred in dismissing the charge against defendant because it applied the *per se* prejudice rule formulated in *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971). *Hill* involved a defendant charged with driving under the influence of an intoxicating liquor. The defendant had called his attorney who immediately went to the jail and arranged bond for him. After having posted

bond, the jailer refused to release Hill to the custody of his attorney.

Upon review by the Supreme Court of North Carolina, the majority in an opinion by Justice (later Chief Justice) Sharp, dismissed the prosecution against Hill and set forth the following rule:

> [T]he rule we now formulate will be uniformly applicable hereafter. It may well be that here "the criminal is to go free because the constable blundered." *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587. Notwithstanding, when an officer's blunder deprives a defendant of his only opportunity to obtain evidence which might prove his innocence, the State will not be heard to say that such evidence did not exist. *In Re Newbern*, 175 Cal. App. 2d 862, 1 Cal. Rptr. 80.

State v. Hill, 277 N.C. at 555, 178 S.E. 2d at 467.

Hill was prosecuted under N.C.G.S. § 20-138 (repealed 1983) for unlawfully operating a motor vehicle on a public street while under the influence of an intoxicating liquor. 1937 N.C. Sess. Laws ch. 407, § 101; 1971 N.C. Sess. Laws ch. 619, § 1; and 1973 N.C. Sess. Laws ch. 1081, § 1. Under that statute there was only one offense—driving under the influence.

> A person is under the influence within the meaning of G.S. 20-138 when he has drunk a sufficient amount of intoxicating beverage or taken a sufficient amount of narcotic drug to cause him to lose normal control of his bodily or mental faculties or both to such an extent that there is an appreciable impairment of either or both of these faculties. *State v. Ellis*, 261 N.C. 606, 135 S.E. 2d 584 (1964); *State v. Carroll*, 226 N.C. 237, 37 S.E. 2d 688 (1946).

State v. Jenkins, 21 N.C. App. 541, 543, 204 S.E. 2d 919, 921 (1974).

Prior to 1973, chemical analysis results could only establish an inference that the defendant was under the influence. *State v. Jenkins*, 21 N.C. App. 541, 204 S.E. 2d 919. The jury was free to acquit a defendant no matter what the results of the chemical analysis showed. *State v. Cooke*, 270 N.C. 644, 155 S.E. 2d 165 (1967). Likewise, the jury could convict without any chemical

analysis, based upon other evidence relating to the observed impairment of a defendant's physical or mental faculties.

Under N.C.G.S. § 20-138, it was therefore critical to the defense that the defendant immediately upon being charged be able to gather evidence that would potentially persuade a jury that his mental and physical faculties were, in fact, not appreciably impaired. In *Hill* the denial of access to counsel and friends was clearly prejudicial since it did, in fact, deprive the defendant of his only opportunity to obtain evidence which might prove his innocence. As the defendant's condition changed over time, the evidentiary value of access to counsel and friends evaporated.

In 1973 a new offense was created, driving with an alcohol concentration of 0.10 or more. 1973 N.C. Sess. Laws ch. 1081, § 1. This statute is codified as N.C.G.S. § 20-138.1(a)(2) and states in part that "[a] person commits the offense of impaired driving if . . . after having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.10 or more."

Because of the change in North Carolina's driving while intoxicated laws, denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case. While denial of access was clearly prejudicial in *Hill*, under the current 0.10 statute, a defendant's only opportunity to obtain evidence is not lost automatically, when he is detained, and improperly denied access to friends and family. Prejudice may or may not occur since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict.

It is certainly possible that a defendant might be prejudiced by a denial of access or unwarranted detention. Such prejudice could occur, for example, where a defendant was not advised of his right to have a second chemical test, *State v. Shadding*, 17 N.C. App. 279, 282-83, 194 S.E. 2d 55, 57, *cert. denied*, 283 N.C. 108, 194 S.E. 2d 636 (1973), or where his right to secure a second test was denied. *See State v. Fuller*, 24 N.C. App. 38, 42, 209 S.E. 2d 805, 808 (1974) (failure of the State to establish that defendant was accorded the right to obtain an additional test rendered State's breath analysis inadmissible). Prejudice might also occur,

for example, if pertinent evidence relating to contested elements of the offense, such as whether the defendant was in fact driving, became unavailable as a result of the denial of access.

However, at the very least, a defendant must show that "lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost" as a result of the statutory deprivations of which he complains. *State v. Dietz*, 289 N.C. 488, 493, 223 S.E. 2d 357, 360 (1976) (discussing what constitutes prejudice in preindictment delay cases). Therefore, we hold that application of a *per se* prejudice rule as set forth in *Hill* is inappropriate in cases involving a violation of N.C.G.S. § 20-138.1(a)(2), driving with an alcohol concentration of 0.10 or more.

[3] In the case before us, defendant's blood alcohol level was 0.30 —substantially in excess of 0.10. Therefore, the result of the chemical analysis alone constitutes evidence sufficient to convict defendant. N.C.G.S. § 20-138.1(a)(2) (1983). From the findings of fact, it is obvious that the court below applied the *Hill* test to determine whether defendant's rights were prejudiced. Nothing in the record supports the trial court's findings that would clearly indicate what, if any, evidence bearing on the issue of guilt or innocence was lost.

Such findings are, therefore, inadequate to support the dismissal of the charge in this case.

[4] Of particular significance in this case is the finding of fact that defendant had asked the arresting officer to allow him to take the intoxilyzer test again. Defendant's second affidavit, introduced into evidence at the hearing, states that after blowing a 0.30 on the first test Knoll asked the arresting officer, "May I please take this test again?" The officer, according to the defendant's affidavit, said "No."

It is unclear from the evidence whether defendant was asking to retake the State administered test or to be allowed to take a second independent test. The "Affidavit and Revocation Report of Chemical Analyst" states that defendant was informed "orally" and "in writing" of his rights pursuant to N.C.G.S. § 20-16.2(a). That statute requires in part that the defendant "may have a qualified person of his own choosing administer a chemical test or

tests in addition to any test administered at the direction of the charging officer."

The uncontradicted evidence then, is that defendant was advised orally and in writing of his right to obtain a second test. It is unclear whether the officer's refusal to permit defendant "to take this test again" was a permissible denial of a request to have the State administer a second test or a denial of defendant's statutory right to have an independent test made. As pointed out in *State v. Fuller*, 24 N.C. App. 38, 209 S.E. 2d 805 (1974), "[s]hould it be established that defendant was advised of his right to have another test, and he failed to obtain one or was unable to obtain one, G.S. 20-139.1(d) provides that the admissibility in evidence of the results of the test administered is not precluded." 24 N.C. App. at 42, 209 S.E. 2d at 808.

"The failure of the State to establish that defendant was accorded this statutory right, in addition to the others which he was properly accorded, rendered the results of the breathalyzer test inadmissible in evidence." *Id.* at 42, 209 S.E. 2d at 808.

The evidence in the present case is inconclusive on this point and, therefore, inadequate to support the trial court's finding of fact that defendant was prejudiced as a result.

This case is reversed and remanded for trial. The superior court shall enter an order remanding this case to the district court for further proceedings in accordance with this opinion.

Reversed and remanded for trial.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. SAMSON WARREN, JR.

No. 8610SC423

(Filed 3 February 1987)

Arrest and Bail § 7— driving while impaired—access to counsel and friends—denial of statutory right—absence of prejudice

Defendant was not prejudiced by the denial of his statutory right of access to counsel and friends after his arrest for driving while impaired.

State v. Warren

APPEAL by the State from *Farmer, Judge.* Order entered 19 February 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 17 September 1986.

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

Crumpler & Scherer, by William B. Crumpler and Sally H. Scherer, for the defendant appellee.

ORR, Judge.

Defendant, Samson Warren, Jr., was charged with driving while impaired in violation of N.C.G.S. § 20-138.1 and with illegally transporting liquor in the passenger area of his car under N.C.G.S. § 18B-401. The district court dismissed the driving while impaired charge against defendant and the superior court affirmed the dismissal on the grounds that defendant was denied his constitutional and statutory rights of access to counsel and friends after being arrested.

Defendant was stopped by a North Carolina State University Campus Policeman on 29 March 1984 at 10:11 p.m. He was taken to the Wake County Courthouse where a breath analysis was administered at 11:08 p.m. The results of this test showed that defendant had an alcohol concentration of 0.25. Defendant was brought before a magistrate who set secured bond at $500.00.

Dr. Donald C. Martin, head of the North Carolina State University Computer Science Department, and his son arrived at the magistrate's office between 11:00 p.m. and 11:30 p.m. while defendant was undergoing breath analysis. Dr. Martin had $300.00 and was willing to assume responsibility for defendant. However, the magistrate told Dr. Martin that defendant would have to be in jail until 6:00 a.m. to sober up. Upon learning this, Dr. Martin and his son left, returning at 8:00 a.m. to arrange for defendant's release.

For the reasons set forth in *State v. Knoll*, 84 N.C. App. 228, 352 S.E. 2d 463 (1987), we reverse and remand this case for trial. The superior court shall enter an order remanding this case to the district court for further proceedings in accordance with this opinion.

Reversed and remanded for trial.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. BENNIE GARLAND HICKS

No. 8610SC422

(Filed 3 February 1987)

Arrest and Bail § 7— driving while impaired—denial of statutory right of access to counsel and friends—absence of prejudice

Defendant was not prejudiced by the denial of his statutory right of access to counsel and friends after his arrest for driving while impaired.

APPEAL by the State from *Farmer, Judge.* Order entered 19 February 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 17 September 1986.

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

Crumpler & Scherer, by William B. Crumpler and Sally H. Scherer, for the defendant appellee.

ORR, Judge.

Defendant, Bennie Garland Hicks, was charged with driving while impaired, pursuant to N.C.G.S. § 20-138.1, and speeding. The district court dismissed the driving while impaired charge against defendant and the superior court affirmed the dismissal on the grounds that defendant was denied his constitutional and statutory rights of access to counsel and friends after being arrested.

Defendant was stopped for speeding in Knightdale, North Carolina, on 28 April 1984 at approximately 12:45 a.m. He was then taken to the Wake County Courthouse, where at 1:35 a.m. the arresting officer requested that defendant submit to chemical analysis. Defendant submitted to the analysis and had an alcohol concentration of 0.18. Defendant was then taken before a magistrate who set a $200.00 secured bond.

Defendant was allowed to call his wife in Wendell, but she was unable to come to the jail to pick him up.

Defendant told the magistrate that he had adequate funds to post bond and showed the required amount of money to the magistrate. The arresting officer told the magistrate of defendant's call to his wife. However, defendant was not allowed to post bond and was committed to jail at approximately 2:00 a.m. He remained in jail until 6:00 a.m. that morning.

For the reasons set forth in *State v. Knoll*, 84 N.C. App. 228, --- S.E. 2d --- (1987) (No. 8610SC424, filed 3 February 1987), we reverse and remand this case for trial. The superior court shall enter an order remanding this case to the district court for further proceedings in accordance with this opinion.

Reversed and remanded for trial.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. FRANKLIN KEITH BOWMAN

No. 8625SC263

(Filed 3 February 1987)

1. Rape and Allied Offenses § 19— indecent liberties—evidence sufficient

The evidence was sufficient to warrant the inference that defendant willfully took or attempted to take an indecent liberty with a child for the purpose of arousing or gratifying his sexual desire where the evidence showed that when the victim awoke, she found her pajamas at her feet and defendant in her room; she heard defendant unzip his pants and take off his boots; defendant climbed on top of her; defendant made the bed shake, kissed her cheek, and touched her "pee pee"; and defendant at the time of the incident was twenty-nine years old while the child was eight years seven months old. N.C.G.S. 14-202.1(a)(1).

2. Rape and Allied Offenses § 19; Criminal Law § 50.1— indecent liberties—delay in reporting—expert opinion admissible

The trial court did not err in a prosecution for taking indecent liberties with a minor by admitting the testimony of the victim's pediatrician that a delay between the occurrence of an incidence of child sexual abuse and the child's revelation of the incident was the usual pattern where the witness was a stipulated expert physician specializing in family medicine; his testimony was

based on his knowledge, skill, experience, training, and education as a physician; and defendant opened the door to corroboration of the victim by cross-examining her about her delay in reporting the incident. N.C.G.S. 8C-1, Rule 702.

3. **Rape and Allied Offenses § 19; Criminal Law § 50.2— indecent liberties—opinion of officer—not admissible**

The trial court erred in a prosecution for taking indecent liberties with a minor by admitting the testimony of a police officer that a child of the victim's age did not have the necessary information about sexuality to fantasize where the officer had not been qualified as an expert. There was prejudice because the State's case against defendant was almost totally dependent on the credibility of the victim. N.C.G.S. 8C-1, Rule 701.

APPEAL by defendant from *Hairston, Judge*. Judgment entered 10 October 1985 in Superior Court, CALDWELL County. Heard in the Court of Appeals 20 August 1986.

Attorney General Lacy H. Thornburg by Assistant Attorney General G. Patrick Murphy for the State.

Wilson and Palmer by W. C. Palmer for defendant appellant.

COZORT, Judge.

Defendant was tried upon a proper indictment issued 14 January 1985 charging him with (1) first-degree rape, G.S. 14-27.2, and (2) taking indecent liberties with a minor, G.S. 14-202.1. Defendant was convicted of taking indecent liberties with a minor and sentenced to the presumptive term of three years in prison. On appeal defendant alleges (1) that the trial court should have granted his motion to dismiss the indecent liberties charge against him because the State's evidence was insufficient, and (2) that the testimony of two State witnesses was improperly admitted because it exceeded corroboration of the victim's credibility and was without adequate foundation. We find no error in the trial court's refusal to dismiss the indecent liberties charge. We grant a new trial on one evidentiary issue, finding prejudicial error in the trial court's admission of expert testimony from a lay witness.

The State's evidence tended to show that in March 1983, the victim, an eight-year-seven-month-old girl, and her sister were left in the care of the defendant when the girls' father took their mother to Caldwell Memorial Hospital to be treated for a mi-

graine headache. The victim had been adopted by her stepfather, who is the brother of the defendant. The victim testified that on the night in question she awoke and found her pajamas at her feet. She heard defendant unzip his pants and take off his boots. Defendant got on top of her in her bed. The victim did not remember what part of defendant's body touched her, but she did remember the bed was shaking while he was on top of her. She did not know which direction defendant was facing because, although the hallway light was on, her room was dark. The victim testified defendant kissed her on the cheek and touched her "pee pee." She did not remember how long defendant was on top of her; however, her stomach hurt below her waist while he was on top of her. After defendant got up, the victim heard him zip up his pants and pick up his boots. She stated defendant told her not to tell her parents of the incident. At the time of the incident, the defendant was twenty-nine years old.

The victim testified her vaginal area had gotten red four or five times after the incident. One night about a year later, her mother saw it while she was bathing. She told her mother about the incident. She told Dr. Marc Guerra about the incident during an examination on 25 March 1984. The initial report was filed with the Caldwell County Sheriff's Department on 30 March 1984, and Sergeant Henrietta Lane interviewed the victim on 13 April 1984.

Donald Bowman, the victim's father, testified he and several family members, including defendant, went to Sims Country Barbecue on a night in 1983 and defendant signed a register that night at the business. Defendant and Donald later went to a night spot and returned to Donald's house around 1:00 a.m. Later that night Donald left his children with defendant while he took his wife to the hospital to obtain treatment for a migraine headache. Donald testified that about a year had passed between the night he took his wife to the hospital and the time the victim told her mother about defendant molesting her.

Dr. Marc Guerra testified he examined the victim on 25 March 1984, and she related the incident to him. His examination revealed no physical evidence of rape. Nancy Bowman, the victim's mother, and Sergeant Henrietta Lane, juvenile officer for

the Caldwell County Sheriff's Department, both testified that the victim had related the incident to them.

The defendant's evidence was an alibi tending to show defendant was in Virginia and not in Lenoir the night the incident was alleged to have occurred. Defendant and four defense witnesses testified to his presence in Virginia.

[1] Defendant assigns as error the trial court's denial of the defendant's motion to dismiss the indecent liberties charge at the close of the State's evidence on the grounds of insufficient evidence. Defendant was convicted under G.S. 14-202.1(a)(1), which reads as follows:

> Taking indecent liberties with children:
>
> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> . . . .

Defendant argues that, while the evidence may appear damaging at first glance, upon scrutiny of the testimony as a whole, the specific intent to commit a sexual act or "arouse or gratify sexual desire" is absent. We disagree and find the evidence sufficient.

> [U]pon a motion to dismiss in a criminal action, all the evidence admitted, whether competent or incompetent, must be considered by the trial judge in the light most favorable to the State, giving the State the benefit of every reasonable inference that might be drawn therefrom. Any contradictions or discrepancies in the evidence are for resolution by the jury. . . . The trial judge must decide whether there is substantial evidence of each element of the offense charged. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Brown, 310 N.C. 563, 566, 313 S.E. 2d 585, 587 (1984) (citations omitted). "It is immaterial whether the substantial evidence is circumstantial or direct, or both." *State v. Jones*, 303 N.C. 500, 504, 279 S.E. 2d 835, 838 (1981) (quoting *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431 (1956)). Circumstantial evidence need not exclude every reasonable hypothesis of innocence. *Id.*

State v. Diaz, 317 N.C. 545, 546-47, 346 S.E. 2d 488, 490 (1986).

The evidence taken in the light most favorable to the State shows when the victim awoke she found her pajamas at her feet and the defendant in her room. She heard the defendant unzip his pants and take off his boots. Then defendant climbed on top of her. The victim testified defendant made the bed shake, kissed her cheek, and touched her "pee pee." The defendant at the time of the incident was twenty-nine years old, and the child was eight years seven months old. We hold this evidence was sufficient to warrant the inference that the defendant willfully took or attempted to take an indecent liberty with a child for the purpose of arousing or gratifying his sexual desire.

[2] Defendant's next assignment of error challenges the admission into evidence of testimony by two of the State's corroborating witnesses. We first examine the testimony of Dr. Guerra, who examined the victim on 25 March 1984. Dr. Guerra testified on direct examination that a delay between the occurrence of an incident of child sexual abuse and the child's revelation of the incident was the usual pattern of conduct for victims of child sexual abuse. Defendant contends this testimony was prejudicial because it suggested to the jury that the alleged victim was a victim of child sexual abuse. The State argues the defendant opened the door by attacking the victim's credibility on cross-examination. The defendant contends Dr. Guerra's testimony goes far beyond the corroboration of the alleged victim and was improperly admitted.

If scientific, technical, or 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. G.S. 8C-1, Rule 702. Dr. Guerra was a stipulated expert physician and surgeon specializing in family medicine. Dr.

Guerra's testimony concerning a child's delay in reporting an incident of child sexual abuse as being normal was based on his knowledge, skill, experience, training and education as a physician. We find no error in the admission of Dr. Guerra's testimony.

This case is distinguishable from *State v. Stafford*, 317 N.C. 568, 346 S.E. 2d 463 (1986), where the Supreme Court addressed a situation *similar* to this case. In *Stafford*, the victim testified that she awoke one night and found her uncle in her bedroom, and her uncle raped her. The child did not reveal the event to anyone until a month later. The medical expert in that case testified that he could not form an opinion concerning whether the victim suffered from rape trauma syndrome, but he testified about symptoms the victim revealed to him which were consistent with the syndrome. Some of these symptoms were not testified to by the victim at trial. The Supreme Court upheld this Court's reversal of the lower court's ruling, finding that the medical expert's testimony concerning symptoms not testified to by the victim went far beyond corroborating the testimony of the alleged victim; and its admission was error. *Id.* at 575, 346 S.E. 2d at 467. These statements to the physician were made for the purpose of preparation for trial, not treatment or diagnosis, and do not qualify under G.S. 8C-1, Rule 803(4).

In the present case the defendant cross-examined the victim concerning her delay in reporting the incident. This cross-examination opened the door for the State to corroborate the victim's testimony. Dr. Guerra's testimony concerning delay in a child's reporting sexual abuse cases was used to corroborate victim's credibility after defendant's cross-examination attacked her credibility and therefore was properly admitted. It was admissible testimony which corroborated the testimony of the victim.

[3] Next we examine Sergeant Lane's testimony on redirect examination that a "child of that age does not have the necessary information about sexuality to fantasize any of it." Defendant contends that testimony went far beyond the corroboration of the victim's testimony with no adequate foundation for the testimony. We agree with defendant that there was no adequate foundation for this testimony.

Sergeant Lane was not qualified as an expert witness and was testifying as a lay witness. The standard used for a lay wit-

ness's testimony is found in G.S. 8C-1, Rule 701, which reads as follows:

> Opinion testimony by lay witness.
>
> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

The prosecution's redirect examination of Sergeant Lane reads as follows:

> Q. In your training for the examination and investigation of child sex abuse cases, you've testified in your prior testimony that you were taught certain things regarding how to separate fantasy from fact, is that correct?
>
> A. Correct.
>
> Q. And what were you taught about a child's propensity to fantasize in these matters at the age of eight years old?
>
> MR. PALMER:—OBJECTION.
>
> THE COURT:—OVERRULED.
>
> A. A child of that age does not have the necessary information about sexuality to fantasize any of it.

Since Sergeant Lane had not been qualified as an expert, she could not testify to this opinion.

Having found that the court erred in allowing Sergeant Lane to testify concerning a child's ability to sexually fantasize, we must determine whether the error was so prejudicial as to warrant a new trial.

> A defendant is prejudiced by adverse evidentiary rulings where 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." N.C.G.S. § 15A-1443 (1983).

State v. Aguallo, 318 N.C. 590, 350 S.E. 2d 76, 82 (1986).

In this case, only the defendant and the victim purported to have personal knowledge of whether the alleged incident charged against the defendant actually occurred. The testimony given by each absolutely conflicted with the testimony of the other. The State's case against the defendant was almost totally dependent on the credibility of the victim. Due to these circumstances, we can only conclude that the erroneous admission of Sergeant Lane's testimony concerning a child's ability to create sexual fantasies demonstrates a "reasonable possibility" that a different result would have been reached at trial had the error not been committed. As a result, we hold the defendant is entitled to a new trial.

New trial.

Judges BECTON and JOHNSON concur.

CARTWOOD CONSTRUCTION COMPANY, INC. v. WACHOVIA BANK & TRUST COMPANY, N.A., NORTHWESTERN BANK, FIRST FINANCIAL SAVINGS & LOAN ASSOCIATION, INC. AND WACHOVIA BANK & TRUST COMPANY, N.A. v. VIRGIL REID PATTERSON, D/B/A THE PATTERSON COMPANY

No. 8621SC616

(Filed 3 February 1987)

1. Banks § 11.2; Uniform Commercial Code § 36— joint checks—forged endorsements—summary judgment for issuing bank proper

In an action to recover the proceeds of several joint checks that were written on a construction loan agreement, delivered to someone other than plaintiff contractor and paid on allegedly forged endorsements, the trial court did not err by granting summary judgment for defendant First Financial Savings and Loan, which issued the checks, where the loan agreement was between First Financial and Tyndall, the borrower and co-payee; Financial did not assume the duty to make money available to anyone other than Tyndall; and the affixing of plaintiff's name to the checks did not itself create an affirmative duty to deliver the checks to plaintiff.

2. Uniform Commercial Code § 36; Banks § 11.2— joint checks—forged endorsement—summary judgment for depository bank—improper

In an action against a depository bank for the conversion of checks paid upon allegedly forged endorsements, the trial court erred by granting summary judgment for the bank where it was undisputed that the checks were made in part to plaintiff, that plaintiff did not endorse the checks, and that the checks were deposited with the bank. Under N.C.G.S. 25-3-419, an instrument is converted when it is paid upon a forged endorsement, plaintiff had made a *prima facie* showing of the bank's liability, and the bank was thus not entitled to summary judgment; however, the trial court correctly granted summary judgment for the bank on plaintiff's negligence claim because the bank's duties are specifically defined under N.C.G.S. 25-3-419.

3. Uniform Commercial Code § 36; Banks § 11.2— joint checks—forged endorsement—summary judgment before paying bank—improper

The trial court erred by granting summary judgment for defendant Northwestern Bank in a conversion action where plaintiff's evidence that Northwestern paid the checks on forged endorsements established a *prima facie* case of conversion under N.C.G.S. 25-3-419 (1986).

Judge WELLS dissenting in part and concurring in part.

APPEAL by plaintiff from *Seay, Judge.* Order entered 3 February 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 13 November 1986.

Nifong, Ferguson & Sinal, by Paul A. Sinal and Of Counsel Deborah L. Parker, for plaintiff appellant.

Williams Kearns Davis and Stephen M. Russell and Of Counsel, Bell, Davis & Pitt, P.A., for Wachovia Bank & Trust Company; W. R. Loftis, Jr. and Penni Pearson Bradshaw and Of Counsel Petree Stockton & Robinson for Northwestern Bank; William G. McNairy, John H. Small, Jim W. Phillips, Jr. and Of Counsel Brooks, Pierce, McLendon, Humphrey & Leonard, for First Financial Savings and Loan Association.

BECTON, Judge.

This is an action by plaintiff, Cartwood Construction Company (Cartwood), to recover the proceeds of several checks that were deposited with defendant Wachovia Bank and Trust Company (Wachovia) and paid by defendant Northwestern Bank (Northwestern). Cartwood alleged that the proceeds from the checks were paid on forged endorsements and that Wachovia and Northwestern are liable for conversion. Additionally, Cartwood

sued the maker of the checks, First Financial Savings and Loan Association (First Financial), and Wachovia for their alleged negligence in handling the checks. The trial judge granted motions for summary judgment in favor of all three defendants. Cartwood appeals. We affirm the trial judge's order granting summary judgment for First Financial and Wachovia on the negligence claim, but we reverse the trial judge's order granting summary judgment for Wachovia and Northwestern on the conversion claim.

I

The following facts are not in dispute. Tony and Teresa Tyndall borrowed $75,000 from First Financial to finance the construction of a new home. The Tyndalls wanted Virgil Reid Patterson to construct the home. However, because Patterson did not have a license and could not obtain a performance bond as required by North Carolina law, Cartwood agreed with Patterson that Cartwood would obtain the necessary bonds. Cartwood was named as the contractor on various documents, including the bid proposal, the loan agreement between the Tyndalls and First Financial, and the agreement between the Tyndalls and the contractor.

As construction proceeded, First Financial made progress payments in the form of checks from its account with defendant, Northwestern. The first six checks were payable to Tony Tyndall and Virgil Reid Patterson. The next eight were payable to Tony Tyndall and Cartwood Construction Company. Patterson received all fourteen of the checks and obtained the endorsement of Tony Tyndall before doing anything else with those checks. After obtaining Tyndall's endorsement on the first six checks, Patterson then endorsed those checks. He took the seventh check to James A. Carter, president of Cartwood, and Carter endorsed that check and gave it back to Patterson. Someone other than Carter himself signed James A. Carter's name onto the remaining checks which are the subject of this lawsuit. Patterson deposited all fourteen of the checks in the Patterson Company account at Wachovia. Wachovia presented each check to Northwestern for payment from First Financial's account, and Northwestern paid all of them.

Cartwood sued First Financial for negligence in making the first six checks payable to Patterson and in delivering all four-

teen of the checks to Patterson; Cartwood sued Wachovia for conversion and negligence for accepting six of the last seven checks; and Cartwood sued Northwestern for conversion for paying the six disputed checks.

II

First Financial Savings and Loan

[1] Cartwood contends that the trial judge erred in granting First Financial's motion for summary judgment since various documents, including the Tyndall/First Financial loan agreement, put First Financial on notice that Cartwood was the contractor. Cartwood also argues that the loan agreement itself, which states "that the proceeds of this loan are to be used for the payment of materials, bills, labor and for other uses and purposes in and for the construction of said building . . .," placed an affirmative duty on First Financial to make the checks payable to Cartwood and to deliver them to Cartwood. We disagree.

The loan agreement was between First Financial and the Tyndalls. Cartwood was not a party to that agreement. In fact, Cartwood's name was placed on the agreement by Patterson who was not even authorized to do so. Further, nowhere in the agreement does First Financial assume a duty to make money available to anyone other than the Tyndalls. The provision on which Cartwood relies merely describes what the Tyndalls may do with the money. Because no reasonable reading of the loan agreement obligates First Financial to pay Cartwood and because the affixing of Cartwood's name to the checks does not itself create an affirmative duty on First Financial's part to deliver the checks to Cartwood, this assignment of error is overruled.

III

Wachovia Bank and Trust Company

[2] Contending that the trial judge erred in granting Wachovia's motion for summary judgment on the conversion issue, Cartwood argues that it has established a *prima facie* case against Wachovia for conversion by showing that Wachovia accepted the six checks on an apparently forged endorsement. Wachovia counters, arguing that it cannot be liable for conversion because Cartwood had no interest in the proceeds of the checks.

Cartwood's interest in the proceeds under any underlying contract with the Tyndalls or Virgil Patterson is different from Wachovia's liability for its handling of the checks. Wachovia's liability, if any, based on its handling of the checks is governed by the provisions of the Uniform Commercial Code (Chapter 25 of the N.C. Gen. Stats.). We are mindful of this Court's holding in *Alamance Builders, Inc. v. CCB v. Slaughter*, 45 N.C. App. 46, 262 S.E. 2d 338 (1980). Wachovia cites that case as authority for the proposition that the pivotal issue in all cases involving a bank's conversion of a check is what interest the complaining party has in the check. *Alamance Builders* does not go that far.

In *Alamance Builders* this Court declined to reach the question whether the nonendorser was required to make out a *prima facie* case that he was entitled to recover the face amount of the check as provided by case law or whether as provided under N.C. Gen. Stat. Sec. 25-3-419, the nonendorser was *presumed* to be entitled to recover the face amount of the check. Instead this Court stated that in either case, the "answer turns on what *interest* the [nonendorsing] plaintiff had in the checks." (Emphasis added.) *Id.* at 47, 262 S.E. 2d at 338. In *Alamance Builders* the plaintiff's *interest* in the checks was dispositive because the application of either the presumption or the *prima facie* rule required the same factual inquiry. Plaintiff could recover only the amount to which he proved he was entitled or the amount to which defendant proved plaintiff was entitled. This Court reasoned that the difference between the two rules was one of burdens of proof and persuasion, not one of substance. *Alamance Builders* at 47, 262 S.E. 2d at 338.

In the case *sub judice* neither the *prima facie* rule nor the presumption applies. Wachovia is a depository bank, and N.C. Gen. Stat. Sec. 25-3-419 (1986) provides that a depository bank (defined in N.C. Gen. Stat. Sec. 25-4-105(a) (1986)), which deals with the instrument in "good faith and in accordance with reasonable commercial standards," is not liable in conversion beyond the amount of any proceeds remaining in its hands. The critical inquiry is whether the bank dealt with the instrument in good faith and in accordance with reasonable commercial standards, not what interest the plaintiff had in the checks.

Cartwood alleged, and it was undisputed, that James A. Carter did not endorse the six checks. Patterson deposited those checks in the Patterson Company account at Wachovia. Under N.C. Gen. Stat. Sec. 25-3-419 an instrument is converted when it is paid on a forged endorsement. Thus Cartwood made a *prima facie* showing of Wachovia's liability under that section. Wachovia was not entitled to summary judgment on the issue of conversion. Rather the fact finder should have decided whether the instruments were actually paid on a forged endorsement and, if so, whether Wachovia used reasonable commercial standards by paying the instruments, thus limiting the recovery to the amount of proceeds remaining in its hands.

Cartwood next contends that the trial judge erred in granting Wachovia's motion for summary judgment on the allegation of negligence. Cartwood argues that Wachovia's acceptance of the checks for deposit in Patterson's account gives rise to a separate action for negligence. We disagree. Wachovia's duties regarding its handling of the instruments are specifically defined under N.C. Gen. Stat. Sec. 25-3-419 which gives Cartwood an action in conversion and provides a remedy. This assignment of error is overruled.

IV

Northwestern Bank

[3] Cartwood's final contention is that the trial judge erred in granting Northwestern's motion for summary judgment on the allegation of conversion. Cartwood argues that its evidence that Northwestern paid the six checks on a forged endorsement establishes a *prima facie* case for conversion. We agree. N.C. Gen. Stat. Sec. 25-3-419 (1986) provides that conversion occurs when an instrument is paid on a forged endorsement and the drawee's liability is the face amount of the instrument. This was intended as a rule of "absolute liability" of the drawee. *See* N.C. Gen. Stat. Sec. 25-3-419 Official Comment 4 (1986). Cartwood's interest in the proceeds of the check is irrelevant under this provision of the statute. If the fact finder determines that the instrument was paid on a forged endorsement, the matter is settled. Northwestern was not entitled to summary judgment on this issue.

In summarizing, we reverse the trial judge's grant of summary judgment for Wachovia and Northwestern on the issue of conversion and remand for further proceedings consistent with this opinion, but we affirm the trial judge's grant of summary judgment for First Financial and Wachovia on the issue of negligence.

Affirmed in part; reversed and remanded in part.

Judge ORR concurs.

Judge WELLS dissents in part and concurs in part.

Judge WELLS dissenting in part and concurring in part.

I dissent from that portion of the majority opinion which holds that defendants Wachovia and Northwestern were not entitled to summary judgment on the issue of the alleged conversion of the disputed checks. In my opinion, the forecast of evidence before the trial court conclusively showed that plaintiff had no interest in the checks, and therefore, plaintiff was not entitled to recovery on its theory of conversion. *See Builders, Inc. v. Trust Co.*, 45 N.C. App. 46, 262 S.E. 2d 338 (1980).

I concur in all other aspects of the majority opinion.

LOUIS WILLIAM ALLISON v. FOOD LION, INCORPORATED

No. 8622SC520

(Filed 3 February 1987)

Malicious Prosecution § 13.2— probable cause—evidence sufficient

The trial court did not err by denying defendant's motions for a directed verdict and for j.n.o.v. in a suit alleging malicious prosecution arising from the prosecution of plaintiff for the unlawful concealment of two packs of cigarettes where plaintiff's evidence tended to show that he had purchased the cigarettes on his first trip to defendant's store and put them in his pocket; he had a receipt for the cigarettes but had not produced it because he was upset and because he had not been asked if he had a receipt; and defendant had declined to stop the prosecution when plaintiff returned the next day with the receipt.

Defendant's evidence to the contrary was a contradiction for the jury to resolve.

Judge PARKER dissenting.

APPEAL by defendant from *Mills, Judge.* Judgment entered 15 January 1985 in Superior Court, IREDELL County. Heard in the Court of Appeals 15 October 1986.

Jay F. Frank for plaintiff appellee.

Palmer, Miller, Campbell & Martin by Douglas M. Martin for defendant appellant.

COZORT, Judge.

Plaintiff filed suit against defendant alleging malicious prosecution resulting from the prosecution of Allison for unlawful concealment of two packs of cigarettes at the defendant's store. At the close of the plaintiff's evidence and at the close of all the evidence, defendant's motions for a directed verdict were denied. A $12,500 verdict was returned in favor of the plaintiff, and judgment was entered for the plaintiff in accordance with the jury verdict. Defendant appeals from the denial of its motions for directed verdict and motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. We affirm the trial court's denial of the motions.

Plaintiff's evidence tends to show that on 13 October 1984, plaintiff, a 72-year-old retired fork lift operator, went to Food Lion in Statesville, North Carolina. He was going to meet a man in the parking lot concerning a power saw. While plaintiff was waiting he went in Food Lion between 4:30 and 5:00 p.m. and bought four packs of Tarleton cigarettes. The plaintiff had a receipt for $3.30 dated 13 October 1984, as representing the four packs of cigarettes at seventy-nine cents each. Plaintiff testified he told the cashier he did not need a "poke" and put two packs of the cigarettes in his shirt pocket and two in his pants pocket. He then returned to the parking lot to wait for the man to bring the saw. While waiting there the plaintiff opened one pack and began to smoke them.

After waiting for the man with the saw for approximately two hours, the plaintiff went back in the Food Lion store between

6:30 and 7:00 p.m. to buy a loaf of bread and a six-pack. Plaintiff had a receipt for the bread and six-pack dated 13 October 1984 with 7:21 p.m. printed on it. Plaintiff testified that as he was leaving the check-out line, a man hit him on the leg and said, "You ain't paid for those cigarettes in your pocket." Plaintiff told the man he had bought the cigarettes earlier that day, and they were already paid for. He then gave the man the cigarettes from his pants pocket and offered to pay for them again. Plaintiff testified he told the manager he did not take the cigarettes. The manager replied that he did not see him take the cigarettes. The manager saw the two packs in his shirt pocket, one of which was open. After that, the police came in and gave plaintiff a citation. Plaintiff was never told what the citation was for, but he suspected it was for taking the two packs of cigarettes. Plaintiff became very upset and nervous while all this was going on. He was allowed to leave the store after he received the citation.

Plaintiff testified he and his son went back to the store the next day to show the manager the sales receipt. He did not show the manager the receipts on the day of the incident because he was too upset to think of it, and no one asked him for them. Plaintiff was told by the store manager and the security officer that his case would still have to go to court. Plaintiff was acquitted of the unlawful concealment charge.

The defendant's evidence tended to show that two security guards, Donald Wilson, and his wife, Reela Wilson, saw the plaintiff pick up the two packs of cigarettes and put them in his pants pocket. After plaintiff paid only for the loaf of bread and six-pack, he tried to leave the store. Donald Wilson testified that when he took plaintiff into the manager's office, he asked him for a receipt for the cigarettes, and plaintiff had none. Tony Caldwell, Food Lion manager, testified he never asked plaintiff for a receipt, but he heard Wilson ask him.

Defendant contends on appeal that the motion for directed verdict should have been granted because plaintiff failed to present sufficient evidence that the defendant initiated the prosecution without probable cause, one of the elements plaintiff is required to show in an action for malicious prosecution.

> The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence. G.S. 1A-1, Rule 50(a);

Wallace v. Evans, 60 N.C. App. 145, 298 S.E. 2d 193 (1982). The evidence must be taken in the light most favorable to the plaintiff. *Farmer v. Chaney*, 292 N.C. 451, 233 S.E. 2d 582 (1977). Contradictions, conflicts, and inconsistencies in the evidence must be drawn in the plaintiff's favor. *Tripp v. Pate*, 49 N.C. App. 329, 271 S.E. 2d 407 (1980). The question presented on appeal is whether the evidence taken in the light most favorable to plaintiff is sufficient for submission of the case to the jury.

To establish malicious prosecution the plaintiff must show that the defendant instituted or caused to be instituted against him a criminal proceeding, with malice and without probable cause and that such proceeding was terminated in the plaintiff's favor. *Jones v. City of Greensboro*, 51 N.C. App. 571, 588, 277 S.E. 2d 562, 573 (1981).

Hitchcock v. Cullerton, 82 N.C. App. 296, 297, 346 S.E. 2d 215, 217 (1986).

Whether probable cause exists is a question for determination by the jury. *Taylor v. Hodge*, 229 N.C. 558, 560, 50 S.E. 2d 307, 308-09 (1948). The test for determining want of probable cause in an action for malicious prosecution is whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had no reasonable foundation. *Bryant v. Murray*, 239 N.C. 18, 79 S.E. 2d 243 (1953). Plaintiff's evidence tended to show he did not steal the cigarettes from Food Lion. He purchased the cigarettes on his first trip to the store and put them in his pocket. He had a receipt for the cigarettes when he was questioned by the guard and store manager, but he did not produce it then because he was upset and because he was not asked whether he had one. When he came back the next day and showed the receipt, the defendant declined to stop the prosecution. Defendant's evidence to the contrary, that he was asked for and did not produce the receipt, is a contradiction for the jury to resolve. Plaintiff's evidence is a sufficient showing of lack of probable cause.

Malice may be inferred from the lack of probable cause. *Taylor v. Hodge, supra.* The evidence taken in the light most favorable to the plaintiff is sufficient to raise an inference from which

the jury could find lack of probable cause. Thus, plaintiff presented sufficient evidence from which malice could be inferred.

We find the instant case analogous to *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 317 S.E. 2d 17 (1984), *aff'd*, 313 N.C. 321, 327 S.E. 2d 870 (1985). In that case, plaintiff was a part-time saleswoman at defendant's store during the Christmas season, working in the jewelry department. She had been told by other employees that employees could model the jewelry. One day at work she wore a pair of earrings and a bracelet from the display case, putting her own earrings in her purse under the counter. She returned the bracelet to the display case in the afternoon. In her haste to help close the store, she failed to return the earrings. After she left the store, she was seized by security, questioned at length by store employees, searched, and charged with misdemeanor larceny. She was found not guilty in court. In an action for malicious prosecution, she received a verdict of $1,000 in damages. On appeal, we upheld the trial court's submission of the case to the jury, denying defendant's motions for directed verdict and for judgment notwithstanding the verdict. Judge Wells wrote for our Court:

> The existence of probable cause is a mixed question of law and fact. . . . If the facts are admitted or not in dispute, it is a question of law for the court. . . . Conversely, when the facts are in dispute, the question of probable cause is for the jury. . . . In the case now before us, the facts were disputed, plaintiff's evidence tending to show that she took no earrings from defendant's stock, but only through forgetfulness, wore one pair out of the store, while defendant's evidence tended to show that Officer Lynch observed plaintiff putting something in her purse while she was working and that plaintiff did wear a pair of defendant's earrings out of the store. Thus, the question was for the jury, and we are persuaded that from the evidence, considered in the light most favorable to plaintiff, that after defendant's agents had concluded their investigation, they could not have harbored a reasonable suspicion that plaintiff had stolen defendant's earrings. Defendant's investigation disclosed no missing earrings nor disclosed that plaintiff had committed any trespass against defendant, an element of larceny. . . . Defendant's

motions for a directed verdict and for judgment N.O.V. were properly denied.

Id. at 319, 317 S.E. 2d at 20 (citations omitted).

We find the reasoning in *Williams* persuasive and hold that the trial court did not err in denying defendant's motions for directed verdict and for judgment notwithstanding the verdict.

Defendant contends in its brief that the trial court erred in denying its alternative motion for a new trial; however, defendant raises no arguments concerning this issue. Upon review of the record, we find no error.

No error.

Judge PHILLIPS concurs.

Judge PARKER dissents.

Judge PARKER dissenting.

I respectfully dissent. In my view the evidence taken in the light most favorable to plaintiff and giving plaintiff the benefit of every reasonable inference to be drawn therefrom does not raise a question of fact for the jury on the issue of probable cause. At the critical time, *i.e.*, the moment at which plaintiff was apprehended in defendant's store, the undisputed evidence was (i) plaintiff had come through the checkout line, (ii) he had in his pocket two packs of cigarettes, (iii) he said he had bought them on an earlier visit, (iv) he produced no receipt, (v) he offered to pay for the cigarettes again and (vi) two security guards said they had seen plaintiff put the cigarettes in his pocket. While plaintiff's statement conflicted with the security guard's statement, on the issue of probable cause, the only disputed fact before the jury in the civil action was whether the guard had asked plaintiff if he had a receipt. The pertinent inquiry is not whether defendant's store manager should have believed plaintiff, but rather whether under the circumstances existing at the time the criminal action was instituted, the store manager acted as a person of reasonable prudence in concluding that the crime charged had been committed. The fact that plaintiff was subsequently acquitted in the

criminal action is similarly not relevant to the issue of probable cause.

The standard to be applied was stated in *Taylor v. Hodge*, 229 N.C. 558, 560, 50 S.E. 2d 307, 309 (1948), as whether plaintiff has shown "that the defendant acted against his own light—laid the charge regardless of facts within his knowledge which should have convinced a man of ordinary prudence and intelligence of the plaintiff's innocence of that crime . . . ." Measured by this criterion, the facts in the instant case would not, in my opinion, permit the jury to infer that defendant's manager acted without probable cause.

The case of *Williams v. Boylan-Pearce, Inc.*, 69 N.C. App. 315, 317 S.E. 2d 17 (1984) is in my judgment distinguishable for the reason that in *Williams* plaintiff was charged with larceny and the evidence showed that at the time she was arrested, plaintiff was an employee and did not commit the necessary trespass. Moreover, the search of plaintiff's pocketbook conducted before she was arrested, did not confirm the suspicion that she had placed something in her purse.

For the foregoing reasons, defendant's motion for directed verdict should have been granted.

WALTER R. SHEPPARD, JR., GUARDIAN OF WILLIAM L. SHEPPARD, INCOMPETENT v. COMMUNITY FEDERAL SAVINGS AND LOAN AND COMMUNITY SAVINGS AND LOAN ASSOCIATION

WALTER R. SHEPPARD, JR., GUARDIAN OF WILLIAM L. SHEPPARD, INCOMPETENT v. COMMUNITY SAVINGS AND LOAN ASSOCIATION, COMMUNITY FEDERAL SAVINGS AND LOAN AND JUDY HOVEY

No. 8629SC241

(Filed 3 February 1987)

Rules of Civil Procedure § 17; Insane Persons § 2.2; Courts § 9.1— action by incompetent—determination of incompetency

In a civil action in which plaintiff's competency became an issue, a superior court judge erred by finding the plaintiff was competent and did not have to be examined by a psychiatrist where another superior court judge had previously found that a substantial question existed as to plaintiff's competen-

cy, ordered that plaintiff be examined by a psychiatrist, and ordered that a hearing be held on whether the plaintiff was competent to proceed without a guardian. The second judge not only failed to follow the procedure laid down for protecting the rights of incompetents, he also in effect overruled another superior court judge; an affidavit from plaintiff's mother withdrawing an earlier affidavit which stated that plaintiff was incompetent added to rather than eliminated the uncertainty as to plaintiff's competency. N.C.G.S. 35-2.

APPEAL by plaintiff from *Allen, C. Walter, Judge.* Judgment entered 19 July 1985 in Superior Court, HENDERSON County. Heard in the Court of Appeals 26 August 1986.

Though the list of papers filed in these two related cases covers three and one-half pages in the printed record, only the following facts are material to this appeal: William L. Sheppard brought these actions before he was adjudged to be incompetent. Community Federal Savings and Loan is the successor in interest to Community Savings and Loan Association and Judy Hovey was employed by them. The complaint in the first action was filed by Attorney W. R. Sheppard, the elderly and professional inactive father of William L. Sheppard. Six days later the complaint in the second action was filed by Attorneys White & Dalton. The second complaint duplicates some of the claims made earlier against the savings and loan and adds several other claims against both defendants. In gist plaintiff alleged in the two complaints that: The savings and loan association breached its deposit agreement with him by refusing to return and pay interest on money that he had deposited with it; the savings and loan association was negligent in handling his funds; and defendant Hovey misappropriated and converted his funds to her own use. Both the corporate and individual defendant denied plaintiff's allegations and counterclaimed, alleging that he had falsely reflected upon their honesty to various persons on divers occasions. Plaintiff replied denying that he had ever spoken or written falsely about either defendant. Several months later after some discovery was done, W. R. Sheppard, Sr., as plaintiff's attorney in one case, moved to amend plaintiff's reply to the counterclaims so as to allege that William L. Sheppard was incompetent at all times involved. The motion was supported by an affidavit from plaintiff's mother to the effect that he had been mentally ill and incompetent since being discharged from the Navy in 1945. The defendant savings and loan immediately moved that an evidentiary hearing be held to determine

plaintiff's competency to proceed without a guardian. Pursuant thereto, in September 1983 Judge Burroughs found that a substantial question existed as to plaintiff's competency, ordered that plaintiff be examined by a psychiatrist, and that an evidentiary hearing be held on 28 November 1983 to determine whether plaintiff was competent to proceed in the actions without the aid of a guardian. On 26 October 1983, after plaintiff failed to keep two appointments with a psychiatrist and also failed to keep several appointments with his attorneys White & Dalton, that firm moved for permission to withdraw from the case. On 2 November 1983 a motion was filed under the purported signature of Attorneys White & Dalton requesting the court to reconsider the issue of plaintiff's competency; the motion was supported by another affidavit by plaintiff's mother to the effect that plaintiff was not mentally incompetent and she signed the first affidavit under duress from plaintiff's father, who was mishandling plaintiff's affairs. Immediately thereafter White & Dalton filed a notice asserting that they did not prepare and had no knowledge of the foregoing motion and affidavit and would not participate in any hearing with respect to it. About the same time the defendants moved to dismiss both complaints because of plaintiff's failure to submit to a psychiatric examination as Judge Burroughs ordered. On 28 November 1983 Judge Cornelius denied White & Dalton's motion to withdraw as plaintiff's counsel, denied the motion to strike plaintiff's complaints, found that plaintiff was competent and ruled that he did not have to be examined by a psychiatrist as previously ordered by Judge Burroughs, and could proceed in the litigation without a guardian. In making the latter rulings concerning plaintiff's competency Judge Cornelius heard no evidence, though he did ask plaintiff several questions and heard him argue with the defense lawyers about different matters in the cases, some of which were before the court and some were not. Later White & Dalton refiled their motion to withdraw and Judge Snepp allowed it in February 1984.

On 14 May 1984 Judge Beaty ordered plaintiff to answer 115 questions that he did not answer when his deposition was taken; to produce certain documents earlier requested by defendants; and to pay $1,150 to defendant savings and loan's counsel for having put them to that trouble. On 18 May 1984, pursuant to the motion of W. R. Sheppard, Sr., supported by several affidavits

saying that William L. Sheppard was incompetent, the Assistant Clerk of Court appointed Walter R. Sheppard, Jr. Guardian *ad litem* for him; on 24 May 1984 the Guardian *ad litem* moved that Judge Beaty's order entered on 14 May 1984 be reconsidered because of William L. Sheppard's incompetency. On 31 May 1984 the same Assistant Clerk of Court set aside the order appointing a Guardian *ad litem* on the ground that Judge Cornelius had found William L. Sheppard competent to proceed on his own. On 12 July 1984 Judge Owens found that plaintiff had failed to pay defendants' attorneys $1,150 as Judge Beaty had directed, imposed judgment for that amount against plaintiff, and dismissed his complaint for failing to comply with the rules of discovery and the court's order. The trial of the cases at the 10 September 1984, 4 March 1985 and 20 May 1985 sessions of court was continued upon plaintiff's motion for more time within which to obtain counsel, and the May order directed that plaintiff proceed without a Guardian *ad litem* because the competency issue had been determined by Judge Cornelius. Plaintiff's motion at the 15 July 1985 session to again continue the trial was denied and plaintiff tried the cases himself. After finding against the plaintiff on the defendants' counterclaims the jury awarded defendant savings and loan $2 compensatory damages and $15,000 punitive damages, and awarded defendant Hovey $60,000 compensatory damages and $115,000 punitive damages. On 27 August 1985 plaintiff William L. Sheppard was adjudicated incompetent and a few days thereafter Walter R. Sheppard, Jr., his appointed Guardian, was substituted as party plaintiff in pursuing the appeal.

Long, Parker, Payne & Warren, by Robert B. Long, Jr. and Ronald K. Payne, for plaintiff appellant.

Jackson & Jackson, by Frank B. Jackson and Charles Russell Burrell, for defendant appellee Community Federal Savings and Loan Association.

David K. Fox and Hogan and Hogan, by Lawrence A. Hogan and Robert L. Hogan, for defendant appellee Judy Hovey.

PHILLIPS, Judge.

Of the several contentions that the appellant makes in his quest for a new trial it is necessary to discuss just one, as a new trial is clearly required and the developments that gave rise to

the other contentions are not likely to recur. For when Judge Cornelius disregarded Judge Burroughs' prior order directing that plaintiff be examined by a psychiatrist and that a hearing be held on the issue of plaintiff's competency this case took a wrong turn prejudicial to the plaintiff as the foregoing facts indicate. Judge Burroughs' order, entered several months before trial, was based upon a well supported finding that there was "a substantial question" as to the plaintiff's competency and it was error for the court to go forward with the case before that question was properly resolved. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E. 2d 163 (1971).

When a party to a lawsuit in this state is mentally incompetent he must be represented by his Guardian if he has one, and if not by a Guardian *ad litem*. Rule 17(b), N.C. Rules of Civil Procedure. As pointed out in *Hagins v. Redevelopment Commission*, 275 N.C. 90, 165 S.E. 2d 490 (1969) and *Rutledge, supra*: When a question as to a party's competence arises during the course of a civil action or proceeding, as it did here, the court must conduct an evidentiary hearing and if it is found from the evidence that the party is mentally incompetent and he does not object a Guardian *ad litem* to act for him should be appointed; but if notwithstanding the court's finding the party asserts his competency the issue must be determined as provided in G.S. 35-2. This salutary and mandatory procedure for the protection of possible mentally incompetents was set in motion by Judge Burroughs' order and it was error not to continue the process until the issue was resolved in the way that the law provides. In determining from his observations that plaintiff was competent and an evidentiary hearing was not necessary Judge Cornelius not only failed to follow the course laid down for protecting the rights of possible incompetents, he also in effect overruled another Superior Court judge, which our law does not approve. *East Coast Fertilizer Co. v. Hardee*, 211 N.C. 56, 188 S.E. 623 (1936). That this erroneous step prejudiced the trial of plaintiff's case is strongly indicated by the recorded fact that about six weeks after plaintiff undertook to represent himself in the trial of the case he was adjudged to be mentally incompetent in a proceeding brought in accord with G.S. 35-2. Since this error may have deprived plaintiff of the needed aid of a Guardian or Guardian *ad litem* from that point forward in the litigation the orders and judgment entered thereafter that af-

fect his property rights must be set aside. Thus we vacate the judgment entered upon the verdict for the defendants and the orders by Judge Owens imposing sanctions and dismissing plaintiff's complaint against the defendant savings and loan association.

The arguments of the defendants that Judge Cornelius did not err in cancelling the evidentiary hearing directed by Judge Burroughs because plaintiff's mother had withdrawn her earlier affidavit stating that he was incompetent are not persuasive. While the second affidavit was a change of sorts its contents and the circumstances that accompanied it added to, rather than eliminated, the uncertainty as to plaintiff's competency. Apart from the broadside, unexplained statement that she was forced to sign the first affidavit, the second affidavit is a rambling, argumentative and largely irrelevant document, the main thrust of which is that her husband and plaintiff's father, still listed as plaintiff's counsel in one of the cases, had "dealt treacherously" with plaintiff in other business transactions that apparently have nothing to do with the issues raised in these cases. And though the second affidavit was attached to and filed with a motion purportedly prepared and signed by Attorneys White & Dalton those lawyers, in a notice promptly filed with the court, disavowed any knowledge of either document. These circumstances, it seems to us, added to the need for an evidentiary hearing; for the question of plaintiff's competency still remained and grave new questions had arisen—questions concerning the truthfulness of contradictory and conflicting affidavits by the same affiant; the intimidation of a witness; and the claimed forgery of a law firm's name to documents filed with the court. That these urgent and significant questions were not resolved in the manner that the law requires before the cases were tried makes it necessary to try them again.

Vacated and remanded for a new trial.

Judges BECTON and MARTIN concur.

STEVEN W. HUMPHREY v. JAMES A. SINNOTT AND SUZANNE BROWN

No. 861SC810

(Filed 3 February 1987)

1. **Appearance § 1.1; Rules of Civil Procedure § 12— motion for discretionary change of venue—general appearance**

Defendant Sinnott's motion to dismiss a negligence complaint arising from an automobile accident should not have been granted where he moved for a discretionary change of venue, and so made a general appearance, without first or simultaneously asserting his defenses relating to jurisdiction and process.

2. **Process §§ 1.1, 16— nonresident motorist—summons addressed to Commissioner of Motor Vehicles—sufficient**

A summons directed to the Commissioner of Motor Vehicles was sufficient where it was clearly addressed to the Commissioner in his representative capacity as process agent; defendant Brown's name and last known address appeared immediately following the words "name and address of second defendant" immediately under "William S. Hiatt, Commissioner of Motor Vehicles as process agent for defendant"; defendant Brown's name clearly appeared as defendant in the caption of the case; and the accompanying complaint clearly referred to her as a defendant. There was no possibility of any confusion as to who the defendant was.

3. **Process § 16— nonresident motorist—service by certified rather than registered mail—sufficient**

Plaintiff showed sufficient compliance with N.C.G.S. 1-105(2) to confer jurisdiction notwithstanding his use of certified rather than registered mail where plaintiff filed an affidavit of compliance showing that a copy of the summons and complaint was mailed to defendant Brown at her last known address by certified mail, return receipt requested, and that it was returned undelivered because it was unclaimed.

4. **Constitutional Law § 24.7— nonresident motorist—service under N.C.G.S. 1-105—constitutional**

The trial court did not err in a negligence action against a nonresident motorist by refusing to hold that N.C.G.S. 1-105 was unconstitutional as applied to her because no actual service of process was obtained upon her and the method of service did not provide reasonable assurance that she would receive actual notice.

APPEAL by plaintiff from *Tillery, Judge*. Order entered 27 March 1986 in Superior Court, DARE County. Heard in the Court of Appeals 18 December 1986.

Plaintiff, a resident of Virginia, brought this action alleging that, due to the negligence of both defendants, he sustained per-

sonal injuries in an automobile collision which occurred 29 May 1982 in Kill Devil Hills, North Carolina. In his complaint, filed in the Superior Court of Forsyth County, plaintiff alleged that defendant Sinnott was a resident of New Jersey and that defendant Brown was a resident of Delaware. Plaintiff sought to obtain service on both defendants by substituted service on the Commissioner of Motor Vehicles pursuant to G.S. 1-105. Copies of the summons and complaint were mailed to each defendant's last known address by certified mail, return receipt requested.

On 10 June 1985, defendant Sinnott filed a motion pursuant to G.S. 1-83(2) to change venue from Forsyth County to Dare County "for the convenience of witnesses and the ends of justice." On 14 June 1985, defendant Brown filed a similar motion, together with motions to dismiss pursuant to G.S. 1A-1, Rule 12(b), challenging jurisdiction, process, service of process and the sufficiency of the complaint to state a claim. On 10 July 1985, defendants' motions for change of venue to Dare County were allowed by the Forsyth County Superior Court.

On 12 July 1985, defendant Sinnott filed motions to dismiss challenging personal jurisdiction, sufficiency of process, and sufficiency of service of process, pursuant to G.S. 1A-1, Rules 12(b)(2), (4) and (5). Defendant Brown subsequently renewed her motions to dismiss based upon lack of personal jurisdiction, insufficient service of process, and failure to state a claim upon which relief could be granted. From orders granting both defendants' motions to dismiss, plaintiff appeals.

D. Keith Teague, P.A., by D. Keith Teague, and Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Gary S. Parsons and Carolin Bakewell, for plaintiff appellant.

Hornthal, Riley, Ellis & Maland, by L. P. Hornthal, Jr. and Donald C. Prentiss, for defendant appellee Brown.

White, Hall, Mullen, Brumsey & Small, by Gerald F. White and John H. Hall, Jr., for defendant appellee Sinnott.

MARTIN, Judge.

Plaintiff appeals from the orders granting defendants' motions to dismiss his complaint. For the reasons stated below, we

conclude that neither defendant was entitled to a dismissal of the complaint.

I

[1] The only question raised by plaintiff's brief with respect to defendant Sinnott is whether he waived his right to challenge personal jurisdiction, sufficiency of process and sufficiency of service of process. We hold that defendant Sinnott, by moving for a discretionary change of venue pursuant to G.S. 1-83(2) without first or simultaneously asserting his Rule 12(b) defenses relating to jurisdiction and process, made a general appearance and voluntarily submitted himself to the jurisdiction of the court.

Pursuant to G.S. 1-75.7(1), the courts of North Carolina, if vested with jurisdiction over the subject matter of an action, may exercise personal jurisdiction over a person, without service of process upon him, if he enters a general appearance in the action. "[A] general appearance is one whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person." *Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E. 2d 279, 287-88 (1978), *disc. rev. denied, appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979), *quoting In re Blalock*, 233 N.C. 493, 504, 64 S.E. 2d 848, 856 (1951).

In the present case, defendant Sinnott moved, prior to asserting his Rule 12(b) defenses or filing any other motion or pleading, that venue be transferred to Dare County. His motion necessarily invoked the adjudicatory and discretionary power of the court as to the relief which he requested. "[I]f the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and has submitted himself to the jurisdiction of the court whether he intended to or not." *Swenson, supra*, at 89, 250 S.E. 2d at 288. The concept of general appearance has been accorded a very liberal interpretation and virtually any appearance other than to challenge jurisdiction or to gain an extension of time constitutes a general appearance. *Alexiou v. O.R.I.P., Ltd.*, 36 N.C. App. 246, 243 S.E. 2d 412, *disc. rev. denied*, 295 N.C. 465, 246 S.E. 2d 215 (1978). Because defendant Sinnott made a general appearance prior to asserting his defenses under Rules 12(b)(2), (4) and (5), he waived any objection to per-

sonal jurisdiction, process, or service of process. His subsequent motions to dismiss on those grounds should have been denied.

II

Defendant Brown's motions to dismiss were grounded upon challenges to: (1) personal jurisdiction, Rule 12(b)(2); (2) sufficiency of process, Rule 12(b)(4); (3) service of process, Rule 12(b)(5); and (4) sufficiency of the complaint to state a claim, Rule 12(b)(6). She makes no serious contention, however, that the complaint is not sufficient to state a claim against her and we hold, without discussion, that a claim is stated.

[2] The first question which we must consider with respect to defendant Brown involves the sufficiency of the process directed to her. The plaintiff sought to obtain service of process on defendant Brown by leaving a copy of the summons and complaint with the Commissioner of Motor Vehicles, as provided in G.S. 1-105. The summons addressed to defendant Brown was directed as follows:

> To:
>
> William S. Hiatt, Commissioner of Motor Vehicles as Process Agent for Defendant.
>
> Name and Address of Second Defendant:
>
> Suzanne I. Brown
> Route 2, Box 74
> Frankfurt, Delaware

Defendant, relying on *Philpott v. Kerns*, 285 N.C. 225, 203 S.E. 2d 778 (1974), contends that since the summons was directed to the Commissioner of Motor Vehicles rather than defendant Brown, it was defective. We do not agree. Although the summons was directed to the Commissioner of Motor Vehicles, it was clearly done so in his representative capacity as process agent for defendant Brown. Immediately underneath this, following the words "Name and Address of Second Defendant" appeared the name and last known address of defendant Brown. Defendant Brown's name clearly appeared as defendant in the caption of the case and the accompanying complaint clearly referred to her as a defendant. We see no possibility of any confusion as to who the defendant in this case was. *See Harris v. Maready*, 311 N.C. 536,

319 S.E. 2d 912 (1984). This case differs from *Philpott, supra,* where the Commissioner of Motor Vehicles was summoned to appear, and the only reference to the defendant was in the caption. Likewise this case may be distinguished from *Distributors v. McAndrews,* 270 N.C. 91, 153 S.E. 2d 770 (1967), where the Sheriff of Wake County was commanded to summon the Commissioner of Motor Vehicles rather than the defendants. While G.S. 1-105 must be strictly construed because it is in derogation of the common law, where, as here, the possibility of confusion among people of ordinary intelligence is virtually impossible, more recent cases direct that the summons should not be found invalid simply because of technical mistakes or poor wording. Accordingly we hold that the summons in this case was sufficient to bring defendant Brown within the jurisdiction of the trial court. *See Harris v. Maready, supra. Wiles v. Construction Co.,* 295 N.C. 81, 243 S.E. 2d 756 (1978).

[3] Defendant Brown also contends that service of process upon her was insufficient because plaintiff used certified mail, return receipt requested, rather than registered mail, return receipt requested, as required by G.S. 1-105(2). We have held that the use of certified mail provides the same reliability as a basis for proof of service as that accompanying the use of registered mail. *See In re Annexation Ordinance,* 62 N.C. App. 588, 303 S.E. 2d 380, *disc. rev. denied, appeal dismissed,* 309 N.C. 820, 310 S.E. 2d 351 (1983); G.S. 1A-1, Rule 4(j) (providing for service by registered *or* certified mail). In this case, plaintiff filed an affidavit of compliance, as required by G.S. 1-105(3), showing that a copy of the summons and complaint was mailed to defendant Brown at her last known address by certified mail, return receipt requested, and that it was returned undelivered because it was unclaimed. We hold that plaintiff has shown sufficient compliance with G.S. 1-105(2) to confer jurisdiction, notwithstanding his use of certified, rather than registered, mail.

[4] By cross-assignment of error, defendant Brown contends that the trial court erred by refusing to hold that G.S. 1-105 is unconstitutional as applied to her because no actual service of process was obtained upon her and the manner of substituted service did not provide "reasonable assurance" that she would receive actual notice of the suit. We reject her contention. G.S. 1-105 has been held constitutional. *Ewing v. Thompson,* 233 N.C. 564, 65

S.E. 2d 17 (1951). The statute does not require actual notice to nonresident motorists; indeed, the provisions of G.S. 1-105(2) contemplate situations where actual notice may not be possible by providing that if notice is not delivered to a defendant because he has moved, service is deemed completed when the notice is returned unclaimed to plaintiff. But the requirement for mailing a copy of the process to a nonresident motorist's last known address provides sufficient assurance of actual notice as to meet minimum due process requirements and to provide a constitutional basis for personal jurisdiction of a nonresident motorist who is served in conformity with the statute. *See Davis v. St. Paul-Mercury Indemnity Co.*, 294 F. 2d 641 (4th Cir. 1961); *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

III

The orders of the trial court granting defendants' motions to dismiss this action must be reversed.

Reversed.

Judges WELLS and PARKER concur.

MARY LOUISE COLEMAN v. INTERSTATE CASUALTY INSURANCE COMPANY

No. 8618SC682

(Filed 3 February 1987)

1. **Appeal and Error § 6.2— partial summary judgment—no immediate appeal**

A partial summary judgment on the issue of liability, reserving for trial the issue of damages, is not immediately appealable.

2. **Insurance § 95.1— automobile liability insurance—notice of cancellation—failure to advise of eligibility under state plan**

The statute requiring an insurer's notice of cancellation of automobile liability insurance to advise the insured of his possible eligibility for insurance through the N.C. Automobile Insurance Plan, N.C.G.S. 20-310(f)(5), was repealed by implication by enactment of the Reinsurance Facility Act, N.C.G.S. 58-248.26 *et seq.* Therefore, a notice of cancellation which did not so advise the insured was valid where it was mailed to the insured after the N.C. Automobile Insurance Plan had been terminated pursuant to N.C.G.S. 58-248.40.

APPEAL by defendant from *Wood, Judge.* Judgment filed 1 May 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 10 December 1986.

Defendant appeals from partial summary judgment for plaintiff in an insurance cancellation case.

Carruthers & Roth, P.A., by Arthur A. Vreeland for defendant-appellant.

W. Steven Allen for plaintiff-appellee.

GREENE, Judge.

Plaintiff sought to secure automobile liability insurance by paying only $108.00 of a $300.00 premium. The defendant insurance company demanded the additional premium payment of $192.00. When the insurance company did not receive the additional premium, it mailed to plaintiff a form styled "Notice of Cancellation or Refusal to Renew" on 7 January 1985. Plaintiff received the notice which stated the insurance would be cancelled for nonpayment on 24 January 1985. Plaintiff did not pay the additional $192.00. On 26 February 1985, plaintiff's automobile was involved in an accident. Defendant denied coverage of any resulting damages. Plaintiff filed a complaint for damages which requested the court find plaintiff's insurance policy was not properly cancelled.

Defendant mailed plaintiff the disputed notice pursuant to the notice requirements of N.C. Gen. Stat. Sec. 20-310(f). At the time of this action, Section 20-310(f)(5) stated in part:

> Either in the notice or in an accompanying statement [the notice shall] advise the insured of his possible eligibility for insurance through the North Carolina Automobile Insurance Plan [hereinafter, the "Plan"]. . . .

The notice defendant mailed plaintiff did not advise plaintiff of the Plan as then required by Section 20-310(f)(5). In 1973, the Legislature enacted N.C. Gen. Stat. Sec. 58-248.26 *et seq.* (hereinafter, the "Reinsurance Facility Act" or "Act") which established what is now called the "North Carolina Motor Vehicle Reinsurance Facility." As the purpose of both the Plan and the Reinsurance Facility Act was remedying the problem of reinsuring

problem drivers, the Legislature intended that the Act supersede the Plan:

> The Commissioner of Insurance is authorized and directed to terminate the [Plan] established pursuant to G.S. 20-279.34 when it appears to his satisfaction that the Facility herein established is fully operational and when the policies issued under the prior Plan have expired.

N.C. Gen. Stat. Sec. 58-248.40.

According to defendant's uncontroverted affidavits from state insurance officials, the Plan was terminated pursuant to Section 58-248.40 since the Plan had been completely inactive since 9 October 1973 and since no policies under the Plan existed after 9 October 1974. Upon defendant's motion for summary judgment, the trial court entered summary judgment for plaintiff as it concluded plaintiff's insurance policy was in force at the time of the accident. Defendant appeals.

There are only two issues for review: (1) Is the order allowing summary judgment for plaintiff appealable? (2) Was the defendant's cancellation notice valid?

I

[1] The trial court's order did not address the issue of damages nor was there a subsequent trial of the issue. Accordingly, the order of summary judgment was a partial summary judgment. N.C. Gen. Stat. Sec. 1A-1, Rule 56(c). A partial summary judgment on the issue of liability, reserving for trial the issue of damages, is not immediately appealable. *See Tridyn Ind. Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 488-93, 251 S.E. 2d 443, 445-48 (1979); *Smith v. Watson*, 71 N.C. App. 351, 354, 322 S.E. 2d 588, 590, *disc. review denied*, 313 N.C. 509, 329 S.E. 2d 394 (1985).

Nevertheless, we have elected in our discretion to treat the purported appeal as a petition for writ of certiorari and proceed to address the merits. N.C. Gen. Stat. Sec. 7A-32(c); N.C.R. App. P. 21(a); *see Industrotech Constructors, Inc. v. Duke Univ.*, 67 N.C. App. 741, 742-43, 314 S.E. 2d 272, 274 (1984); *Ziglar v. E. I. DuPont De Nemours & Co.*, 53 N.C. App. 147, 149, 280 S.E. 2d 510, 512, *disc. review denied*, 304 N.C. 393, 285 S.E. 2d 838 (1981).

II

[2] At the time of this dispute, Section 20-310(f)(5) required the defendant advise the insured of her "possible eligibility for insurance through the [Plan]" in order to give proper notice of cancellation. The affidavits before the trial court showed the Commissioner of Insurance had terminated the Plan no later than 1974 pursuant to Section 58-248.40. In short, there was no Plan at the time of this dispute.

In order to cancel the policy properly under Section 20-310(f), plaintiff argues Section 20-310(f)(5) required the insurance company advise plaintiff of her "possible eligibility" under the admittedly defunct Plan. While the Legislature effectively abolished the Plan with passage of the Reinsurance Facility Act, notification of the Plan under Section 20-310(f)(5) was not specifically repealed until 1985. 1985 Sess. L., c. 666, s. 67. Since the Legislature repealed the former Plan system, we hold Section 20-310(f)(5) was also thereby repealed by implication to the extent it required notification of the defunct Plan.

As the statutory enactment of the Reinsurance Facility Act conflicted with the prior requirement that insureds be advised of the Plan, we must ascertain the Legislature's intent. Statutes which treat the same subjects, although enacted at different times, must be read together in order to ascertain legislative intent. *See Carver v. Carver*, 310 N.C. 669, 674, 314 S.E. 2d 739, 742 (1984). Both the notice provisions of Section 20-310(f)(5) and the Reinsurance Facility Act concern reinsurance for drivers.

However, though the statutes in question are themselves plain and unambiguous, when construed together they are irreconcilable in purpose and effect. Under the former scheme, "poor risk" drivers applied directly to the Plan for involuntary assignment to an insurer. Under the new scheme, all drivers apply directly to the insurer who must then provide insurance to all applicants; the insurer may, however, cede the risk to the Reinsurance Facility. N.C. Gen. Stat. Sec. 58-248.31; *see generally State ex rel. Hunt v. N.C. Reinsurance Facility*, 302 N.C. 274, 283, 275 S.E. 2d 399, 402 (1981). If the two schemes co-exist, the effect is an inescapable dilemma for the defendant insurer: Section 20-310(f)(1) requires each insurance cancellation be in a form approved by the Commissioner of Insurance. The Commissioner ap-

proved forms under the new scheme without reference to the Plan. Thus, if defendant notified plaintiff of the Plan, it would violate the requirement that the approved form be used; if, as it did, defendant used the approved form, it then fails to give notice of the Plan.

Where two statutes are necessarily and irreconcilably in conflict, the courts of this state presume the Legislature intended that the latter statute repeal the former statute, even without a specific repealing clause. *See State ex rel. Com'r of Ins. v. N.C. Fire Ins. Ratings Bureau*, 29 N.C. App. 237, 246 (waiver of hearings deemed repealed by later mandate of public hearing), *aff'd on other grounds*, 291 N.C. 55, 229 S.E. 2d 268 (1968); *see also State v. Greer*, 308 N.C. 515, 518, 302 S.E. 2d 774, 777 (1983); *Chrysler Credit Corp. v. Burton*, 599 F. Supp. 1313, 1317 (M.D.N.C. 1984).

Insofar as it required reference to the Plan, N.C. Gen. Stat. Sec. 20-310(f)(5) is irreconcilably and necessarily in conflict with the Reinsurance Facility Act. We therefore hold the latter Act operated to repeal by implication that portion of Section 20-310 (f)(5) requiring notice of the defunct Plan.

III

The trial court's entry of summary judgment for plaintiff is reversed and the case remanded with directions that summary judgment be entered for the defendant.

Reversed and remanded.

Judge JOHNSON concurs.

Chief Judge HEDRICK concurs in the result.

STATE OF NORTH CAROLINA v. TERRY LYNN OAKLEY

No. 8622SC426

(Filed 3 February 1987)

1. **Criminal Law § 178— greater sentence following appeal—law of the case**

In an appeal from a greater sentence at a resentencing hearing following appeal, the conclusions in the original appeal regarding double jeopardy and the effect of an accepted plea bargain were the law of the case.

2. **Criminal Law § 138.11— guilty plea—appeal—greater sentence**

In a prosecution for assault, the imposition of a greater sentence following appeal was supported by new matters at the resentencing hearing where the only evidence at the first sentencing hearing was the prosecutor's statement that defendant had knocked the victim to the floor and kicked her in the back, that the victim had required emergency medical treatment in the hospital and had a fractured vertebrae with possible permanent damage, and that the victim's medical bills were over $10,000; and the victim's testimony at the second hearing tended to show: defendant had threatened to shoot her, held a rifle to her face, repeatedly slapped her, repeatedly called her names; the defendant hit the victim in the face and knocked her to the floor, picked her up, raised her over his head, "body slammed" her to the floor on her back, again held the gun to her face and threatened to kill her, hit and kicked her to the floor when she got to her knees, all in the presence of her 4-year-old son; defendant repeatedly kicked the victim in the back with the heel of his boot; the victim was able to go next door for help when defendant finally fell asleep; the victim was taken by an ambulance to a hospital where she was treated for three crushed vertebrae; the victim was in the hospital for a month where she received a bone fusion and steel rods were placed in her back; she wore a fiberglass body brace for 6 months; her medical bills were approximately $33,000, less than half of which was covered by Medicaid; and the victim still owed $15,000 in medical bills.

APPEAL by defendant from *John, Judge*. Judgment entered 13 December 1985 in DAVIDSON County Superior Court. Heard in the Court of Appeals 8 December 1986.

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

Stephen C. Holton for defendant appellant.

COZORT, Judge.

This appeal presents the question of whether a trial court can impose a more severe sentence at a resentencing hearing after an appeal than that sentence originally agreed to by the

State, the defendant, and the court in a plea arrangement made when the case first came to trial. We affirm the trial court's imposition of a more severe sentence.

The three issues raised by the defendant on appeal are: (1) that the imposition of the more severe sentence violated the constitutional guarantees against double jeopardy; (2) that the imposition of the more severe sentence was improper because there were no new matters raised at resentencing which justified a more severe sentence; thus, the defendant was improperly punished for exercising his right to appeal; and (3) that the General Statutes of North Carolina provide that once a trial court accepts a plea bargain, it is bound by the terms of the bargain.

This case is before this Court for the second time. The facts of the crime were stated in substantial detail in our first opinion, *see State v. Oakley*, 75 N.C. App. 99, 330 S.E. 2d 59 (1985), and will not be repeated here. A brief procedural summary will be sufficient to dispose of the issues raised in this appeal. Defendant was charged in a proper bill of indictment dated 3 January 1984 with assault with a deadly weapon with intent to kill inflicting serious injury. On 16 April 1984 defendant entered a guilty plea to the lesser offense of assault with a deadly weapon inflicting serious injury. The guilty plea was entered pursuant to a plea arrangement providing that defendant be given a suspended sentence with supervised probation at the discretion of the trial court and that defendant pay restitution of $10,380.06 to the victim to cover her medical expenses. On 16 April 1984, Superior Court Judge William H. Helms imposed a prison sentence of 6 years, suspended, with the defendant placed on supervised probation for 5 years, and ordered that defendant pay restitution of $10,380.06, reimburse the State for court-appointed counsel, pay the costs, and that he not assault the victim during the period of probation. The next day the victim requested a hearing with the trial court to express her dissatisfaction with the sentence imposed, alleging that her medical bills totaled more than $40,000. The State made a motion to set aside the judgment. The court granted the motion and ordered that a warrant be issued charging the defendant with the original crime, assault with a deadly weapon with intent to kill inflicting serious injury. On 20 April 1984, defendant filed notice of appeal. In an opinion filed 4 June 1985, we held that the trial court had the authority to set aside

the judgment on its own motion. *Id.* at 101, 330 S.E. 2d at 61. We further held, however, that the trial court erred by striking the guilty plea and setting the case for trial on the original charge. We remanded the case for reinstatement of the 16 April 1984 guilty plea on the lesser charge. *Id.* at 104, 330 S.E. 2d at 63. We further stated:

> Reinstatement of a guilty plea following the correction of an error of law does not violate the principles of double jeopardy. (Citation omitted.) As discussed earlier, the trial court acted within its discretion in setting aside the judgment. From the record it is apparent that the defendant and the State had entered into a plea arrangement. On remand, the defendant may withdraw his guilty plea at the resentencing hearing, if the judge decides to impose a sentence other than the original plea arrangement, N.C. Gen. Stat. Sec. 15A-1024 (1983), or he may seek to negotiate new terms and conditions under his original plea to the lesser included offense.

Id.

When the case was remanded to the Superior Court of Davidson County, it came on to be heard by Superior Court Judge Joseph R. John at the 9 December 1985 session. Defendant moved to dismiss the charges against him, and the trial court denied the motion. After conducting a resentencing hearing, the trial court advised the defendant and defendant's counsel that he had decided to impose a sentence other than that provided for in the original plea arrangement of 16 April 1984. The court informed the defendant that the defendant was entitled to withdraw his guilty plea and have the matter continued until the next session of court. Defendant's counsel requested a continuance in order to discuss the matter with the defendant. The trial court continued the case for three days. When the hearing resumed, defendant informed the court that he did not wish to withdraw his plea. The court found a factor in aggravation and factors in mitigation and further found that the factor in aggravation outweighed the factors in mitigation. The court then imposed an active sentence of ten (10) years, the maximum punishment permissible under the law.

[1] The first and third issues raised by defendant in this appeal were decided on the first appeal of this case. In our opinion of 4

June 1985, we held that "[r]einstatement of a guilty plea following the correction of an error of law does not violate the principles of double jeopardy." *Id.* at 104, 330 S.E. 2d at 63. We also held that, on remand, the trial court could impose a sentence other than the original plea arrangement, if it follows G.S. 15A-1024, by giving the defendant an opportunity to withdraw his plea and have the matter continued to the next session of court. *Id.* We are bound by the conclusions reached in that appeal. These two issues are the law of the case and will receive no further discussion. *State v. Moore*, 64 N.C. App. 516, 519-20, 307 S.E. 2d 834, 836 (1983), *disc. rev. denied*, 310 N.C. 628, 315 S.E. 2d 694 (1984).

[2] The only remaining issue is whether the imposition of the more severe sentence was error because no new matters were raised in the resentencing hearing. The defendant's argument has no merit. A review of the record reveals that new matters were raised at the resentencing hearing. At the initial sentencing hearing of 16 April 1984, the evidence before the court consisted of a statement from the district attorney, summarizing the crime as follows:

> This crime occurred on September 24, 1983; the defendant, Terry Lynn Oakley, and the prosecuting witness and victim, Jackie Gathings, knew each other for some time. At this time, Mr. Oakley had been drinking and became mad or angry at the victim, accusing her of dating or going out with another man on him. He became violent and knocked her to the floor. The State's evidence indicates that after she was knocked to the floor, he kicked her in the back. She required emergency treatment in the hospital and accumulated numerous bills for back injuries, including fracture to one of her vertebrae; there could be possible permanent damage; at this time it is unknown as to the extent of the damage; she has undergone an operation and total medical bills you have before you is over $10,000. She is still receiving treatment now, to my understanding. I believe you are aware of his prior record of felonious breaking and entering.

At the resentencing hearing on 9 December 1985, the trial court heard testimony from the victim that defendant threatened to shoot her, held a rifle to her face, repeatedly slapped her, and repeatedly called her "Bitch" and "Whore." Inside victim's house,

the defendant hit the victim in the face, knocking her to the floor. The defendant then picked up the victim, raised her over his head, and "body slammed" her to the floor on her back. The defendant again held the gun to her face and threatened to kill her. The victim got up to her knees, and defendant hit her and kicked her to the floor. All of this occurred in the presence of the victim's four-year-old son. The defendant repeatedly kicked the victim in the back with the heel of his boot. When the defendant finally went to sleep in the bedroom, the victim was able to go next door for help. She was taken by ambulance to a hospital where she was treated for three crushed vertebrae. She stayed for a month in the hospital where she received a bone fusion, and steel rods were placed in her back. She wore a fiberglass body brace for over six months. Her medical bills, less than half of which were covered by Medicaid, were approximately $33,000. She still owes $15,000 in medical bills.

We find this evidence sufficient to constitute "new matters" at the resentencing hearing and thus to rebut defendant's contention that the longer sentence was an impermissible punishment for defendant's having exercised his right to appeal. There is no merit to defendant's argument.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judges MARTIN and ORR concur.

RICHARD SEAWELL v. CONTINENTAL CASUALTY COMPANY AND W. R. GRACE & COMPANY

No. 8620SC687

(Filed 3 February 1987)

Contracts § 3— settlement of insurance claims—no definite agreement

In a breach of contract claim arising from attempts to settle claims for contaminated fertilizer used on tobacco, the trial court erred by submitting the case to the jury where there was no evidence that defendants and the Moore County farmers' committee entered into a settlement contract; there was, at best, an agreement to agree which was indefinite and which depended upon future agreements.

APPEAL by plaintiff from *Helms (William H.), Judge.* Judgment entered 13 November 1985 in Superior Court, MOORE County. Heard in the Court of Appeals 6 January 1987.

In 1984, plaintiff used a fertilizer manufactured by W. R. Grace & Company on his tobacco crop. Grace later discovered that some of its fertilizer contained a contaminant identified as dicamba, a herbicide. Grace and its insurer, Continental Casualty Company (CNA) began the process of investigating and adjusting the claims against them. Grace sent explanatory letters to all claimants stating that its goal was to insure that farmers did not suffer any economic loss as a result of using the contaminated fertilizer.

Plaintiff was one of a number of Moore County farmers concerned about symptoms of dicamba contamination in his tobacco crop. A large group of Moore County farmers met and elected a committee to meet with Grace concerning the contaminated fertilizer. The committee consisted of Frank Bryant, Ernest Harris, Richard Pressley and C. B. Ragsdale.

On 30 July 1984, the committee met with representatives of Grace and CNA. Plaintiff presented evidence at trial that an agreement was reached at this meeting whereby defendants would compensate the Moore County farmers for damaged tobacco under a "leaf count" or "buy on the stalk" formula. Defendants presented evidence that there was no agreement beyond assurances that the farmers would not suffer any losses attributable to the use of Grace fertilizer.

After the July 30 meeting, an adjuster for defendants came to plaintiff's fields, estimated the production and conducted a sampling of his tobacco. Plaintiff later sold his tobacco and filed suit against defendants for their refusal to settle his claim under the "leaf count" or "buy on the stalk" formula.

Plaintiff set out the following causes of action in his complaint: 1) breach of contract; 2) promissory estoppel; 3) breach of a covenant of good faith and fair dealing; and 4) tortious refusal to settle or negotiate under the agreement. Defendants moved for a directed verdict and the trial judge granted the motion on all of plaintiff's causes of action except the breach of contract claim.

The trial judge submitted the breach of contract claim to the jury which found that defendants did not enter into a settlement contract with the committee which allegedly represented plaintiff. The jury returned a verdict in favor of defendants. From judgment entered on the verdict, plaintiff appeals and defendants set out cross-assignments of error.

Van Camp, Gill, Bryan, Webb & Thompson, P.A., by James R. Van Camp and Douglas R. Gill, for plaintiff appellant.

Petree, Stockton & Robinson, by W. F. Maready, John F. Mitchell and Steve M. Pharr; and Brown, Holshouser, Pate & Burke, by W. Lamont Brown, for defendant appellees.

ARNOLD, Judge.

Rule 10(d) of the North Carolina Rules of Appellate Procedure states in pertinent part:

> Without taking an appeal an appellee may set out exceptions to and cross-assign as error any action or omission of the trial court to which an exception was duly taken or as to which an exception was deemed by rule or law to have been taken, and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

Defendants cross-assigned error to the trial court's denial of their motion for a directed verdict on plaintiff's breach of contract claim. They contend that the trial court erred in submitting the case to the jury because the evidence was insufficient. We agree.

Offer and acceptance are essential elements in the formation of a contract and constitute the agreement of the parties. *Yeager v. Dobbins*, 252 N.C. 824, 114 S.E. 2d 820 (1960). An offer must be definite and complete, and a mere proposal intended to open negotiations which contains no definite terms but refers to contingencies to be worked out cannot constitute the basis of a contract, even though accepted. *Id.*

In the present case, there is no evidence that defendants and the Moore County farmers' committee entered into a settlement contract at the July 30 meeting. Plaintiff argues that defendants agreed to compensate the farmers for dicamba damage under a

"leaf count" or "buy on the stalk" formula. Plaintiff set out the formula as follows:

(1) The poundage production of the tobacco in the field would be estimated;

(2) The percentage of leaves showing specified contaminant related symptoms in the field would be determined by counting total leaves and damaged leaves from a sample of plants in the field and then applying the percentage from the sample to the field as a whole;

(3) The number of pounds of damaged leaves would be determined by correlating the total pounds with the percentage of damaged leaves, using a table that reflected the differences in weight of leaves by stalk position;

(4) The claimant would be paid a certain price (90¢) for each pound of damaged leaves, unless he chose to, and was able to, show that his profit per pound would have been greater;

(5) The claimant could either destroy or harvest the damaged leaves as he saw fit;

(6) Any attempt to harvest and sell them would be at his own costs and risk—he would keep the proceeds if the sale were successful, and bear the lost expense of harvest and sale if unsuccessful.

Step three of the formula requires the application of a conversion table to estimate damages. The table is essential to the operation of the formula and it is not in the record. The absence of such a necessary element indicates the indefinite nature of plaintiff's formula.

Step one of the formula requires adjusters and individual farmers to agree upon the estimate of the poundage production of the tobacco in the field. Step two requires an additional agreement between the adjusters and each farmer on the number of damaged leaves.

The entire formula is dependent upon future negotiations and agreements with each individual farmer. The evidence shows that the July 30 meeting, at best, amounted to an "agreement to

agree." Frank Bryant, a committee member, testified that "Every farmer was to be settled individually to begin with." The proposal to settle with farmers on an individual basis is not a contract.

The courts generally hold that a contract leaving material portions open for future agreement is nugatory and void for indefiniteness. *Gray v. Hager*, 69 N.C. App. 331, 317 S.E. 2d 59 (1984). "When an offer and an acceptance are relied upon to make out a contract, the offer must be one that is intended to create a legal relationship upon acceptance. It cannot be an offer to open negotiations that eventually may result in a contract." *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 90, 334 S.E. 2d 404, 408 (1985).

No evidence in the record indicates that a contract was entered into at the July 30 meeting. The "agreement to agree" was indefinite and depended upon future agreements. Accordingly, the trial court erred in denying defendants' motion for a directed verdict.

Inasmuch as this decision upon defendants' cross-assignment of error resolves the outcome of this case, there is no need to address plaintiff's assignments of error.

Vacated and remanded for entry of judgment in favor of defendants.

Judges PHILLIPS and ORR concur.

BOBBY D. SPEAR AND WIFE, PATRICIA J. SPEAR v. DALLAS D. DANIEL AND DANIEL HOMES, INC.

No. 863SC740

(Filed 3 February 1987)

Contracts § 18.1— repudiation of contract by contractor—occupancy of house before completion—no waiver of rights under contract

Plaintiffs did not waive their right to sue defendant for breach of a contract for construction of a house by moving into the unfinished house and completing construction on their own, notwithstanding a provision of the contract stated that occupancy of the house prior to payment of the final installment to

defendant contractor constituted approval of defendant's performance, relieved defendant of further performance, and voided any express or implied warranties by defendant, where the evidence showed that defendant refused to complete the house and execute certain lien waivers required for plaintiffs' permanent loan because plaintiffs would not sign a new agreement accepting defendant's construction work and releasing defendant from any further claims relating to the construction work. Defendant could not repudiate its duty of performance under the contract and then take advantage of its own act by denying its liability under the contract.

APPEAL by plaintiffs from *Winberry, Judge*. Judgment entered 13 March 1986 in CARTERET County Superior Court. Heard in the Court of Appeals 11 December 1986.

Plaintiffs brought this action on 17 May 1984 seeking damages for breach of a written construction contract and for damages for deceptive and unfair trade practices under N.C. Gen. Stat. § 75-1.1 *et seq*. Plaintiffs' evidence tended to show, in pertinent part, that:

Plaintiffs and Daniel Homes, Inc. entered into a written contract dated 8 September 1983 for the construction of a residence. The contract provided that the residence would be completed within 150 days. All parties anticipated a moving date around 1 April 1984.

As construction was nearing completion, a dispute occurred between plaintiffs and Dallas Daniel, president of defendant Daniel Homes, Inc. Mr. Daniel contended that plaintiffs owed additional sums for extra work performed by defendant. Plaintiffs contended that they were entitled to credit for work that was not performed or that cost less than they had contracted to pay. Plaintiffs also complained about the correctness of some of the work which was done. Plaintiffs were nearing the date scheduled for closing their permanent loan on the residence when this dispute arose. Mr. Daniel was aware of the plaintiffs' upcoming closing.

During their dispute, Mr. Daniel advised Mr. Spear that he would have to sign a separate, new agreement waiving the warranty provisions of the parties' original 8 September 1983 agreement in order for defendant corporation to complete the house and in order for it to execute certain lien waivers required by plaintiffs' lender as a prerequisite for disbursing the permanent

loan. Plaintiffs refused to sign the waiver, and Mr. Daniel accordingly refused to complete the house or sign the lien waivers. Negotiations between the parties deteriorated at this point. Around 8 May 1984, plaintiffs moved into the residence even though it was not complete because they "had to move out of the house they were living in . . . ." Plaintiffs completed construction of the residence on their own and brought this action.

The trial court granted defendants' motion for directed verdict as against both of plaintiffs' claims at the close of plaintiffs' evidence. From the judgment entered in accordance with this verdict, plaintiffs appealed.

L. Patten Mason, P.A., by L. Patten Mason, for plaintiff-appellants.

Bennett, McConkey, Thompson, Marquardt & Wallace, P.A., by Thomas S. Bennett, for defendant-appellees.

WELLS, Judge.

Plaintiffs contend the court erred in granting defendants' motion for directed verdict against their claim for breach of contract. We agree as to plaintiffs' claim against defendant Daniel Homes, Inc.

The dispositive question is whether plaintiffs waived their rights under the contract by moving into the residence prior to payment of the final installment due under the contract. Plaintiffs' evidence was clearly sufficient for submission to the jury unless plaintiffs, as a matter of law, waived their rights under the contract.

Paragraph #9 of the 8 September Agreement provides:

> 9. OCCUPANCY PRIOR TO FINAL DISBURSEMENT. Should Owner move furnishings or appliances other than those in the contract, or otherwise occupy the dwelling prior to payment to Contractor of the final installment of contract price, together with any and all other sums due, such action shall be deemed final and absolute approval of the Contractors performance of this Agreement, and the Owners; satisfaction therewith, and shall relieve contractor of further performance of duty with respect to this Agreement. Such action

> shall also void the Contractor's express warranty set forth hereinafter, and it shall be a release by Owner unto contractor of any and all implied warranties with respect to construction of the dwelling. Upon such action, the balance of contract price, together with all other sums payable, shall become immediately due by Owner to Contractor.

Defendants contend that by electing "to move into the house before matters were settled . . ." plaintiffs are now restricted by the stipulations in Paragraph #9 from bringing this action for breach of contract. It is apparently on this basis that the court directed a verdict against plaintiffs on this claim. However, defendants' argument disregards the evidence showing that Mr. Daniel refused to finish the residence because plaintiffs would not execute a separate, new written agreement in which plaintiffs were required to agree as follows:

> This will acknowledge that this date we have paid to Daniel Homes, Inc. the sum of $251.11 as full and final payment under the terms of the construction contract that exists between us. We further hereby acknowledge that Daniel Homes, Inc. has completed the construction work agreed upon and it has been accepted by us and we do hereby release him from any further claim on our part against him in any matter relating to the construction of our dwelling located in Country Club East Subdivision.

If Daniel Homes conditioned its own further performance, *viz.*, completion of the residence, on plaintiffs' execution of the above release and thereafter ceased construction when plaintiffs refused to do so, as shown by the plaintiffs' evidence, plaintiffs' subsequent actions in moving into the residence and completing construction on their own would not constitute a waiver of their rights to sue on the contract notwithstanding the stipulations contained in Paragraph #9. One who repudiates his duty of performance under a contract will not be allowed to take advantage of his own act by denying his liability under the contract. *See Commercial National Bank v. Charlotte Supply Co.*, 226 N.C. 416, 38 S.E. 2d 503 (1946); *see also Raleigh Paint & Wallpaper Co. v. James T. Rogers Builders, Inc.*, 73 N.C. App. 648, 327 S.E. 2d 36 (1985).

Accordingly, we hold that plaintiffs are entitled to a new trial on their breach of contract claim against Daniel Homes, Inc.

Defendant Dallas Daniel correctly contends that plaintiffs could not bring a breach of contract claim against him, individually, since the evidence in the record shows that plaintiffs were dealing with him in his official capacity as president of Daniel Homes, Inc. We thus affirm that portion of the judgment dismissing plaintiffs' claims against defendant Dallas Daniel.

Plaintiffs contend the court erred in granting defendants' motion for directed verdict against their claim alleging unfair and deceptive trade practices. However, after reviewing the record in light of this contention, we hold that the court properly granted defendants' motion for directed verdict as against this claim in that plaintiffs failed to present sufficient evidence that defendants' conduct constituted an unfair or deceptive trade practice under N.C. Gen. Stat. § 75-1.1.

Affirmed in part, reversed in part and remanded.

Judges MARTIN and PARKER concur.

GEORGE A. BRYANT, JR. v. MRS. JOHN J. SHORT (VIRGINIA BRYANT SHORT)

No. 8621SC666

(Filed 3 February 1987)

1. Malicious Prosecution § 13— malicious prosecution, abuse of process, contempt—dismissal proper

The trial court did not err by dismissing an action by an executor against his former co-executor alleging that defendant was contemptuous of the court in filing an action for an accounting, that defendant's prior action against plaintiff was a malicious use of process, and that the serving of a request for production of documents and for interrogatories was an abuse of process where defendant was not under a court order and her renunciation of her co-executorship did not preclude her filing for an accounting; a necessary element of malicious prosecution is the termination of the former proceeding in favor of plaintiff and the prior accounting proceeding was terminated in defendant's favor; and there was no merit to the argument that serving interrogatories and a request for production of documents was an abuse of process.

2. Attorneys at Law § 7.5— lack of justiciable issue—award of attorney fees

The trial court did not err by awarding attorney fees to defendant in an action for contempt, malicious use of process, and abuse of process where the

court found that there was a "complete absence of a justiciable issue of law and fact" and a review of the complaint on appeal showed a total absence of any justiciable issue. A further finding regarding plaintiff's propensity for personal attacks was surplusage. N.C.G.S. 6-21.5.

APPEAL by plaintiff from *Helms, William H., Judge.* Judgment filed 10 April 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 15 December 1986.

George A. Bryant, Jr., pro se, for plaintiff-appellant.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers, for defendant-appellee.

GREENE, Judge.

George A. Bryant, Sr. died testate in 1983 having appointed as co-executors of his estate his daughter, defendant herein, and his son, plaintiff herein. Soon after her father's death, defendant resigned as co-executor. The plaintiff began to administer the estate in such a manner that the defendant eventually filed a civil action against the plaintiff requesting, among other things, a full accounting. During the course of that proceeding, defendant herein served certain interrogatories and a request for production on the plaintiff. That proceeding was settled with the filing of a consent judgment on 17 September 1985. In the consent judgment, the plaintiff herein agreed to resign as the executor of the estate and further agreed to a judgment against him for $30,000. The consent decree further provided that he would not share in the assets of the estate.

In the action presently before the Court, plaintiff now alleges defendant was contemptuous of the court in filing the action for accounting and that the prior action was a malicious use of process. He also alleges the defendant committed an abuse of process. Plaintiff now seeks $75,000 in compensatory damages and $50,000 in punitive damages.

Defendant moved for judgment on the pleadings and summary judgment. She also sought attorney's fees pursuant to N.C. Gen. Stat. Sec. 6-21.5.

The trial court reviewed both the pleadings in this case and other court files involving the plaintiff. It also heard testimony on

the issue of attorney's fees. The court granted the defendant's motion to dismiss, the motion for judgment on the pleadings and the motion for summary judgment. As to attorney's fees, the court found the complaint was "totally without merit, and there [was] a complete absence of a justiciable issue of law and fact raised . . . in the complaint." The court also found plaintiff had demonstrated in the other lawsuits a "propensity for personal attacks against opposing parties, counsel for opposing parties, and court personnel . . . ."

The issues for this Court are: (1) whether the complaint was properly dismissed; and (2) whether the award of attorney's fees was appropriate.

I

[1] The defendant moved to dismiss pursuant to N.C. Gen. Stat. Sec. 1A-1, Rules 12(b)(6), 12(c) and 56. As the court considered matters outside the pleadings, the motion to dismiss is properly treated as a motion for summary judgment. N.C. Gen. Stat. Sec. 1A-1, Rule 12(c). Therefore, we review the order of dismissal in accordance with the law of summary judgment.

First, plaintiff contends defendant was in contempt of court for filing the accounting action. We find that the defendant was under no court order; her renunciation of her co-executorship did not preclude her filing the action for accounting. Summary judgment was appropriate as to this claim for relief.

Second, plaintiff contends the filing of the accounting action by the defendant was a malicious use of civil process. A necessary element of malicious prosecution is the termination of the former proceeding in favor of the plaintiff. *Melton v. Rickman*, 225 N.C. 700, 703, 36 S.E. 2d 276, 278 (1945); *Abernethy v. Burns*, 210 N.C. 636, 639, 188 S.E. 97, 98 (1936). Here, the prior accounting proceeding was terminated in the defendant's favor. The court appropriately entered summary judgment against plaintiff.

Third, plaintiff contends that the serving of a request for production of documents and interrogatories not properly addressed to the plaintiff as executor, was an abuse of process. We find absolutely no merit in this argument. Summary judgment on this claim was appropriate.

II

[2] The language of N.C. Gen. Stat. Sec. 6-21.5 is unambiguous. It allows the trial judge to award attorney's fees "to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." The dismissal of an action pursuant to a summary judgment is "not in itself a sufficient reason for the court to award attorney's fees. . . ." The statute also requires the trial judge to make findings of fact and conclusions of law to support the award.

We have previously held that the sufficiency of a pleading is a question of law for the court and the trial court need not make its findings more detailed if it states the pleading raised no justiciable issue of law or fact. *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 325, 344 S.E. 2d 555, 565, *disc. review denied*, 318 N.C. 284, 348 S.E. 2d 344 (1986).

Here, the trial court found there was "a complete absence of a justiciable issue of law and fact" raised in the complaint. Our review of the complaint confirms the trial court's finding: there was a total absence of any justiciable issue. Thus, there exists a justifiable basis for the trial court's finding.

The trial court also found the plaintiff had "demonstrated . . . a propensity for personal attacks against opposing parties . . . ." The only basis for the award of attorney's fees under Section 6-21.5 is the complete absence of a justiciable issue. The finding of plaintiff's propensity for personal attacks is inappropriate and cannot be used to support an award of attorney's fees under the statute. Here, we treat that finding as surplusage. The award of attorney's fees is affirmed.

III

Summary judgment for defendant and the order awarding attorney's fees are

Affirmed.

Chief Judge HEDRICK and Judge JOHNSON concur.

Madden v. Chase

VINCENT MADDEN, CUSTODIAN FOR KATHERINE ANN MADDEN UGTMA, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED v. DAVID T. CHASE, THOMAS N. ROBOZ, E. M. HICKS, J. JOHN FOX, JAMES E. GETTYS, HARRY M. NACEY, JR., J. BENJAMIN BOSTICK, FRANK GABOR, RONALD J. KRAUSE AND STANWOOD CORPORATION

No. 8626SC785

(Filed 3 February 1987)

Attorneys at Law § 7.5; Costs § 4.2— action to enjoin "going private" merger—attorney fees not allowable

Plaintiff shareholder's class action to enjoin a "going private" merger does not fall within the equity exception to the rule that attorney fees are not allowable as part of the costs in the absence of statutory authority since plaintiff brought the action to maintain the value of his investment rather than to protect or preserve public funds or property.

APPEAL by plaintiff from *Saunders (Chase B.), Judge.* Judgment entered 28 March 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 17 December 1986.

Plaintiff, a shareholder of defendant Stanwood Corporation, brought a class action against defendants. He sought to enjoin a proposed "going private" merger whereby defendants David T. Chase and Thomas N. Roboz proposed to purchase all of the outstanding Stanwood stock for $9.00 per share. Plaintiff contended that the price offered by Chase and Roboz was unfair and violated the fiduciary duty that they owed to the shareholders.

After the case had been pending for approximately five months, Interstate Securities, an independent investment banking firm which had initially given an opinion to the directors of Stanwood that the $9.00 per share price was fair, reevaluated its opinion and withdrew it. Thereafter, the offer of Chase and Roboz to acquire the stock was withdrawn, and the "going private" merger was abandoned.

Defendants then moved to dismiss the action. Plaintiff acknowledged that dismissal was proper but sought an opportunity to file an application to recover costs including attorneys' fees. The trial court denied plaintiff's request. From the judgment of the trial court, plaintiff appeals.

Cansler & Lockhart, by Thomas Ashe Lockhart and Bruce M. Simpson; Garwin, Bronzaft & Gerstein, by Bertram Bronzaft and Scott W. Fisher; Gross & Sklar, by Eugene A. Spector, for plaintiff appellant.

Kennedy, Covington, Lobdell & Hickman, by William C. Livingston and Joseph B. C. Kluttz, for defendant appellees Hicks, Fox, Gettys, Nacey, Bostick, Gabor and Krause.

Robinson, Bradshaw & Hinson, by John R. Wester, Martin L. Brackett, Jr. and Samuel D. Walker, for defendant appellee Stanwood Corporation.

No brief for defendant appellees Chase and Roboz.

ARNOLD, Judge.

The general rule in North Carolina is that in the absence of statutory authority, attorneys' fees are not recoverable. *Hicks v. Albertson*, 284 N.C. 236, 200 S.E. 2d 40 (1973). There is no statutory authority for an award of attorneys' fees in the present case. Despite this rule, plaintiff contends that "the trial court erred in denying plaintiff's request for an opportunity to make an application to recover costs, including reasonable attorneys' fees, where plaintiff's class action conferred a substantial benefit on all shareholders."

In support of his argument, plaintiff relies on *Rider v. Lenoir County*, 238 N.C. 632, 78 S.E. 2d 745 (1953), and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970). *Rider* involved a suit by a taxpayer to enjoin the issuance of hospital bonds. The taxpayer prevailed and prevented the county from improperly expending tax revenues. However, the court denied the taxpayer's request for attorneys' fees because the action did not create or restore a common fund. There is dicta in *Rider* that the court may award attorneys' fees in certain equity cases which are successfully prosecuted on behalf of a class. However, the "certain equity cases" cited in *Rider* consider the availability of attorneys' fees from decedent's estates. In other words, *Rider* represents the proposition that fees are at times available from court-supervised funds and municipal funds recovered in tax litigation.

In *Mills*, the U. S. Supreme Court awarded attorneys' fees to minority shareholders who had established a cause of action for a

violation of the Securities Exchange Act of 1934. The Court held that the absence of express statutory authorization under section 14(a) of the Act did not preclude such an award. The Court further held that the award of attorneys' fees was not barred by the fact that no monetary fund was produced by the suit. The interpretation of the Securities Exchange Act of 1934 in *Mills* is irrelevant to the question of whether plaintiff can recover attorneys' fees for his action to enjoin a "going private" merger in North Carolina.

Neither *Rider* nor *Mills* provide authority for the recovery of attorneys' fees in the case *sub judice*.

In *Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Board of Education*, 55 N.C. App. 134, 147, 285 S.E. 2d 110, 118 (1981), *disc. rev. denied*, 305 N.C. 300, 291 S.E. 2d 150 (1982), this Court stated:

> "North Carolina has applied a rule of equity exception in various classes of cases, i.e. where a litigant at his own expense has maintained a successful suit for the preservation, protection or increase of a common fund or of common property." *Ingram, Commissioner of Insurance v. Assurance Co.*, 34 N.C. App. 517, 524-25, 239 S.E. 2d 474, 478 (1977) citing *Horner v. Chamber of Commerce*, 236 N.C. 96, 72 S.E. 2d 21 (1952). See also *Rider v. Lenoir County*, 238 N.C. 632, 78 S.E. 2d 745 (1953); *Hopkins v. Barnhardt*, 223 N.C. 617, 27 S.E. 2d 644 (1943).

In *Kiddie Korner*, plaintiffs argued that their action to stop defendant School Board from spending school funds fell within the equity exception above and entitled them to an award of attorneys' fees. This Court found no merit in their argument and stated that plaintiffs brought the action primarily to protect their business interests, not to protect or preserve public funds or property.

Plaintiff argues in this case that his action to enjoin the "going private" merger falls within the equity exception. We do not agree. Plaintiff brought this action to maintain the value of his investment, not for the primary purpose of protecting or preserving public funds or property. We hold that the trial court did not err

in denying plaintiff's request for an opportunity to make an application to recover costs and attorneys' fees.

We recognize the fact that "going private" mergers are novel transactions and are not expressly covered by the North Carolina Business Corporation Act. However, it is up to the legislature, and not the courts, to make any changes which would allow an award of fees in such situations. Accordingly, the judgment is

Affirmed.

Judges PHILLIPS and ORR concur.

HED, INC. v. HELEN A. POWERS, SECRETARY OF REVENUE

No. 867SC643

(Filed 3 February 1987)

Taxation § 15— sales tax—restaurant equipment—restaurant not a manufacturer

A restaurant is not a manufacturer within the meaning of N.C.G.S. 105-164.1(1)(h), which provides a one percent sales tax rate for accessories sold to a manufacturing industry.

APPEAL by plaintiff from *Winberry, Judge*. Order entered 7 May 1986 in Superior Court, NASH County. Heard in the Court of Appeals 13 November 1986.

Battle, Winslow, Scott & Wiley, P.A., by Jasper L. Cummings, Jr., on the brief, and Poyner & Spruill, by J. Phil Carlton, for plaintiff appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the Secretary of Revenue.

BECTON, Judge.

Plaintiff, HED, Inc., brought this action against Helen A. Powers, Secretary of Revenue, seeking a tax refund of an alleged overpayment as provided by N.C. Gen. Stat. Sec. 105-266.1 (1985). The facts are not in dispute. HED sold mixers, slicers, scales, pumps, fryers, and assembly tables to its parent company, Har-

dee's Food Systems, Inc. (Hardee's). These items were taxed at a state sales tax rate of three percent in accordance with N.C. Gen. Stat. Sec. 105-164.4 (1985). HED claims that the items qualify for sales taxation at the lower rate of one percent as provided by N.C. Gen. Stat. Sec. 105-164.4(h) (1985) because they are accessories to a manufacturing industry. Hardee's used the items to make foods that were sold on its premises. The foods included biscuits, milk shakes, cooked and assembled hamburgers, and roast beef and turkey sandwiches, to name a few.

The trial judge granted the Secretary's motion for summary judgment. Plaintiff appeals. We affirm.

The sole issue before this Court is whether N.C. Gen. Stat. Sec. 105-164.4(1)(h) applies to the items HED sold to Hardee's. The section's applicability turns on whether Hardee's is a "manufacturing industry or plant" within the meaning of that section. The section permits sales taxation at the rate of one percent rather than the normal three percent rate, for "sales of mill machinery or mill machinery parts and accessories to manufacturing industries and plants. . . ."

Despite HED's insistence that *Master Hatcheries, Inc. v. Coble*, 286 N.C. 518, 212 S.E. 2d 150 (1975) compels a decision in its favor, the exact issue involved in this case is one of first impression in North Carolina. *Master Hatcheries* does, however, provide a helpful framework for our analysis.

In *Master Hatcheries* the North Carolina Supreme Court held that the operation of a chicken hatchery constituted manufacturing. The Court recognized as we do here "that the term manufacturing as used in tax statutes is not susceptible of an exact and all-embracing definition, for it has many applications and meanings. Where, as here, the statute does not define the term, courts have resorted to the dictionaries to ascertain its generally accepted meaning and have then undertaken to determine its application to the circumstances of the particular case." *Id.* at 520, 212 S.E. 2d at 151. The court used a comprehensive approach, considering such factors as the general rules regarding statutory interpretation, the commonly accepted meaning of manufacture as found in *Duke Power Co. v. Clayton*, 274 N.C. 505, 164 S.E. 2d 289 (1968), the complexity of the process involved, and cases from other jurisdictions.

The general rule is that a statutory exemption from tax is strictly construed against the claim of exemption. *Yacht Co. v. High*, 265 N.C. 653, 144 S.E. 2d 821 (1965). However, the North Carolina Constitution requires that taxation must be imposed by a uniform rule. N.C. Constitution, Article 5, Section 2; *see Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E. 2d 201 (1969). Nowhere in the statute is the term manufacturing plant specifically defined to include a restaurant. The Secretary has not previously recognized a restaurant as a manufacturer.

In *Duke Power* the court stated that the connotative meaning of manufacturing is "the making of a new product from raw or partly wrought materials." *Id.* at 514, 164 S.E. 2d at 295. Although HED relies heavily on this definition, we heed the Court's suggestion in *Master Hatcheries* that we consider the definition in light of the circumstances of the particular case. A literal application of this definition which HED urges, could result in the inclusion of any business that produces a product. For example, word processing companies take in rough drafts of written material and produce highly literate well-printed documents but word processing operators are hardly referred to as manufacturers.

HED strenuously argues that such processes as the assemblage of hamburgers and mixing of dough to form biscuits fit the technical perimeters of the above definition. However, manufacturing as that term is commonly understood does not include the mere preparation of food items at a restaurant exclusively for sale on the premises. The essence of Hardee's operation is the selling or merchandising of its products, not production. Moreover, Hardee's food preparation is significantly different from the intricate and elaborate industrial operations that have been classified as manufacturing in the past. The list includes such complex operations as the mass incubation of eggs to hatch baby chicks, *see Master Hatcheries*, and heating and carbonizing coal, *see Duke Power*.

The question whether a restaurant qualifies for a special tax exemption as a manufacturing industry has been decided in several other jurisdictions. The Secretary and HED each cited authority in support of their positions. Our review of the cited cases compels us to follow the majority view that a restaurant is not a

manufacturer within the meaning of typical machinery tax statutes. *See The Coachman v. Norberg*, 121 R.I. 1316, 397 A. 2d 1320 (1979); *McDonald's Corp. v. Oklahoma Tax Comm.*, 563 P. 2d 635 (Okla. 1977); *Golden Skillet Corp. v. Virginia*, 214 Va. 276, 199 S.E. 2d 511 (1973); and *Roberts v. Bowers*, 170 Ohio St. 99, 162 N.E. 2d 858 (1959). Although not controlling, these cases are helpful. One discernible pattern is that when the statutes do not provide a definition of manufacturing, as is the case in North Carolina, courts tend to apply a common sense approach and conclude that a restaurant is not a manufacturer. On the other hand, when the statute does provide a definition, that definition is mechanically applied and courts conclude that a restaurant is a manufacturer. *Compare Golden Skillet Corp. v. Virginia with KFC of Ohio v. Kosydar*, Case No. A408 (Oct. 1, 1973).

We are guided by common meaning, an ordinary understanding of the term manufacturing, and the general rule on statutory interpretation. We hold that a restaurant is not a manufacturer as that term is used in N.C. Gen. Stat. Sec. 105-164.4(1)(h) (1985).[1] Judgment is affirmed.

Affirmed.

Judges WELLS and ORR concur.

1. It was not critical to our analysis, but it is important to note that a 1986 Amendment to N.C.G.S. Sec. 105-164.4(h) specifically states that a restaurant is not a manufacturer.

Harshaw v. Mustafa

DORIS HARSHAW D/B/A HARSHAW BONDING COMPANY AND JO WILKINS D/B/A JO WILKINS BONDING COMPANY, PLAINTIFFS v. HUSSAIN MUSSALLAM MUSTAFA, DEFENDANT, AND JOHN ESSA AND NABIL HANHAN, INDIVIDUALLY AND DOING BUSINESS AS SULTANA INVESTMENTS, A PARTNERSHIP, INTERVENOR DEFENDANTS

No. 8618SC668

(Filed 3 February 1987)

Arrest and Bail § 11.2— appearance bond—forfeiture order—accrual of surety's action against principal

Where forfeiture of an appearance bond has been ordered upon failure of the principal to appear for trial, a surety's cause of action against the principal accrues upon a showing that the principal has evaded process by leaving the jurisdiction even though the surety has not yet been ordered to pay the amount of the bond to the court.

APPEAL by intervenor defendants from *Williams, Fred J., Judge.* Judgment entered 30 January 1986 in GUILFORD County Superior Court. Heard in the Court of Appeals 10 December 1986.

This cause of action stems from defendant Mustafa's failure to appear in District Court on 31 May 1985. The trial court ordered forfeiture of an appearance bond on which plaintiffs Harshaw and Wilkins were securities in the amounts of $20,000 and $5,000 respectively. Plaintiffs alleged in a verified complaint filed 7 June 1985 that, upon information and belief,

> Defendant (Mustafa) has the present intention of defrauding his creditors by leaving North Carolina and returning to Kuwait where he will be beyond the reach of North Carolina Civil process. Moreover, the Defendant has the intention of avoiding the domestic courts of North Carolina which are likely to grant custody of the Defendant's minor child to the mother of said child rather than the Defendant. Upon information and belief, Defendant has either left the territory of the United States or is keeping himself concealed within the United States to avoid service of summons and other legal process.

Although plaintiffs had not yet been required to pay the bond, they sought attachment of defendant's real property located at 1309 Juniper Street in Greensboro to secure a money judgment in the amount of $25,000 plus interest and costs. Attachment process

was issued against the property and plaintiffs filed a *lis pendens* against the property on 7 June 1985. On 11 June 1985, the Sheriff of Guilford County levied execution of attachment on the property, thus perfecting plaintiffs' claim.

On 12 June 1985, John Essa and Nabil Hanhan, individually and doing business as Sultana Investments, intervenor defendants, filed a deed in Guilford County which purported to be an earlier conveyance to them of defendant's real property. On 12 July 1985, Sultana filed a motion under N.C. Gen. Stat. § 1-440.43 to dissolve the order of attachment on the basis that the property had been conveyed to Sultana before plaintiffs filed a *lis pendens* but that the attorney whose responsibility it was to record the deed became ill soon thereafter and subsequently died. Before this matter was heard, plaintiffs obtained entry of default and judgment in the amount of $25,000 against defendant Mustafa. On 26 September, Sultana's motion to dissolve the order of attachment was denied.

On 2 October 1985, Sultana filed a motion under G.S. § 1A-1, Rule 60(b) of the N.C. Rules of Civil Procedure to have the judgment against Mustafa set aside. Sultana did not file a motion to intervene until 14 October, which the court granted. The court, which had deemed the Rule 60(b) motion to have been filed on the same date as the motion to intervene, later denied the 60(b) motion and a motion under Rule 12(b)(6) of the N.C. Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Intervenor defendants appealed.

Hatfield and Hatfield, by John B. Hatfield, Jr., and Peggy Kusenberg, for plaintiffs-appellees.

Benjamin D. Haines for Intervenor defendants-appellants.

WELLS, Judge.

Intervenor defendants present two questions for review: whether the court erred in denying their Rule 12(b)(6) motion to dismiss and their Rule 60(b) motion to vacate judgment. However, the linchpin of both arguments as presented by Sultana is the same: that plaintiffs filed this action before their right against Mustafa accrued. We shall therefore begin our discussion by addressing this issue.

When defendant Mustafa failed to appear at the trial on 31 May, the court ordered forfeiture of the appearance bond. Plaintiffs, who posted the $25,000 bond, had not yet been ordered to pay that amount to the court when they filed their complaint against Mustafa. Sultana contends that a surety's right of action accrues when payment is actually made and that therefore plaintiffs' action is premature. We disagree.

Very few cases on this issue have been decided in North Carolina in recent years. The leading case is *Insurance Co. v. Gibbs*, 260 N.C. 681, 133 S.E. 2d 669 (1963). The dispute in *Gibbs* centered on a portion of a contract in which plaintiff agreed to pay claims brought against defendant transport company by shippers or consignees. In the contract, Gibbs had expressly agreed to reimburse plaintiff for any such payments made. Plaintiff was therefore a surety on these obligations, and plaintiff sought to recover from the principal for payments made pursuant to those claims. Defendant contended that plaintiff stood in the shoes of the claimants it paid and that, since the statute of limitations had run barring any possible suit by the claimants, plaintiff's cause of action was similarly barred. The *Gibbs* court disagreed:

> A surety who, pursuant to his contractual obligation, pays the debt of his principal has a right of action to recover the sum so paid. The principal is not obligated to his surety until his surety has made a payment. The surety's right of action accrues at the time of payment, not before.

Id. The apparent rationale for such a rule is to prevent a surety from filing suit when it is still quite possible that the principal will himself pay the debt. Although the rule works well as a general principle and in particular with regard to statute of limitation questions, such cases as the one at bar must be distinguished. Here, the question is not whether the plaintiffs will be made to pay, but when: forfeiture has been ordered and there is evidence that defendant has returned to Kuwait in order to avoid jurisdiction of our courts. To adhere to the general rule set out in *Gibbs* would be to deny plaintiffs any recourse; only by filing this action and attaching defendant's property have they prevented a questionable conveyance of the property until the matter could be adjudicated. Therefore, we hold that where forfeiture of an appearance bond is ordered, a surety's cause of action accrues upon

a showing that the principal has evaded process by leaving the jurisdiction. Intervenor defendants' motions to dismiss and to vacate judgment were properly denied, and the decision of the trial court is

Affirmed.

Judges MARTIN and PARKER concur.

STATE OF NORTH CAROLINA v. WINSTON EUGENE WHITE

No. 8626SC843

(Filed 3 February 1987)

1. **Burglary and Unlawful Breakings § 6.2— breaking or entering—larcenous intent—evidence sufficient**

In a prosecution for felonious breaking or entering, there was evidence of larcenous intent in the statement of defendant's housemate to the district attorney in his office, which she later contradicted, that defendant had told her that he and another man had gone to the victim's house thinking it was the home of a drug dealer and intending to rob that drug dealer. Furthermore, intent to commit larceny could be inferred from the circumstances surrounding the breaking or entering even without the statement.

2. **Criminal Law § 168.1; Constitutional Law § 28— breaking or entering—trial judge—reversal of prior decision on degree of offense to submit—no error**

There was no due process violation in a prosecution for breaking or entering where the trial judge reversed his prior decision to submit misdemeanor breaking or entering and submitted felonious breaking or entering.

APPEAL by defendant from *Snepp, Judge*. Judgment entered 14 March 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 7 January 1987.

Defendant was charged in two separate bills of indictment with robbery with a dangerous weapon and felonious breaking and entering. The indictment for felonious breaking and entering stated that defendant did break and enter a building occupied by Robert Parler with the intent to commit larceny therein.

The State's evidence tended to show the following:

On 19 May 1985, Robert Parler answered a knock at his front door. He saw a man standing at the door holding a newspaper, and he noticed a car in his driveway with an individual sitting on the passenger's side. Parler told the man, who was later identified as Charles Adams, that the paper did not belong to him but that he would take it anyway. When Parler opened the screen door, Adams revealed a pistol under the paper and forced his way into the house. Parler grabbed the gun and it fired. Parler and his wife wrestled with Adams and subdued him in the hallway. During the course of the struggle, Mr. Parler was shot. Mr. Parler took Adams' pistol and told his wife to call the police.

At that time, defendant entered the house carrying a sawed-off shotgun. Mrs. Parler screamed and Mr. Parler shot defendant. Defendant fell back through the front door, ran to the car and drove off.

Kimberly Tipton, a neighbor, saw defendant get into the car with the shotgun and drive away. She gave the license tag number of the car to the police. The police traced the vehicle to Betty Carolyn Blackwell and went to her house where they found the defendant bleeding and sitting at a table. Blackwell and another individual were also present.

Blackwell testified that she lived with Adams. She also testified that when she asked defendant where Adams was, defendant said, "it went bad." She further testified that she had previously informed the district attorney that defendant told her that he and Adams intended to rob the Parlers' home because they thought it was the home of a drug dealer. However, she stated that she was mistaken when she made that statement.

At the close of the State's evidence, the trial judge informed the district attorney that he would submit misdemeanor breaking and entering instead of felonious breaking and entering. Defendant presented no evidence.

After researching the matter further, the trial judge informed the district attorney and defense counsel that he would submit felonious breaking and entering, and he withdrew his previous ruling as improvidently entered. In his charge to the jury, the trial judge submitted both assault with a deadly weapon

and felonious breaking and entering on the theory that defendant aided and abetted Adams.

Defendant was convicted of assault with a deadly weapon and felonious breaking and entering. He was sentenced to consecutive terms of two years and ten years respectively.

From the judgment imposing sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lemuel W. Hinton, for the State.

Barnes & Tomberlin, by Richard H. Tomberlin, for defendant appellant.

ARNOLD, Judge.

[1] The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. *State v. Litchford*, 78 N.C. App. 722, 338 S.E. 2d 575 (1986). Defendant contends that there is no evidence of a larcenous intent on the part of himself or Adams. We do not agree.

During the cross-examination of Blackwell, the district attorney asked, "Did you tell me last Friday in my office that at the hospital when you visited Winston White that he told you that he and Charles Adams went to the Parlers' home on Logie Avenue thinking that it was the home of a drug dealer intending to rob that drug dealer?" Blackwell responded, "yes, I did."

This testimony is sufficient evidence of intent to commit larceny even though the witness later contradicted her statement.

Even without Blackwell's testimony, the intent to commit larceny in this case can be inferred from the circumstances surrounding the breaking and entering. *Cf. State v. Avery*, 48 N.C. App. 675, 269 S.E. 2d 708 (1980); *State v. Quilliams*, 55 N.C. App. 349, 285 S.E. 2d 617 (1982). Therefore, we hold that the evidence sufficiently satisfied the intent requirement of the offense.

[2] Defendant also contends that his due process rights were violated when the trial judge reversed his prior ruling and submitted the charge of felonious breaking and entering to the jury. We are not persuaded by this argument.

> A superior court judge has little opportunity for prolonged deliberation upon many matters involving competency of evidence, legal principles and inferences of law which arise during a trial. He must, of necessity, make immediate rulings on the questions before him in order that trials may progress with reasonable celerity. To hold that he could not in the interest of justice change, modify or reverse a ruling during the progress of a trial and, in proper cases, during term, would be to require infallibility. As was said by one of the Justices when this case was argued in this Court, to hold a superior court judge to such a standard would be tantamount to placing him in a straightjacket.

Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 768, 107 S.E. 2d 746, 749-50 (1959).

The rationale of *Hollingsworth GMC Trucks* is applicable to the present case where the trial judge changed his initial ruling after researching the law on felonious breaking and entering. We hold that no due process violation occurred when the trial court reversed its prior ruling and submitted the charge of felonious breaking and entering to the jury.

No error.

Judges PHILLIPS and ORR concur.

STATE OF NORTH CAROLINA v. DANA DARRELL PHILLIPS

No. 863SC852

(Filed 3 February 1987)

Criminal Law § 138.4— consolidation of charges for sentencing—sentence not exceeding maximum for most serious offense

The trial court could properly impose a consolidated sentence of 8 years on defendant for two counts of felonious possession of stolen goods, which is 2 years in excess of the total presumptive terms for the two felonies consolidated, since the sentence imposed did not exceed the maximum allowable term of 10 years for the most serious felony consolidated. N.C.G.S. 15A-1340.4(a).

State v. Phillips

APPEAL by defendant from *Brown, Frank R., Judge.* Judgment entered 5 March 1986 in PITT County Superior Court. Heard in the Court of Appeals 7 January 1987.

Defendant pled guilty to two counts of felonious possession of stolen goods in cases 84CRS22249 and 85CRS4778, respectively. Following the entry of defendant's plea, the trial court conducted a sentencing hearing at which the State introduced evidence of prior convictions of defendant for criminal offenses punishable by more than sixty days confinement. The court, *ex mero motu*, consolidated the two cases for judgment. It found as the sole factor in aggravation that defendant had a prior criminal record and it found no factors in mitigation. The court sentenced defendant to a term of eight years, two years in excess of the total of the presumptive terms for the two felonies consolidated. Defendant appealed this sentence.

Attorney General Lacy H. Thornburg, by Associate Attorney General J. Charles Waldrup, for the State.

Assistant Public Defender Robert E. Dillow, Jr. for defendant-appellant.

WELLS, Judge.

Defendant's sole contention is that the court erred in sentencing him to a term of eight years "on grounds that said sentence exceeds the total of the presumptive terms for each felony so consolidated in violation of [N.C. Gen. Stat. §] 15A-1340.4(a)." Defendant argues that our recent decision in *State v. Ransom*, 74 N.C. App. 716, 329 S.E. 2d 673 (1985) controls the disposition of this appeal, and that, following *Ransom*, the court committed reversible error in sentencing defendant. We disagree.

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

> If the judge imposes a prison term, whether or not the term is suspended, and whether or not he sentences the convicted felon as a committed youthful offender, he must impose the presumptive term provided in this section unless, after consideration of aggravating or mitigating factors, or both, he decides to impose a longer or shorter term, or unless he imposes a prison term pursuant to any plea arrangement as to sentence under Article 58 of this Chapter, or unless

> when two or more convictions are consolidated for judgment he imposes a prison term (i) that does not exceed the total of the presumptive terms for each felony so consolidated, (ii) that does not exceed the maximum term for the most serious felony so consolidated, and (iii) that is not shorter than the presumptive term for the most serious felony so consolidated.

In *Ransom*, defendant was indicted on twenty charges of breaking or entering and twenty charges of larceny. He pled guilty to thirteen charges of breaking or entering and thirteen charges of larceny. After consolidating all of the charges, the trial court found one aggravating factor and no mitigating factors, and it sentenced defendant to a term of twenty years. The maximum term for any of the charges to which defendant pled guilty was ten years.

The *Ransom* Court applied and interpreted G.S. § 15A-1340.4(a) as follows:

> As we read this section the judge may impose a sentence other than the presumptive sentence if he finds aggravating or mitigating factors. He may also impose a sentence other than the presumptive sentence pursuant to a plea bargain. The third way he may impose a sentence other than a presumptive sentence is by consolidating two or more charges for judgment. He may without finding aggravating or mitigating factors impose a sentence other than the presumptive sentence so long as the sentence complies with the three requirements set forth in G.S. 15A-1340.4 including the requirement that the sentence imposed is not for a term longer than the maximum term for any of the charges consolidated.

> The Court in this case consolidated the charges for judgment and then found an aggravating factor. The question is whether after the Court has found an aggravating factor may it enhance the sentence by more than is allowed under the third sentencing method of G.S. 15A-1340.4. We hold that it may not. G.S. 15A-1340.4 provides for three methods of sentencing. These methods are in the disjunctive. The statute makes no provision for finding aggravating or mitigating factors if two or more crimes are consolidated for judgment and we hold it was error for the Court to enhance the presump-

tive sentence by more than the maximum for any of the charges.

Ransom, supra.

As in *Ransom*, the trial court here consolidated defendant's offenses for sentencing, made findings of factors in aggravation and mitigation, and imposed a sentence other than the presumptive. We understand *Ransom* to require only that in this case the sentence imposed not exceed the maximum term for the most serious felony so consolidated. The trial court in *Ransom* erred in imposing a term in excess of the maximum term for any of the charges in violation of the second requirement under G.S. § 15A-1340.4(a). In this case, however, the maximum term allowable was ten years and defendant received a sentence of only eight years. We therefore affirm defendant's sentence.

Affirmed.

Judges MARTIN and PARKER concur.

WHITECO METROCOM, INC. v. WILLIAM R. ROBERSON, JR., AS SECRETARY OF TRANSPORTATION OF THE STATE OF NORTH CAROLINA

No. 8610SC458

(Filed 3 February 1987)

Highways and Cartways § 2.1— outdoor advertising sign—violation of controlled access—employees of independent contractor—revocation of permit

A permit to erect and maintain an outdoor advertising sign near an interstate highway was properly revoked on the ground that two persons servicing the sign crossed the controlled access for the highway in violation of an administrative regulation promulgated under the Outdoor Advertising Control Act, notwithstanding such persons were not employees of the permittee but were employees of an independent contractor hired by the permittee to maintain the sign.

APPEAL by petitioner from *Read, Judge*. Order entered 10 December 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 25 September 1986.

Bailey, Dixon, Wooten, McDonald, Fountain & Walker, by Kenneth Wooten and Carolin Bakewell, for petitioner appellant.

Attorney General Thornburg, by Assistant Attorney General Thomas H. Davis, Jr., for respondent appellee.

PHILLIPS, Judge.

Appellant, who is engaged in the business of erecting and maintaining outdoor advertising signs, obtained a permit from the North Carolina Department of Transportation to erect and maintain an outdoor advertising sign near Interstate Highway 85 in this state. The permit was issued under the Outdoor Advertising Control Act, G.S. 136-126, *et seq.*, which was enacted to protect the public by controlling outdoor advertising near interstate and other primary highways. *Bracey Advertising Co. v. North Carolina Department of Transportation*, 35 N.C. App. 226, 241 S.E. 2d 146, *disc. rev. denied*, 295 N.C. 89, 244 S.E. 2d 257 (1978). In addition to the Act the permit was also issued subject to the various regulations or ordinances that the Department of Transportation has promulgated thereunder. G.S. 136-130. One such regulation or ordinance so promulgated, Title 19A, N. C. Administrative Code, Sec. 02E.0210, requires the Department's district engineer to revoke a sign permit for any one of thirteen reasons, one of which is the "unlawful violation of the control of access on interstate, freeway, and other controlled access facilities." So when two persons servicing petitioner's sign were seen to cross the controlled access for I-85 in apparent violation of the ordinance the Department's district engineer revoked petitioner's permit. The revocation was appealed to the respondent Secretary, who affirmed it. This final agency decision, judicially reviewed in a hearing *de novo* pursuant to G.S. 136-134.1, was also affirmed as a matter of law.

The question presented by petitioner's appeal is quite narrow. The evidence pertinent to the revocation is not disputed here and was not disputed in any of the proceedings below. The dispute is, and has been, limited to the legal effect of the evidence, which indicates that: A controlled access area of I-85 was crossed by persons servicing petitioner's sign; and the persons that did the crossing were not employees of the petitioner but were unsupervised, uncontrolled, independent sign maintenance

subcontractors that petitioner engaged as and when its signs needed servicing. Petitioner concedes that the crossing of the designated controlled access area on the occasion involved would have violated the foregoing regulation and justified the revocation of its permit if the persons doing the crossing had been its employees; but it contends that its permit cannot be revoked since the delinquencies were those of an independent contractor. The fallaciousness of this contention is obvious and we reject it. This is not a negligence case where the one who engaged an independent contractor had no duty to either the injured person or the public. In this case, by obtaining the statutorily authorized permit, petitioner accepted the duty to follow the law in its exercise; and petitioner did not rid itself of this duty by hiring an independent substitute to act for it; for a duty imposed by statute cannot be delegated. *Davis v. Summerfield*, 133 N.C. 325, 45 S.E. 654 (1903).

Affirmed.

Judges PARKER and COZORT concur.

CLARENCE E. McGRAW, EMPLOYEE PLAINTIFF v. FIELDCREST MILLS, INC., EMPLOYER, SELF-INSURED, DEFENDANT

No. 8610IC640

(Filed 3 February 1987)

Master and Servant § 59— workers' compensation—horseplay—injury arising out of employment

There was ample evidence to support the Industrial Commission's finding of fact that plaintiff sustained his injury by accident arising out of and in the course of his employment as a result of horseplay where a co-worker was sitting on a box, plaintiff said he was going to push a jack under the box and turn the co-worker over, and the co-worker grabbed the front of plaintiff's belt and jerked him, resulting in an injury to plaintiff's back.

APPEAL by defendant from the North Carolina Industrial Commission Opinion and Award filed 27 February 1986. Heard in the Court of Appeals 9 December 1986.

Plaintiff sought compensation benefits for injuries sustained as a proximate result of an assault and battery by a co-employee. The incident arose on 17 April 1984 when the co-worker, Johnny Trexler, was sitting on a box of cloth in the dyeing department of Fieldcrest Mills, Inc. Plaintiff walked by Trexler and told him that he was going to push the jack under the box and turn Trexler over onto the floor. Trexler got up and grabbed the front of plaintiff's belt and jerked him. This caused an injury to plaintiff's back which eventually resulted in plaintiff having a disc removed from his back by surgery.

On 21 October 1985, Deputy Commissioner John Charles Rush entered an Opinion and Award finding that plaintiff sustained an injury by accident in the course of his employment, but that the injury did not arise out of plaintiff's employment. Deputy Commissioner Rush denied plaintiff benefits under the Workers' Compensation Act.

Upon appeal, the Full Commission entered an Opinion and Award which adopted most of the Deputy Commissioner's findings of fact. The Full Commission found, however, that plaintiff's injury did arise out of and in the course of plaintiff's employment as a result of horseplay. The Opinion and Award stated that plaintiff was entitled to benefits and the case was remanded back to Deputy Commissioner Rush for a determination of benefits due. From the Opinion and Award of the Industrial Commission, defendant appeals to this Court.

Cruse and Spence, by Thomas K. Spence, for plaintiff appellee.

Smith, Helms, Mulliss & Moore, by Jeri L. Whitfield and Lynn G. Gullick, for defendant appellant.

ARNOLD, Judge.

Defendant appellant contends that the Industrial Commission erred in holding that plaintiff's injury was an accident arising out of and in the course of plaintiff's employment. We disagree.

The plenary powers of the Industrial Commission are such that upon review, it may adopt, modify or reject the findings of fact of the Hearing Commissioner. In doing so, it may weigh the evidence and make its own determination as to the weight and

credibility of the evidence. *Hollar v. Furniture Co.*, 48 N.C. App. 489, 269 S.E. 2d 667 (1980). There was ample evidence to support the Full Commission's finding of fact that plaintiff sustained his injury by accident arising out of and in the course of his employment as a result of horseplay.

In *Bare v. Wayne Poultry Co.*, 70 N.C. App. 88, 318 S.E. 2d 534 (1984), this Court held that horseplay which resulted in an employee being cut by a chicken deboning knife did, in fact, arise out of the course of her employment. The case stated that "the workers' compensation system is based upon the realities of human conduct, and that workers occasionally relieving the tedium of their labors by sportive and foolish acts is a routine and accepted incident of employing them." *Id.* at 94, 318 S.E. 2d at 539. The Court in *Bare* also stated that plaintiff's participation in the horseplay was irrelevant. *Id.* at 91-92, 318 S.E. 2d at 537-538. *Bare* is controlling on the case *sub judice*. The Industrial Commission did not err in holding that plaintiff's injury arose out of his employment.

Affirmed.

Judges PHILLIPS and ORR concur.

STATE OF NORTH CAROLINA v. ANTHONY JOSEPH PERRY

No. 8627SC701

(Filed 3 February 1987)

Narcotics § 2— possession of more than one ounce of marijuana—sufficiency of indictment

An indictment alleging that defendant "did possess with intent to sell and deliver a controlled substance, namely more than one (1) ounce of Marijuana" was sufficient to support defendant's conviction of possession of more than one ounce of marijuana.

APPEAL by defendant from *Ross, Judge*. Judgment entered 12 February 1986 in Superior Court, LINCOLN County. Heard in the Court of Appeals 9 December 1986.

Defendant was indicted as follows:

THE JURORS FOR THE STATE UPON THEIR OATH PRESENT that on or about the date of the offense shown [17 June 1985] and in the county named above the defendant named above unlawfully, willfully and feloniously did possess with intent to sell and deliver a controlled substance, namely more than one (1) ounce of Marijuana, which is included in Schedule VI of the North Carolina Controlled Substances Act, in violation of the General Statutes of North Carolina and against the peace and dignity of the State.

Defendant pleaded not guilty and was tried before a jury.

The State presented evidence tending to show the following facts. On 17 June 1985, defendant was arrested at his home pursuant to a warrant charging him with assault. Immediately prior to his arrest, defendant was a passenger in a truck driven by another individual. Subsequent to defendant's arrest, the truck was searched and a shaving kit containing 40 grams of marijuana and a gun were found on the floor of the passenger side of the truck. Defendant admitted that the marijuana and gun belonged to him.

The trial judge submitted four possible verdicts: (1) guilty of possession with the intent to sell or deliver a controlled substance; to wit, marijuana; (2) guilty of possession of more than one ounce of the controlled substance marijuana; (3) guilty of possession of marijuana; and (4) not guilty. The jury convicted defendant of possession of more than one ounce of marijuana. From the judgment imposing a five-year term of imprisonment, defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Randy Meares, for the State.

John O. Lafferty, Jr. for defendant appellant.

ARNOLD, Judge.

Defendant contends that he was not charged with possession of more than one ounce of marijuana and therefore the trial judge erred in charging the jury on the alternative verdict of possession of more than one ounce of marijuana.

To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. *State v. McGill*, 296 N.C. 564, 251 S.E. 2d 616 (1979).

We do not agree with defendant's contention that he was not charged with possession of more than one ounce of marijuana since the two elements of possession of more than one ounce of marijuana are both set forth in the indictment.

G.S. 15A-924(a)(5) provides in part that a criminal pleading must contain:

> A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

The indictment in the present case alleged the element of possession of marijuana and further alleged that the amount of marijuana possessed exceeded one ounce. We find that the elements of possession of more than one ounce of marijuana were set out with sufficient clarity to apprise defendant that he was charged with that offense.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

No error.

Judges PHILLIPS and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 FEBRUARY 1987

ANDERSON v. KEPHART No. 8630SC691	Cherokee (85CVS18)	Reversed
BLACK v. BLACK No. 8629DC896	Polk (85CVD110)	Appeal Dismissed
COASTAL WATER v. WATERCARE No. 865SC807	New Hanover (86CVS761)	Appeal Dismissed
FISHER v. FISHER No. 8626DC378	Mecklenburg (81CVD11411)	Affirmed
HORNE v. PET WORLD, INC. No. 8618DC800	Guilford (84CVD6525)	Reversed in part, Affirmed in part
KIDSHILL v. FOSTER- STURDIVANT No. 8610SC465	Wake (84CVS3288)	Affirmed
McCLINTON v. WPEG RADIO No. 8626SC912	Mecklenburg (86CVS3605)	Affirmed
MARCHIANO v. JACKSON BEVERAGE No. 865SC299	New Hanover (82CVS2453)	Affirmed
MATTER OF BARTEL No. 864SC764	Onslow (86CRS4146)	Reversed
MATTER OF KIME No. 8610DC794	Wake (86SPC500)	Affirmed
OSBORNE v. ROGERS No. 8618DC902	Guilford (85CVD6350)	Affirmed
SIMPSON v. BOARD OF COMM. No. 8617SC838	Surry (86CVS50)	Affirmed
SPARKS v. LOWE'S No. 8621SC568	Forsyth (84CVS3940)	Affirmed
STATE v. ADAMS No. 8626SC676	Mecklenburg (85CRS038934) (85CRS038937)	No Error
STATE v. ARNETTE No. 8613SC878	Brunswick (85CRS6262)	No Error
STATE v. BAILEY No. 8619SC960	Cabarrus (86CRS1898) (86CRS1899)	No Error

STATE v. BOWKLEY No. 863SC865	Carteret (85CRS8798)	No Error
STATE v. HOPE No. 8618SC504	Guilford (85CRS75707)	No Error
STATE v. MOORE No. 8616SC859	Robeson (85CRS23628) (85CRS23629)	No Error
STOTESBURY v. OLIVER No. 862DC745	Washington (85CVD88)	Appeal Dismissed

JENNIFER LOVE CAMPBELL, BY AND THROUGH HER GUARDIAN AD LITEM, DUNCAN A. McMILLAN, MARGARET O. CAMPBELL AND JEFFREY L. CAMPBELL v. PITT COUNTY MEMORIAL HOSPITAL, INC.

No. 863SC556

(Filed 17 February 1987)

1. **Trial § 3.2— counsel unprepared for trial—denial of continuance proper**

The trial court did not err in failing to grant defendant's motions for continuance where defendant argued that its counsel was unprepared for trial because plaintiffs first informed defendant approximately one month before trial that 22 or 23 people would be expert witnesses for plaintiffs at trial and the burden of attending depositions in so short a time made it impossible to prepare adequately for trial, but defendant failed to show any substantial prejudice to its rights by this alleged burden.

2. **Physicians, Surgeons and Allied Professions § 15; Evidence § 22.1— personal injury action against hospital—settlement of case against physician—references properly prohibited**

In a personal injury action against defendant hospital, the trial court did not err in prohibiting any references to a physician's participation as a defendant in the case when the case against him had been settled, since any such references were properly excluded as irrelevant under N.C.G.S. § 8C-1, Rule 402 of the N.C. Rules of Evidence and as contravening the strong public policy favoring settlement of controversies out of court.

3. **Evidence § 25— personal injury action—"Day-in-the-Life" videotape—admissibility**

The trial court in a personal injury action did not err in admitting a "Day-in-the-Life" videotape of the injured child where the court examined carefully the authenticity, relevancy, and competency of the videotape, found that it was admissible, and gave the jury proper limiting instructions at the time it was introduced; moreover, though it would have been the better practice to provide notice to both opposing counsel and the trial court prior to taping, plaintiffs' failure to provide such notice here did not render the tape inadmissible.

4. **Hospitals § 3.2— injury to breech baby—duties of hospital—sufficiency of evidence of breach**

Defendant hospital, under the doctrine of corporate negligence set forth in *Bost v. Riley*, 44 N.C. App. 638, as applied to the specific facts and circumstances of the case, did have a legal duty to insure that plaintiffs' informed consent to a vaginal delivery of a footling breech baby had been obtained prior to delivery, and defendant also had a duty to establish an effective mechanism for the prompt reporting of any situation which created a threat to the health of a patient such as the minor plaintiff here; furthermore, evidence was sufficient to establish defendant's liability as a corporate entity for damages resulting from defendant's breach of these duties.

5. Damages § 3.4— injury to breech baby—emotional or mental distress of father—no actual physical injury shown to father

In an action to recover for personal injuries to the minor plaintiff, the trial court erred in submitting an issue as to plaintiff father's emotional pain and suffering as the minor's parent and erred in allowing him to recover $5,000 since a plaintiff, to recover for emotional or mental distress in an ordinary negligence case, must prove that such distress was the proximate result of some physical impact with or injury to himself also resulting from defendant's negligence, and plaintiffs' evidence here showed no physical injury.

6. Damages § 16.2; Rules of Civil Procedure § 59— injury to breech baby—medical expenses—jury verdict not set aside—no error

In an action to recover damages resulting from a brain injury suffered by plaintiff's child during a footling breech birth, the trial court did not abuse its discretion in denying defendant's motion to set aside the jury's verdict as to the amount plaintiff father was entitled to recover where the jury awarded plaintiff $1,646,000; plaintiffs had presented evidence that the present value of the minor plaintiff's medical expenses during her minority was only $646,708; the court found this verdict excessive, unsupported by the evidence, and given under the influence of passion and prejudice; plaintiffs consented to a remittitur of $1,000,000, reducing the award to $646,000; and the court then entered judgment for this amount.

7. Damages § 16.1; Rules of Civil Procedure § 59— injury to breech baby—excessive verdict set aside—no error

In an action to recover damages resulting from a brain injury suffered by the minor plaintiff during a footling breech birth, the trial court did not err in setting aside the jury's award of $4,850,000 to the minor plaintiff where the court proposed a remittitur of $2,425,000 which plaintiffs declined to accept, and the court then set aside the verdict and ordered a new trial as to this issue only, finding that the jury's verdict was excessive, appeared to be given under the influence of passion and prejudice, and was unsupported by the evidence.

Judge BECTON concurring in part and dissenting in part.

Judge ORR dissenting in part.

APPEAL by plaintiffs and defendant from *Phillips, Judge.* Judgment entered 12 June 1985 in PITT County Superior Court. Heard in the Court of Appeals 18 November 1986.

Plaintiffs brought this action to recover damages for (1) personal injury to Jennifer Love Campbell, the minor child of Margaret and Jeffrey Campbell, (2) for medical expenses for Jennifer's care, (3) for loss of Jennifer's services, and (4) for mental anguish and trauma to Jennifer's parents.

The action, originally begun in Wake County on 28 April 1982, named as defendants Dr. Robert Deyton, Greenville Obstetrics and Gynecology, P.A., and Pitt County Memorial Hospital. On motion of defendants, the action was moved to Pitt County for trial. On 15 March 1985, plaintiffs entered into a settlement with Dr. Deyton and his professional association for $1,500,000.00, leaving the hospital as the sole defendant. The trial began on 18 March 1985 and came to verdict on 11 April 1985. At trial, the evidence showed, *inter alia*, the following events and circumstances:

On 30 April 1979 plaintiff Margaret Campbell was admitted to defendant Pitt County Memorial Hospital for the delivery of a child. Plaintiff Jeffrey Campbell, Mrs. Campbell's husband, accompanied her to the hospital. Shortly after Mrs. Campbell's admission, Dr. Robert Deyton, the attending obstetrician, determined that her baby was in the footling breech (feet first) presentation.

A baby can be delivered either vaginally or by Cesarean section. The presentation of the fetus is important in deciding which method is appropriate. In a prenatal visit about five weeks before the date of delivery, Mrs. Campbell was told by Dr. Richard Taft, her treating physician at that time, that her baby was then in a breech presentation and that, if the baby was still in a breech presentation when labor began, the method of delivery would be by Cesarean section.

While Dr. Deyton and the nurses assigned to monitor Mrs. Campbell's labor at defendant hospital knew that her baby was in the footling breech presentation by 1:30 p.m. on the date of delivery, no one informed either Mrs. Campbell or her husband about this fact or its significance. Dr. Deyton elected to proceed with a vaginal delivery despite the position of the baby.

Dr. Deyton performed a vaginal delivery at about 7:00 p.m. on 30 April. For several hours prior to delivery, the nurses monitoring the baby observed complications which they believed were affecting the condition of the fetus adversely. Nurse Debra Cannon expressed some of these concerns to Dr. Deyton, but she did not contact her immediate supervisor or anyone else when Dr. Deyton failed to address these complications.

Prior to delivery, the baby's umbilical cord became wrapped around her legs. It was later determined that the child, plaintiff Jennifer Campbell, sustained brain damage due to severe asphyxia from the "entangled cord." Jennifer has cerebral palsy and requires constant care and supervision.

The court denied defendant hospital's motions for a continuance prior to and at the time of trial. The court prohibited defendant hospital from making any reference to Dr. Deyton's participation as a defendant in the case during the trial. The court admitted into evidence, over objection, a "Day-in-the-Life" videotape of the minor-plaintiff.

At the close of all the evidence the following six issues were submitted to the jury and answered as follows:

1. Were plaintiffs, Jennifer Love Campbell, and Jeffrey L. Campbell injured by the negligence of Nurses Cannon and/or Copeland, acting as agents of defendant Pitt County Memorial Hospital, Inc.?

ANSWER: No.

2. Were the plaintiffs, Jennifer Love Campbell and Jeffrey L. Campbell, injured by the negligent failure of the defendant, Pitt County Memorial Hospital to insure that plaintiff[s'] informed consent ha[d] been obtained?

ANSWER: Yes.

3. Were the plaintiffs, Jennifer Love Campbell and Jeffrey L. Campbell, injured by the corporate negligence of the defendant, Pitt County Memorial Hospital, Inc.?

ANSWER: Yes.

4. What amount, if any, is plaintiff, Jeffrey L. Campbell, entitled to recover for emotional pain and suffering?

ANSWER: $5,000.

5. What amount, if any, is the plaintiff, Jeffrey L. Campbell, parent of Jennifer Love Campbell, entitled to recover?

ANSWER: $1,646,000.

6. What amount, if any, is the plaintiff, Jennifer Love Campbell, entitled to recover?

ANSWER: $4,850,000.

The court granted defendant's motion for judgment notwithstanding the verdict as to issue #3. The court found that the jury's awards in issue #5 and issue #6 were excessive, appeared to be given under the influence of passion and prejudice, and were unsupported by the evidence. Accordingly, as to issue #5, a remittitur of $1,000,000 was entered, reducing the sum awarded to $646,000. No remittitur was entered for issue #6. The court granted defendant's motion for a new trial as to issue #6 only. With the above modifications and after making an adjustment for plaintiffs' settlement with Dr. Deyton and his medical group, the court entered judgment in accordance with the verdict and ordered that defendant pay a portion of plaintiffs' costs pursuant to N.C. Gen. Stat. § 6-20.

Plaintiffs and defendant appealed.

Tharrington, Smith & Hargrove, by John R. Edwards and Burton Craige; Kirby, Wallace, Creech, Sarda & Zaytoun, by Robert Zaytoun, for plaintiffs.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert M. Clay and Alene M. Mercer, for defendant Pitt County Memorial Hospital, Inc.

Bell, Davis & Pitt, P.A., by William Kearns Davis and Stephen M. Russell, for North Carolina Association of Defense Attorneys as amicus curiae.

Kevin B. Yow and Harris, Cheshire, Leager & Southern, by Samuel O. Southern, for North Carolina Hospital Association as amicus curiae.

WELLS, Judge.

Defendant's Appeal

[1] Defendant contends the court erred in failing to grant its motions for a continuance. We disagree.

"Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it."

Shankle v. Shankle, 289 N.C. 473, 223 S.E. 2d 380 (1976). "The granting of a continuance is within the discretion of the trial court and absent a manifest abuse of discretion its ruling is not reviewable on appeal." *Lumbermens Mut. Cas. Co. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 70 N.C. App. 742, 321 S.E. 2d 10 (1984).

Defendant contends that its counsel was unprepared for trial because plaintiffs first informed defendant on 15 February 1985, approximately one month before trial, that either twenty-two or twenty-three persons would be expert witnesses for plaintiffs at trial. Defendant argues that the burden of attending depositions between 25 February and 14 March made it impossible to prepare adequately for trial.

We hold, however, that defendant has failed to show any substantial prejudice to its rights by this alleged burden. *Suggs v. Carroll*, 76 N.C. App. 420, 333 S.E. 2d 510 (1985). Accordingly, we hold that the court did not err in denying defendant's motions for a continuance.

[2] Defendant contends that the court erred in prohibiting any references to Dr. Deyton's participation as a defendant in the case. However, we hold, following *Cates v. Wilson*, 83 N.C. App. 448, 350 S.E. 2d 898 (1986), that the court properly excluded references to Dr. Deyton's participation as a defendant. Specifically, any such references were properly excluded as irrelevant under N.C. Gen. Stat. § 8C-1, Rule 402 of the North Carolina Rules of Evidence and as contravening the strong public policy favoring settlement of controversies out of court. *Cates, supra.*

[3] Defendant contends the court erred in admitting a "Day-in-the-Life" videotape of Jennifer Campbell. We disagree.

Videotapes generally are admissible into evidence under North Carolina law for both illustrative and substantive purposes. N.C. Gen. Stat. § 8-97; *State v. Strickland*, 276 N.C. 253, 173 S.E. 2d 129 (1970). In *Strickland*, our Supreme Court observed that

> the use of properly authenticated moving pictures to illustrate a witness' testimony may be of invaluable aid in the jury's search for a verdict that speaks the truth. However, the powerful impact of this type of evidence requires the trial judge to examine carefully into its authenticity, relevan-

> cy, and competency, and—if he finds it to be competent—to give the jury proper limiting instructions at the time it is introduced.

Based on our review of the record we hold that the court (1) did examine carefully into the authenticity, relevancy, and competency of the videotape, (2) found that it was admissible and (3) gave the jury proper limiting instructions at the time it was introduced. *Strickland, supra.* Mrs. Campbell testified that she had viewed the videotape and that it accurately illustrated Jennifer's daily activities, capabilities, and physical deficiencies. Although the court did not view the tape before it was played to the jury, the court heard arguments on the admissibility of the tape in which the nature of the tape, how it was made, its length and the principals involved all were described. After ruling the tape admissible in its entirety, the court gave the jury the following limiting instruction:

> And I instruct you now that you would not consider this video tape as proof for the purpose of establishing the truth of any matter in this lawsuit. You would consider it for the purposes of illustrating the testimony of witnesses, if in fact you find that it does illustrate testimony of witnesses in this lawsuit, and would not consider it for any other purpose.
>
> It is not offered nor is it received for any purpose other than as illustrative of witnesses' testimony.

Defendant further emphasizes that its counsel had inadequate notice "as to the filming of the videotape because counsel for defendant was not invited to the taping session and did not receive an opportunity to view the tape until the first day of trial."

We recognize that, in order to prevent any likelihood of unfair surprise, the better practice is to provide notice to both opposing counsel and the trial court prior to taping. Passanante, "The Use of Clinical and 'Day-in-the-Life' Presentations in Personal Injury Litigation: A Rising Star in the American Courtroom," 20 Wake Forest L. Rev. 121 (1984). We hold however, that plaintiffs' failure to provide such notice here did not render the tape inadmissible. Rather, as we have emphasized above, the admissibility of the videotape under the particular facts and circum-

stances of this case lay solely within the sound discretion of the trial court. As defendant has not shown that the court abused its discretion by admitting the evidence, we find no error.

Defendant contends the court erred in allowing "cross-examination of defendant's witnesses with purported quotes from depositions not in evidence and with hypothetical questions which were inflammatory and irrelevant to the facts of the case." We have reviewed each of these exceptions and find no prejudicial error in the court's findings. *See Cole v. Duke Power Co.*, 81 N.C. App. 213, 344 S.E. 2d 130, *disc. rev. denied*, 318 N.C. 281, 347 S.E. 2d 462 (1986).

[4] Defendant contends the court improperly submitted issue #2 and issue #3 to the jury. Both of these issues involve the question of corporate negligence. In essence, during trial plaintiffs presented evidence establishing two separate duties which they alleged defendant owed to them under the doctrine of corporate negligence. The first duty concerns informed consent, and it is addressed by issue #2 which reads: "Were the plaintiffs . . . injured by the negligent failure of the defendant . . . to insure that plaintiff[s'] informed consent ha[d] been obtained?"

The second duty concerns the absence of an operational and effective chain of command at the hospital and it is addressed by issue #3 taken with the jury charge for this issue. Issue #3 reads: "Were the plaintiffs . . . injured by the corporate negligence of the defendant . . .?" The court charged the jury, under issue #3, in pertinent part:

> In this regard, ladies and gentlemen, I instruct you that if the plaintiffs have proved by the greater weight of the evidence that the defendant hospital was negligent in failing to make a reasonable effort to monitor and oversee the treatment of Margaret and Jennifer Campbell by Dr. Deyton, . . . [in] that the hospital had a duty to make a reasonable effort to establish a mechanism for the prompt reporting of any situation that created a threat to the health of a patient so that such reporting is effective to safeguard the health of the patient and can be done without fear of reprisal, and that the defendant failed to do that;

> And, if the plaintiffs have further satisfied you from the evidence and by its greater weight that such negligence, if any, was a proximate cause of injury to the plaintiff, it would be your duty to answer this issue "Yes" in favor of the plaintiff.

The jury answered both issues in the affirmative.

In summary, issues #2 and #3 respectively raise the following two dispositive questions affecting defendant's corporate liability to plaintiffs: (1) whether plaintiffs' injuries were caused by a breach of a duty owed directly by defendant hospital to plaintiffs to insure that plaintiffs' informed consent to a vaginal delivery of a footling breech baby had been obtained prior to the actual delivery of the minor-plaintiff and (2) whether plaintiffs' injuries were caused by a breach of a duty owed directly by defendant hospital to plaintiffs to establish an effective mechanism for the prompt reporting of any situation that created a threat to the health of a patient such as the minor-plaintiff here. An affirmative answer to either issue would establish defendant hospital's corporate liability to plaintiffs.

For the reasons discussed below, we hold that defendant, under the doctrine of corporate negligence set forth in *Bost v. Riley*, 44 N.C. App. 638, 262 S.E. 2d 391, *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 621 (1980) as applied to the specific facts and circumstances of this case, did have a legal duty to insure that plaintiffs' informed consent to a vaginal delivery of a footling breech baby had been obtained prior to delivery. We further hold that the evidence, when viewed in the light most favorable to plaintiffs, was sufficient to establish defendant's liability as a corporate entity for damages resulting from defendant's breach of this duty. Regarding issue #3, we hold that defendant also had a duty under the doctrine of corporate negligence set forth in *Bost* as applied to the specific facts and circumstances of this case to establish an effective mechanism for the prompt reporting of any situation that created a threat to the health of a patient such as the minor-plaintiff here. We further hold that the evidence, when viewed in the light most favorable to plaintiffs, was sufficient to establish defendant's liability as a corporate entity for damages resulting from defendant's breach of this duty.

In *Bost, supra*, this Court expressly recognized the doctrine of corporate negligence, which involves the violation of a duty owed directly by the hospital to the patient, as a basis for liability apart and distinct from *respondeat superior*. In this regard, we stated:

> If, as our Supreme Court has stated, a patient at a modern-day hospital has the reasonable expectation that the hospital will attempt to cure him, it seems axiomatic that the hospital have the duty assigned . . . to make a reasonable effort to monitor and oversee the treatment which is prescribed and administered by physicians practicing at the facility.

Plaintiffs presented the following pertinent evidence regarding defendant's duty to insure plaintiffs' informed consent had been obtained:

Approximately five weeks before delivery, Mrs. Campbell learned that her baby was in the "bottom first" breech position. She was admitted to the hospital around midday on 30 April 1979 in early active labor. Mrs. Campbell informed the admitting nurse that her doctor had said "to check me for being breech." Shortly after admission, Dr. Deyton determined by pelvic x-ray that the baby was in the footling breech presentation. When Mrs. Campbell returned to the labor room, a footling breech was confirmed by vaginal examination.

Plaintiffs presented evidence that in 1979 obstetricians and labor and delivery nurses were aware of the higher risks of vaginal delivery for a baby in the footling breech presentation. Plaintiffs' experts indicated that the primary risk was umbilical cord entanglement and resulting asphyxia and that this risk could be avoided by a Cesarean delivery.

Plaintiffs' nursing experts testified that the nurses treating Mrs. Campbell in the hospital's labor room were required under the standard of practice for nurses with similar training and expertise to assure "prior to the performance" of any procedures that Mr. and Mrs. Campbell had been informed by their physician that the baby was in the footling breech position and that they were informed of the relative risks of a vaginal delivery, as opposed to Cesarean delivery, under these circumstances. Dr.

Moore, a perinatal nurse, explained in this regard: "Explaining the risk of alternative procedures would be the responsibility of the physician[;] [a]ssuring that the patient has had an explanation would be the responsibility of the nurse."

Nurse Susan Rumsey, another expert for plaintiff, testified that a parent who had been informed that its baby was in the footling breech presentation and who had been informed of the risks of a vaginal delivery ordinarily "would opt for a safer procedure." Accordingly, failure to see that informed consent had been obtained "could have affected the outcome . . ." here in Nurse Rumsey's opinion.

Plaintiffs presented evidence that (1) Dr. Deyton never informed either Mr. or Mrs. Campbell that the baby was in the footling breech presentation and the attendant risks of vaginal versus Cesarean delivery and (2) Nurses Copeland and Cannon, who attended Mrs. Campbell during labor and delivery, never asked either Mr. or Mrs. Campbell whether they were aware of the position of the baby or whether Dr. Deyton had spoken with them about the baby's footling breech presentation and its significance for a vaginal versus Cesarean delivery.

In 1979, the hospital had a policy which required that consent be obtained prior to procedures being performed at the hospital. In this regard labor and delivery nurses were charged with the responsibility of obtaining the signature of the parents on a hospital consent form before delivery. No one at the hospital presented Mr. or Mrs. Campbell with this consent form prior to Jennifer's birth. Nurse Cannon did present the consent form to Mr. Campbell shortly after Jennifer's birth when Mr. Campbell was still unaware of Jennifer's condition, and Mr. Campbell signed it. At this time, Mr. Campbell did not know that Jennifer had been in the footling breech position, and he did not know the risks of vaginal delivery under these circumstances. The form provided, in pertinent part, that: "The nature and the purpose of the operation, possible alternative methods of treatment, the risks involved . . . have been fully explained to me."

Mrs. Campbell testified that the first time she was aware that Jennifer was in the footling breech presentation was when her attorney obtained a copy of her medical records from the hospital. Both Mr. and Mrs. Campbell testified that, if they had been

advised of the risks of vaginal versus Cesarean delivery prior to delivery, they would have elected the latter method of delivery.

We hold that the foregoing evidence establishes that the hospital's general obligation "to make a reasonable effort to monitor and oversee the treatment" pursuant to *Bost, supra,* included the specific duty, under the particular facts and circumstances of this case, to make a reasonable effort to insure that plaintiffs' informed consent to a vaginal delivery of a footling breech baby had been obtained prior to delivery. Plaintiffs' evidence is also sufficient to establish that defendant-hospital's failure to perform this duty was a proximate cause of Jennifer's injuries. *See Bost, supra; Sasser v. Beck,* 65 N.C. App. 170, 308 S.E. 2d 722 (1983), *disc. rev. denied,* 310 N.C. 309, 312 S.E. 2d 652 (1984). Accordingly, we hold that the court properly submitted issue #2 to the jury.

Plaintiffs presented the following pertinent evidence regarding defendant's duty to have an operational and effective chain of command:

By approximately 5:00 p.m. on the date of delivery, Nurse Cannon, who was monitoring Mrs. Campbell's labor through the use of an electronic fetal heart rate monitor, was aware that Mrs. Campbell's baby was in distress, and she informed Dr. Deyton about the problems she was observing. By 5:23 p.m., Nurse Cannon acknowledged that "all of the various signs [that] could indicate fetal hypoxia . . ." were present on the fetal heart rate monitor. Despite the fact that Dr. Deyton did not respond to the information relayed to him by Nurse Cannon, at no time did she notify her supervisor or anyone else in her administrative chain of command.

Plaintiffs' nursing experts testified that, if an attending nurse concludes that a treating physician's actions are negligent or dangerous, then he or she must act to protect the patient by contacting a supervisor. In the instant case, plaintiffs' experts testified that by 5:30 or earlier when Dr. Deyton failed to take any action to deliver the baby, Nurse Cannon had a duty to notify her supervisor that a life-threatening situation existed.

Plaintiffs presented further evidence showing that the reason why Nurse Cannon did not contact a supervisor was because the

hospital had failed to establish a mechanism for the reporting of negligent or dangerous treatment. Plaintiffs presented evidence through experts that every hospital must have an established mechanism for reporting negligent or dangerous treatment so that such reporting can go through official channels and be done without fear of reprisal. Finally, plaintiffs presented evidence that defendant hospital had failed to establish such a mechanism and that, if it had, Jennifer would not have suffered brain damage.

Once again, we hold that plaintiffs presented sufficient evidence to show that the hospital's general obligation "to make a reasonable effort to monitor and oversee the treatment" pursuant to *Bost, supra,* included the specific duty, under the particular facts and circumstances of this case, to establish an effective mechanism for the prompt reporting of any situation that created a threat to the health of a patient such as the minor-plaintiff here. Plaintiffs' evidence is also sufficient to demonstrate that defendant-hospital's failure to perform this duty was a proximate cause of Jennifer's injuries. *See Bost, supra; Sasser, supra.* Accordingly, we hold that the court properly submitted issue #3 to the jury.

Citing Jones v. New Hanover Hospital, 55 N.C. App. 545, 286 S.E. 2d 374, *disc. rev. denied,* 305 N.C. 586, 292 S.E. 2d 570 (1982), defendant contends that issues #2 and #3 "should not have been submitted to the jury as this case arose in 1979, prior to the *Bost* declaration of the new duties of hospitals." It was apparently on this basis that the trial court granted defendant's motion for judgment notwithstanding the verdict as to issue #3, since it expressly denied a conditional new trial, finding that plaintiffs' corporate negligence claim was supported by the evidence.

However, subsequent to *Jones* and the court's ruling here, we resolved this issue against defendant in *Blanton v. Moses H. Cone Hosp.*, 78 N.C. App. 502, 337 S.E. 2d 200 (1985), *disc. rev. allowed,* 316 N.C. 374, 342 S.E. 2d 890 (1986). In *Blanton,* we held that the doctrine of corporate negligence applies prospectively to causes of action arising after 20 January 1967, the date charitable immunity was abolished.

In light of *Blanton,* we hold that the court properly submitted issues #2 and #3 to the jury and that it improperly granted defendant's motion for judgment notwithstanding the verdict

based on *Jones, supra,* as to issue #3. However, the court's improper granting of judgment notwithstanding the verdict as to issue #3 did not materially affect the outcome of the case since the final judgment entered upholds the jury's verdict on defendant's liability to plaintiffs in issue #2.

[5] Defendant contends the court erred in submitting issue #4 to the jury and in allowing Mr. Campbell to recover the amount of $5,000 for his emotional pain and suffering as Jennifer's parent. We agree.

For a plaintiff to recover for emotional or mental distress in an ordinary negligence case, he must prove that such distress was the proximate result of some physical impact with or physical injury to himself also resulting from defendant's negligence. *Woodell v. Pinehurst Surgical Clinic, P.A.*, 78 N.C. App. 230, 336 S.E. 2d 716 (1985), *aff'd*, 316 N.C. 550, 342 S.E. 2d 523 (1986). As in *Woodell*, plaintiffs' evidence here shows "genuine emotional anguish" with no physical injury. Accordingly, following *Woodell*, we hold that the court improperly submitted issue #4 to the jury and that the portion of the court's judgment allowing recovery based on this issue must be reversed.

[6] Defendant contends the court abused its discretion in denying its motion to set aside the jury's verdict as to issue #5. We disagree.

In general,

> The standard for review of a trial court's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is virtually prohibitive of appellate intervention. Appellate review "is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge." *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E. 2d 599, 602 (1982). The trial court's discretion is " 'practically unlimited.' " *Id.*, 290 S.E. 2d at 603, quoting from *Settee v. Electric Ry.*, 170 N.C. 365, 367, 86 S.E. 1050, 1051 (1915). A "*discretionary* order pursuant to G.S. 1A-1, Rule 59 for or against a new trial upon *any* ground may be reversed on appeal only in those exceptional cases where an abuse of discretion is clearly shown." *Worthington*, 305 N.C. at 484, 290 S.E. 2d at 603.

> "[A] manifest abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-85, 290 S.E. 2d at 604. "[A]n appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Id.* at 487, 290 S.E. 2d at 605.

Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E. 2d 889 (1985).

The jury here awarded Mr. Campbell $1,646,000 in its answer to issue #5. Plaintiffs, however, had presented evidence that the present value of Jennifer's medical expenses during her minority was only $646,708. The court found that this verdict was "excessive and appears to have been given under the influence of passion and prejudice and that the evidence was insufficient to justify the verdict." Plaintiffs consented to a remittitur of $1,000,000, reducing the award for issue #5 to $646,000, and the court entered judgment on issue #5 for this amount.

Applying the *Worthington* standard to the "cold record" here, we hold that it contains no indication of a manifest abuse of the court's discretion. Accordingly, we hold that the court did not err in denying defendant's motion to set aside the jury's verdict as to issue #5.

Defendant contends that the court erred in its computation of pre-judgment interest. However, we do not reach this issue since defendant's exception to the court's computation was not made the basis of an assignment of error. N.C.R. App. Proc. 10(a).

Defendant contends the "the trial court's awarding of part of plaintiff[s'] costs was improper. . . ." Specifically, defendant contends that plaintiffs could not recover as costs charges of expert witnesses for time spent outside trial or expenses for more than two expert witnesses who testified about the standard of care applicable to nurses in similar communities. However, defendant here has not shown that the court exceeded its discretionary authority to award such costs pursuant to N.C. Gen. Stat. § 6-20. *See, e.g., Dixon, Odom & Co. v. Sledge*, 59 N.C. App. 280, 296 S.E. 2d 512 (1982), and we therefore reject this.

Plaintiffs' Appeal

[7] Plaintiffs contend the court erred in setting aside the jury's award of $4,850,000 to Jennifer in issue #6. We disagree.

The jury awarded Jennifer $4,850,000 in general and special damages. The court proposed a remittitur of $2,425,000 which plaintiffs declined to accept. Accordingly, the court set aside this verdict and ordered a new trial as to this issue only, finding that the jury's verdict was excessive, appeared to be given under the influence of passion and prejudice, and was unsupported by the evidence.

While it appears to us from our examination of the "cold record" that this verdict was not the result of passion or prejudice nor unsupported by the evidence, applying the strict *Worthington* standard of appellate review followed and applied in *Pearce, supra,* we cannot say that the court's order "probably amounted to a substantial miscarriage of justice." *Pearce, supra.* Accordingly, we leave undisturbed the court's order granting defendant's motion for a new trial on the issue of Jennifer's damages.

Given our disposition of defendant's appeal, we do not reach plaintiffs' remaining arguments.

No error in part, reversed in part.

Judge BECTON concurring in part and dissenting in part.

Judge ORR dissenting in part.

Judge BECTON concurring in part and dissenting in part.

I

In *Cox v. Haworth,* this Court, in an opinion I authored, declined the Coxes' invitation "*to impose a duty* upon a hospital to properly inform and advise a patient of the nature of a medical procedure to be performed . . . when the patient [had been] admitted to the hospital for an operation under the care of his privately retained physician." 54 N.C. App. 328, 331, 283 S.E. 2d 392, 394-95 (1981) (emphasis added). *Cox* is a summary judgment

case, and it is distinguishable from the case *sub judice*. The Coxes forecasted no evidence of any duty the hospital had which would invoke the doctrine of corporate negligence. In *Cox* we were asked to determine if a court could impose such a duty on a hospital. In the case *sub judice*, we are asked to determine whether a court should instruct a jury regarding a duty which, the evidence shows, the hospital had imposed on itself.

Judicial enforcement of a duty that a hospital imposes upon itself is significantly different than judicial imposition of a new duty on a hospital. That a hospital can violate a duty it created and owed is clear from the following quote from *Bost v. Riley*:

> The plaintiff in the present case has introduced evidence tending to show that the defendant surgeons failed to keep progress notes on Lee's condition for a number of days in succession following the operation of 6 August 1974, *in violation of a rule promulgated by Catawba.* Catawba took no action against the surgeons for their violation. *While this evidence is sufficient to show that Catawba may have violated the duty it owed to Lee to adequately monitor and oversee his treatment,* plaintiff has offered no evidence to show that this omission contributed to Lee's death.

(Emphasis added.) 44 N.C. App. 638, 648, 262 S.E. 2d 391, 397, *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 621 (1980).

In the case before us, plaintiff's expert witnesses testified that defendant's labor room nurses were required under the standard of practice for nurses with similar training and experience to assure, prior to any procedure, that the plaintiffs had been informed by their physician that the baby was in the footling breech position and of the relative risk of a vaginal delivery. One witness explained: "Assuring that the patient has had an explanation would be the responsibility of the nurse." Moreover, plaintiffs presented evidence that in 1979 defendant hospital had a policy requiring labor and delivery room nurses to obtain the signature of patients on a hospital consent form before delivery. Believing that the foregoing evidence supported the instructions given by the trial court, I concur in the result reached on the informed consent issue.

II

A trial judge's discretionary power is broad, but not unlimited. *Hensley v. McDowell Furniture Co.*, 164 N.C. 148, 150, 80 S.E. 154, 155 (1913). And trial judges cannot insulate their orders setting aside jury verdicts from appellate review simply by cloaking their orders in the mantle of "passion and prejudice" and "insufficient evidence." Appellate courts are required to look behind the conclusory statements of trial judges to determine whether trial judges have abused their discretion. Indeed, only after our Supreme Court combed the record as a whole in *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982) was the Court able to sustain the trial judge's decision to set aside the verdict on account of excessiveness. In the case *sub judice* the trial judge cited nothing (and my review, as well as that of the majority, ante p. 18, reveals nothing) in the record or the conduct of the trial, to support a finding of passion and prejudice. Similarly, the trial judge did not indicate in what respect (and I have found none) plaintiffs' evidence was insufficient to justify the jury award. Thus, believing that *Worthington* is distinguishable and that, in the case *sub judice*, the trial judge abused his discretion by nullifying the jury's verdict, I dissent.

Judge ORR dissenting in part.

The majority expands the hospital's duty in this case to require the hospital to make a reasonable effort to insure that the patient's informed consent to delivery of a footling breech baby has been obtained prior to delivery. This duty applies, according to the majority, even though the patient was being treated by her own private physician. I find no support in our statutes or case law for such an extension of a hospital's duty. Furthermore, this requirement would appear to constitute a major invasion of the physician/patient relationship and place an unworkable burden upon hospitals.

Bost v. Riley, 44 N.C. App. 638, 262 S.E. 2d 391, *disc. rev. denied*, 300 N.C. 194, 269 S.E. 2d 621 (1980), relied upon by the majority, does not, in my opinion, mandate such an expansion. *Bost* states that "the hospital [has] the duty . . . to make a reasonable effort to monitor and oversee the treatment which is prescribed and administered by physicians practicing at the facili-

ty." *Bost*, 44 N.C. App. at 647, 262 S.E. 2d at 396. A reasonable effort on the part of a hospital to insure that quality medical care is being provided to patients by private physicians with privileges at the hospital is an accepted hospital practice. Likewise, where hospital staff become aware of a patient's lack of informed consent, or negligent treatment of a patient by a private physician, they have a duty to report it to the person designated by the hospital to take appropriate corrective action.

However, the duty to make a reasonable effort to monitor and oversee treatment does not extend to the direct intervention in the physician/patient relationship as it applies to informed consent.

In *Bost* our Court stated, "Since all of the above duties which have been required of hospitals in North Carolina are duties which flow *directly from the hospital to the patient*, we acknowledge that a breach of any such duty may correctly be termed corporate negligence. . . ." *Bost*, 44 N.C. App. at 647, 262 S.E. 2d at 396 (emphasis added). The duties referred to included: (1) the duty to make a reasonable inspection of equipment used by the hospital in the treatment of patients and remedy any defects discoverable by such inspection, *Payne v. Garvey*, 264 N.C. 593, 142 S.E. 2d 159 (1965); (2) the duty to provide equipment reasonably suited for the use intended, *Starnes v. Hospital Authority*, 28 N.C. App. 418, 221 S.E. 2d 733 (1976); (3) the duty not to obey instructions of a physician which are obviously negligent or dangerous, *Byrd v. Hospital*, 202 N.C. 337, 162 S.E. 738 (1932); (4) a duty to promulgate adequate safety rules relating to the handling, storage and administering of medications, *Habuda v. Hospital*, 3 N.C. App. 11, 164 S.E. 2d 17 (1968); and (5) the failure to adequately investigate the credentials of a physician selected to practice at the facility, *Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E. 2d 148 (1978). *Bost v. Riley*, 44 N.C. App. at 647, 262 S.E. 2d at 396.

Noticeably missing from these enumerated hospital duties is the duty to insure that a patient's informed consent has been obtained when that patient is being treated in the hospital by a private physician. As previously pointed out, the Court in *Bost* concluded that the duties imposed on hospitals flow directly from the hospital to the patient. In this case a duty to insure that a pa-

tient's informed consent has been obtained does not flow directly from the hospital to the patient. There is an intervening party—the private treating physician who is the person directly responsible for obtaining a patient's informed consent. *Bost*, therefore, cannot be read as authority for imposing such a duty on a hospital where the patient has a private treating physician.

Furthermore, this Court has previously refused to extend the doctrine of informed consent in a similar situation. In *Cox v. Haworth and Cox v. Haworth*, 54 N.C. App. 328, 283 S.E. 2d 392 (1981), this Court was asked "to impose a duty upon a hospital to properly inform and advise a patient of the nature of a medical procedure to be performed on him when the patient is admitted to the hospital for an operation under the care of his privately retained physician." 54 N.C. App. at 331, 283 S.E. 2d at 394-95.

In *Cox*, plaintiff alleged that defendant hospital was liable under a corporate negligence theory. Plaintiff's private physician performed a myelogram on plaintiff at defendant hospital which resulted in a failure to remove all the dye injected into plaintiff's spinal canal. Plaintiff contended that the hospital had a duty to obtain his informed consent before the plaintiff's private physician performed the myelogram. A unanimous Court declined to impose such a duty on the hospital and relied on *Bost*.

> We do not read *Bost* or the cases cited therein to impose a duty on the Hospital to obtain the informed consent of Mr. Cox under the facts of this case. The role of the Hospital in the entire procedure was to provide facilities and support personnel for Dr. Haworth. Any liability imputed to the Hospital would have to flow from acts or omissions which were a part of the function it performed in the myelogram.
>
> This Court has held that if circumstances warrant, a physician has a duty to warn a patient of consequences of a medical procedure. *Brigham v. Hicks*, 44 N.C. App. 152, 260 S.E. 2d 435 (1979). The physician in this case was Mr. Cox's own privately retained physician. Any duty to inform Mr. Cox of the risks of the procedures would have been on the privately retained physician, not on the Hospital or its personnel. Consequently, we find that the Hospital had no duty to inform Mr. Cox of the risks and procedures to be used in the administration of the myelogram or to secure his in-

formed consent when Mr. Cox hired his private physician to perform the myelogram.

Cox v. Haworth and Cox v. Haworth, 54 N.C. App. at 332-33, 283 S.E. 2d at 395-96.

Whether a party has a legal duty to another is not a question of fact to be decided by a jury based upon expert testimony or other evidence.

> The question of the existence of a legal duty of care in a given factual situation presents a question of law which is to be determined by the Courts alone. (*Elam v. College Park Hospital, supra*, 132 Cal. App. 3d at p. 339; *Peter W. v. San Francisco Unified Sch. Dist.* (1976) 60 Cal. App. 3d 814, 822 [131 Cal. Rptr. 854]; 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, § 493, p. 2756.)

Clarke v. Hoek, 174 Cal. App. 3d 208, 213, 219 Cal. Rptr. 845, 848-49 (1985).

> Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law. (Citations omitted.) The duty may arise specifically by mandate of statute, or it may arise generally by operation of law under application of the basic rule of the common law which imposes on every person engaged in the prosecution of any undertaking an obligation to use due care, ...

Pinnix v. Toomey, 242 N.C. 358, 362, 87 S.E. 2d 893, 897 (1955).

In the case *sub judice* the trial court's jury instruction as to the informed consent issue indicated that the jury had to determine whether plaintiff had proven that the hospital had a duty to insure the patient's informed consent was obtained. This was clearly in error. In *Clarke*, plaintiff sought to interject the issue of foreseeability into that of duty, thus making a question of fact for the jury. There the Court stated:

> [w]hile it is the province of the jury, as trier of fact, to determine whether an unreasonable risk of harm was foreseeable under the particular facts of a given case, the trial court must still decide as a matter of law whether there was a duty in the first place, even if that determination includes a con-

> sideration of foreseeability. (*Stout v. City of Porterville* (1983) 148 Cal. App. 3d 937, 941 [196 Cal. Rptr. 301]; *Peter W. v. San Francisco Unified Sch. Dist., supra,* 60 Cal. App. 3d at pp. 822-23.)

Clarke v. Hoek, 174 Cal. App. 3d at 214, 219 Cal. Rptr. at 849.

Likewise, in this case whatever issues of fact may have arisen, it is still a question of law whether there was a duty on the part of the hospital. As previously pointed out, I find no support in our law for extending a hospital's duty as required by the majority.

Finally, to impose such a duty on hospitals would place hospital personnel in the untenable position of interjecting themselves into the physician/patient relationship and producing an unworkable requirement on hospital staffs. This could result in the disturbing duty of going behind a treating physician's back in order to determine if the patient has been "informed" about the procedure in question and the inherent risks involved.

> As has been observed by our [N.Y.] Court of Appeals, the relationship between the physician and his patient "is always one of great delicacy. And it is perhaps the most delicate matter, often with fluctuating indications, from time to time with the same patient, whether a physician should advise the patient (or his family), more or less, about a proposed procedure, the gruesome details, and the available alternatives. Such a decision is particularly one calling for the exercise of medical judgment. . . . In the exercise of that discretion, involving as it does grave risks to the patient, a third party should not ordinarily meddle. . . ." *Fiorentino v. Wenger,* 19 N.Y. 2d 407, 415-16.

Prooth v. Wallsh, 105 Misc. 2d 603, 603, 432 N.Y.S. 2d 663, 665 (1980).

The logical extension of the new duty imposed on hospitals by the majority is potentially fraught with problems. As a practical matter, what hospital staffer should determine whether a patient's informed consent to a procedure had been obtained? Is it the admission clerk at the front desk or a nurse assigned to the patient's care? To what medical procedures or treatment does the duty apply? If a thoracic surgeon is prepared to perform by-pass

surgery, is it the hospital's duty to insure that the risks and alternative treatments have been explained? If a privately retained physician determines that a hospitalized patient should take a certain medication with known side effects, is the hospital required to determine if the patient's informed consent has been obtained before a nurse administers the medication? Should a hospital be required to insure that a privately retained obstetrician has informed a patient of the risks and alternatives involved in a footling breech delivery and that the patient has consented? The majority apparently says that a hospital has such a duty. I disagree and for the reasons set forth above, I dissent from that portion of the majority opinion imposing a duty on the hospital to insure that a patient's informed consent has been obtained prior to treatment performed by a privately retained physician. As to the other parts of Judge Wells' opinion, I concur.

IN THE MATTER OF: CHRISTOPHER B. REGISTER, KEVIN SCOTT MORGAN, KELLY STARNES, JOHN W. CRANDELL

No. 865DC713

(Filed 17 February 1987)

1. **Infants § 10— *seventeen infants involved in vandalism*—eight selected for prosecution—inability to pay restitution as basis for prosecution**

The trial court erred in failing to dismiss petitions against respondent juveniles based on their alleged vandalism of a residence where the record affirmatively disclosed that seventeen juveniles were involved in the vandalism, but only eight were selected for prosecution based on their or their parents' unwillingness or inability to pay $1,000 each to the victim.

2. **Infants § 10— filing of juvenile petition—procedure**

Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition; furthermore, when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing.

3. **Infants § 18— juvenile proceedings—court's acceptance of admissions from juveniles—failure of court to meet statutory requirements**

In a juvenile proceeding where respondents were alleged to be delinquent because of various acts of vandalism committed against the same victim, the trial judge failed to meet the requirements of N.C.G.S. § 7A-633 with regard

to accepting admissions from the juveniles where the judge did not make the required inquiries of each child *individually*, neglected to inform any of the juveniles of their right to remain silent and that their statements could be used against them, neglected to inform them that by admitting the charges they waived their right to be confronted by the witnesses against them, and failed to ask two of the children if they understood the nature of the charges against them.

4. Infants § 19— children accused of vandalism—failure to find proof beyond reasonable doubt

In a juvenile proceeding where respondents were alleged to be delinquent because of various acts of vandalism committed against the same victim, the trial judge erred in failing to find, pursuant to N.C.G.S. § 7A-635, that the allegations of the petition had been proved beyond a reasonable doubt; furthermore, it was doubtful that the record would have supported such a finding against two eight-year-olds and one nine-year-old, and the court, at common law, could not have found a six-year-old guilty beyond a reasonable doubt.

5. Infants § 20— children from 6 to 14 accused of vandalism—identical judgments entered against each—failure to consider dispositional alternatives

The trial court in a juvenile proceeding failed to follow the provisions of N.C.G.S. § 7A-646 with regard to dispositional alternatives where the court entered identical judgments in all cases involving eight juveniles who ranged in age from 6 to 14, were found to have committed and admitted committing different offenses, and had varying degrees of culpability; and there was nothing in the record to indicate that the court heard and considered any evidence as to the most appropriate dispositional order in each case.

6. Infants § 20— children accused of vandalism—ordering restitution from each improper

The trial court in a juvenile proceeding erred in requiring $1,000 in restitution of each juvenile who was accused of vandalism, since reimbursing the victim for her financial loss seemed to be the overriding concern of everyone in the cases, and the amount of restitution, rather than being individually determined, was based on the limit of the parents' civil liability for damage "maliciously or willfully" done to property by a juvenile pursuant to N.C.G.S. § 1-538.1.

Judge GREENE concurring.

APPEAL by respondents from *Burnett, Judge*. Orders entered 4 February 1986 in District Court, NEW HANOVER County. Heard in the Court of Appeals 15 December 1986.

These are juvenile proceedings wherein petitions were filed in January 1986 alleging that each of these juveniles are delinquent because they had committed the following offenses: 1) Petition No. 86J0016 alleged that Christopher Register, age fourteen, broke and entered the residence of Judy Radliff located at 539

Cathay Road, Wilmington, North Carolina and threw "a brick through a window"; 2) Petition No. 86J0023 alleged that Kevin Morgan, age eight, broke and entered the residence of Judy Radliff with intent to commit larceny and stole "1 B.B. pistal [sic] & McDonald watch . . . having a total value of $13.00"; 3) Petition No. 86J0022 alleged that Kelly Starnes, age eight, broke and entered the residence of Judy Radliff, broke and entered it on another occasion with the intent to commit larceny, and stole "a Barbie doll & clothes . . . having a total value of $12.00"; 4) Petition No. 86J0019 alleged that John Crandell, age fourteen, broke and entered the residence of Judy Radliff and "injured" her house, furnishings and personal property by "knocking holes in walls, shooting out windows with a B.B. gun, by destroying appliances, pouring paint on the carpet and damaging furniture."

[The foregoing four juveniles were tried together with Amanda Croom, age six, and Jessica Bailey, age nine. Petition No. 86J0021 alleged that Amanda Croom was delinquent because she had broke and entered the residence of Judy Radliff with the intent to commit larceny and stole "one baton . . . having a total value of unknown." Petition No. 86J0020 alleged that Jessica Bailey was delinquent because she broke and entered the residence of Judy Radliff with the intent to commit larceny and stole "1 pocketbook . . . having a total value of $5.00." The decision in the appeal of Amanda Croom and Jessica Bailey, No. 865DC607, is being filed simultaneously with the filing of the decision in these four appeals. When we, in the course of this opinion, refer to "these cases" we are referring to the cases and appeals of all six juveniles.]

At the adjudicatory hearing, each of the juveniles answered the allegations in the petitions as follows: Christopher Register admitted committing misdemeanor breaking and entering and throwing a brick through a window; Kevin Morgan, Kelly Starnes, Jessica Bailey and Amanda Croom admitted committing misdemeanor breaking and entering and misdemeanor larceny; and John Crandell admitted committing misdemeanor breaking and entering. The allegation that John Crandell had injured personal property was dismissed by the State.

Following a hearing involving the juveniles in all these cases and two other juveniles who did not appeal, the court entered or-

ders finding that each juvenile had committed the offense that he or she had admitted committing, concluded as a matter of law that each juvenile was delinquent and entered the following dispositional order in each of these cases:

> That [he/she] is placed on six months probation according to the terms of the probation judgment.
>
> That [he/she] is to read Youth and Law.
>
> That [he/she] is to pay $1,000.00 restitution to Mrs. Judy Radliff.

These six respondents appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Cathy J. Rosenthal, for the State.

Kenneth B. Hatcher for respondent, appellant Christopher B. Register.

Andrew L. Waters for respondent, appellant Kevin Scott Morgan.

Regina Floyd-Davis for respondent, appellant Kelly Starnes.

Northrope D. Rice for respondent, appellant John W. Crandell.

HEDRICK, Chief Judge.

Because of the discussion to follow regarding the payment of compensation to Mrs. Radliff for damages done to her house in these and other cases, it is necessary and appropriate to point out that we are not in the least critical of Mrs. Radliff's efforts to be compensated for the extensive damage done to her home and personal property. We understand her agony and support the proposition that victims of crime should be compensated whenever possible. We endorse the discriminate and prudent use of restitution in juvenile cases as provided in G.S. 7A-649, but compensation of victims should never become the only or paramount concern in the administration of juvenile justice.

The evidence in the record before us tends to show the following: During the last two weeks in August 1985, Mrs. Judy Radliff and her children were away from their home in Wilming-

ton, North Carolina, because Mrs. Radliff was working in South Carolina. Sometime between 17 August 1985 and 1 September 1985, her house was broken into and virtually demolished. Mrs. Radliff returned home to find that windows were broken, paint was smeared over a sliding glass door and the interior walls, debris was on the floor, furniture and appliances were damaged, and items of personal property were missing. There is little in the record to establish the exact amount of damage, but a figure of $17,000 does not seem unreasonable.

When Mrs. Radliff returned home and discovered the damage she called the New Hanover County Sheriff's Department. Apparently, Wilma Jones, a juvenile investigator for the sheriff's department, made the investigation and learned that Mrs. Radliff's home was allegedly vandalized by seventeen juveniles, ranging from six to fourteen years in age. The four juveniles involved in these cases and the two in the companion cases, were six of the seventeen children allegedly involved in the destruction of Mrs. Radliff's home.

Some of the contentions raised on appeal by counsel for the various respondents are as follows: 1) The trial court erred in denying respondent's motion to dismiss the petitions due to prosecutorial misconduct and selective prosecution; 2) the trial court erred in ordering Christopher Register to pay $1,000 restitution in violation of his Constitutional rights to due process and equal protection; 3) the court erred in ordering Kelly Starnes, Jessica Bailey, Amanda Croom and Kevin Morgan to pay $1,000 in restitution when they were not alleged to have caused property damage; and 4) the court erred in ordering each respondent to pay $1,000 restitution where there was no evidence or finding that each juvenile caused damage to that extent and no finding that they had the means to pay restitution. All of respondents' contentions have merit.

The briefs for the State are perfunctory and provide little assistance to the Court. For example, in its brief the State asserts, "Respondents' contentions that the District Attorney deliberately diverted the charges against those juveniles who had the ability to pay $1,000 restitution to the victim Judy Radliff is belied by the record." It is the record that shows that these juveniles were prosecuted simply because they or their parents

were unwilling or unable to pay $1,000 each to compensate for the damage done to the Radliff home.

[1] To maintain a defense of selective prosecution, a defendant must show more than simply that discretion has been exercised in the application of a law resulting in unequal treatment among individuals; he must show that in the exercise of that discretion there has been intentional or deliberate discrimination by design. *State v. Spicer*, 299 N.C. 309, 261 S.E. 2d 863 (1980); *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed. 2d 446 (1962).

The record before us discloses that each of these respondents received unequal treatment among individuals who were alleged to have committed the same or similar offenses by design. The record affirmatively discloses that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to Mrs. Radliff while other juveniles similarly situated were not prosecuted because they, or their parents, were able or willing to pay $1,000 to the complainant.

The purpose of the North Carolina Juvenile Code is described in G.S. 7A-516 as follows:

> This Article shall be interpreted and construed so as to implement the following purposes and policies:
>
> (1) To divert juvenile offenders from the juvenile system through the intake services authorized herein so that juveniles may remain in their own homes and may be treated through community-based services when this approach is consistent with the protection of the public safety;
>
> (2) To provide procedures for the hearing of juvenile cases that assure fairness and equity and that protect the constitutional rights of juveniles and parents; and
>
> (3) To develop a disposition in each juvenile case that reflects consideration of the facts, the needs and limitations of the child, the strengths and weaknesses of the family, and the protection of the public safety.

Article 43 of the juvenile code provides for the "screening of delinquency and undisciplined petitions" through intake services.

The purpose of intake services is defined in G.S. 7A-530 as follows:

> The Chief Court Counselor, under the direction of the Administrator of Juvenile Services, shall establish intake services in each judicial district of the State for all delinquency and undisciplined cases.
>
> The purpose of intake services shall be to determine from available evidence whether there are reasonable grounds to believe the facts alleged constitute a delinquent or undisciplined offense within the jurisdiction of the court, to determine whether the facts alleged are sufficiently serious to warrant court action and to obtain assistance from community resources when court referral is not necessary. The intake counselor shall not engage in field investigations to substantiate complaints or to produce supplementary evidence but may refer complainants to law-enforcement agencies for those purposes.

G.S. 7A-531 provides, in pertinent part, that when a complaint is received, the intake counselor shall make a preliminary inquiry to determine whether the juvenile is within the jurisdiction of the court as a delinquent or undisciplined juvenile and the legal sufficiency of the facts alleged. The statute further provides that "[w]hen requested by the intake counselor, the prosecutor shall assist in determining the sufficiency of evidence as it affects the quantum of proof and the elements of offenses." G.S. 7A-532 provides that upon a finding of legal sufficiency, except in certain "nondivertible offenses" set out in G.S. 7A-531, the intake counselor "shall determine whether a complaint should be filed as a petition, the juvenile diverted to a community resource, or the case resolved without further action." The statute further provides that in making this decision, the intake counselor shall consider criteria which shall be provided by the Administrator of Juvenile Services and, if practicable, conduct interviews with the complainant or victim, the juvenile, his parents, guardian or custodian, and with persons known to have information about the juvenile or his family, if pertinent. G.S. 7A-533 provides that the intake counselor must evaluate the petition within fifteen days, with an extension for a maximum of fifteen additional days, and

decide whether a complaint will be filed as a juvenile petition. This statute further provides, in pertinent part, as follows:

> . . . If the intake counselor determines that a complaint should be filed as a petition, he shall assist the complainant when necessary with the preparation and filing of the petition, or help with the preparation and filing of the petition, shall endorse on it the date and the words "Approved for filing," shall sign it beneath such words, and shall transmit it to the clerk of superior court. If the intake counselor determines that a petition should not be filed, he shall immediately notify the complainant in writing with reasons for his decision and shall include notice of the complainant's right to have the decision reviewed by the prosecutor. The intake counselor shall then sign his name on the complaint beneath the words "Not approved."
>
> Any complaint not approved for filing as a juvenile petition shall be destroyed by the intake counselor after holding the complaint for a temporary period to allow follow-up and review as provided in G.S. 7A-534 and 7A-536.

G.S. 7A-535 provides that within five calendar days after receipt of the intake counselor's decision not to approve the filing of the complaint as a petition, the complainant may request review of the decision by the prosecutor. Pursuant to G.S. 7A-536, such review by the prosecutor shall include conferences with the complainant and the intake counselor. At the conclusion of the review, the prosecutor shall "affirm the decision of the intake counselor or direct the filing of a petition." The pleading in a juvenile action is the petition. G.S. 7A-559.

For reasons not readily ascertainable from the record before us, the district attorney injected his office into these cases when on 9 October 1985 he sent the following communication on his official stationery, apparently to the intake officer:

> If the Intake Officer, Phyllis Roebuck, and victim, Judy Radliff, deems it appropriate, the State will consent to the diversion of any case involving damage to the property of Judy Radliff upon the condition that pro-rata restitution in

the amount of $1,000.00 has been paid by or on behalf of the juvenile whose case is diverted.

s/JERRY SPIVEY
Jerry L. Spivey
District Attorney

The juvenile code makes it clear that the district attorney's involvement in cases charging juveniles with being undisciplined or delinquent, before the juvenile petition is filed, is limited to 1) assisting the intake counselor, when requested, during the preliminary inquiry in determining the legal sufficiency of the evidence, G.S. 7A-531, and 2) reviewing the decision of the intake counselor not approving the filing of a juvenile petition, and to affirm the decision of the intake counselor or direct the filing of a petition himself. G.S. 7A-536.

It is evident that the district attorney's premature involvement in these cases by the memo dated 9 October 1985, contributed to the many errors that followed. At the adjudicatory hearing in these cases, Mrs. Radliff testified on cross-examination as follows:

Q. Now you and the District Attorney and some other parties made an agreement as to paying restitution to some extent, is that correct?

A. Yes.

Q. And what was the nature of that agreement?

A. That everyone would pay $1,000.00.

Q. Ok, and what if a party wasn't able to pay $1,000.00?

A. Well, that is not for me to decide.

Q. Well, as in relation to the ones who paid the $1,000.00, was the agreement that the charges against them would be dismissed?

A. If they paid the $1,000.00?

Q. Yes.

A. Yes.

Q. Ok, and as to those who did not pay the $1,000.00 or could not, was the agreement that they would be prosecuted?

A. Yes.

Q. And you engaged in this conversation with what parties?

A. I don't understand what you are saying.

Q. Who were the people who were involved with the agreement, was the prosecutor involved in that, Mr. Spivey, Jerry Spivey?

A. I didn't talk to him personally about that.

Q. Do you remember talking with an intake officer, do you know if that was the person that you talked to?

A. I talked to Ms. Roebuck.

Q. Was anyone else present when you all had that discussion?

A. I don't think so.

From the record before us, it appears that seventeen juveniles were involved in the vandalism of Mrs. Radliff's home. Petitions were filed against at least eight of the juveniles allegedly involved. These eight juveniles were tried together. Six of these cases are on appeal herein. Apparently, two respondents did not appeal. The record discloses that at least six of the seventeen juveniles had "paid out" at the time of the hearing. One other juvenile had agreed to pay and at the time of the hearing had not paid, but that juvenile was not put on trial. Thus, it appears that a total of seven juveniles had their cases dismissed or petitions were not filed against them simply because they were willing and able to pay $1,000 each to Mrs. Radliff pursuant to the agreement described in her testimony. From the above, it is clear to us that the juveniles in these cases were prosecuted simply because they were unwilling or unable to pay $1,000 each for damage done to Mrs. Radliff's home. Some of the seventeen juveniles involved in the destruction of Mrs. Radliff's home were willing and able to pay their proportionate share of the damages and were not prosecuted. The record before us affirmatively discloses that eight juveniles, including the six in these cases, were selected for pros-

ecution by design based on their, or their parents', unwillingness or inability to pay $1,000 each to Mrs. Radliff. Surely, the purposes of the legislature in adopting our juvenile code are not served by making the willingness or ability of a juvenile to pay compensation the determinative factor in the decision of whether to file a complaint as a juvenile petition. This, in our opinion, is selective prosecution.

At the hearing, Judge Burnett made the following statement, "I gathered from what Mr. water's [sic] has said that all of these cases have been through intake." The record belies that statement. There is nothing in the record to indicate that the intake counselor made any preliminary inquiry or evaluation of any of these cases pursuant to the provisions of G.S. 7A-531 and G.S. 7A-532. Each juvenile petition in these cases contains a section on the form to indicate the evaluation decision of the intake counselor in accordance with the provisions of G.S. 7A-533. This section of the form contains boxes beside the words "Approved for Filing" and "Not Approved" and a line for the signature of the intake counselor. The intake counselor did not complete or sign this portion of any of the juvenile petitions in these cases. The intake counselor, Ms. Roebuck, is mentioned only two times in the 188 pages comprising the records and transcript in these cases; first, in the testimony of Mrs. Radliff heretofore referred to, and second, in the 9 October 1985 memo signed by the district attorney. It is unfortunate that the judge apparently did not determine whether the cases had "been through intake." We cannot overemphasize the importance of the intake counselor's evaluation in cases involving juveniles alleged to be delinquent or undisciplined. The role of an intake counselor is to ensure that the needs and limitations of the juveniles and the concern for the protection of public safety have been objectively balanced before a juvenile petition is filed initiating court action. The district attorney preempted any action upon the part of the juvenile court counselor, and his action might account for the fact that the intake counselor took no action in these cases, but it does not excuse it nor did such preemptive action upon the part of the district attorney authorize the juvenile court to proceed against these juveniles.

[2] We hold that before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record

must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore we hold that when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In these cases, the record does not indicate that the intake counselor or district attorney approved the filing of the juvenile petitions. The record before us does not show that the intake counselor disapproved the filing. Had the procedure described above with respect to the responsibilities and duties of the intake counselor and district attorney been followed in these cases, all of the seventeen juveniles would have received equal treatment under the law, and these respondents would not have been subjected to selective prosecution, while the other juveniles involved were not prosecuted. We hold the trial court erred in not dismissing all of the petitions against these juveniles, on motion of the respondents or *ex mero motu*, when the matters described above came to its attention.

We proceed now to discuss other serious errors appearing in the records before us.

G.S. 7A-633 provides, in pertinent part, as follows:

> (a) A judge may accept an admission from a juvenile only after first addressing him personally and
>
> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to deny the allegations;
>
> (4) Informing him that by his admissions he waives his right to be confronted by the witnesses against him;
>
> (5) Determining that the juvenile is satisfied with his representation; and
>
> (6) Informing him of the most restrictive disposition on the charge.

(b) By inquiring of the prosecutor, the juvenile's attorney, and the juvenile personally, the judge shall determine whether there were any prior discussions involving admissions, whether the parties have entered into any arrangement with respect to the admissions and the terms thereof, and whether any improper pressure was exerted. The judge may accept an admission from a juvenile only after determining that the admission is a product of informed choice.

[3] In all of these cases, the juveniles "admitted," pleaded guilty, to some of the charges alleged in the juvenile petitions. While the judge made inquiry of the respondents as to some of the matters and things required by G.S. 7A-633(a), he neglected to inform any of the juveniles of their right to remain silent and that their statements could be used against them, or that by admitting the charges they waived their right to be confronted by the witnesses against them. He also failed to ask respondents Amanda Croom and Kevin Morgan if they understood the nature of the charges against them. The judge asked all of the juveniles as a group if they were satisfied with their lawyers. This is just another example of the problems raised by the court's attempt to hear all of these cases at the same time without regard to the ages of the individual juveniles or the offenses they were alleged to have committed. We believe the better practice would be for the trial judge to address each juvenile individually. It is the duty of the trial judge in carrying out the requirements of G.S. 7A-633 to give each child individual attention. It is impossible for the judge to determine "that the admission is a product of informed choice," without making the required inquiries of each child individually.

[4] G.S. 7A-635 provides, in pertinent part, that "[t]he allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt." G.S. 7A-637 further provides, in part, that "[i]f the judge finds that the allegations in the petition have been proved as provided in G.S. 7A-635, he shall so state." The order of the trial judge must affirmatively state that the allegations are proved beyond a reasonable doubt, even in cases where the juvenile admits the offense alleged. *See, In re Johnson*, 32 N.C. App. 492, 232 S.E. 2d 486 (1977).

In none of these cases did Judge Burnett find that the allegations in the petition had been proved "beyond a reasonable

doubt." Indeed, in the cases of Kelly Starnes, age eight, Kevin Morgan, age eight, and Jessica Bailey, age nine, it is doubtful whether the record would support such a finding. At common law, the court could not have found Amanda Croom, age six, guilty beyond a reasonable doubt because a juvenile under age seven could not be charged with, found guilty of and punished for a criminal offense, because of the irrebuttable presumption that she was *doli incapax*, *State v. Yeargan*, 117 N.C. 706, 23 S.E. 153 (1895). We realize that the juvenile court has jurisdiction over children age six, but we do not believe the juvenile court had authority in this case to find Amanda Croom to be delinquent because she had been found to have committed breaking or entering and larceny of "one baton . . . value of unknown."

[5] G.S. 7A-646 provides, in part, that the purpose of dispositions in juvenile actions is to "design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction." This statute further provides, in pertinent part, as follows:

> In choosing among statutorily permissible dispositions for a delinquent juvenile, the judge shall select the least restrictive disposition both in terms of kind and duration, that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case and the age and prior record of the juvenile.

G.S. 7A-649 lists the dispositional alternatives for delinquent juveniles and provides, in part, that the judge may "[r]equire restitution, full or partial, payable within a 12-month period to any person who has suffered loss or damage as a result of the offense committed by the juvenile." G.S. 7A-649(2).

In entering the dispositional orders in these cases, it is clear that the judge did not follow the foregoing provisions in the juvenile code. It is clear that the court failed to consider the express purposes of the juvenile code where it entered identical judgments in all these cases wherein the juveniles ranged in age from six to fourteen, were found to have committed and admitted committing different offenses and had varying degrees of culpability. There is nothing in the record to indicate that the court heard and considered any evidence as to the most appropriate dispositional order in each case.

[6] With respect to restitution, we must again point out that reimbursing the victim for her financial loss seems to have been the overriding concern of everyone in these cases. When addressing the court with respect to restitution, the assistant district attorney, John Smith, said, "We do not contend that $1,000.00 is a fair pro-rata assessment of the total losses. The $1,000.00 was arrived at because that is the maximum amount that can be recovered in a civil law suit against parents who do not commit the acts but whose liability is contingent upon that of the child. The restitution where it's actually pro-rated would be much higher than that $1,000.00."

Manifestly, the limit of the parents' civil liability for damage "maliciously or willfully" done to property by a juvenile pursuant to G.S. 1-538.1, is not the proper criteria for determining the punishment to be imposed upon that juvenile found to be delinquent under G.S. 7A-649. The statement by the assistant district attorney is another example of the fact that the juveniles in these cases were prosecuted simply because they or their parents were unwilling or unable to pay $1,000 to Mrs. Radliff.

For the reasons stated, the adjudicatory and dispositional orders are vacated, and the judgments in these cases will be arrested.

Judgments arrested.

Judges JOHNSON and GREENE concur.

Judge GREENE concurring.

While I agree with the majority in almost every respect, I cannot join in the majority's statement that "[a]t common law, the court could not find Amanda Croom, age six, guilty beyond a reasonable doubt because a juvenile under age seven could not be charged with, found guilty of and punished for a criminal offense, because of the irrebuttable presumption that she was *doli incapax*." As Amanda Croom was six years old and thus irrebuttably presumed incapable of criminal intent, I agree that she could not be punished for a *criminal* offense. Given the definition of a "delinquent juvenile" as one "less than 16 years of age *who has committed a crime* . . .," N.C. Gen. Stat. Sec. 7A-517(12) (1986)

(emphasis added), the majority's dictum implies that the common law presumption of criminal incapacity precludes the juvenile court from adjudicating the delinquency of certain juveniles.

Any such implication by the majority is clearly erroneous. The common law presumption only shields a child from indictment and punishment for criminal offenses. An adjudication of delinquency does not arise from a criminal indictment. Disposition in a juvenile case is not punishment since the purpose of such disposition is "to design an appropriate plan to meet the needs of the juvenile." N.C. Gen. Stat. Sec. 7A-646 (1986). While the six-year-old in the instant case had an absolute defense to criminal prosecution, she could nevertheless be adjudicated delinquent in a juvenile proceeding. While the common law presumption limits the capacity of children to commit a criminal act, the legislature has determined in the Juvenile Code that a "criminal" act is a "delinquent" act when committed by a child between the ages of six through fifteen. In short, the Juvenile Code transforms the nature of the act itself.

Our courts have consistently held an adjudication of delinquency is not synonymous with determination of criminal guilt. In *State v. Burnett*, 179 N.C. 735, 740, 102 S.E. 711, 713 (1920), our Supreme Court stated "that in causes investigated and determined by the juvenile court, . . . [a child shall not] be denominated a criminal by reason of such adjudication, nor shall adjudication be denominated a conviction . . . ." In *In re Drakeford*, 32 N.C. App. 113, 115, 230 S.E. 2d 779, 780 (1977), this Court more recently reaffirmed its decisions that a juvenile proceeding is not a criminal prosecution and a finding of delinquency is not a criminal conviction. Therefore, while Amanda Croom's legal disability may have shielded her from criminal prosecution, her youth did not divest the juvenile court of jurisdiction to adjudicate her delinquency. On the contrary, her youth was the basis of the juvenile court's jurisdiction.

Accordingly, the implication of the majority's dictum erroneously limits the juvenile court's jurisdiction over cases involving children. However, as I agree that the lower court did not comply with the relevant juvenile statutes, I join with the majority in vacating the adjudicatory and dispositional orders and arresting the judgments.

IN THE MATTER OF: JESSICA YVONNE BAILEY AND AMANDA MARIE CROOM

No. 865DC607

(Filed 17 February 1987)

APPEAL by respondents from *Burnett, Judge.* Orders entered 4 February 1986 in District Court, NEW HANOVER County. Heard in the Court of Appeals 9 December 1986.

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

Jeffrey R. Baker for respondents, appellants.

HEDRICK, Chief Judge.

For further details in these two cases, see the opinion, No. 865DC713, filed simultaneously with this decision. For the reasons stated therein, the adjudicatory and dispositional orders entered herein are vacated, and the judgments in these cases will be arrested.

Judgments arrested.

Judges JOHNSON and GREENE concur.

JOANN M. HARRIS v. EMERY HOOPER HARRIS

No. 8615DC573

(Filed 17 February 1987)

1. **Divorce and Alimony § 30— equitable distribution of marital property—defendant's earning potential properly considered**

The trial court properly considered defendant's earning potential as a factor leading to its determination that an equal division of marital property would be inequitable; moreover, the court's conclusion that defendant's income earning ability was substantially greater than plaintiff's was clearly supported by its findings of fact and by the evidence.

2. **Divorce and Alimony § 30— equitable distribution of marital property—determination of value of defendant's separate property proper**

The trial court did not err in its determination of the value of defendant's separate property where the valuation placed on certain real property was based on the valuation given to it by defendant in a financial statement; values assigned by defendant to other properties could not be determined because he failed to include the financial statement in the record on appeal, and it was therefore presumed that the trial court's findings were based upon competent evidence; evidence amply supported the court's finding that defendant received approximately $1,100 per month as payment on a six year promissory note; and even if the court did err in finding that defendant's separately owned stocks were worth $8,000, such error was harmless because the trial court did not include the value of defendant's stock in its computation of the value of his separate property.

3. **Husband and Wife § 30— equitable distribution of marital property—treatment of country club stock—no error**

Any error which the trial court may have committed by failing to apportion the respective marital and separate interests in country club stock and by charging the entire value against defendant's distributive share of the marital property was, in view of the total value of the marital property, of such limited significance as not to require recomputation of the respective awards to the parties; furthermore, in the proposed findings of fact and judgment which defendant tendered to the trial court, he also treated the country club stock as marital property.

4. **Divorce and Alimony § 30— equitable distribution of marital property—residence to plaintiff—distribution award to defendant—method of payment improper**

Though the trial court did not err in awarding the marital residence to plaintiff and making a distributive award to defendant, the court's method of payment of the award, based on the age of the parties' youngest child, resulted in the payment not being due for more than seven years after the termination of the marriage, rather than within six years, and it thus violated the provision of N.C.G.S. § 50-20(b)(3) that a distributive award "shall not include

payments that are treated as ordinary income to the recipient under the Internal Revenue Code"; moreover, the court did not make any findings with respect to the existence of any legal or business impediments which would prevent completion of the distributive award within six years after termination of the marriage.

APPEAL by defendant from *Washburn, Judge.* Judgment entered 30 January 1986 in District Court, ALAMANCE County. Heard in the Court of Appeals 12 November 1986.

Plaintiff and defendant were married to each other in 1964. Three children were born of the marriage, two of whom are still minors. The parties separated in February 1984. Plaintiff brought this action seeking, *inter alia,* alimony, custody of the children, child support, and an equitable distribution of the parties' marital property upon an absolute divorce being granted. Following a hearing in August 1984, an order was entered awarding plaintiff custody of the minor children and requiring defendant to pay child support, alimony *pendente lite,* and attorneys' fees. Plaintiff was also granted a writ of possession to the parties' marital residence and the furniture and furnishings located therein until the parties' youngest child reaches 18 years of age.

A judgment of absolute divorce was entered 17 April 1985. Two evidentiary hearings were conducted concerning the issue of the distribution of the marital property. On 30 January 1986, the trial court entered an order concluding that an equal division of the marital property would not be equitable and providing for its unequal distribution. Defendant appeals.

T. Randall Sandifer and Wiley P. Wooten for plaintiff appellee.

Latham and Wood, by James F. Latham and William A. Eagles for defendant appellant.

MARTIN, Judge.

The defendant assigns error to numerous of the trial court's findings of fact, contending primarily that they are not supported by the evidence. He also contends that the trial court erred in its conclusion that an equal division of the marital assets would not be equitable. We decline to disturb the trial court's judgment in any of these respects. However, one of defendant's assignments of

error, involving a distributive award ordered by the court, has merit and necessitates that we vacate the distributive award as ordered and remand the case for further proceedings.

The trial court's findings of fact may be summarized as follows:

The parties were married from 31 January 1964 to 17 April 1985. Plaintiff is a high school graduate and has completed one and one-half years of college. Defendant is a graduate of North Carolina State University and has been employed in the textile industry all of his life. Two of their three children are minors and are in the custody of plaintiff.

Defendant was employed with his family's hosiery business from 1976 until the fall of 1982. In January of 1983, the parties incorporated Lakeside Dyeing and Finishing Company with the outstanding common stock issued in the name of the defendant. Both parties worked in the business until their separation. Since the separation plaintiff has obtained employment at the Bowman Eye Clinic.

The parties own, as tenants by the entirety, the marital dwelling and lot located on Ferndale Drive in Burlington. The plaintiff and the minor children are living in the Ferndale residence pursuant to a writ of possession granted in the 7 August 1984 custody order and have the use and possession of the furnishings therein.

The parties' marital assets consist primarily of their home, household furnishings and motor vehicles. These assets are of a nonliquid character and have a net fair market value of $92,118.63. The trial court included in the marital assets five shares of Alamance Country Club Stock which defendant sold after the separation for $1,250, using the proceeds for his own purposes.

Upon the date of the parties' separation, defendant owned the following assets as his separate property which had a net fair market value as indicated:

1. Joint Money Market Account traceable to defendant's separate property	5,224.36
2. Antique wine cabinet	400.00

3. Personal clothing	1,000.00
4. Coin collection	500.00
5. Stereo-radio	500.00
6. 38.02 acres farmland in Boone Station Township	38,000.00
7. 23⅔ acres in Rutherford County	23,500.00
8. One-half undivided interest in 77 acres in Alamance County	38,500.00
Total	$107,624.36

After the parties separated, defendant borrowed $15,000 to refinance some of Lakeside Dye's debts, securing the loan with a deed of trust on his separate realty. As of the date of the equitable distribution hearing, the foregoing assets had a net value of $92,624.36. Pursuant to a stipulation, it was agreed that the stock and realty of Lakeside Dyeing and Finishing, Inc. would be distributed to defendant at "a zero value." In addition to these assets, defendant owned, upon the date of separation, stock in a family hosiery mill. Subsequent to the separation he sold the stock for approximately $19,000 cash and a promissory note providing for payments of approximately $1,100 per month for six years. Defendant also owns other stock acquired from his father with a net fair market value of approximately $8,000.

The court found that defendant's adjusted gross income for the calendar year 1982 was $37,000, and for the calendar year 1983, his gross income was in excess of $18,500. Although defendant had discontinued his monthly salary from Lakeside Dye in March 1983, the court found that Lakeside Dye was not in financial distress and was capable of paying defendant a reasonable salary.

At the date of the parties' separation, plaintiff owned separate property, consisting of jewelry, clothing, and dishes, having a fair market value of $3,300. The trial court further found that the plaintiff needs ownership of the Ferndale residence in order to properly maintain it and that the value of the defendant's separate property and promissory note payments plus his superior earning ability gives him a substantial economic advantage over plaintiff.

The trial court thereafter concluded:

. . . that an equal division of the parties' marital assets is not equitable in that:

a) the defendant's present income earning ability and the present net value of his separate property, including the balance of the promissory note payments, are substantially greater than plaintiff's;

b) the plaintiff, as the custodial parent of the parties' minor children, needs to own and occupy the former marital dwelling and the household furniture located therein;

c) the plaintiff made direct and indirect contributions to the starting of Lakeside Dyeing and Finishing Co., the stock of which is owned by the defendant, through her working at the Company while contributing her time and efforts as defendant's spouse, providing for their children and serving as homemaker; and

d) [sic] the nonliquid character of the marital property.

The trial court distributed to plaintiff marital property having a net fair market value, as of the date of separation, of $78,978, and distributed to defendant marital property having a net fair market value of $13,140.63. Plaintiff was ordered to pay to defendant a distributive award, as authorized by G.S. 50-20(e), in the amount of $23,706.82, but payment of the award was postponed until the parties' youngest child reaches age 18 or graduates from high school, whichever event last occurs. Plaintiff was ordered to assume the existing indebtedness on the residence and to execute a note, secured by a second deed of trust on the residence, payable to defendant in the amount of the distributive award with interest at 8% compounded annually. The furniture and furnishings located in the residence were continued under the writ of possession until the youngest child reaches her majority.

Defendant first contends that the trial court erred in ordering an unequal distribution of the marital assets. He asserts that the court's conclusion that an equal division would not be equitable is grounded upon findings of fact which are unsupported by the record. He specifically challenges the court's findings of fact with respect to his income and the value of his separate property.

North Carolina's Equitable Distribution statute mandates that marital property be divided equally unless the court determines that an equal division would not be equitable. *White v. White*, 312 N.C. 770, 324 S.E. 2d 829 (1985). "If the court determines that an equal division is not equitable, the court shall divide the marital property equitably." G.S. 50-20(c). In making this determination, the court must consider the specific factors listed in G.S. 50-20(c), as well as any other factor raised by the evidence reasonably related to division of the marital property. If the court, upon balancing the factors tending to show that an equal division would be inequitable against the strong public policy favoring equal division, concludes that equal division would not be equitable, the court may properly order an unequal division, but must clearly articulate the facts which support that conclusion. *Alexander v. Alexander*, 68 N.C. App. 548, 315 S.E. 2d 772 (1984). Distribution of the marital property is then committed to the sound discretion of the trial judge, the exercise of which will not be disturbed absent some clear abuse. *Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E. 2d 100 (1986).

In the present case, the trial court found facts relating to the factors listed in G.S. 50-20(c) and concluded that an equal division of the parties' marital property would not be equitable. We are bound by the court's findings if they are supported by any competent evidence. *Lawing, supra.* The court's conclusion, reached upon balancing those facts against the policy favoring an equal division, is a matter entrusted to its sound discretion and is reversible only if "manifestly unsupported by reason." *White, supra*, at 777, 324 S.E. 2d at 833.

[1] We first consider defendant's contention that the trial court erred in its findings concerning the respective incomes of the parties. He contends that the court improperly relied on defendant's superior income earning ability to conclude that defendant's income exceeded plaintiff's income. We disagree.

In *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E. 2d 809, *disc. rev. denied*, 316 N.C. 730, 345 S.E. 2d 385 (1986), this court affirmed the trial court's conclusion that an equal division of marital assets would be inequitable because the defendant-husband "had greater earning potential, because plaintiff had custody of both minor children, and because of plaintiff's services as

homemaker and caretaker." *Andrews* at 231, 338 S.E. 2d at 811. In that case, the defendant's earning potential was treated as a factor proper for consideration as "income" under G.S. 50-20(c)(1).

The language of G.S. 50-20(c), read as a whole, supports such a conclusion. The factors listed under subsection (c) indicate that the legislature intended to grant the trial court the authority to consider the future prospects of the parties, as well as their status at the time of the hearing, in determining whether an equal division of marital assets would be equitable. The statute directs the court to consider, among other things, obligations for support arising out of prior marriages, the age and health of the parties, the need of the custodial parent to own or occupy the marital residence, expectations of nonvested pension or retirement rights, and contributions to the development of the other spouse's career potential. All of these factors relate, in part, to future prospects and responsibilities of the parties. Thus, we hold that the trial court properly considered defendant's earning potential as a factor leading to its determination that an equal division would be inequitable.

Moreover, the court's conclusion that defendant's income earning ability is substantially greater than plaintiff's is clearly supported by its findings of fact and by the evidence. Defendant testified that he is a college graduate and has worked with textiles all of his life. He has earned substantial incomes in his previous employments and receives substantial income from sources other than employment. Although he has incurred liabilities associated with the operation of Lakeside Dye, and was receiving no salary at the time of the hearing, the record reflects that he owns substantial separate property valued at $92,624.36, most of which has income producing potential. On the other hand, plaintiff has completed only a year and a half of college. She owns separate property worth only $3,300, none of which has potential for income production. She is the custodial parent for the two minor children. Although the trial court found her present income to be $750 per month when all of the evidence indicates that her salary is $850 per month, we conclude such error is harmless in view of the overwhelming economic advantage defendant retains over plaintiff due to his greater earning potential and valuable separate property.

[2] Defendant also asserts that the trial court erred in its determination of the value of his separate property. He contends that the trial court made no finding of fact as to the value of his separate property "at the time the division of property is to become effective" as required by G.S. 50-20(c)(1).

In his testimony, defendant estimated the value of his 38.02 acres in Boone Station Township to be $800 per acre. He estimated the value of his 23.67 acres in Rutherford County and his one-half interest in 77 acres at Morton Township to be $700 per acre. He further testified to a belief that these properties had decreased in value since the date of separation. In its findings of fact, however, the trial court found that each of defendant's realty interests was worth $1,000 per acre and that none of the properties had decreased in value since the date of separation. Defendant contends that these findings are unsupported by competent evidence and that the trial court's use of the inflated figures flawed its determination that an equal division would be inequitable. We disagree.

The record indicates that plaintiff introduced into evidence, without objection, a financial statement in which defendant had placed higher valuations upon the properties than those to which he testified. Although the exhibit was not included with the record on appeal, the transcript of testimony reveals that, upon cross-examination by plaintiff's counsel, defendant admitted that he had valued his Morton Township property at $1,000 per acre on the financial statement. We have no way to determine what values defendant assigned, on the financial statement, to the other two properties because he did not include the exhibit in the record on appeal. When the evidence is not included in the record, it is presumed that the trial court's findings are based upon competent evidence. *Webb v. James*, 46 N.C. App. 551, 265 S.E. 2d 642 (1980).

Defendant also contends that the trial court did not determine the value of his promissory note when valuing his separate property. We disagree. The trial court specifically found that defendant was receiving approximately $1,100 per month as payment on a six-year promissory note. The court further found that approximately four and one-half years remained on the note, a

year and a half having elapsed on the six-year term of the note. These findings are amply supported by evidence of record.

Defendant asserts that the trial court erred by finding that his separately owned stocks were worth $8,000. Even if there was error in this finding, it was harmless because the trial court did not include the value of defendant's stock in its computation of the value of his separate property. Therefore, the finding could not have affected the court's conclusion that an equal division of property would not be equitable.

[3] Defendant also contends that the trial court erred by including, as marital property, the shares of stock in Alamance Country Club and by charging the value of those shares, $1,250, as a part of his distributive share of the marital property. He contends that the stock was his separate property.

Although the evidence discloses that defendant purchased the country club stock during the marriage with his own separate funds, other evidence indicates that the country club membership, evidenced by the stock, was maintained by the use of marital funds. Therefore, the evidence supports a finding that at least a portion of the value of the country club stock was attributable to investments of marital property. Any error which the trial court may have committed by failing to apportion the respective marital and separate interests in the stock and by charging the entire value against defendant's distributive share of the marital property is, in view of the total value of the marital property, of such limited significance as not to require recomputation of the respective awards to these parties. Our view in this respect is reinforced by the fact that, in the proposed Findings of Fact and Judgment which defendant tendered to the trial court, he also treated the country club stock as marital property.

[4] Defendant next contends that the trial court erred by awarding the marital residence to plaintiff and making a distributive award of $23,706.82 to defendant. He argues that the court should have required a sale of the residence and a division of the proceeds. We find no merit in this contention.

"Once property has been properly designated as marital property and valued, and the court has decided in what proportions its value should be divided, there appears to be no other

guide than the discretion and good conscience of the trial judge in determining which party gets which specific property." *Andrews, supra*, at 235-36, 338 S.E. 2d at 814. In the present case, the trial court has identified and valued the marital property and has concluded that an equal division would not be equitable. We discern no abuse of discretion attendant upon the court's decision to award the residence to plaintiff in view of the evidence in this case.

The court's decision to award the residence to plaintiff resulted in property having a net value of $78,978.00 being distributed to her, while property passing to defendant had a net value of only $13,140.63. G.S. 50-20(e) directs the court to make a distributive award "in order to achieve equity between the parties" in those cases where a distribution in kind would be impractical, and otherwise permits a distributive award in order "to facilitate, effectuate or supplement a distribution of marital property." In the present case, the court ordered that plaintiff make a distributive award of $23,706.82 to defendant in order to reach a division of the marital property which the court had apparently concluded would be equitable, i.e., 60% to plaintiff and 40% to defendant. The distributive award was within the authority vested in the court by G.S. 50-20(e).

Defendant further contends, however, that the manner in which the trial court ordered payment of the distributive award is violative of G.S. 50-20(b)(3) which provides, in pertinent part, that a distributive award "shall not include payments that are treated as ordinary income to the recipient under the Internal Revenue Code." His contentions in this respect have merit.

The court provided that plaintiff pay the distributive award "upon the parties' youngest child reaching age 18 or at the time she graduates from high school, whichever event last occurs . . . ." The court further provided that the amount of the award would draw interest at 8% and that plaintiff would be required to secure payment of the award by executing a note secured by a second deed of trust on the residence. At the time of the divorce, the parties' youngest child was ten years of age, so that payment of the distributive award would not become due for more than seven years after the termination of the marriage.

In *Lawing, supra,* this court recognized that a distributive award under G.S. 50-20(e) could be made payable over an extended time period, the duration of which is within the sound discretion of the trial court. However, the court also held that G.S. 50-20(b)(3) limits the exercise of the trial court's discretion so that the court may not permit a distributive award to be payable over such an extended time period that the payment thereof will be treated by the Internal Revenue Service as ordinary income. *Id.* In general, I.R.S. regulations provide that gains or losses resulting from transfers "related to the cessation of the marriage" are not treated as ordinary income. Transfers occurring more than six years after the termination of the marriage, however, are presumed not to be related to the cessation of the marriage. *Id.* at 181, 344 S.E. 2d at 115, *citing* 26 C.F.R. Section 1.1041 T (1985). After surveying the applicable provisions of the Internal Revenue Code and the legislative intent behind North Carolina's Equitable Distribution Act, the *Lawing* court interpreted G.S. 50-20(b)(3)

> as authorizing the court to make distributive awards for periods of "not more than six years after the date on which the marriage ceases" except upon a showing by the *payor* spouse that legal or business impediments, or some overriding social policy, prevent completion of the distribution within the six-year period.

Id. at 184, 344 S.E. 2d at 116 (emphasis original). With the requirement that the payor spouse make a showing that grounds exist for extending the period of payment beyond six years is a concurrent duty on the part of the trial court to affirmatively find the existence of such grounds.

In the present case, the trial court made no findings with respect to the existence of any legal or business impediments which would prevent completion of the distributive award within six years after termination of the marriage, nor, from our review of the evidence, does it appear that plaintiff offered proof of any such impediment. Had the court ordered an immediate sale of the dwelling and a distribution of the proceeds, the writ of possession, entered as a condition of child support pursuant to the August 1984 order, would have constituted a legal impediment to the immediate distribution of the dwelling in that manner. *See Dorton v. Dorton,* 77 N.C. App. 667, 336 S.E. 2d 415 (1985).

However, the dwelling was distributed entirely to plaintiff, and, in order to achieve the total distribution found by the court to be equitable, plaintiff was ordered to pay a distributive award to defendant. The completion of payment of that distributive award is not impeded by the existence of the writ of possession, particularly in view of the trial court's order transferring title to plaintiff and requiring her to assume the outstanding indebtedness.

Finally, we observe that the provision of the order delaying plaintiff's payment of the distributive award until the youngest child's majority bears resemblance to a child support feature. We remind the trial court that equitable distribution of marital property is to be carried out without regard to child support and that, after the distribution has been determined, either party may request modification of previously ordered child support. G.S. 50-20(f).

Because the trial court made no findings which would permit completion of the payment of the distributive award beyond six years from the date the parties' marriage was terminated, we must vacate that portion of the order providing for the distributive award and remand this case for further proceedings consistent with this opinion. Except to the extent that it finds the taking of additional evidence necessary to the determination of the question of the distributive award, the trial court may, upon remand, rely upon the original record and its findings of fact and conclusions of law relating to the identification and valuation of the marital and separate property, which we specifically affirm. We do not disturb the trial court's determination that an equal division of the parties' marital property would not be equitable in this case. We recognize, however, that the trial court may, depending upon its findings upon remand with respect to a distributive award, conclude that it is necessary to modify the manner in which it has distributed the parties' marital property and we specifically confirm that any such decision is committed to the sound discretion of the trial court.

Affirmed in part, vacated in part, and remanded.

Chief Judge HEDRICK and Judge COZORT concur.

JAMES H. MARSHBURN, AND WIFE, VIRGINIA T. MARSHBURN v. ASSOCIATED INDEMNITY CORPORATION

No. 864SC743

(Filed 17 February 1987)

1. **Insurance § 137— time limitation for filing claim—failure to discover damage until after time limitation has run**

The phrase, "inception of the loss," when used in a policy of insurance, means that the policy limitation period runs from the date of the occurrence of the event out of which the claim for recovery arose, and a claim filed after the contractual time limitation has expired is barred, regardless of its merit, unless the insurer, by its conduct, waives or is estopped from relying upon the limitation provisions of the policy. Furthermore, the insured's failure or inability to discover damage resulting from the insured-against casualty until after the contractual limitations period has run is immaterial and does not operate to toll or restart the limitations period.

2. **Insurance § 137— time limitation for filing claim—discovery of additional damages—accrual of cause of action**

There was no merit to plaintiffs' contentions that, under the provisions of N.C.G.S. § 1-52(12) and N.C.G.S. § 1-52(16), their cause of action against defendant on a fire insurance policy for damages from a 21 July 1979 lightning strike did not accrue until the discovery of the additional damages on 2 September 1982 and that this suit, filed 21 February 1985, was properly instituted within three years of that accrual date, since, by enacting N.C.G.S. § 1-52(12), the General Assembly intended only to include the standard fire insurance policy limitation period in the comprehensive list of actions which are generally subject to three year periods of limitation, and the standard fire insurance policy limitation provision contained in N.C.G.S. § 1-52(12) and N.C.G.S. § 58-176(c) and reproduced in plaintiffs' policy of homeowners' insurance, constituted a limitation period "otherwise provided by statute" which precluded the applicability of N.C.G.S. § 1-52(16) to the present case.

3. **Insurance § 137— lightning damage—accrual of cause of action—latent damages—statute of limitations not restarted**

Even if the provisions of N.C.G.S. § 1-52(16) applied to plaintiffs' action, it was still filed after the limitations period had expired where plaintiffs' cause of action was grounded upon damage to their home allegedly caused by a 21 July 1979 lightning strike; the immediate and obvious damage to the structure, for which they received payment from defendant, made it apparent to defendants that their home had been damaged, and their cause of action against defendants accrued at that time; and the fact that evidence of latent damages was discovered more than three years later did not restart the statutory limitations period.

4. **Insurance § 137.1— lightning damage—action barred by statute of limitations —insurer not estopped from invoking statute of limitations**

There were no questions of material fact as to whether defendant insurer was estopped from invoking any limitation period which might operate to bar this action under a homeowners' insurance policy, since the bar of the contractual limitations provision had already become complete prior to plaintiffs' discovery of the additional damage, and any conduct on the part of defendant insurer with regard to that damage could not have induced plaintiffs' failure to institute a timely action under the policy.

5. **Unfair Competition § 1— failure to settle insurance claim alleged—no unfair and deceptive trade practice**

Failure to allege more than a single refusal by a defendant insurance company to settle a claim is fatal to a cause of action under N.C.G.S. § 58-54.4(11) for unfair and deceptive trade practices.

6. **Unfair Competition § 1— method of investigating and settling insurance claim —no unfair or deceptive acts**

Plaintiffs' claim for unfair or deceptive acts in violation of N.C.G.S. § 75-1.1 must fail where there was no showing of any facts which would create any genuine issue that the manner in which defendant insurer conducted its investigation, or its subsequent denial of plaintiffs' claim, was unethical, oppressive or deceptive in any way.

APPEAL by plaintiffs from *Phillips, Herbert O., Judge.* Judgment entered 13 May 1986 in Superior Court, ONSLOW County. Heard in the Court of Appeals 11 December 1986.

In October 1978, defendant issued to plaintiffs a standard homeowners insurance policy insuring plaintiffs' residence located at Route #1, Box 190A, Maple Hill, North Carolina. The policy included coverage against direct loss to plaintiff's property caused by fire or lightning. The policy specifically excluded coverage of any loss caused by, resulting from, contributed to, or aggravated by surface water or water below the surface of the ground. The policy provided that no action for the recovery of any claim could be maintained "unless commenced within three years next after inception of the loss."

On 21 July 1979, plaintiffs' home was struck by lightning. The immediate and obvious damage to the house included smoke damage, scorched walls, damage to the heating system and television, and cracked and loosened bricks on a rear windowsill. Plaintiffs reported the incident to defendant and upon adjustment of the loss, received from defendant a check in the amount of

$643.65 as full payment of all claimed damages resulting from the lightning strike.

In September 1982, Mr. Marshburn noticed cracks along the mortar joints and through some of the bricks immediately below the windowsill damaged by the lightning. He notified defendant that additional damage caused by the lightning had become apparent and requested that the loss be readjusted. Defendant's adjuster, J. A. Renfrow, inspected plaintiffs' premises on 20 October 1982. Defendant thereafter retained David Brown, an engineer with Research Engineers, Inc., to inspect plaintiffs' residence. On 17 January 1983, Renfrow contacted Mr. Marshburn, requesting that he dig a trench down to the concrete footing to expose the alleged lightning damage. Mr. Marshburn protested that water would collect in the open trench, but complied with Renfrow's request. A considerable amount of rain fell in the days which followed, collecting in the trench until Mr. Marshburn drained it prior to Brown's inspection of the footing on 31 January 1983. On 27 April 1983 Renfrow notified plaintiffs that their claim for damages was denied on the basis of Brown's conclusion that the cracks and separations in the footings and brickwork were "the result of water intrusion at the foundation and drainage problems which rendered the subgrade unstable."

In March 1984, plaintiffs contacted K. B. Hurst, a contractor, and Robert M. Sheegog, an engineer, in an effort to refute Brown's conclusion. Hurst was of the opinion that the lightning had cracked a concrete footing under the house, weakening the structure, and that the full extent of the damage done had not become apparent until the building had a chance to settle. Apparently Sheegog disagreed with Brown's opinion about soil conditions and water intrusion. Plaintiffs forwarded this information to defendant in April 1984. By letter dated 15 June 1984, defendant confirmed the denial of plaintiffs' claim for additional damage, stating (1) that the damage was not caused by lightning, and (2) that the time period for filing claims and instituting legal action had expired.

Plaintiffs brought this action on 21 February 1985 seeking payment under the homeowners policy for the additional damages allegedly caused by the lightning, and alleging, in a second count, that defendant, by its handling of plaintiffs' insurance claim, had

engaged in unfair and deceptive trade practices in violation of Chapters 58 and 75 of the General Statutes. Defendant denied the material allegations of the complaint, pleaded the statute of limitations and the provisions of the policy in defense, and moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. Defendant offered in support of its motion the affidavit of J. A. Renfrow and the plaintiffs' policy of homeowner's insurance. In opposition, plaintiffs filed affidavits of James H. Marshburn, K. B. Hurst and Marvin Swinson, who estimated the cost of repairs to be $27,000.00. Plaintiffs appeal from the trial court's 10 May 1986 order granting defendant's summary judgment motion.

Jeffrey S. Miller for plaintiff appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey and Reid Russell, for defendant appellee.

MARTIN, Judge.

The primary question presented by the parties to this appeal is whether plaintiffs' action to recover additional damages allegedly caused by the lightning is barred because it was not brought within the time provided by the insurance policy and by the applicable statute of limitations. We conclude that the action is barred and, for the reasons hereinafter stated, affirm the order of the trial court granting summary judgment for defendant.

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). The burden of establishing the lack of any triable issue of material fact is on the party moving for summary judgment. *Texaco, Inc. v. Creel*, 310 N.C. 695, 314 S.E. 2d 506 (1984). When a defendant has properly pleaded the applicable statute of limitations, however, the burden is on the plaintiff to show that the action was instituted within the requisite period after accrual of the cause of action. *Little v. Rose*, 285 N.C. 724, 208 S.E. 2d 666 (1974). In ruling on a motion for summary judgment, the trial court must carefully scrutinize the moving party's papers and resolve all inferences against him. *Kidd v. Early*, 289 N.C. 343, 222 S.E. 2d 392 (1976).

Generally, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. *Ports Authority v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 240 S.E. 2d 345 (1978). When the statute of limitations is properly pleaded and the facts of the case are not disputed resolution of the question becomes a matter of law and summary judgment may be appropriate. *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E. 2d 350 (1985).

Plaintiffs first contend that their claim for damages is not barred by either the time limitation provided for in the insurance policy or by the three-year statute of limitations. We conclude that the action is barred by both the contractual limitation and the statute of limitations.

The pertinent provision of the insurance policy provides that "[n]o suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within three years next after inception of the loss." The foregoing provision complies with the "Standard Fire Insurance Policy for North Carolina" prescribed by G.S. 58-176 and is a valid contractual limitation binding upon and enforceable between the parties. Failure to bring an action on the policy within the specified period bars any recovery unless the contractual limitation is waived by the insurer. *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 195 S.E. 2d 545 (1973).

Our Supreme Court has construed the word "inception," when used as in this case, as follows:

> In this connection the word "inception" as defined by Webster means "act or process of beginning; commencement, initiation." Hence as used above "inception" necessarily means that the beginning, the commencement, the initiation of the loss was that caused by fire.

Boyd v. Bankers & Shippers Ins. Co., 245 N.C. 503, 509, 96 S.E. 2d 703, 707 (1957). With respect to the term "inception of the loss," the Court has stated:

> The provision contained in property insurance policies requiring action to be instituted within "twelve months next after inception of the loss" has been construed by the majority of

> jurisdictions to mean that the policy limitation runs from the date of the occurrence of the destructive event giving rise to the claim of liability against the insurer. (Citations omitted.)

Avis, supra at 151, 195 S.E. 2d at 550.

[1] We therefore hold, in accord with what appears to be the majority view, that the phrase "inception of the loss," when used in a policy of insurance as in the present case, means that the policy limitation period runs from the date of the occurrence of the event out of which the claim for recovery arose. Annot., 24 A.L.R. 3d 1007, 1059 (1969 & 1986 Supp.); 18A Couch on Insurance 2d § 75:88 (Rev. ed. 1983). *See, e.g., Closser v. Penn Mut. Fire Ins. Co.*, 457 A. 2d 1081 (Del. 1983); *Gremillion v. Travellers Indemnity Co.*, 256 La. 974, 240 So. 2d 727 (1970); *Margulies v. Quaker City Fire & Marine Ins. Co.*, 276 A.D. 695, 97 N.Y.S. 2d 100 (1950). A claim filed after the contractual time limitation has expired is barred, regardless of its merit, unless the insurer, by its conduct, waives or is estopped from relying upon the limitation provision of the policy. *Meekins v. Aetna Ins. Co.*, 231 N.C. 452, 57 S.E. 2d 777 (1950). The insured's failure or inability to discover damage resulting from the insured-against casualty until after the contractual limitations period has run is immaterial and does not operate to toll or restart the limitations period. *See, Segar Glove Corp. v. Aetna Ins. Co.*, 317 F. 2d 439 (7th Cir.), *cert. denied*, 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed. 2d 165 (1963); *Thames Realty Corp. v. Massachusetts Fire & Marine Ins. Co.*, 16 Misc. 2d 747, 184 N.Y.S. 2d 170 (1959).

In the present case, it is undisputed that damage allegedly resulting from the 21 July 1979 lightning strike constitutes the basis of plaintiffs' claim under the policy of insurance. The "inception" of plaintiffs' loss, therefore, occurred on 21 July 1979 and, under the terms of the policy, any suit or action on claims for damage must have been commenced within three years of that date. Thus, in order to recover for damages caused by the lightning, plaintiffs were required by the policy to file suit on or before 21 July 1982. Plaintiffs' discovery of additional damage allegedly resulting from the lightning strike did not occur until 2 September 1982, approximately six weeks after the limitation period had already expired. Their suit to recover for those damages was instituted 21 February 1985, more than five years

after the inception of their loss. Plaintiffs' action was therefore barred by operation of the policy limitation provision and defendant was entitled to summary judgment as a matter of law.

[2] Plaintiffs contend, however, that the contractual limitations provision does not govern the disposition of their claim because of the nature of the loss they suffered. Rather, they assert that the applicable period of limitation is that provided for by G.S. 1-52(12) and G.S. 1-52(16). They argue that under those provisions, their cause of action against defendant did not accrue until the discovery of the additional damages on 2 September 1982 and that this suit, filed 21 February 1985, was properly instituted within three years of that accrual date.

G.S. 1-52 prescribes a three-year period for the commencement of an action:

> (12) Upon a claim for loss covered by an insurance policy which is subject to the three-year limitation contained in lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-176(c).

Another subsection of the same statute provides:

> (16) Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

Plaintiffs argue that these provisions indicate that "the only possible legislative interest in enacting G.S. § 1-52(12) was to make it clear that G.S. § 1-52(16) governed the determination of when a claim on the policy accrued." They assert that in cases such as this one, where damage does not become apparent until a period of time has passed, the accrual provisions of G.S. 1-52(16) must be read into the policy limitation provision so that the limitations period does not begin to run until the damage is, or reasonably should be, discovered. We disagree.

G.S. 1-52(12) came before the General Assembly as "An act to insert the three-year limitation contained in the standard fire insurance policy into the list of three-year limitations contained in G.S. 1-52" and became effective 1 January 1972. 1971 Sess. Laws, c. 939. It is clear, then, that by enacting G.S. 1-52(12), the General Assembly intended only to include the standard fire insurance policy limitation period in the comprehensive list of actions which are generally subject to three-year periods of limitation and to provide a cross-reference between general statutory periods of limitation contained in G.S. 1-52, and the more specific limitation provisions of the Standard Fire Insurance Policy for North Carolina set out in G.S. 58-176(c).

G.S. 1-52(16) became effective 1 October 1979. 1979 Sess. Laws, c. 654, s. 8. Its enactment was wholly independent of the provisions of G.S. 1-52(12). The language of the statute does not require that G.S. 1-52(12) be applied in conjunction with or subject to the provisions of G.S. 1-52(16) and we decline to read such a requirement into the language of the statute without any clear authority for doing so. Moreover, G.S. 1-52(16) provides, by its own express terms, that it is to be applied "unless otherwise provided by statute." In our view, the Standard Fire Insurance Policy limitation provision, contained in G.S. 1-52(12) and G.S. 58-176(c) and reproduced in plaintiffs' policy of homeowners insurance, constitutes a limitation period "otherwise provided by statute" which precludes the applicability of G.S. 1-52(16) to the present case.

[3] However, even assuming, *arguendo*, that the provisions of G.S. 1-52(16) apply to the facts of the present case, plaintiffs' action was still filed after the limitations period had expired. In *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 317 S.E. 2d 41 (1984), *aff'd*, 313 N.C. 488, 329 S.E. 2d 350 (1985), plaintiff brought suit for breach of contract, negligence and unjust enrichment in connection with defendant's construction of a defective roof. Defendants asserted the statute of limitations, arguing that more than three years had elapsed between the time plaintiffs first discovered leaks and the time suit was filed. In response, plaintiff argued that the complaint was based upon evidence of "blistering" in the roof, caused by moisture trapped between the layers of roofing material, which developed well after the first discovery of leaks. Plaintiff asserted that the earlier leaks were not of the same character or extent as those on which

the complaint was based and that the statute of limitations should run from the subsequent date of discovery of the blistering.

This Court disagreed, stating that it was irrelevant that the early leaks were not of the same extent as the subsequent blistering because

> [U]nder G.S. 1-52(16) a cause of action "shall not accrue until bodily harm to claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant. . . ." This statute serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, *not until he is aware of the full extent of the damages suffered.*

Pembee at 508-09, 317 S.E. 2d at 43. (Emphasis added.)

G.S. 1-52(16) modifies the common law rule on accrual of actions only insofar as it requires discovery of physical damage before a cause of action can accrue. "It does not change the fact that once some physical damage has been discovered the injury springs into existence and completes the cause of action." *Pembee* at 509, 317 S.E. 2d at 43. The Supreme Court affirmed the decision, stating,

> as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run . . . . The fact that further damage which plaintiff did not expect was discovered does not bring about a new cause of action, it merely aggravates the original injury. (Citations omitted.)

Pembee Mfg. Corp. v. Cape Fear Constr. Co., 313 N.C. 488, 493-94, 329 S.E. 2d 350, 354 (1985).

In the present case, plaintiff's cause of action was grounded upon damage to their home allegedly caused by the 21 July 1979 lightning strike. The immediate and obvious damage to the structure, for which they received payment from defendant, made it apparent to plaintiffs that their home had been damaged, and their cause of action against defendants accrued at that time. The fact that evidence of latent damages was discovered more than three years later does not restart the statutory limitations period.

[4] Plaintiffs further contend that questions of material fact exist as to whether defendant is estopped from invoking any limitation period which might operate to bar this action. Plaintiffs alleged that defendant reopened their initial claim for damages on 22 September 1982 and assigned Renfrow to inspect the house. Renfrow thereafter requested that Mr. Marshburn dig out around the damaged footing so that a professional engineer could inspect the damage. Plaintiffs argue that as a result of Renfrow's contacts and assurances, Mr. Marshburn performed a considerable amount of labor, expended money to hire a professional engineer, and was otherwise put "through the hoops" only to find the claim denied by reason of the passage of time.

It is true that an insurer can be estopped, by its own conduct or words during the limitations period, from asserting the contractual limitation period as a bar to plaintiff's action. *Meekins, supra.* There is nothing in the record, however, that could estop defendant from asserting this defense. The lightning struck plaintiffs' home on 21 July 1979. More than three years elapsed and the contractual period of limitation had expired before the occurrence of any of the acts of defendant's adjuster relied upon by plaintiff to establish an estoppel. Inasmuch as the bar of the contractual limitations provision had already become complete prior to plaintiffs' discovery of the additional damage, any conduct on the part of the insurance company with regard to that damage could not have induced plaintiffs' failure to institute a timely action under the policy. These assignments of error are overruled.

[5] Plaintiffs next contend that the trial court erred by entering summary judgment against them with respect to their claim that defendants engaged in unfair and deceptive trade practices. In their complaint, plaintiffs alleged that the defendant, through its agent Renfrow committed unfair and deceptive acts in violation of G.S. 58-54.4(11) and G.S. 75-1.1. Plaintiffs neither alleged nor offered any proof, however, that defendant had done any act "with such frequency as to indicate a general business practice." G.S. 58-54.4(11). Failure to allege more than a single refusal by a defendant insurance company to settle a claim is fatal to a cause of action under G.S. 58-54.4(11). *Smith v. King,* 52 N.C. App. 158, 277 S.E. 2d 875 (1981). The facts, as alleged and as established by affidavit, fail to create a genuine issue concerning the frequency of

defendant's actions and plaintiffs' claim under G.S. 58-54.4(11) must fail.

[6] Plaintiffs' claim for relief under Chapter 75 must also fail. G.S. 75-1.1 provides, in pertinent part, that "unfair or deceptive acts or practices in or affecting commerce, are declared unlawful" and has been held to provide a remedy for unfair and deceptive trade practices in the insurance industry. *Phillips v. Integon Corp.*, 70 N.C. App. 440, 319 S.E. 2d 673 (1984).

The terms "unfair" and "deceptive" were defined by the Supreme Court in *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262-63, 266 S.E. 2d 610, 621 (1980).

> What is an unfair or deceptive trade practice usually depends upon the facts of each case and the impact the practice has in the marketplace. . . . The concept of 'unfairness' is broader than and includes the concept of 'deception.' A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. (Citations omitted.)

Our review of the record does not reveal the existence of any facts which would create any genuine issue that the manner in which defendant conducted its investigation, or its subsequent denial of plaintiffs' claim, was unethical, oppressive or deceptive in any way. These assignments of error are overruled.

The order of the trial court allowing defendant's motion for summary judgment is

Affirmed.

Judges WELLS and PARKER concur.

GEORGE BARNETT AND WIFE, JEANE B. BARNETT v. SECURITY INSURANCE COMPANY OF HARTFORD, JOHN HOWE INSURANCE AGENCY, INC. AND JOHN HOWE, INDIVIDUALLY

No. 8627SC685

(Filed 17 February 1987)

1. **Insurance § 2.2— failure of agent to renew policy**

The trial court erred in entering judgment n.o.v. for defendant insurance agents where the evidence was sufficient for the jury to find that defendants had the duty to renew plaintiffs' insurance policy on a metal building; they negligently failed to do so; and as a proximate result of such negligence, plaintiffs were damaged in the amount of $30,000.

2. **Rules of Civil Procedure § 59; Trial § 53— new trial for errors committed by court—errors not specified—no objection to error—new trial improper**

The trial court erred in granting defendants' conditional motion for a new trial where the trial court's ground for allowing the motion for a new trial was "for errors committed by the court during the course of the trial," but the trial judge did not specify the errors and defendants did not object to the error which was assigned as the basis for the new trial, as required by N.C.G.S. § 1A-1, Rule 59(a)(8).

3. **Rules of Civil Procedure § 49— failure to object to issue—no right to appeal on ground that issue was erroneous**

Pursuant to N.C.G.S. § 1A-1, Rule 49(c), defendants waived their right to appeal on the ground that an issue submitted to the jury was erroneous where they failed to object at the time it was submitted.

Chief Judge HEDRICK concurring in part and dissenting in part.

APPEAL by plaintiffs from *Burroughs, Judge.* Order entered 12 March 1986 in Superior Court, GASTON County. Heard in the Court of Appeals 10 December 1986.

Whitesides, Robinson, Blue and Wilson, by Henry M. Whitesides and David W. Smith, III, for plaintiff-appellants.

Robert H. Forbes for defendant-appellees.

GREENE, Judge.

In this civil action, plaintiffs seek to recover damages allegedly resulting from defendant John Howe's failure to renew their fire insurance policy.

Defendant John Howe is the principal owner and employee of the defendant John Howe Insurance Agency which was an agent of defendant Security Insurance Company of Hartford (Security Insurance). In their complaint, plaintiffs alleged a building they owned was damaged by fire after their fire insurance policy with Security Insurance expired. The John Howe Insurance Agency was the agent for that policy.

The following issues were submitted to and answered by the jury as indicated:

> 1. Did the plaintiffs suffer loss as a result of John Howe Insurance Agency, Inc.'s failure to procure insurance for the plaintiffs, Mr. and Mrs. Barnett?
>
> ANSWER: Yes.
>
> 2. What amount, if any, are the plaintiffs, Mr. and Mrs. Barnett, entitled to recover for damages to real property?
>
> ANSWER: $30,000.00

On 12 March 1986, the court entered judgment on the jury's verdict. In open court, defendant John Howe Insurance moved for judgment notwithstanding the verdict and, in the alternative, for a new trial. That same day, the court entered judgment for defendant notwithstanding the verdict. On 21 March 1986, the trial court entered an order conditionally allowing defendant's motion for a new trial and ordered if the judgment notwithstanding the verdict was "vacated or reversed" on appeal, defendant should have a new trial "for errors committed by the Court during the course of the trial." Plaintiffs appeal.

The issues for this Court's determination are: (1) whether the trial court erred in entering judgment notwithstanding the verdict pursuant to N.C. Gen. Stat. Sec. 1A-1, Rule 50(b); and (2) whether the trial court erred in granting the defendant's conditional motion for a new trial.

I

[1] Plaintiffs argue that the evidence was sufficient for the jury to find that defendants negligently failed to renew the insurance on the building. Therefore, the trial court erred in entering judgment notwithstanding the verdict for defendants. We agree.

An insurance agent has a fiduciary duty to keep the insured correctly informed about his insurance coverage. *R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 659, 303 S.E. 2d 573, 577 (1983). The agent "is not obligated to assume the duty of procuring a policy of insurance for a customer. . . ." *Alford v. Tudor Hall and Assoc. Inc.*, 75 N.C. App. 279, 282, 330 S.E. 2d 830, 832, *disc. review denied*, 315 N.C. 182, 337 S.E. 2d 855 (1985). However, an agent who, "with a view to compensation for his services, undertakes to procure insurance [for a customer and] fails to do so, will be held liable for any damage resulting therefrom." *Id.* (Citations omitted.)

In determining whether an agent has undertaken to procure insurance, a court must consider the conduct of and the communications between the parties and, more specifically, "the extent to which they indicate that the agent has acknowledged an obligation to secure a policy." *Id.* Where " 'an insurance agent or broker promises, or gives some affirmative assurance, that he will procure or renew a policy of insurance under circumstances which lull the insured into the belief that such insurance has been effected, the law will impose upon the broker or agent the obligation to perform the duty which he has thus assumed.' " *Id.* (Citation omitted.) Additionally, if in their prior dealings, the agent has customarily taken care of the customer's insurance needs without consulting the insured, then a legal duty to procure additional insurance may arise without express orders from the customers and acceptance by the agent. *Id.*

A motion for judgment notwithstanding the verdict is simply a motion that judgment be entered in accordance with the movants' earlier motion for directed verdict. Therefore, the same standard of sufficiency of the evidence applies in reviewing rulings on these motions. *Snider v. Dickens*, 293 N.C. 356, 357, 237 S.E. 2d 832, 833 (1977). In our review of the court's judgment notwithstanding the verdict, we must consider the evidence in the light most favorable to the non-movant. *Id.*

When considered in the light most favorable to plaintiffs, the evidence in the present case tends to show the following:

In 1982, plaintiffs built a metal building joining Highway 321 in Gastonia, North Carolina. They purchased an insurance policy on the building in the amount of $30,000 from John Howe In-

surance, through its agent, John Howe. The policy came into effect on 1 April 1982, and they paid the initial premium of $227.00 when billed.

Plaintiffs had purchased all of their insurance from defendants, including policies on their home, automobiles, a boat and a trailer. Over a period of three and one half years, plaintiffs maintained an "open account" with defendants. Under this arrangement, John Howe would bill plaintiffs quarterly for their premiums on their various insurance policies and plaintiffs would pay all or a portion of the amount when billed. The parties never agreed that plaintiffs had to pay the full amount when billed. When a policy expired, John Howe automatically issued another policy.

In December 1984, plaintiffs received notices that their policies on their home, automobiles and boat would be cancelled. When plaintiff George Barnett asked John Howe about these cancellation notices, he was told "not to worry about anything, that the insurance company was behind in issuing out the policies." Plaintiffs never received written or oral notice of cancellation of the policy on the metal building adjoining Highway 321. The building was damaged by fire on 14 February 1986. When George Barnett reported the fire to John Howe, he was told the policy on the building had been cancelled prior to the fire. The cost to repair the building amounted to $36,621.00.

We hold that this evidence was sufficient for the jury to find that defendants had the duty to renew plaintiffs' insurance policy on the metal building, that they negligently failed to do so and that as a proximate result of such negligence, plaintiffs were damaged in the amount of $30,000. Therefore, the trial court erred in entering judgment for defendants notwithstanding the verdict.

II

Plaintiffs next contend the trial court erred in granting defendants' conditional motion for a new trial. We agree.

A

[2] N.C. Gen. Stat. Sec. 1A-1, Rule 50(c)(1) requires the trial court to specify the grounds for granting or denying a motion for a new

trial. In the present case, the trial court's ground for allowing the motion for a new trial was "for errors committed by the Court during the course of the trial." The order does not specify the errors, and thus, the trial court failed to fulfill the requirements of the rule.

N.C. Gen. Stat. Sec. 1A-1, Rule 59(a) sets forth the various grounds for a new trial. Rule 59(a)(8) permits a new trial for "errors in law occurring at the trial and objected to by the party making the motion." The trial court's ground for the new trial —"for errors committed by the Court"—is an order under Rule 59(a)(8).

Both a motion and an order for new trial filed under Rule 59(a)(8) have two basic requirements. First, the errors to which the trial judge refers must be specifically stated. *Bryant v. Nationwide Ins. Co.*, 313 N.C. 362, 382, 329 S.E. 2d 333, 344 (1985). Second, the moving party must have objected to the error which is assigned as the basis for the new trial. N.C. Gen. Stat. 1A-1, Rule 59(a)(8).

Here, the trial court did not specify the errors. Without specificity, this Court "would be forced to embark on a voyage of discovery through an unchartered record to find the errors of law referred to in the order." *In re Will of Herring*, 19 N.C. App. 357, 360, 198 S.E. 2d 737, 740 (1973).

In this case, it can be argued, as the dissent does, that the wording of the first issue was inadequate and it is the error referred to by the trial court in its order for new trial. However, a review of the record shows that defendants did not object to the submission of the first issue to the jury. We hold that Rule 59(a)(8) precludes this Court from considering any error in the first issue.

When the trial court fails to comply with Rule 59 and Rule 50 in ordering a new trial, the general course is to reverse and remand for reinstatement of the verdict. *Herring* at 360, 198 S.E. 2d at 740.

B

[3] We also find grounds to reverse the order for a new trial in N.C. Gen. Stat. Sec. 1A-1, Rule 49(c). It provides as follows:

> (c) Waiver of Jury Trial on Issue. If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issues so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered.

We have previously discussed the effect of Rule 49(c) in cases, similar to the case at hand, where the issue was whether the court had properly formed the issues submitted to the jury.

In *Brant v. Compton*, 16 N.C. App. 184, 191 S.E. 2d 383, *cert. denied*, 282 N.C. 672, 196 S.E. 2d 809 (1972), the trial court submitted the following issue to the jury on contributory negligence: "If [the defendant was negligent], did the plaintiff contribute to such damage as alleged in the answer?" The jury answered the issue yes. Judgment was entered for the defendant. The plaintiff argued on appeal that the trial court erred since the issue included no reference to negligence. This Court held: " 'If the parties consent to the issues submitted, or do not object at the time or ask for different or additional issues, the objection cannot be made later.' " *Id.* at 185, 191 S.E. 2d at 384 (quoting *Baker v. Malan Construction Corp.*, 255 N.C. 302, 307, 121 S.E. 2d 731, 735 (1961)).

In *Winston-Salem Joint Venture v. City of Winston-Salem*, 65 N.C. App. 532, 310 S.E. 2d 58 (1983), this Court, while stating that the trial judge must submit issues that are necessary to settle the material controversies arising out of the pleadings, said:

> It appears from the record that defendants failed to properly object to the issues submitted; even if defendants were found to have properly objected to the forming of the issue, their assignment of error is without merit. The issue presented to the jury, when considered in light of the court's instructions to the jury, settles all the material controversies which arise out of the pleadings.

Id. at 538, 310 S.E. 2d at 62.

By application of Rule 49(c), since the defendants here failed to object to the first issue submitted to the jury, they waived their right to appeal on the ground that it was erroneous.

C

Additionally, in determining whether the court submitted the issues necessary to determine the material controversies of the suit, the court's instructions and the issues submitted should be construed together. *See Winston-Salem Joint Venture* at 537-38, 310 S.E. 2d at 62. The court here properly instructed the jury upon the law of negligence. We hold that construed together, the instructions and the issues submitted, when answered, settled the material controversies of the suit.

III

The judgment for the defendants notwithstanding the verdict and the entry of the order for a new trial are reversed, and the cause is remanded for entry of judgment in accordance with the jury verdict.

Reversed and remanded.

Judge JOHNSON concurs.

Chief Judge HEDRICK concurs in part and dissents in part.

Chief Judge HEDRICK concurring in part and dissenting in part.

I concur with that portion of the majority opinion that reverses the judgment notwithstanding the verdict for defendant. I dissent, however, from that portion of the decision that remands the cause to the superior court for entry of judgment on the verdict.

Without citing any authority, the majority assumes that this motion for a new trial under G.S. 1A-1, Rule 50(c) is the same as a motion for a new trial pursuant to G.S. 1A-1, Rule 59(a)(8). I am not convinced that this is a valid assumption. In my opinion, the majority is being too technical in order to require the trial court to enter a judgment for plaintiff on the verdict.

An error of law appears on the face of the record in this case. The first issue submitted to the jury, "Did the plaintiffs suffer loss as a result of John Howe Insurance Agency Inc.'s failure to procure insurance for the plaintiffs, Mr. and Mrs. Barnett:," permitted the jury to find that defendant was liable in damages without determining whether plaintiffs' damage was proximately caused by any negligence on the part of defendant. Although the court instructed the jury as to negligence, the answer to the issue did not resolve the question as to any negligence on the part of defendant.

As was done in *In re Will of Herring*, 19 N.C. App. 357, 198 S.E. 2d 737 (1973) and *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985), I would vote to order a new trial in this case to prevent a manifest injustice, and to obviate the necessity of another appeal from the judgment which the majority now orders entered on the verdict. I vote to reverse judgment for defendant notwithstanding the verdict and to remand for a new trial on all issues.

STATE OF NORTH CAROLINA v. CHRISTOPHER A. RUSSELL

No. 8623SC288

(Filed 17 February 1987)

1. Searches and Seizures § 11— warrantless search of airplane—probable cause

An airplane falls within the "automobile exception" to the warrant requirement of the Fourth Amendment so that a law enforcement officer is required only to have probable cause to believe that the plane or its contents contain contraband.

2. Searches and Seizures § 11— warrantless search of airplane—sufficiency of evidence of probable cause

The initial stop of an airplane and detention of its occupants were justified by the reasonable suspicion of law enforcement officers that the plane was transporting contraband where the officers had knowledge that the Ashe County airport had been used before to fly in contraband; the plane was approaching the airport on a foggy night, well after the normal operating hours of the airport, had circled the airport several times making very low passes, and was a plane unusually large to be landing at that airport; an individual with no identification who was driving an empty pickup truck with no registration, only temporary Utah tags, was waiting for the plane; and the driver of

this truck stated, without prompting or questioning, that the plane would not land because the pilot had seen the lights of a car which had pulled into the airport. Furthermore, this reasonable suspicion was elevated to probable cause once the plane was on the ground because of statements and behavior of the plane's occupant and pilot and the person waiting on the ground.

3. **Searches and Seizures § 11— warrantless search of plane—search of baggage proper**

Where law enforcement officers engaged in a legitimate, warrantless search of an airplane, the permissible scope of the search extended to the suitcases and overnight bag in the plane in which cocaine was found.

4. **Criminal Law § 75— warrantless search of airplane—statements by suspects prior to search—admissibility**

There was no merit to defendant's contention that the trial court erred in failing to suppress certain statements made by each of three suspects during their detention leading up to the search of an airplane, since officers had reasonable suspicion to justify the initial detention; certain events elevated the suspicion to probable cause; and each suspect was given the Miranda warnings upon his initial encounter with the officers.

5. **Criminal Law § 98.2— sequestration of witnesses—denial proper**

The trial court did not abuse its discretion and defendant failed to demonstrate any prejudice in denial by the court of defendant's motion to sequester the State's witnesses.

6. **Criminal Law § 64— defendant under influence of narcotics at arrest—officer's opinion properly admitted**

In a prosecution of defendant for conspiring to traffic in cocaine and trafficking in cocaine by possessing and transporting in excess of 400 grams, the trial court did not err in allowing a law enforcement officer to testify that in his opinion defendant was under the influence of narcotics on the night of his arrest.

7. **Narcotics § 1.3— trafficking in cocaine by possessing and transporting—separate offenses—separate punishments proper**

Defendant's convictions and sentencing for the two separate offenses of trafficking in cocaine by possession and trafficking in cocaine by transporting did not violate the constitutional guarantee against multiple punishments for the same offense.

APPEAL by defendant from *Morgan, Judge*. Judgment entered 30 October 1985 in Superior Court, WILKES County. Heard in the Court of Appeals 27 August 1986.

The Ashe County airport is located several miles from Jefferson, the county seat, which has a population of approximately one thousand. The airport is a modern facility with a 4,200-foot runway, long enough to handle large twin-engine private aircraft

such as turboprops. The runway is equipped with a sophisticated system of landing lights which can be activated by a radio signal from a plane wishing to land. The facility is run by a fixed-base operator who lives in a trailer adjacent to the airport.

On 28-29 August 1985, the late evening and early morning hours were foggy and the airport was quiet. Then, around midnight, a state trooper who lived near the airport was awakened by the noise of a large, twin-engine plane flying low overhead. The trooper was aware that state and local authorities suspected that illegal drugs had been flown into the Ashe County airport in the past. He telephoned the sheriff's office to inform Ashe County Sheriff Goss about the plane. The sheriff radioed deputies who were near the airport to proceed to the airport, with lights off so as not to alert the plane.

One deputy who had been nearest the airport arrived first and spotted a pickup truck with a camper top and temporary Utah tags parked at the airport gate. The driver of the truck identified himself as Ken Kubinski and stated that he was there to pick up two friends but that the plane probably could not land because of the fog. The driver had no identification and no registration for the truck. The deputy radioed this information to the sheriff, who was on his way to the airport with two more deputies. Sheriff Goss ordered the deputy at the airport to detain Kubinski.

The plane circled the airport several times. Sheriff Goss arrived soon with the other deputies. A car approached with its lights on; the driver was a curious neighbor who had been awakened by the circling plane. Sheriff Goss asked him to leave the area. Kubinski then stated that the plane would not land because the pilot had seen the car headlights.

Evidently, though, the plane had already landed because at that moment the plane was seen taxiing toward the gate. The officers hid as the plane approached. When the plane stopped taxiing, defendant Russell got out of the plane and began walking toward the gate.

As defendant neared the gate, he was confronted by a uniformed deputy. Defendant turned and began walking rapidly back toward the plane; he did not stop when commanded to by the dep-

uty. Defendant was heard to yell, "Get the hell out of here." Defendant then returned to where the deputy was standing, and the deputy asked defendant to go on board the plane and ask the pilot to shut down the engines. When defendant got to the plane, the deputy again heard him yell, "Get the hell out of here," to the pilot. The deputy heard the engines get louder, and he thought the pilot may have been trying to take off. The deputy entered the plane and ordered the pilot to cut off the engines. The pilot complied. The pilot and defendant were escorted from the plane.

Sheriff Goss advised the pilot of his *Miranda* rights and asked for permission to search the plane. The pilot refused and the sheriff dispatched a deputy back to the magistrate's office in Jefferson to procure a search warrant. Defendant and the pilot, identified as Rick Loyd, were detained, but not placed under arrest, while the deputy was gone. During the wait, the pilot stated he had changed his mind and would consent to a search of the plane. Loyd signed a form giving consent to search the plane and its contents. Defendant was asked if he objected and, according to Sheriff Goss, stated that he didn't care because he had no belongings on the plane anyway.

The search of the plane uncovered two large suitcases. The suitcases were latched but not locked. The deputies unlatched the suitcases and opened them. Inside were large quantities of a white powdered substance, later identified as cocaine. Other packages of cocaine were also found. The total amount of cocaine found on the plane was well in excess of 1,900 grams of ninety percent pure cocaine, having a street value of over fifteen million dollars.

Defendant Russell was indicted for conspiracy to traffic in cocaine, trafficking in cocaine by transporting in excess of 400 grams, and trafficking in cocaine by possessing in excess of 400 grams. The pilot Loyd and the driver of the waiting pickup truck, Kubinski, were both also indicted on all three charges.

Because of prejudicial pre-trial publicity, Judge Morgan granted defendants' motion for change of venue. Defendants were tried in Wilkes County. Defendants' motion to suppress the cocaine as the fruit of an unconstitutional search and seizure was denied. After a lengthy trial, defendants Kubinski and Loyd were acquitted of all charges. Defendant Russell was convicted of both

trafficking charges, but acquitted of the conspiracy charge. He was sentenced to forty years for each offense, to be served consecutively, and was also fined a total of four million dollars. He appeals.

Attorney General Lacy H. Thornburg by Assistant Attorneys General John H. Watters and Steven F. Bryant for the State.

Richard D. Esper, of the State Bar of Texas, admitted pro hac vice, for defendant-appellant.

PARKER, Judge.

[1] Defendant's primary contention on this appeal is that the trial court erred in denying his motion to suppress the cocaine seized from the airplane as the fruit of an illegal search and seizure. The trial court below conducted a hearing on the motion pursuant to G.S. 15A-977(d). At the conclusion of the hearing, the court made extensive findings of fact and conclusions of law. Based on these findings and conclusions, the court ruled that the search of the plane and the luggage on board was valid on two alternative theories. First, the pilot of the plane had freely given his knowing consent to search the plane, and the scope of such consent could, and did, include the luggage on board. Second, the court concluded that an airplane falls within the "automobile exception" to the warrant requirement of the Fourth Amendment, requiring only that the Sheriff have probable cause to believe the plane or its contents contained contraband. The court specifically found that such probable cause existed.

In our view the search of the plane and its contents was justified because probable cause existed to believe that the plane carried contraband. An airplane is a highly mobile vehicle, subject to extensive regulation, in which a defendant has a diminished expectation of privacy and, therefore, comes within the "automobile exception" to the warrant requirement of the Fourth Amendment. *See, e.g., United States v. Rollins*, 699 F. 2d 530 (11th Cir. 1983). In such a situation, "a search is not unreasonable if based on facts which would justify the issuance of a warrant, even though a warrant has not been obtained." *United States v. Ross*, 456 U.S. 798, 809, 102 S.Ct. 2157, 2164-65, 72 L.Ed. 2d 572, 584 (1982).

[2] In this case, the initial "stop" of the airplane and detention of its occupants were justified, as they must be, by the "reasonable suspicion" of the law enforcement officers that the plane was transporting contraband. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). The officers had knowledge that the Ashe County airport had been used before to fly in contraband. The plane was approaching the airport on a foggy night, well after the normal operating hours of the airport, had circled the airport several times, making very low passes, and was a plane unusually large to be landing at that airport. An individual with no identification who was driving an empty pickup truck with no registration, only temporary Utah license tags, was waiting for the plane. The driver of this truck stated, without prompting or questioning, that the plane would not land because the pilot had seen the lights of a car which had pulled into the airport. These facts were sufficient to give the officers a reasonable suspicion that the plane contained contraband. Therefore, the "stop" of the plane and the initial detention of the three suspects, defendant, the pilot and the waiting driver, were justified.

Once the plane was on the ground, several things occurred which elevated this reasonable suspicion to probable cause. Upon seeing the plane taxiing toward the officers, the driver who had been waiting for the plane said in response to a question, "My name is Peter Rabbit and I want a lawyer." The defendant here exited the plane and began walking toward the gate. When he spotted the waiting law enforcement officers, he wheeled and began returning to the plane. Despite being requested to stop by the nearest officer, defendant continued toward the plane. An officer followed him and as defendant approached the plane, the officer heard him shout, "Get the hell out of here." Defendant then returned to where the officer was standing and produced a California driver's license in response to a request for identification. The engines of the plane were still running and the officer requested that defendant return to the plane and ask the pilot to cut off the engines. Defendant returned to the plane, followed by the officer. As defendant reentered the plane, he was again heard to exclaim, "Get the hell out of here." The engines began to get louder, but at that point the officer entered the plane and asked the pilot to cut off the engines. The officer noticed that defendant appeared to be under the influence of a narcotic, which he be-

lieved to be either cocaine or methamphetamine. These additional facts, combined with those facts already known to the officers, were sufficient to give the officers probable cause to believe the plane contained contraband.

[3] Having concluded that the officers had probable cause to search the plane, the question then becomes the permissible scope of the search. Under the decision in *Ross, supra*, when the police engage in a legitimate, warrantless search of an automobile, the scope of that search extends to any containers found inside that may conceal the object of the search. *Id.* at 824, 102 S.Ct. at 2172, 72 L.Ed. 2d at 593. Therefore, the permissible scope of the search in this case extended to the suitcases and overnight bag in which the cocaine was found.

In light of our holding on the issue of probable cause to search, we need not address the contentions of defendant related to the pilot's consent to search the plane. That consent was unnecessary to authorize the search; therefore, its validity or invalidity has no relevance to our inquiry.

[4] Defendant also contends that the trial court erred in failing to suppress certain statements made by each of the suspects during their detention leading up to the search. Defendant argues that the initial detention was not supported by the required reasonable suspicion and that, even if it were, their detention exceeded the limited intrusion allowed by *Terry, supra*, and its progeny. However, as pointed out above, we believe there was reasonable suspicion to justify the initial detention and, as the facts developed to the officers, the reasonable suspicion became probable cause. So, even if there were a *de facto* arrest, as defendant contends, it was supported by probable cause and was, therefore, legitimate. *See Peters v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed. 2d 917 (1968). Further, each of the suspects had been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), upon their initial encounter with the officers. The police actions in this case were just the sort of "graduated responses" to changing circumstances approved in *United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.Ed. 2d 605 (1985).

[5] Defendant next assigns as error the denial by the trial court of his motion to sequester the State's witnesses, made at both the

suppression hearing and the trial. The North Carolina rule is that the motion to sequester witnesses is addressed to the sound discretion of the trial judge. G.S. 8C-1, Rule 615; *State v. Young*, 312 N.C. 669, 325 S.E. 2d 181 (1985). The trial court's ruling on the motion to sequester is reviewable on appeal only upon a showing of abuse of discretion. *Young, supra.* We note further that defendant presented no argument in support of his motion to the trial court here.

Defendant is also unable to demonstrate any prejudice in this case. At the suppression hearing, Sheriff Goss was the first witness to testify and he related all the key facts necessary to support the trial court's ruling on the motion. Thus, there could be no prejudice resulting from the failure to sequester the witnesses. Although defendant does allege that Sheriff Goss changed his testimony from that given at the suppression hearing, the alleged change related only to a collateral matter—corroboration of another officer's testimony—and defendant was free to impeach the Sheriff's trial testimony with his earlier testimony given at the suppression hearing. This assignment of error is overruled.

[6] Defendant's next assignment of error is that the trial court erred in allowing Officer Baker of the Ashe County Sheriff's Department to testify at the suppression hearing that in his opinion, defendant was under the influence of narcotics the night of his arrest. The defendant objected to this testimony on two grounds: first, that it was improper rebuttal evidence and, second, that the officer was not qualified to give such an opinion.

As to the first objection, rebuttal testimony is permissible to "impeach defendant's witnesses or to explain, modify, or contradict defendant's evidence." *State v. Sidden*, 315 N.C. 539, 554, 340 S.E. 2d 340, 349 (1986). The testimony was proper rebuttal evidence, as it was relevant to impeach the reliability of defendant's testimony concerning the events of the night of his arrest. As to the second objection, the rule is well established in this jurisdiction "that a lay witness may state his opinion as to whether the person is under the influence of drugs when he has observed the person and such testimony is relevant . . . ." *State v. Lindley*, 286 N.C. 255, 258, 210 S.E. 2d 207, 210 (1974). The assignment of error is overruled.

[7] Defendant's final assignment of error is that his convictions and sentencing for the two separate offenses of "trafficking in cocaine by possession" and "trafficking in cocaine by transporting" violate the constitutional guarantee against multiple punishments for the same offense. This issue has been decided adversely to defendant in *State v. Perry*, 316 N.C. 87, 340 S.E. 2d 450 (1986) (trafficking in heroin by possession, trafficking in heroin by manufacturing and trafficking in heroin by transporting are three distinct offenses, and a conviction for each does not violate the prohibition against double jeopardy), and *Sanderson v. Rice*, 777 F. 2d 902 (4th Cir. 1985), *cert. denied*, --- U.S. ---, 106 S.Ct. 1226, 89 L.Ed. 2d 336 (1986) (convictions for trafficking in marijuana by possession and trafficking in marijuana by manufacturing do not constitute double jeopardy). The assignment of error is overruled.

Having carefully examined the record on appeal and thoroughly considered the contentions of defendant, we conclude defendant received a fair trial free from prejudicial error.

No error.

Judges ARNOLD and EAGLES concur.

MARTIN L. TAYLOR v. MARGIE V. TAYLOR

No. 868DC623

(Filed 17 February 1987)

Husband and Wife § 12— bigamous marriage—compliance with separation agreement not required

The trial court did not err in declaring that plaintiff was relieved of his obligation to support defendant and that defendant was not entitled to receive payments from plaintiff pursuant to the parties' deed of separation where defendant admitted that she participated in a bigamous marriage ceremony while the parties were still married to each other. N.C.G.S. § 31A-1.

Judge GREENE dissenting.

APPEAL by defendant from *Jones (Arnold O.), Judge*. Judgment entered 16 January 1986 in District Court, WAYNE County. Heard in the Court of Appeals 9 December 1986.

This is a civil action wherein plaintiff seeks to be relieved of an obligation to make certain payments to his wife, defendant, pursuant to a deed of separation entered into between them. Plaintiff also seeks custody of a minor child, and a "divorce from bed and board." Defendant filed an answer praying that plaintiff not receive the relief prayed for in the complaint and a counterclaim seeking specific performance of the deed of separation.

After a hearing, the trial judge made the following pertinent findings of fact:

> 3. Three (3) children were born of the marriage of the parties of whom only ELIZABETH RENEE TAYLOR, born June 17, 1968, is a minor child.
>
> 4. The parties executed a written separation agreement on October 5, 1984, which provides in pertinent part in Paragraph 2 thereof, "Husband shall pay to Wife for her support and for support of the children the sum of ONE THOUSAND DOLLARS ($1,000.00) per month for one year, the payments beginning on October 10, 1984 and ending on September 10, 1985; thereafter, Wife shall receive one-half of the retirement pay of the Husband (the retirement pay at this time is EIGHT HUNDRED TWENTY-SEVEN AND 77/100 ($827.77) per month) and shall receive one-half of said retirement pay as it may increase or decrease until her remarriage or death."
>
> 5. In Paragraph 7 of the separation agreement, the parties agreed, "except as expressly set forth herein, each party does hereby waive any and all rights—past, present, and future—which either party may have against the other for support, alimony, alimony pendente lite, any claim under the Equitable Distribution Act, and all other claims which the parties may have by reason of the marriage."
>
> 6. The Plaintiff paid to the Defendant the sum of ONE THOUSAND DOLLARS ($1,000.00) per month through and including the month of May, 1985, pursuant to the terms of the separation agreement.
>
> 7. On April 8, 1985, the Defendant applied for a license to marry George Dwight Davis at Dillon, South Carolina, at 5:25 p.m. She subsequently went with George Dwight Davis to Lumberton, North Carolina where they registered at Motel 6

and spent the night together and then returned to Dillon, South Carolina on April 9, 1985.

8. On April 9, 1985 at 5:25 p.m., the Defendant participated in a marriage ceremony with George Dwight Davis at Dillon, South Carolina and a License and Certificate for Marriage was duly issued to them by the State of South Carolina.

9. The Defendant, Margie V. Taylor, testified that she went through a marriage ceremony with George Dwight Davis for the purpose of trying to lure him back to North Carolina.

10. The Defendant, Margie V. Taylor, testified that she had not cohabited with George Dwight Davis in the State of North Carolina since entering into the marriage ceremony with him.

11. The Plaintiff, Martin L. Taylor, testified that he was married to Margie V. Taylor on April 9, 1985; Margie V. Taylor testified that she has not divorced Martin L. Taylor.

12. Thereafter, the Defendant lived from time to time with George Dwight Davis in the State of Florida and has received some support from George Dwight Davis since April 9, 1985.

13. The parties stipulated that the Plaintiff shall have the care, custody and control of the minor child, ELIZABETH RENEE TAYLOR and that the Defendant shall have the privilege of visiting with said child at reasonable times and intervals and so long as such visits do not interfere with the health, education and welfare of said child and the Court finds that such custody and visitation will be in the best interest of said child.

Based on these findings, the judge made the following conclusions of law:

1. The obligation of the Plaintiff to pay support for the Defendant as provided in Paragraph 2 of the separation agreement between the parties dated October 5, 1984 was terminated upon the marriage ceremony of the Defendant on April 9, 1985 at Dillon, South Carolina.

2. The Plaintiff has paid the Defendant all sums due for her support under the separation agreement and owes the Defendant nothing pursuant to Defendant's Counterclaim.

3. The custody of the minor child, ELIZABETH RENEE TAYLOR, should be awarded to the Plaintiff and the Defendant should have reasonable visitation with said child.

The trial court entered a judgment ordering that plaintiff have exclusive custody of the minor child, declaring that the marriage ceremony of defendant at Dillon, South Carolina on 9 April 1985 terminated plaintiff's obligation pursuant to the deed of separation to support defendant, and that defendant take nothing by her counterclaim and pay the costs of the action. Defendant appealed.

Cecil P. Merritt for plaintiff, appellee.

Hulse & Hulse, by B. Geoffrey Hulse, for defendant, appellant.

HEDRICK, Chief Judge.

We note at the outset that the record does not indicate that the trial court entered a judgment with respect to plaintiff's prayer for "divorce from bed and board." We also point out that defendant took no exception to any of the findings of fact made by the trial court; nor does she contend in her brief that the findings of fact are not supported by the evidence. In her brief, defendant makes no contention regarding the order of custody. The minor child in question became eighteen years of age on 17 June 1986.

The only questions raised on appeal relate to the bigamous marriage ceremony entered into between defendant and George Dwight Davis in Dillon, South Carolina on 9 April 1985. Defendant, in fact, testified that she and George Dwight Davis participated in the marriage ceremony in Dillon on 9 April 1985. Defendant contends the trial court erred in allowing evidence regarding the bigamous marriage ceremony. Evidence regarding the bigamous marriage ceremony was and is relevant and material, and the trial court did not err in hearing such evidence and considering it in the judgment entered.

G.S. 31A-1, in pertinent part, provides:

> (a) The following persons shall lose the rights specified in subsection (b) of this section:
>
> . . .
>
> (5) A spouse who knowingly contracts a bigamous marriage.
>
> (b) The rights lost as specified in subsection (a) of this section shall be as follows:
>
> . . .
>
> (6) Any rights or interests in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage.

We think the statute is clear, and is an absolute bar to defendant's claim to have plaintiff pay her one-half of his retirement pay pursuant to the deed of separation entered into on 5 October 1984. It can hardly be argued that defendant's right to claim one-half of her spouse's retirement benefits was not a property right settled upon her in the deed of separation entered into after the marriage solely in consideration of the marriage. Defendant, the offending spouse, would have no right to claim anything from plaintiff, her spouse, if she was not in fact married to him at the time he and she entered into the deed of separation which required her husband, plaintiff, to pay her, his spouse, $1,000 per month for one year and, thereafter, one-half of his retirement benefits. We hold, therefore, that the trial judge did not err in declaring that plaintiff was relieved of his obligation to support defendant and that defendant was not entitled to receive the payments from her spouse pursuant to the deed of separation and in dismissing her counterclaim. We are not prepared to ignore the plain language of G.S. 31A-1 with respect to the facts of this case.

The judgment appealed from is affirmed.

Affirmed.

Judge JOHNSON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I believe the trial judge erred in declaring plaintiff relieved of his obligation to support defendant. I disagree with the majority that the language of N.C. Gen. Stat. Sec. 31A-1(b)(6) creates a bar to defendant's claim under the separation agreement.

I

Plaintiff asserts that N.C. Gen. Stat. Sec. 31A-1 requires the forfeiture of defendant's contractual right to alimony because defendant entered into a bigamous marriage.

The relevant portions of Section 31A-1 are found in subsections (a)(5) and (b)(6). Read together, they provide that "[a] spouse who knowingly contracts a bigamous marriage" shall lose "[a]ny rights or interests in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage." The majority determined the rights given by a separation agreement are rights or interests "in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage." I disagree.

I first note there is no case law addressing the meaning of subsection (b)(6). I also note Professor Lee found the section to be unclear. *See generally* 2 R. Lee, North Carolina Family Law Sec. 219, n. 20 (4th ed. 1980). Professor Lee also said: "It is doubtful that separation agreements, contemplating a separation or a divorce, are affected by N.C. Gen. Stat. Sec. 31A-1(b)(6)." *Id.*

This Court has held that property agreements are valid and may be entered into at any time either before, during or after marriage. *Buffington v. Buffington*, 69 N.C. App. 483, 488, 317 S.E. 2d 97, 100 (1984). Relying upon *Buffington*, the plaintiff contends that subsection (b)(6) now encompasses agreements settling property made during the marriage in contemplation of divorce. I, however, would not conclude that all property settlement agreements and/or separation agreements, are included in the language of N.C. Gen. Stat. Sec. 31A-1(b)(6).

In *Buffington*, this Court held that N.C. Gen. Stat. Sec. 50-20 had abolished the common law rule that property settlements entered into prior to the date of separation were void. 69 N.C. App.

at 488, 317 S.E. 2d at 100. Plaintiff's argument does not aid in the interpretation of the statute at hand since the language upon which subsection (b)(6) turns is the phrase "solely in consideration of the marriage." I construe that language to mean "solely in consideration of entering marriage." It is clear the agreement here was entered into in contemplation of the separation or divorce, in other words, in contemplation of ending a marriage. Indeed, this Court has previously indicated that the right to support set out in a separation agreement does not arise out of the marriage, but arises out of contract. *See Haynes v. Haynes*, 45 N.C. App. 376, 381-82, 263 S.E. 2d 783, 786 (1980).

Additionally, if subsection (b)(6) includes separation agreements, as the majority holds, then separation agreements are unenforceable after the divorce, unless they are incorporated into the divorce decree. This is so because N.C. Gen. Stat. Sec. 31A-1 (a)(1) states that the spouse forfeits any rights enumerated in section (b) once the divorce is entered or the marriage is annulled. In North Carolina, separation agreements have been enforceable contracts after the divorce, even without incorporation into the divorce decree. *Haynes* at 381-82, 263 S.E. 2d at 786.

I would hold that Section 31A-1(b)(6) does not include separation agreements. Therefore, the bigamous marriage entered into by defendant would not result in forfeiture of her rights under the agreement entered into by she and plaintiff.

II

Since I would hold that N.C. Gen. Stat. Sec. 31A-1 would not require forfeiture of the defendant's rights, two additional issues are raised: (1) whether "remarriage," as used in the separation agreement, includes a bigamous marriage, and (2) whether defendant is estopped from asserting that her remarriage is bigamous.

A

N.C. Gen. Stat. Sec. 51-3 states "[a]ll marriages . . . between persons either of whom has a husband or wife living at the time of such marriage . . . shall be void." This is commonly known as bigamy.

A bigamous marriage is void *ab initio* in this state. *Ivery v. Ivery*, 258 N.C. 721, 727, 129 S.E. 2d 457, 460 (1963); *Pridgen v.*

Pridgen, 203 N.C. 533, 537, 166 S.E. 591, 593 (1932). Since it is a nullity, it can be collaterally attacked at any time and no legal rights flow from it. *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E. 2d 353, 355 (1964). Therefore, I would hold that a bigamous marriage is a void marriage and cannot be considered a remarriage.

B

Our courts have held that equity can suspend the operation of N.C. Gen. Stat. Sec. 51-3. In an action for divorce, a party may be estopped from asserting that a current marriage is bigamous in order to avoid paying alimony. *Mayer v. Mayer*, 66 N.C. App. 522, 311 S.E. 2d 659, *disc. rev. denied*, 311 N.C. 760, 321 S.E. 2d 140 (1984); *Redfern v. Redfern*, 49 N.C. App. 94, 270 S.E. 2d 606 (1980); *McIntyre v. McIntyre*, 211 N.C. 698, 191 S.E. 507 (1937). "Under quasi-estoppel doctrine, one is not permitted to injure another by taking a position inconsistent with prior conduct, regardless of whether the person had actually relied upon that conduct." *Mayer* at 532, 311 S.E. 2d at 666.

By entering into the marriage ceremony performed in South Carolina, defendant impliedly represented she was not then married to any other person. Such conduct is inconsistent with her present assertion that the South Carolina "marriage" is void. However, plaintiff has not been injured by defendant's conduct: he simply has not been relieved of the obligations arising from his marriage to her. Neither plaintiff nor defendant have entered into any new obligations by virtue of defendant's actions; the only obligation presented in the case is that created prior to the South Carolina marriage ceremony.

While it is true defendant might be estopped to assert the invalidity of the South Carolina marriage in an action by George Dwight Davis on the ground that it was bigamous, I find no inequity in allowing her to assert the voidness of her South Carolina marriage ceremony in this particular action. While some may find defendant's conduct to be of questionable morality, courts are guided by principles of law and equity. Plaintiff would not be estopped from asserting the voidness of the South Carolina marriage.

III

In its judgment, the trial court directed defendant take nothing by her counterclaim. In light of my dissent, I would hold the trial court erred in denying the counterclaim and remand the action to the trial court for a new trial.

I vote to reverse and remand.

THE AETNA CASUALTY AND SURETY COMPANY AND THE WALNUT CIRCLE PRESS, INC. v. ROBINETTE SKEEN YOUNTS, VOY SKEEN, TERESA STANLEY, ADMINISTRATRIX OF THE ESTATE OF WILLIAM BOYD STANLEY, DECEASED, TERESA STANLEY, AND ROGER BARNES

No. 8618SC858

(Filed 17 February 1987)

1. **Insurance § 87.3— automobile liability insurance—car provided by employer—car driven by employee's children—permission of employer**

In an action to recover under an automobile insurance policy the evidence was sufficient to support the trial court's findings of fact that defendant father was given the auto in question as a fringe benefit of his job; plaintiff employer never restricted or limited the business or personal use of the vehicle in question by defendant father; on various occasions before the accident in question, defendant father and his family members used the auto for personal purposes in the good faith belief that such use was not in violation of any law, contractual obligation or prohibition of plaintiff employer; defendant father had informed plaintiff employer that his children had occasionally used the auto for personal purposes; and at no time prior to the accident did plaintiff employer expressly tell defendant to discontinue his personal use of the vehicle or to prohibit further use by his children.

2. **Insurance § 87.2— automobile liability insurance—car provided by employer—car driven by employee's daughter—permission of employer**

In an action to recover under an automobile insurance policy the trial court's findings of fact that on various occasions prior to the accident in question defendant employee and his family members had used the auto in question for personal purposes, that defendant explicitly informed plaintiff that his daughter had made personal use of the auto, and that plaintiff never instructed defendant to discontinue his personal use of the auto or to prohibit any further use by his daughter permitted the inference drawn by the court that at the time of the collision, the daughter was driving with the implied permission of plaintiff employer. Since the driver had the "permission" of the vehicle's owner under the omnibus clause of the policy at the time of the collision, there was full coverage.

APPEAL by plaintiffs from *Wood, Judge.* Judgment entered 15 May 1986 in GUILFORD County Superior Court. Heard in the Court of Appeals 14 January 1987.

On 1 October 1984, plaintiff, Aetna Casualty and Surety Company (Aetna), issued an insurance policy to plaintiff, Walnut Circle Press, Inc. (Walnut), affording certain motor vehicles liability insurance coverage in the amount of $1,000,000. One of the vehicles covered was a 1980 VW Dasher owned by Walnut.

Defendant Voy Skeen became employed by Walnut in 1980. In February 1984 Mr. Skeen was promoted to the position of production manager. Walnut provided Mr. Skeen with the use of the Dasher as a fringe or employee benefit. Walnut allowed Mr. Skeen the use of the Dasher "to ride back and forth to work . . . with the understanding that during the day the car was at the complete disposal and use of the company for company business."

Mr. Skeen drove the Dasher home daily where it was parked in the driveway of his residence with other family cars. Mr. Skeen owned a Ford, his wife owned a Chevrolet, and his son Phillip owned a Mustang. Mr. Skeen usually drove the Dasher or his Ford. In addition to driving the Dasher to and from work, Mr. Skeen occasionally made use of it for personal errands and trips from his home.

Mr. Skeen's daughter, defendant Robin Younts, lived with her parents and did not own a car. Ms. Younts usually drove her father's Ford, but she also drove the Dasher to various places including local stores and her place of employment. Mr. Skeen's son, Phillip, made similar use of the Dasher on occasion.

On 26 January and 22 February 1985, Walnut held management meetings to discuss various corporate matters including the topic of corporate liability for personal use of a company-owned vehicle. At one of these meetings Mr. Skeen informed Bruce Clapper, President of Walnut, and Jerry Clapper, Secretary of Walnut, that his son and daughter had used the Dasher for personal purposes on occasion. Despite this revelation, no one at Walnut told Mr. Skeen to discontinue his own personal use of the Dasher or to prohibit any further use by his children.

On 5 May 1985, Ms. Younts drove the Dasher to a concert which she attended with a friend. After the concert, she was in-

volved in a collision with another vehicle while she was driving the Dasher. William Boyd Stanley was killed in this accident and both defendant Teresa Stanley and defendant Roger Barnes were seriously injured.

Plaintiffs brought this action to obtain a declaratory judgment determining, *inter alia*, that the policy issued to Walnut covering the Dasher "provides no coverage for any of the injuries or deaths arising out of the collision on 5 May 1985. . . ." The case was tried before the trial court sitting without a jury.

After making findings of fact, the court made the following conclusions of law:

> 17. That on May 5, 1985, the defendant, Voya Robinette Skeen Younts was in lawful possession of a 1980 VW Dasher, identification number 33A0193203, owned by the plaintiff, The Walnut Circle Press, Inc.
>
> 18. That the plaintiff, The Walnut Circle Press, Inc. had knowledge of the previous personal use of the 1980 VW Dasher by the defendant, Voya Robinette Skeen Younts.
>
> 19. That the failure of the plaintiff, The Walnut Circle Press, Inc., to object to or prohibit such personal use of the 1980 VW Dasher by the defendant, Voya Robinette Skeen Younts constituted acquiescence to such use by the plaintiff.
>
> 20. That the knowledge of and acquiescence by the plaintiff, The Walnut Circle Press, Inc., to the previous personal uses of the 1980 VW Dasher by the defendant, Voya Robinette Skeen Younts constituted the implied permission of the owner to the use of the 1980 VW Dasher by Voya Robinette Skeen Younts on May 5, 1985; and at the time of this collision Voya Robinette Skeen Younts was driving the 1980 VW Dasher with the permission of The Walnut Circle Press, Inc.
>
> 21. That Voya Robinette Skeen Younts was an insured driver under the terms of The Aetna Casualty & Surety Company policy . . . on May 5, 1985.
>
> 22. That coverage in the amount of $1,000,000.00 is provided under the terms of The Aetna . . . policy . . . issued to The Walnut Circle Press, Inc. for any of the injuries, deaths, damages, claims or liabilities arising out of the collision on

May 5, 1985 between the 1980 VW Dasher owned by The Walnut Circle Press, Inc. and operated by Voya Robinette Skeen Younts and the vehicle operated by William Boyd Stanley, deceased.

Based on these conclusions the court entered a judgment for defendants which decrees that the policy provides coverage "for any injuries, deaths, claims or liabilities arising out of the [5 May 1985] collision . . . ." Plaintiffs appealed.

Smith, Helms, Mulliss & Moore, by J. Donald Cowan, Jr. and Caroline Hudson, for plaintiff-appellants.

Bretzmann & Bruner, by Joseph E. Bruner, for defendant-appellee Robinette Skeen Younts.

Haworth, Riggs, Kuhn, Haworth & Miller, by William B. Haworth, for defendant-appellee Voy Skeen.

C. Thomas Ross and William W. Walker, for defendant-appellee Teresa Stanley, individually, and as administratrix of the estate of William Boyd Stanley.

Wyatt, Early, Harris, Wheeler & Hauser, by Frank B. Wyatt and James R. Hundley, for defendant-appellee Roger Barnes.

WELLS, Judge.

[1] Plaintiffs contend that the court erroneously made findings of fact which are not supported by the evidence. The court found, in pertinent part, that:

10. The defendant, Voy Skeen, was promoted to the position of production manager by the plaintiff, The Walnut Circle Press, Inc. in 1984. At the time of his promotion, he was provided as a fringe benefit the use of a 1980 VW Dasher . . . for business and personal use by the President of The Walnut Circle Press, Inc., Bruce Warner Clapper.

The Walnut Circle Press, Inc. never restricted or limited the business or personal use of the 1980 VW Dasher by the defendant, Voy Skeen.

11. On various occasions before May 5, 1985 Voy Skeen and his family members had used the 1980 VW Dasher for

personal purposes. Both Voy Skeen and his family members had the good faith belief that such use was not in violation of any law, contractual obligation, or prohibition of The Walnut Circle Press, Inc.

12. The defendant, Voya Robinette Skeen Younts, resided in the home of her father, Voy Skeen, on May 5, 1985. Ms. Younts had made personal uses of the 1980 VW Dasher on several occasions prior to May 5, 1985.

13. On January 26 and February 22, 1985, the plaintiff, The Walnut Circle Press, Inc. held management meetings to discuss various corporate matters. At one of these meetings, the defendant, Voy Skeen, explicitly informed the President of The Walnut Circle Press, Inc., Bruce Clapper and his wife Jerry Clapper, Secretary of The Walnut Circle Press, Inc., that his daughter, Voya Robinette Skeen Younts, on occasions used the 1980 VW Dasher for personal purposes.

14. At no time prior to May 5, 1985 was the defendant, Voy Skeen, expressly told by the plaintiff, The Walnut Circle Press, Inc., to discontinue his personal use of the 1980 VW Dasher or to prohibit any further use by his daughter, Voya Robinette Skeen Younts.

15. On May 5, 1985, Voya Robinette Younts was driving the 1980 VW Dasher owned by The Walnut Circle Press, Inc., with the good faith belief that she had permission to do so, on Skeet Club Road in Guilford County, North Carolina, when she collided with an automobile operated by William Boyd Stanley in which Teresa Stanley was a passenger.

Plaintiffs contend findings #10, 11, 12, 14 and 15 are not supported by the evidence. We disagree.

When the trial court sits without a jury, as it did here,

> the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. . . . The trial judge acts as both judge and jury and considers and weighs all the *competent* evidence before him. . . . If different inferences may be drawn from the evidence, he determines which inferences

> shall be drawn and which shall be rejected. . . . "There is no difference in this respect in the trial of an action upon the facts without a jury under Rule 52(a)(1) and a trial upon waiver of jury trial under former G.S. 1-185. Findings of fact made by the court which resolve conflicts in the evidence are binding on appellate courts." (Citations omitted.)

Williams v. Insurance Co., 288 N.C. 338, 218 S.E. 2d 368 (1975).

Defendants presented evidence that:

Mr. Skeen was provided with the Dasher at the time of his promotion as a fringe benefit to help him out on his travel expenses to and from work. There was no written company policy regarding the use of company cars, and Walnut placed no restrictions on Mr. Skeen's business or personal use of the car. Mr. Skeen drove the Dasher to and from work and also used it to run personal errands. Robin Younts used the Dasher on several occasions to drive to local stores and to drive to her place of employment. Both Mr. Skeen and Ms. Younts testified that they had the good faith belief that such personal use of the Dasher was with the permission of Walnut.

Mr. Skeen explicitly informed Walnut at one of the two Walnut management meetings in January and February of 1985 that his daughter, Robin, and his son, Phillip, had used the Dasher for personal purposes on occasion. Mr. Skeen had no further discussions with Walnut regarding personal use of the Dasher after these management meetings. Even after Mr. Skeen informed Walnut of personal use of the Dasher by his children, Walnut did not place any restrictions on the use of the car.

We hold that the foregoing evidence supports the court's findings of fact #10 through #15. *See Williams, supra.* Accordingly, these contentions are rejected.

Plaintiffs additionally contend that the court erred in failing to make specific findings of fact concerning the actual use of the Dasher by Ms. Younts. However, the court is not required to find all the facts shown by the evidence so long as it finds enough material facts to support the judgment. *In re Custody of Stancil*, 10 N.C. App. 545, 179 S.E. 2d 844 (1971). For the reasons discussed *infra*, we hold that the court here did find enough material facts to support the judgment. These contentions are rejected.

[2] Plaintiffs contend the court erred in concluding that Robin Younts was in lawful possession of the Dasher on the day of the collision. We disagree.

N.C. Gen. Stat. § 20-279.2(b)(2) provides:

> (b) Such owner's policy of liability insurance:
>
> . . .
>
> (2) Shall 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 or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and ten thousand dollars ($10,000) because of injury to or destruction of property of others in any one accident . . . .

This provision of the Financial Responsibility Act (the Act) requires that specified amounts of coverage be provided in liability insurance contracts and designates those who must be covered within such limits. *Caison v. Insurance Co.*, 36 N.C. App. 173, 243 S.E. 2d 429 (1978). When recovery is sought within the amount of the mandatory liability insurance coverage required by G.S. § 20-279.21(b)(2), a party need only show lawful possession of the vehicle by the operator and is not required to prove that the operator had the owner's permission to drive on the very trip and occasion of the collision. *Id.* The question of lawful possession has been mooted in this case by our concurrence, *infra*, in the trial court's findings and conclusion that the insured vehicle was being operated with the implied consent of the owner at the time of the collision. We note, nevertheless, that the trial court's findings and conclusions clearly establish that Ms. Younts was in lawful possession of the insured vehicle at the time of the collision. We now

address the question whether there is coverage for the full amount of $1,000,000 under the terms of the policy. In general, liability insurance coverage in excess of the amounts required under G.S. § 20-279.21(b)(2) is voluntary and not controlled by the provisions of the Act. *Caison, supra.* G.S. § 20-279.21(g) specifically excludes such coverage in addition to and in excess of that required by G.S. § 20-279.21(b)(2). *See id.* Aetna's liability, if any, for coverage in excess of that required by the Act must be judged according to the terms and conditions of the policy. *See id.*

The policy here provides in pertinent part:

> D. WHO IS INSURED:
>
> (1) *You* are an *insured* for any covered *auto.*
>
> (2) Anyone else is an *insured* while using with *your* permission a covered *auto you* own, hire, or borrow except:
>
> (a) The owner of a covered *auto you* hire or borrow from one of *your* employees or a member of his or her household.
>
> (b) Someone using a covered *auto* while he or she is working in a business of selling, servicing, repairing or parking *autos* unless that business is *yours.*
>
> (c) Anyone other than *your* employees, a lessee or borrower or any of their employees, while moving property to or from a covered *auto.*

Plaintiffs contend the court erroneously concluded that Ms. Younts was using the Dasher with the implied permission of Walnut on the date of the collision. We disagree.

First, we note that this disputed "conclusion" by the trial court may be more properly considered as a finding of fact to support the conclusion of coverage. In this context, we look for guidance to the decision of our Supreme Court in *Bailey v. Insurance Co.*, 265 N.C. 675, 144 S.E. 2d 898 (1965) and the decision of this Court in *Caison v. Insurance Co.*, 45 N.C. App. 30, 262 S.E. 2d 296 (1980). In *Bailey*, the Court stated:

> The owner's permission for the use of the insured vehicle may be expressed or, under certain circumstances, it may

be inferred. "Where express permission is relied upon it must be of an affirmative character, directly and distinctly stated, clear and outspoken, and not merely implied or left to inference. On the other hand, implied permission involves an inference arising from a course of conduct or relationship between the parties, in which there is mutual acquiescence or lack of objection under circumstances signifying assent." (Citations omitted.)

In *Caison*, we stated the proposition as follows: "[t]o invoke coverage where permission is at issue, the fact to be found is *whether the use in question falls within the scope of the express or implied permission granted* (emphasis in original)."

Applying the foregoing principles to the instant case, we hold that the trial court's findings of fact that on various occasions prior to 5 May 1985 Mr. Skeen and his family members had used the Dasher for personal purposes, that Mr. Skeen explicitly informed Walnut that Ms. Younts had made personal use of the Dasher, and, finally, that Walnut never instructed Mr. Skeen to discontinue his personal use of the Dasher or to prohibit any further use by Ms. Younts permits the inference drawn by the court that at the time of the collision, Ms. Younts was driving the Dasher with the implied permission of Walnut.

We thus hold that the court did not err in finding or concluding that "the knowledge and acquiescence by [Walnut] to the previous personal uses of the [Dasher] by [Ms.] Younts constituted the implied permission of the owner to the use of the [Dasher] by [Ms.] Younts on May 5, 1985 . . . at the time of this collision. . . ." Accordingly, since Ms. Younts had the "permission" of the vehicle's owner, Walnut, under the omnibus clause of the policy at the time of the collision, there is full coverage.

For the foregoing reasons, the judgment of the trial court decreeing full coverage under the terms of the policy is

Affirmed.

Judges EAGLES and GREENE concur.

STATE OF NORTH CAROLINA v. DENNIS RAY UNDERWOOD

No. 8615SC582

(Filed 17 February 1987)

1. **Criminal Law § 75.8— right to counsel invoked—arrest warrant read—no initiation of conversation or interrogation**

An officer's delivery and reading of arrest warrants to defendant after he had invoked his right to counsel did not amount to an initiation of conversation or interrogation so as to require suppression of defendant's subsequent written statement.

2. **Homicide § 8.1— voluntary intoxication—instruction on defense not required**

Though there was evidence that defendant had used drugs on the night of the crimes charged, the evidence did not support a finding by the trial court that defendant was intoxicated, and the trial court did not err in failing to charge on the defense of voluntary intoxication.

3. **Criminal Law § 138.29— victim asleep as aggravating factor—error**

The trial court erred in finding as an aggravating factor at sentencing for assault with a deadly weapon inflicting serious injury that the victim was asleep at the time of the assault, since the victim's vulnerability was no greater than that ordinarily present in a felonious assault on any unsuspecting victim.

APPEAL by defendant from *Battle, Judge*. Judgments entered 15 January 1986 in Superior Court, ORANGE County. Heard in the Court of Appeals 18 November 1986.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elisha H. Bunting, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Louis D. Bilionis, for defendant appellant.

ORR, Judge.

Defendant Dennis Ray Underwood was convicted in a jury trial of second-degree murder, assault with a deadly weapon inflicting serious injury, and misdemeanor larceny. He received a twenty year sentence for the murder conviction, a ten year sentence for the assault conviction, and a two year sentence for the larceny conviction, with all sentences to run consecutively. On appeal defendant contends he is entitled to either a new trial, or in the alternative, a new sentencing hearing in each of the three convictions.

Defendant assigns as error (1) the trial court's denial of his motion to suppress his statement given on 5 August 1985; (2) the trial court's refusal to submit to the jury the lesser included offense of voluntary manslaughter; (3) the trial court's failure to instruct the jury on the defense of voluntary impairment to the charge of misdemeanor larceny; (4) the trial court's submission of additional instructions to the jury on the charge of misdemeanor larceny; (5) the trial court's failure to find as a mitigating factor in sentencing that defendant grew up in an environment lacking in the necessary guidance and structure; and (6) the trial court's finding as an aggravating factor in sentencing defendant for assault with a deadly weapon inflicting serious injury that the victim was asleep at the time of the assault.

We find error in the trial court's consideration of the victim's sleeping state at the time of assault as a factor in aggravation of defendant's sentence received for the assault. We find, however, no merit in defendant's remaining assignments of error.

The State's evidence tended to show that at the time of the offenses charged defendant had shared a rented trailer with a married couple, Mitchell and Tracy Joyner, for over a month. On 2 August 1985, Mitchell Joyner invited a friend, Donald Raynor, to spend the night at the trailer. Mitchell and Donald left work, picked up Tracy in Durham, and spent the rest of the evening in Durham, returning to the trailer at approximately 10:00 p.m. Defendant returned to the trailer about ten minutes after the Joyners and Raynor had arrived. The Joyners and defendant walked to the trailer of a neighbor, Cherry Bland. The evidence was that everyone at Bland's smoked marijuana, then Mitchell bought some "crank," an amphetamine. The Joyners returned home leaving defendant at Bland's trailer. Raynor had remained at the Joyner's trailer watching television, and when Mitchell and Tracy returned, all three split the amphetamine. Shortly thereafter, at approximately 11:30 p.m., the Joyners went to a bed in the back of the trailer, and Raynor prepared to sleep on the living room couch. At this time, defendant had not returned to the trailer. Bland testified that defendant left her trailer around 12:30 a.m. after telling her he was going back to his trailer.

Tracy Joyner testified that she awoke to see defendant standing next to her side of the bed. Defendant reached across

her and struck her sleeping husband, Mitchell, in the head with a hammer. Tracy, at defendant's direction, followed defendant into the living room, where she saw defendant strike Raynor in the back of the head with the hammer killing him. Then Tracy, again at the defendant's direction, returned to the bedroom, removed all her husband's money from his wallet, and took the money to defendant, who was in the living room taking money out of Raynor's pants pocket.

Defendant and Tracy left the trailer in Mitchell Joyner's white Mustang with defendant driving. At approximately 3:30 a.m. defendant and Tracy rented a room at the Happy Inn in Durham, where they spent the remainder of the night. The next morning, 3 August 1985, at approximately 7:00 a.m., Tracy called friends, who picked her up at the motel and took her back to the trailer. Tracy was then persuaded to call the police.

Defendant was subsequently arrested for murder, assault, and larceny. At the police station, after his arrest, defendant invoked his sixth amendment right to counsel and was placed in a jail cell. A short time later Officer Collins, who was present when defendant invoked his right to counsel, delivered and read to defendant the contents of the arrest warrants. Shortly thereafter defendant notified a jailer that he wished to speak with Officer Collins. After receiving and waiving his *Miranda* rights, defendant proceeded to give the police a statement. Defendant's statement was introduced into evidence at trial. Defendant was convicted of the charges. At the sentencing hearing the trial court found as an aggravating factor that defendant had prior convictions for criminal offenses punishable by more than sixty days' confinement and that the victim was asleep when assaulted by defendant.

I.

[1] Defendant first contends that his written statement was taken in violation of *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed. 2d 984 (1981). In *Edwards*, the United States Supreme Court held that once a suspected criminal invokes his right to counsel he may not be questioned further until counsel is provided. However, if the suspected criminal, himself, initiates the dialogue, he may waive his right to have an attorney present. Defendant argues that Of-

ficer Collins' formal delivery and reading of the arrest warrants to defendant constituted the initiation of conversation by someone other than defendant. It was thus, according to defendant, improper interrogation, and the State is prohibited from using the statement at defendant's trial.

Edwards does not prohibit all interaction between the accused and law enforcement officers. As noted by the United States Supreme Court in *Oregon v. Bradshaw*, 462 U.S. 1039, 77 L.Ed. 2d 405 (1983), when discussing *Edwards*, "[s]uch inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*." 462 U.S. at 1045, 77 L.Ed. 2d at 412.

We conclude that Officer Collins' delivery and reading of the arrest warrants was not an initiation of conversation or interrogation as that term was used in *Edwards*. When a defendant is arrested pursuant to an arrest warrant, N.C.G.S. § 15A-401(a)(2) requires the arrest warrant to be served upon the defendant, as soon as possible. In the case *sub judice*, the warrants were not available for service at the time of arrest. The fact that delivery and reading of the warrants was made after a request for an attorney does not alter the routineness of such delivery nor does it constitute the initiation of questioning. *See Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed. 2d 297 (1980) (interrogation refers to not only express questioning, "but also to any words or actions on the part of the police (*other than those normally attendant to arrest and custody*) that the police should know are reasonably likely to elicit an incriminating response. . . .").

Likewise, defendant initiated the conversation with Officer Collins after Collins had read the warrants and left. *See also State v. Williams*, 314 N.C. 337, 333 S.E. 2d 708 (1985). We find no error.

II.

[2] Defendant next contends that the trial court erred in denying his request for an instruction on his voluntary intoxication. Defendant claims that such intoxication raised reasonable doubt as to his capacity to form the specific intent required for conviction of larceny. We disagree.

> To make the defense of voluntary intoxication available to defendant, the evidence must show that at the time of the [offense] the defendant's mind and reason were so completely intoxicated and overthrown that he could not form a specific intent to [commit it]. [Citations omitted.] In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to [commit the offense], the court is not required to charge the jury thereon.

State v. Gerald, 304 N.C. 511, 521, 284 S.E. 2d 312, 318-19 (1981).

Tracy Joyner testified that defendant smoked "a joint" while at Cherry Bland's trailer. In defendant's statement to police, defendant said he had smoked grass and mixed amphetamines with LSD Friday evening. There is evidence that defendant had been using drugs on 2 August 1985. However, sufficient evidence showing that he was intoxicated or unable to reason was not presented.

Cherry Bland testified that defendant was not drinking while he was at her trailer, nor did defendant appear drunk, high, or "messed up" to her. Defendant arrived at Bland's trailer between 10:00 p.m. and 11:00 p.m. and left around 12:30 a.m., giving Bland ample opportunity to observe his physical and mental state.

Bill Pruessing, the night auditor at the Happy Inn in Durham, checked defendant into the motel a short time after the crimes were committed. He testified that defendant was extremely courteous and patient when renting the room.

Defendant was seen shortly before and after he committed the crime, and he appeared rational and sober on both occasions. The evidence in this case does not support a finding by the trial court that defendant was intoxicated and the trial court did not err in failing to charge on the defense of voluntary intoxication. *See State v. Gerald*, 304 N.C. 511, 284 S.E. 2d 312. This assignment of error is without merit.

III.

[3] Defendant finally contends that the trial court erred in finding as an aggravating factor at sentencing for assault with a deadly weapon inflicting serious injury that the victim was asleep at the time of the assault. We agree.

An aggravating factor is intended to aid the trial court in imposing a punishment commensurate with defendant's culpability. N.C.G.S. § 15A-1340.4(a) (1983). In *State v. Hines*, 314 N.C. 522, 335 S.E. 2d 6 (1985), while discussing the use of the victim's age as an aggravating factor, the Supreme Court stated a guideline for determining when a factor is properly used to aggravate a sentence. The Court said a factor should not be considered in aggravation of a sentence unless it makes defendant more blameworthy than he already is as a result of committing a violent crime against another person. "A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized. Unless [the victim's] age has such an effect, it is not an aggravating factor under the Fair Sentencing Act." *Id.* at 525, 335 S.E. 2d at 8.

The State argues that in this case the victim was rendered more vulnerable to defendant's assault because he was asleep when attacked and unable to defend himself; therefore, the trial court properly considered the victim's increased vulnerability, which was vulnerability beyond that ordinarily present in a felonious assault, when sentencing defendant. We reject the State's argument.

The State's claim of increased vulnerability is grounded solely on the fact that the victim was not warned of an impending assault before being assaulted by defendant. This alone, however, is insufficient to uphold the State's argument. "Inherent in most crimes is an unprovoked, uninvited and unwarranted attack on an unprepared, innocent victim. Such is the very essence of violent crime and it can be presumed that the Legislature was guided by this unfortunate fact when it established presumptive sentences for crimes which fall within the purview of the Fair Sentencing Act." *State v. Higson*, 310 N.C. 418, 424, 312 S.E. 2d 437, 441 (1984).

The victim in this case was sleeping and, therefore, unprepared for defendant's assault. Any unsuspecting victim, however, would be equally as vulnerable to this type of violent assault. *Id.; State v. Nelson*, 76 N.C. App. 371, 333 S.E. 2d 499

(1985). The State has failed to demonstrate how the victim's sleeping state rendered him any more vulnerable than victims similarly assaulted as required before this factor may be considered in aggravation of a sentence. *State v. Higson*, 310 N.C. 418, 312 S.E. 2d 437.

This case must be remanded for a new sentencing hearing because the trial court erred in its finding of a factor in aggravation. *State v. Ahearn*, 307 N.C. 584, 300 S.E. 2d 689 (1983).

IV.

We have considered defendant's remaining assignments of error: that the trial court erred in refusing to submit to the jury the lesser included offense of voluntary manslaughter; that the trial court erred by submitting additional instructions to the jury on the charge of misdemeanor larceny; and that the trial court erred in failing to find as a mitigating factor in sentencing that defendant grew up in an environment lacking in the necessary guidance and structure. We hold that these assignments of error have no merit and do not warrant further consideration.

For the reasons set forth above, the second-degree murder conviction, No. 85CRS9542, and the misdemeanor larceny conviction, No. 85CRS11607, are upheld. However, the assault with a deadly weapon inflicting serious injury conviction, No. 85CRS 9543, is remanded for resentencing.

No. 85CRS9542—Second degree murder—no error.

No. 85CRS9543—Assault with a deadly weapon inflicting serious injury—remanded for resentencing.

No. 85CRS11607—Misdemeanor larceny—no error.

Judges WELLS and BECTON concur.

Olschesky v. Houston and Morton v. Houston

GREG OLSCHESKY v. CLARENCE W. HOUSTON, JR.

DEAN H. MORTON, JR. v. CLARENCE W. HOUSTON, JR.

No. 865SC561

(Filed 17 February 1987)

Rules of Civil Procedure § 4— service of process—leaving summons and complaint with responsible person at residence—proper name in complaint

A deputy's testimony and two returns of service were competent evidence which would support the trial court's finding that defendant resided at a given address with his brother on the dates that summons and complaints were left there and that the brother was a person of suitable age and discretion to accept service; furthermore, omission of the "Jr." in defendant's name in the titles of the complaints would not deprive the court of jurisdiction, and such error could properly be corrected by later amendments of the complaints. N.C.G.S. 1A-1, Rule 4(j)(1)a.

APPEAL by defendant from *Allsbrook, Judge.* Judgments entered 29 August 1985 in Superior Court, NEW HANOVER County. Heard in the Court of Appeals 11 November 1986.

Scott, Payne, Boyle & Swart, by John P. Swart, attorney for plaintiff appellee, Greg Olschesky.

Prickett & Corpening, by J. H. Corpening, II, attorney for plaintiff appellee, Dean H. Morton, Jr.

Goldberg & Anderson, by Frederick D. Anderson, attorney for defendant appellant.

ORR, Judge.

This appeal is from two orders denying defendant's motions to dimiss for insufficient service of process. We affirm the trial court's dismissal.

On 3 July 1981, plaintiffs Olschesky and Morton filed separate complaints against defendant Clarence W. Houston. Each individually alleged that defendant had committed assault and battery.

A summons was issued with each complaint addressed to defendant "Clarence W. Houston, 5409 Ridgewood Heights Drive, Wilmington, N.C." Deputy J. W. Greer served the Olschesky com-

plaint and summons on 14 July 1981 by leaving the documents with Robert Houston, defendant's brother, at 310 Pine Hills Drive, the alleged dwelling house or usual place of abode of defendant and Robert Houston.

On 20 July 1981, Deputy Greer served the Morton complaint and summons by leaving the documents with Robert Houston at 310 Pine Hills Drive.

Defendant filed motions to dismiss the complaints, alleging failure by plaintiffs to state a claim for relief, failure to obtain personal jurisdiction over defendant, and failure to institute proper service of process on defendant.

Plaintiffs responded by issuing in each case an alias and pluries summons against defendant, who was identified as "Mr. Clarence W. Houston, a/k/a Clarence W. Houston, Jr., at 5409 Ridgewood Heights Drive, Wilmington, N.C. 28403."

On 11 October 1981, Deputy Greer personally served the Olschesky complaint and alias and pluries summons on "Clarence W. Houston, a/k/a Clarence W. Houston, Jr. at 5901 Wrightsville Ave."

Morton's complaint and alias and pluries summons addressed to "Clarence W. Houston, Jr., 310 Pine Hills Drive, Wilmington, NC" were personally served on "Clarence W. Houston, Jr." on 2 October 1981.

On 6 October 1981, defendant renewed his motions to dismiss.

Plaintiffs amended their complaints on 24 November 1981 and 21 December 1981, changing the party defendant's name from Clarence W. Houston to Clarence W. Houston, Jr. and subsequently causing both amended complaints to be personally served on defendant Clarence W. Houston, Jr. Defendant, on 26 January 1982, once again renewed his motions to dismiss. The motions were heard and denied by District Court Judge Jacqueline Morris-Goodson. Defendant obtained a transfer of the cause to Superior Court where Judge Charles Winberry also heard and denied defendant's motions. The two actions were consolidated and tried by a jury, which awarded plaintiffs $77,500.00 in actual and punitive damages.

Defendant appealed.

Defendant contends that the trial court improperly denied his motions to dismiss plaintiffs' complaints because the evidence in the record did not support the finding that each complaint and summons had been properly served on defendant before the running of the statute of limitations on plaintiffs' causes of action. There is a one year statute of limitations for assault and battery under N.C.G.S. § 1-54.

The trial court is not required to make findings of fact and conclusions of law when deciding on a motion to dismiss unless such facts and conclusions are specifically requested by a party or required by N.C.G.S. § 1A-1, Rule 41(b), which is not applicable in the instant case. N.C.G.S. § 1A-1, Rule 52(a)(2) (1983). If neither party makes such a request, the appellate court on review will presume that the trial court on proper evidence found facts to support its judgment. *Estrada v. Burnham*, 316 N.C. 318, 341 S.E. 2d 538 (1986).

In the present case defendant did not request that the trial court make findings of fact and conclusions of law to explain its decision to deny defendant's motions to dismiss. Therefore, we presume such facts were properly found, and focus instead on the sufficiency of the evidence. If the presumed findings of fact are supported by competent evidence, they are conclusive on appeal despite evidence to the contrary. *J. M. Thompson Co. v. Doral Manufacturing Co.*, 72 N.C. App. 419, 324 S.E. 2d 909, *disc. rev. denied*, 313 N.C. 602, 330 S.E. 2d 611 (1985).

The evaluation of the weight, sufficiency, and credibility of contradictory evidence is the duty of the trial court and not the duty of the appellate court. *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).

The single issue before this Court is whether competent evidence was presented as a matter of law to support the trial court's presumed finding that proper service was had on defendant.

Defendant argues that service was improper for two reasons. First, defendant contends service was improper because each original summons and complaint named Clarence W. Houston as

defendant and indicated on each summons that his address was "5409 Ridgewood Heights Drive." Defendant argues that the complaints brought suit against his father, Clarence W. Houston, Sr., and were inadequate to bring any action against him, Clarence W. Houston, Jr. Furthermore, defendant contends, by the time plaintiffs amended the complaints to substitute "Clarence W. Houston, Jr." for "Clarence W. Houston" as a party to the action, the statute of limitations had run, prohibiting any actions against defendant based on the 6 July 1980 batteries. We disagree.

"Although service of process should correctly state the name of the parties, a mistake in the names is not always a fatal error, and as a general rule a mistake in the given name of a party who is served will not deprive the court of jurisdiction." *Jones v. Whitaker*, 59 N.C. App. 223, 225, 296 S.E. 2d 27, 29 (1982). "Names are to designate persons, and where the identity is certain a variance in the name is immaterial." *Id.* at 225, 296 S.E. 2d at 29 (quoting *Patterson v. Walton*, 119 N.C. 500, 26 S.E. 43 (1896)). Where service of process is made on the party intended to be sued, a misnomer which does not leave the name of the party to be sued in doubt, may be corrected by amendment at any stage of the suit. *Harris v. Maready*, 311 N.C. 536, 319 S.E. 2d 912 (1984).

The misnomer upon which defendant bases his argument is minor, consisting only of the omission of "Jr." from the title; the remaining portion of the name is correct. Furthermore, plaintiffs' evidence showed that defendant did not always use the "Jr." in his name, noting specifically that when called as a witness for the State in the criminal case arising out of the 6 July 1980 batteries, defendant was identified as Clarence W. Houston. If defendant was properly served, this misnomer would not deprive the trial court of jurisdiction, and would in fact have been corrected by the later amendments of the complaints to change the name to "Clarence W. Houston, Jr."

Defendant's final assignment of error is therefore the crucial question in this decision. In it, defendant contends that Deputy Greer did not properly serve each summons and complaint on defendant by leaving them with Robert Houston at 310 Pine Hills Drive. Defendant's contention is that he was not living at the 310 Pine Hills Drive address at the time of service on 14 and 20 July 1981.

Deputy Greer submitted a service return of the summons and complaint in each case. This was accomplished by leaving the documents at 310 Pine Hills Drive, with Robert Houston, "a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode."

When a defendant appears in an action and challenges a service of summons by the sheriff of the county where the defendant was found, N.C.G.S. § 1-75.10(1)a states that proof of the service shall be "by the officer's certificate thereof, showing place, time and manner of service." "When the return upon its face shows legal service by an authorized officer, that return is sufficient, at least *prima facie*, to show service in fact." *Williams v. Burroughs Wellcome Co.*, 46 N.C. App. 459, 462, 265 S.E. 2d 633, 635 (1980). A deputy's return or judgment based thereon cannot be set aside unless the evidence is clear and unequivocal. *Guthrie v. Ray*, 293 N.C. 67, 235 S.E. 2d 146 (1977).

Plaintiffs presented the testimony of Deputy Greer to establish the sufficiency of the services of process. Deputy Greer testified that on 14 July 1981 he attempted to serve the Olschesky complaint and summons on defendant at 5409 Ridgewood Heights Drive. At this address Deputy Greer said he spoke with defendant's stepmother, Mary Love Houston, who indicated that there were two Clarence W. Houstons, a junior and a senior. Having told her that the matter involved an "assault case at Wrightsville Beach," Mrs. Houston told Deputy Greer that the person he was looking for did not live there. She then told him where she thought the person he was looking for was staying. Deputy Greer proceeded as directed by Mrs. Houston to 310 Pine Hills Drive and spoke to Robert Houston, who confirmed that defendant "stayed" there. Greer then left a copy of the summons and complaint with Robert Houston.

On 20 July 1981 Deputy Greer also served the Morton complaint against Clarence Houston by leaving it with Robert Houston at 310 Pine Hills Drive. For each complaint and summons, Deputy Greer submitted a properly prepared return verifying a legal service of process by leaving copies at defendant's dwelling house with a "person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode."

Defendant presented three witnesses to challenge the sufficiency of plaintiffs' returns of service.

Defendant testified, on his own behalf, that 310 Pine Hills Drive was not his dwelling house or usual place of abode on the 14th and 20th of July 1981.

Mary Houston testified that she could not recall speaking with Deputy Greer or anyone else regarding a complaint and summons in 1981. Furthermore, she did not know if defendant was residing with Robert Houston at 310 Pine Hills Drive during July of 1981. She did remember, however, that Robert Houston and defendant moved into the house at 310 Pine Hills Drive at the same time and that defendant had lived there off and on with Robert Houston until Robert Houston married.

Robert Houston acknowledged that he did not marry until after July 1981. He then testified that when Deputy Greer attempted to serve the complaints and summons on defendant at 310 Pine Hills Drive, he told Deputy Greer that defendant did not live at that address and he refused to accept any documents on defendant's behalf.

As discussed above, it is the trial court who must determine the weight, sufficiency, and credibility of the conflicting evidence. In this case defendant bears the burden of proving by clear and unequivocal evidence that he was not properly served. In addition he must also overcome the presumption of proper service of process created by the return of service.

Therefore, after reviewing the record, this Court concludes that Deputy Greer's testimony and the two returns of service are competent evidence which would support the trial court's finding that defendant resided at 310 Pine Hills Drive, with his brother Robert Houston, on 14 and 20 July 1981, and that Robert Houston was a person of suitable age and discretion to accept service. Such a finding would support the conclusion that proper service on defendant had been accomplished pursuant to the requirements of N.C.G.S. § 1A-1, Rule 4(j)(1)a. The trial court did not err in denying defendant's motions to dismiss for insufficient service of process.

Affirmed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. ANN MAJOR

No. 8612SC812

(Filed 17 February 1987)

1. **Criminal Law § 146.4— double jeopardy claimed—order denying dismissal immediately appealable**

Where a motion for dismissal of criminal charges is based upon double jeopardy grounds, an order denying the motion is immediately appealable.

2. **Criminal Law § 26.8— mistrial for prosecutorial misconduct—no double jeopardy**

There was no merit to defendant's contention that a mistrial was intentionally provoked by the State and that any further prosecution of the charges against her was barred by the Double Jeopardy clause of the Fifth Amendment to the U.S. Constitution, since the trial court concluded that prosecutorial misconduct was the result of an effort to get before the jury information which the prosecutor thought they needed rather than an attempt to goad defendant into seeking a mistrial; moreover, though it would have been the better practice for the trial court to set out specifically its findings of fact and conclusions of law in its order denying defendant's motion to dismiss, its failure to do so was not prejudicial to defendant.

APPEAL by defendant from *Barnette, Judge.* Order entered 24 March 1986 in Superior Court, CUMBERLAND County. Heard in the Court of Appeals 6 January 1987.

Defendant was convicted of second degree murder in connection with the 12 July 1983 stabbing death of William Corbett. She appealed her conviction and was awarded a new trial. *State v. Majors,* 73 N.C. App. 26, 325 S.E. 2d 689, *aff'd,* 314 N.C. 111, 331 S.E. 2d 689 (1985).

Defendant's second trial commenced on 17 February 1986 before Judge E. Lynn Johnson. After the State had presented its evidence, and as a result of a question posed to a defense witness by the prosecutor during cross-examination, defendant moved for a mistrial. Judge Johnson allowed the motion and declared a mistrial.

Prior to a third trial, defendant filed a motion alleging that any further prosecution of the action is constitutionally barred and seeking dismissal of the charge. She appeals from the denial of her motion to dismiss.

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

Gregory A. Weeks for defendant appellant.

MARTIN, Judge.

I

[1] Although neither party has raised the issue, previous decisions of this Court are in conflict upon the question of whether a defendant has a right to an immediate appeal from an order denying a motion to dismiss charges based upon double jeopardy grounds. In *State v. Jones*, 67 N.C. App. 413, 313 S.E. 2d 264 (1984), the majority of a panel of the Court held that an order denying such a motion was interlocutory and did not deprive the defendant of a substantial right which would be lost if the order was not reviewed prior to final judgment. Therefore, an appeal from such an order was held to be premature. Less than a year later, however, another panel of this Court held that, although interlocutory, the denial of a motion to dismiss based upon double jeopardy considerations was immediately appealable because it involved a substantial right of a defendant not to be put to trial twice for the same offense. *State v. Montalbano*, 73 N.C. App. 259, 326 S.E. 2d 634, *disc. rev. denied, appeal dismissed*, 313 N.C. 608, 332 S.E. 2d 182 (1985).

Our Supreme Court has recognized that an immediate appeal may be taken from an interlocutory order in a criminal case where the order appealed from "may destroy or impair or seriously imperil some substantial right of the appellant." *State v. Bryant*, 280 N.C. 407, 411, 185 S.E. 2d 854, 856 (1972). We hold that a defendant's right not to be unconstitutionally subjected to multiple criminal trials for the same offense is a substantial right, a violation of which cannot be fully remedied by an appeal taken after the subsequent trial has already occurred. This is so because the mere fact of the subsequent trial is a violation of the protected right. Therefore, we hold that where a motion for

dismissal of criminal charges is based upon double jeopardy grounds, an order denying the motion is immediately appealable.

II

In her motion to dismiss, defendant alleged that during her second trial, her counsel advised Judge Johnson and the prosecutor that the defense intended to present Yvette Bonner as a witness. Ms. Bonner, a 14 year old girl, had not testified at defendant's first trial and counsel stated that he had become aware of the witness shortly before the commencement of the second trial. During a conference between Judge Johnson and both counsel, the prosecutor inquired as to the extent to which he would be permitted to cross-examine Ms. Bonner concerning her failure to come forward earlier. He specifically inquired as to whether he might ask Ms. Bonner why she had "let Ann Major go to prison and didn't say anything to anybody?" Judge Johnson advised the prosecutor that if such a question was asked, defendant's motion for a mistrial would be granted. The prosecutor was instructed that he should avoid any question involving the fact that a prior trial had been held or the results thereof.

Ms. Bonner testified that the victim, William Corbett, had beaten defendant earlier in the day on which he was killed. She further testified, on direct examination by defendant's counsel, that she told her mother about the beating after reading of Corbett's death in the newspaper. The prosecutor's cross-examination of Ms. Bonner began as follows:

> Q. Miss Bonner, when was it you saw all this in the newspaper?
>
> A. I do not have a specific date. If I'm not mistaken, it was around about—it was probably the 12th, because we got the morning's paper and the afternoon's paper.
>
> Q. And what did you see in the newspaper?
>
> A. Well, my mom was reading it, and she had told me about it. I say, "We just left Ann's house not too long ago, yesterday sometime." And then she say, "Yes. It is."
>
> Q. Okay. So you told your mom about it on the 12th?
>
> A. Yes, sir. I did.

Q. Now, did you ever read anything else about Ann Major in the newspaper?

A. Yes, sir.

Q. When was that?

A. When they said she get a retrial.

Q. Okay. Before the retrial, did you read anything before that?

A. No, sir. I didn't.

Q. You didn't read anything about an original trial?

A. No, sir.

MR. WEEKS: Your Honor, we object and ask to be heard.

The defendant moved for a mistrial based upon the prosecutor's reference to "an original trial." Judge Johnson allowed the motion and declared a mistrial.

[2] Defendant contends that the mistrial was intentionally provoked by the State and that any further prosecution of the charges against her is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Secondarily, she contends that because the trial court did not make written findings of fact and conclusions of law with respect to her motion to dismiss, its order denying her motion is deficient and must be overturned. We overrule both contentions.

The right of a defendant in a criminal proceeding not to be subjected to repeated prosecutions for the same offense is guaranteed by the Fifth Amendment to the Constitution of the United States and by Article I, Section 19 of the Constitution of North Carolina. *United States v. Dinitz*, 424 U.S. 600, 47 L.Ed. 2d 267, 96 S.Ct. 1075 (1976); *State v. Shuler*, 293 N.C. 34, 235 S.E. 2d 226 (1977). Where the former trial is terminated by a mistrial granted at the request of, or with the consent of, a defendant, the general rule is that the Double Jeopardy Clause does not bar retrial, even if the defendant's motion for mistrial is made as a result of prosecutorial error. *United States v. Dinitz, supra; State v. Britt*, 291 N.C. 528, 231 S.E. 2d 644 (1977). There is, however, a narrow exception to the general rule that a defendant's motion for mistrial

removes any double jeopardy bar to retrial. In *Oregon v. Kennedy*, 456 U.S. 667, 72 L.Ed. 2d 416, 102 S.Ct. 2083 (1982), the United States Supreme Court held that where the prosecutorial misconduct giving rise to a defendant's motion for mistrial was intended to "goad" or provoke the defendant into moving for a mistrial, the defendant may invoke the protection of the Double Jeopardy Clause to bar a retrial. In its holding, the Court specified that the standard to be applied in determining whether retrial should be barred is one which examines the intent of the prosecutor. Absent an "intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause," even prosecutorial misconduct sufficiently overreaching as to require a mistrial will not bar a retrial. *Id.* at 676, 72 L.Ed. 2d at 424, 102 S.Ct. at 2089. The standard requires the court considering the motion to bar retrial to make a finding of fact with respect to such intent, the existence or nonexistence of which may usually be inferred from objective facts and circumstances. *Id.*

At the hearing on defendant's motion to dismiss, defendant offered into evidence the motion to dismiss, the contents of which were verified by her attorney, and a transcript of the direct examination and cross-examination of Ms. Bonner at defendant's second trial. The State offered no evidence upon the motion. The record discloses that the trial court examined the transcript and specifically considered the issue of the prosecutor's intent in asking the question which led to the mistrial. At the conclusion of the hearing the trial court stated:

> As I read the transcript of this—I mean, I understand there is some dispute about what happened but accepting what you say and looking at the transcript, I think he was caught in the—between the horns of a dilema [sic] in trying to get before the jury why at this late hour this witness finally comes forward and risks a mis—and risks a mistrial and I don't find—I don't see anything in here that he violated any express instruction of Judge Johnson, or that he didn't do it first. The witness mentioned it first. Then it's certainly conceivable he can deem that as some sort of waiver and proceeded on and Judge Johnson felt like that the prejudice was so much that he had to declare a mistrial. But that does not mean he intended to goad the defendant in asking for a mistrial. I've seen situations in which the State is about to lose a

> case, they are aware they are about to lose a case, they are missing a witness, they have been forced to trial, in effect, without a material witness and in a situation like that they deliberately might do something to force the defendant to ask for a mistrial because—so they can get the time. That's the type of thing that justice [sic] Rehnquist, I think, was talking about, that if you did something like that, then you would be entitled to your motion to dismiss. But it has to be something obvious like that, something you can clearly prove. I mean, it naturally follows. This does not naturally follow; as you have admitted yourself, the interpretation that he was just taking a chance in order to get something before the jury that he thought the jury was entitled to know could be a natural interpretation, could be a reasonable interpretation of what is in this transcript. I think it is, too. In fact, I really think that is the most reasonable interpretation, so your motion is denied.

From the foregoing statement, it is apparent that the trial court considered the evidence and the opposing inferences which might be drawn from it. The court determined that the most reasonable inference arising from the circumstances was that, although it may have been improper, the prosecutor's question to Ms. Bonner was not asked in a deliberate, intentional attempt to provoke a mistrial. When the court acts as fact finder, it is for the court to determine which of differing reasonable inferences should be drawn from the evidence. From our review of the record, we cannot say that the trial court's determination was unreasonable or erroneous.

Although it would have been the better practice for the trial court to specifically set out its findings of fact and conclusions of law in its order denying defendant's motion to dismiss, its failure to do so in this case has not resulted in any prejudice to defendant. There were no material conflicts in the evidentiary materials submitted to the court which required resolution by detailed findings of fact. The only factual issue which the trial court was required to resolve was the question of the prosecutor's intent. The resolution of that issue was dependent upon the inferences which the court determined to draw from the established facts. The court's statement, quoted *ante*, amply reflects the inferences

which it chose to draw and sufficiently states the legal basis for its ruling.

The trial court's determination that the prosecutor did not intentionally attempt, by his question, to provoke defendant into moving for a mistrial is supported by the record in this case. Therefore, her retrial is not barred by the Double Jeopardy Clause. We affirm the denial of defendant's motion.

Affirmed.

Judges WELLS and PARKER concur.

JIMMY GRAHAM, JR., ADMINISTRATOR OF THE ESTATE OF LINK C. GRAHAM v. JAMES F. JACKSON ASSOCIATES, INC. AND REPUBLIC INSURANCE COMPANY

No. 868SC674

(Filed 17 February 1987)

Municipal Corporations § 12.3— person shot by police officer—insurance policy purchased by municipality—injury covered

Where a police officer pled guilty to involuntary manslaughter in the shooting death of plaintiff's intestate, plaintiff obtained a jury award of $150,000 in compensatory damages in a civil rights action, at the time of the shooting the police officer was insured under a policy of public officers' and employees' professional liability insurance issued by defendant to the town which employed the officer, and plaintiff complied with all pertinent provisions of the policy and made formal demand upon defendant to pay the judgment obtained against the officer, the trial court erred in ruling that coverage was excluded by the terms of the insurance policy and by public policy which prohibits insuring against liability for one's criminal acts, since the coverage and exclusion provisions of the policy were in such conflict as to make it virtually impossible for either an insured or a beneficiary to determine precisely which perils were covered and which were not; because the policy was reasonably susceptible to more than one construction, it must be construed in favor of providing coverage; and the public policy prohibiting insuring against one's criminal acts must be balanced with the strong public policy considerations favoring the protection and compensation of innocent members of the public.

APPEAL by plaintiff from *Llewellyn, Judge*. Judgment entered 14 March 1986 in Superior Court, LENOIR County. Heard in the Court of Appeals 10 December 1986.

The facts of this case have been stipulated. Plaintiff is the administrator of the estate of Link C. Graham, a former resident of Lenoir County, North Carolina, who was shot and killed on 20 April 1981 by Chris Basden, an officer of the LaGrange Police Department. Officer Basden was indicted for murder, but subsequently pled guilty to involuntary manslaughter.

Plaintiff filed an action against Officer Basden, the Town of LaGrange, and the LaGrange Police Department in the United States District Court for the Eastern District of North Carolina seeking, *inter alia*, damages for violations of Link Graham's civil rights pursuant to 42 U.S.C. § 1983, including damages for pain and suffering and wrongful death. Plaintiff subsequently dismissed the Town of LaGrange and the LaGrange Police Department as defendants in the action. After Basden failed to answer or otherwise defend in the action, a jury returned a verdict awarding plaintiff $150,000 in compensatory damages and $50,000 in punitive damages. The court entered judgment for plaintiff on the jury verdict.

At the time of the shooting, Officer Basden was an insured under a policy of public officers' and employees' professional liability insurance issued to the Town of LaGrange by defendants. The policy contained a $1,000,000 limit of liability. Plaintiff has complied with all pertinent provisions of the policy and has made formal demand upon defendants to pay the judgment obtained against Officer Basden. Defendants have denied that the policy provides coverage for Basden's act and have refused to pay the judgment.

Plaintiff filed this action seeking recovery against defendant insurers for all amounts awarded plaintiff pursuant to the judgment against Basden in the federal action. Having stipulated the relevant facts, the parties filed cross-motions for summary judgment. Plaintiff appeals from the trial court's order denying his motion for summary judgment, allowing defendants' motion for summary judgment, and dismissing plaintiff's complaint with prejudice.

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by James E. Ferguson, II and Frank E. Emory, Jr. for plaintiff appellant.

Moore, Van Allen, Allen & Thigpen, by George M. Teague and Sarah W. Fox for defendant appellees.

MARTIN, Judge.

There are no genuine issues of fact and this is an appropriate case for decision by summary judgment. At the outset, plaintiff concedes that he is not entitled to recover from these defendants the $50,000 in punitive damages awarded him in his suit against Officer Basden, and we summarily affirm the trial court's judgment so holding. The sole issue for our determination is whether the insurance policy issued by defendants provides coverage for compensatory damages awarded plaintiff as a result of Officer Basden's acts. The trial court ruled that coverage was excluded by the terms of the insurance policy and by public policy which prohibits insuring against liability for one's criminal acts. We reverse.

The insurance policy at issue in this case contained the following pertinent provisions:

I. COVERAGE CLAIMS MADE PROVISION

The company will

A. Pay, on behalf of the insured, all sums which the insured shall become legally obligated to pay as damages by reason of any negligent act, error or omission arising out of the performance of insured's duties while on official assignments as a law enforcement official or officer in the regular course of public employment as hereinafter defined arising out of the following perils: Bodily Injury, including assault and battery (as hereinafter defined), Property Damage (as hereinafter defined), Personal Injury (as hereinafter defined) including mental anguish, false arrest, false imprisonment, wrongful eviction, malicious prosecution, libel, slander, invasion of rights of privacy or discrimination.

* * *

III. EXCLUSIONS

This policy does not apply:

. . .

(L) to any dishonest, fraudulent, criminal or malicious act or omission.

IV. DEFINITIONS

When used in this policy (including endorsements forming a part hereof):

. . .

(E) Bodily injury as used herein means physical injury to any person (including death) and any mental anguish or mental suffering associated with and arising from such physical injury.

. . .

(H) Personal injury means

(1) false arrest, false imprisonment, wrongful eviction, wrongful detention, malicious prosecution or humiliation;

(2) libel, slander, defamation of character, invasion of rights of privacy, discrimination or violation of Civil Rights, or assault and battery;

(3) erroneous service of civil process or papers;

(4) bodily injury as hereinabove defined.

In construing the foregoing provisions, we are guided by the general rule that an insurance policy is a contract between the parties which must be construed and enforced according to its terms. *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967). Any ambiguity or uncertainty in the meaning of particular provisions must be resolved in favor of the policyholder or beneficiary, and against the insurance company responsible for the wording of the policy, *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E. 2d 518 (1970), but where the meaning of the policy is clear, the courts must enforce the policy as written, and may not impose additional liabilities upon the parties under the guise of construing an ambiguous term. *Woods v. Nationwide Mutual Ins. Co.*, 295 N.C. 500, 246 S.E. 2d 773 (1978). Exclusions from the undertakings of the insurance company are not favored and will be strictly construed so as to provide the coverage which would otherwise be extended under the policy. *Maddox v. Colonial Life and Accident Ins. Co.*, 303 N.C. 648, 280 S.E. 2d 907 (1981); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E. 2d 775 (1984).

In the present case, plaintiff contends that the coverage provisions and the exclusion provisions of the policy are in such conflict as to make it virtually impossible for either an insured or a beneficiary to determine precisely which perils are covered and which are not. We agree.

To the average reader, the language of the policy issued by defendants presents an interesting array of drafting ambiguities which, we believe, can produce nothing less than confusion as to the perils for which coverage is provided by the policy. For example, the policy explicitly provides coverage for negligently inflicted bodily injury (including death) resulting from assault and battery, a criminal act pursuant to G.S. 14-33, but thereafter purports to exclude claims arising out of any criminal act. The policy specifically provides coverage for malicious prosecution, but later excludes claims arising out of any "malicious act or omission." In short, while the policy provides coverage for a number of specific perils, the exclusionary language "[t]his policy does not apply . . . to any dishonest, fraudulent, criminal or malicious act or omission," when applied literally, effectively denies coverage for many of those very same perils.

Officer Basden was convicted of involuntary manslaughter in connection with the death of plaintiff's intestate. Involuntary manslaughter, a felony in this State, has been defined as an unintentional killing of a person without malice, proximately resulting from the commission of an unlawful act not amounting to a felony nor naturally dangerous to human life, *or* a culpably *negligent* act or omission. *State v. Redfern*, 291 N.C. 319, 230 S.E. 2d 152 (1976). The policy issued by defendants expressly provides coverage for negligently inflicted bodily injury resulting in death, but purports to exclude from coverage "criminal acts," which, in the case of involuntary manslaughter, could include negligently inflicted bodily injury resulting in death. Thus, the policy is reasonably susceptible to more than one construction and must be construed in favor of providing coverage. *Stanback, supra.* Moreover, the policy specifically provided coverage for personal injury occasioned by a violation of civil rights, which was the basis for plaintiff's federal suit against Officer Basden.

Defendants argue, however, that even if the insurance policy may be construed as providing coverage for plaintiff's claim, the

coverage violates public policy and that the contract of insurance is, therefore, unenforceable. It is a general rule that an insurance policy is void as against public policy if its intent is to indemnify the insured against liability for his own criminal acts. *Shew v. Southern Fire & Casualty Co.*, 307 N.C. 438, 298 S.E. 2d 380 (1983); 6B Appleman, Insurance Law and Practice § 4252 (Buckley ed. 1979); 1 Couch on Insurance 2d § 1:39 (Rev. ed. 1984). The general rule prohibiting insurance against liability for criminal acts advances a legitimate public policy interest against relieving a wrongdoer from responsibility for his own wilful and wrongful act, in order that the commission of such acts not be encouraged. *See Shew, supra; Nationwide Mutual Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E. 2d 654 (1964); 43 Am. Jur. 2d, Insurance, § 260 (1982).

The public policy considerations raised by defendants and served by the foregoing rule are not the only ones present in this case, however. The insurance policy involved in the present case was purchased by the Town of LaGrange, a municipality which would ordinarily be immune from tort liability. As stated in *Edwards v. Akion*, 52 N.C. App. 688, 693, 279 S.E. 2d 894, 897, *aff'd*, 304 N.C. 585, 284 S.E. 2d 518 (1981), "[A] city is ordinarily immune from tort liability, [and] when it voluntarily waives that immunity by purchasing liability insurance, it obviously does so to protect innocent victims. By extending its coverage to city employees, the clear intent is to protect victims from acts of the employees as well as its officers, directors, and stockholders." Thus, there arise strong public policy considerations favoring the protection and compensation of innocent members of the public. These competing public interests must be balanced. *See Mazza v. Medical Mutual Ins. Co.*, 311 N.C. 621, 319 S.E. 2d 217 (1984); *Moore v. Jones*, 44 N.C. App. 578, 261 S.E. 2d 289 (1980). In our view, providing to the public the protection intended by the Town of LaGrange when it purchased insurance would best serve the public interest and should prevail. Therefore, we hold that plaintiff may properly receive payment under the policy for all sums, excluding punitive damages, awarded by the jury.

Insofar as the summary judgment entered by the trial court denies plaintiff recovery against these defendants for punitive damages awarded plaintiff in his suit against Officer Basden, the judgment is affirmed. In all other respects, however, the judg-

ment of the trial court is reversed and this case is remanded for entry of judgment for plaintiff consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges WELLS and JOHNSON concur.

FRANK E. WHITE v. PHILLIP DALE LOWERY

No. 8628SC280

(Filed 17 February 1987)

Damages § 10— personal injury action—plaintiff's receipt of retirement benefits—evidence not excluded by collateral source rule

In an action to recover damages for injuries sustained in an automobile accident, the Court of Appeals did not need to rule on plaintiff's contention that the admission of evidence by the trial court that plaintiff received a bonus for taking early retirement and was receiving retirement benefits violated the collateral source rule, since such evidence was not offered in mitigation of damages but was instead offered to show that the reason plaintiff took early retirement was not because of the accident but because of the economic incentives his employer offered for his retiring early, and the evidence was thus properly admitted to impeach plaintiff's testimony that he retired because the injuries he suffered as a result of the accident left him unable to do his job as a telephone cable repairman.

APPEAL by plaintiff from *Lamm, Judge*. Judgment entered 14 October 1985, and Order entered 31 October 1985 in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 22 August 1986.

Riddle, Kelly & Cagle by E. Glenn Kelly for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes & Davis by Marla Tugwell for defendant appellee.

COZORT, Judge.

Plaintiff appeals the jury's award of $3,100.00 in damages for injuries he suffered in an automobile accident with defendant Lowery. Defendant admitted liability but contested the amount of

damages plaintiff alleged were proximately caused by the accident. Plaintiff's appeal is primarily based on his contention that the trial court erred in admitting evidence of plaintiff's receiving pension or retirement benefits. Plaintiff argues that the admission of such evidence violated the collateral source rule. Plaintiff also contends the trial court erred in failing to give a number of jury instructions. We find no error.

On 10 June 1983 plaintiff was in an automobile accident. Defendant admitted liability for the collision but denied the collision was the proximate cause of the plaintiff's claimed injuries. The parties stipulated that the only issue to be tried was what amount, if any, plaintiff was entitled to recover from the defendant for his injuries.

At trial plaintiff filed a motion in limine to exclude evidence that he had received retirement benefits after retiring from his job at Southern Bell Telephone Company. Plaintiff contended that the amount of benefits received by reason of his retirement was not admissible and that the collateral source rule prohibited introduction of such evidence. The trial court ruled that such evidence was admissible, although the amount of retirement benefits plaintiff received upon his retirement was not admissible. At trial plaintiff testified that prior to the accident in question he had not planned to retire but that he retired because injuries he suffered as a result of the accident left him unable to do his job as a telephone cable repairman. The trial court allowed defendant to question plaintiff regarding the fact that he did receive a bonus for taking early retirement and did receive retirement benefits.

Defendant's evidence by way of cross-examination of plaintiff and by direct evidence from plaintiff's supervisor tended to show that plaintiff's employer was enacting a work force reduction and was trying to induce senior employees to retire early. On 9 August 1984 plaintiff was offered a bonus for retiring early. He had fifteen days to accept the offer. Plaintiff accepted the retirement bonus by 24 August 1984, with an effective date of 31 October 1984. Plaintiff continued to work for over two months after he decided to retire. He never mentioned to his employer that he was retiring because of any physical problems. Plaintiff's supervisor testified that as far as he was aware, plaintiff was doing his job.

With respect to disability, plaintiff's orthopedic surgeon, Dr. David Lincoln, testified that as a result of injuries from the accident, plaintiff had a total of ten percent permanent partial disability of his neck and back. Plaintiff testified that there were many things he could not do after the accident that he could do before the accident. On direct examination he testified that he had had no physical problems doing his job and no problems with his back and legs prior to the accident. On cross-examination, however, plaintiff admitted that in 1979 he had knee surgery and that he had answered interrogatories that he had "unending problems" with his knee. Plaintiff also admitted that he had suffered a work-related injury in 1980 which shattered both heels and left one ankle disfigured. He received a twenty percent permanent partial disability award for one foot and a thirty percent permanent partial disability award for the other foot.

Plaintiff testified as to the various medical treatments he had received after the collision with the defendant. A review of the transcript shows that plaintiff introduced into evidence as an exhibit copies of his medical bills, although this exhibit was not included in the record on appeal.

From the jury verdict awarding plaintiff $3,100.00, plaintiff appealed.

Plaintiff's principal assignment of error concerns the admission of evidence by the trial court that plaintiff received a bonus for taking early retirement and was receiving retirement benefits. Plaintiff contends the admission of this evidence violates the collateral source rule. We disagree. The collateral source rule provides:

> 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).

Cates v. Wilson, 83 N.C. App. 448, 452, 350 S.E. 2d 898, 901 (1986). Generally, courts which have addressed the issue include pension or retirement benefits within the collateral source rule. *See Annot.*, 47 A.L.R. 3d 234 (1973), and *Annot.*, 75 A.L.R. 2d 885 (1961). The rationale of the collateral source rule is "[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 v. Thompson*, 50 N.C. App. 724, 731, 275 S.E. 2d 507, 513 (1981).

We need not decide, however, whether the retirement benefits here fall under the collateral source rule, for the evidence of the retirement bonus and benefits was not offered in mitigation of damages. Rather, the evidence was offered to show that the reason plaintiff took early retirement was not because of the accident but because of the economic incentives his employer offered for his retiring early. We hold that the evidence was properly admitted to impeach plaintiff's testimony that he retired because the injuries he suffered as a result of the accident left him unable to do his job as a telephone cable repairman. *See Jackson v. Sabuco*, 21 Mich. App. 430, 175 N.W. 2d 532 (1970). We note, however, that the trial court properly excluded evidence of the amount of such benefits.

Plaintiff's remaining assignments of error concern the trial court's jury instructions. First, plaintiff contends the trial court erred in failing to instruct the jury to exclude from its consideration that plaintiff had received retirement benefits and in affirmatively charging that plaintiff had received some retirement benefits. The trial court charged the jury, in pertinent part, that:

> Damages for personal injury include such amount as you find, by the greater weight of the evidence, is fair compensation to the Plaintiff for loss of time, or loss from inability to perform ordinary labor, or reduced capacity to earn money, which are immediate and necessary consequences of the injury.

In determining this amount you are to consider the evidence as to the Plaintiff's age and occupation; the nature and extent of Plaintiff's employment; the amount of Plaintiff's income, at the time of the injury, from fixed salary or wages.

There has been some evidence that Plaintiff is now receiving retirement benefits. I instruct you that you are not to speculate on the amount of these benefits or consider them in arriving at any damages awarded for loss of earnings. Instead, you are to be governed by the rules I have just given you. (Emphasis added.)

In light of our resolution of the collateral source rule issue, we find no error in this instruction.

Next, plaintiff contends that the trial court erred in failing to instruct the jury that it could award plaintiff damages for partial loss of use of his back. There was evidence that plaintiff suffered a ten percent permanent partial disability of his back as a result of the accident. Plaintiff requested the trial court give N.C.P.I. Civil 810.35 on loss of use of part of the body. The trial court refused to give the requested instruction. We have reviewed the instruction given and find that the instruction given on recovery of damages for permanent injury adequately covered the requested instruction. The trial court was not required to give an instruction in the exact language of the request. *State v. Richardson*, 295 N.C. 309, 245 S.E. 2d 754 (1978). Rather, it must cover the requested instruction in substance if it is a correct statement of the law and supported by the evidence. *State v. Corn*, 307 N.C. 79, 296 S.E. 2d 261 (1982).

Finally, the plaintiff contends the trial court erred in failing to instruct the jury that it could award plaintiff sums for future pain and suffering and future medical expenses. With respect to future pain and suffering and future medical expenses plaintiff did not object at trial to the instruction given, as is required by North Carolina Rules of Appellate Procedure, Rule 10(b)(2). Thus, plaintiff is precluded from raising this issue on appeal. *Lowder v. All Star Mills, Inc.*, 75 N.C. App. 233, 330 S.E. 2d 649, *disc. rev. denied*, 314 N.C. 541, 335 S.E. 2d 19 (1985). We note, however, that the trial court instructed the jury that a person whose injuries were proximately caused by an accident is entitled to recover in a lump sum for damages past, present, and prospective,

including medical expenses. Furthermore, plaintiff presented no evidence of future medical expenses. We find no merit to plaintiff's argument.

No error.

Judges BECTON and JOHNSON concur.

WILLIAM A. McNEIL v. HARTFORD ACCIDENT AND INDEMNITY COMPANY

No. 8610SC821

(Filed 17 February 1987)

Insurance § 69.4— automobile insurance—hit-and-run accident—physical contact requirement met in "chain collision"

In a "hit-and-run" collision the physical contact requirement for uninsured motorist coverage is satisfied where the physical contact arises between the hit-and-run vehicle and plaintiff's vehicle through intermediate vehicles involved in an unbroken "chain collision" which involves the hit-and-run vehicle; therefore, in an action by plaintiff to recover on an insurance policy with defendant which included an uninsured motorist endorsement, the trial court erred in granting summary judgment for defendant where the pleadings and discovery materials created a genuine issue of material fact as to whether the hit-and-run vehicle caused plaintiff's alleged damages in an unbroken "chain collision."

APPEAL by plaintiff from *Farmer, Judge*. Judgment entered 30 May 1986 in WAKE County Superior Court. Heard in the Court of Appeals 7 January 1987.

Plaintiff had an insurance policy with defendant covering his 1980 Audi automobile that included an uninsured motorist endorsement. On 13 October 1980 plaintiff was involved in a multi-car accident in the City of Durham. Plaintiff subsequently brought this action seeking compensation from defendant for injuries he allegedly sustained in this accident pursuant to the uninsured motorist endorsement.

Plaintiff's complaint alleged, in pertinent part:

3. That on the 13th day of October, 1980, the plaintiff, was operating a 1980 Audi automobile, vehicle identification number 81A172948, the same being owned by his spouse, Allene W. McNeil.

4. That on the aforesaid date, the Plaintiff was operating the said Audi automobile in a northerly direction on University Drive in the City of Durham, County of Durham, State of North Carolina, when he was struck from the rear by a 1966 Chevrolet automobile being driven by Larry Mumford, which had been struck in the rear by a 1979 Pontiac automobile being driven by Mary Jo Carelli, which had been struck in the rear by a vehicle which left the scene of the accident and its driver and/or owner could not be determined.

Defendant admitted these allegations in its answer.

Defendant submitted the deposition of Mary Jo Carelli in which she states, in pertinent part, that:

Q. Will you describe to me what happened on the 13th day of October, 1980, how the accident happened?

. . .

A. I was coming from Academy Road, going on to University Drive.

Q. Is there a stop sign there?

A. There is a stop light right there.

Q. And it's—what was the traffic signal light when you came to the intersection?

A. It was red. I had to come to a stop. I was stopped.

. . .

Q. All right, after you came to the stop sign, or stop light on Academy Road, then you moved forward and made a left turn into University Road, is that correct?

A. Correct.

Q. And at that time, what traffic did you observe?

A. There was traffic on both sides of me.

Q. How far did you move from the time you left Academy Road, the intersection of Academy Road, into University Drive, before a collision occurred?

A. I really couldn't tell you how many feet it was. It wasn't very far, because Merrill Lynch, the new building was placed right there directly on the corner.

Q. Would you draw that building?

A. Merrill Lynch was right there on the corner just being put in, and I was going to make the turn north.

Q. Is it two-lane traffic?

A. Yes. It is two-lane traffic Uh-huh (yes). This road is two ways. It narrows here to one. The car was turning—the first car was turning into Merrill Lynch.

Q. The first car was turning left into this—which place is it there?

A. Merrill Lynch, I guess, is who it is.

Q. Right. Did you see that vehicle when it was stopped?

A. Yes. I saw the car stop. I did not see the car stop, I can't say that. The car in front of me stopped. I heard the tires squeal. I saw them coming to an abrupt stop. I did the same thing. I proceeded to stop.

Q. The car in front of you?

A. Had stopped dead. He was making a turn.

Q. Then, there was a car behind the car in front—

A. Uh-huh (yes).

Q. —and you were the third car in line?

A. Correct. I was the third car.

Q. All right, did the second car in line hit the first car in line before any collision occurred between your car and that vehicle?

A. Yes, it did.

Q. Go ahead and explain.

A. This car had stopped, as I said, abruptly. It had tried to make a turn to here. The second car hit into it. I was coming from the turn, proceeding down University and tried to stop myself. I did stop. I came very close to hitting that car myself, but upon getting to a stop, a fourth car came in the picture and hit me from the rear, which just jolted me on into the second car.

Q. Was it a rather violent collision?

A. No, sir. It didn't really produce much damage at all.

. . .

Q. In the point of time, of seconds if necessary, how many seconds, if you can tell me, was it between the time that the first—the second vehicle in the line struck the first vehicle in the line, and then the other collision?

A. I couldn't tell you that. It was so long ago. I'm just trying to answer as best I can.

Q. But there was some short period of time between the first collision, between the second car in line and the first car in line and the collision with your car, is that correct?

A. Oh, yes. I'm sure.

The trial court granted defendant's motion for summary judgment, and plaintiff appealed.

Thigpen, Blue, Stephens & Fellers, by Carlton E. Fellers, for plaintiff-appellant.

Leboeuf, Lamb, Leiby & Macrae, by R. Bradley Miller, for defendant-appellee.

WELLS, Judge.

Plaintiff contends that the court erred in granting defendant's motion for summary judgment. We agree.

In order to show that he is entitled to the benefits under the uninsured motorist endorsement, plaintiff must show that: (1) he is legally entitled to recover damages, (2) from the owner or oper-

ator of an uninsured automobile, (3) because of bodily injury, (4) caused by accident and (5) arising out of the ownership, maintenance or use of the uninsured automobile. *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967).

N.C. Gen. Stat. § 20-279.21(b)(3)(b) provides:

> Where the insured, under the uninsured motorist coverage, claims that he has sustained bodily injury as a result of collision between motor vehicles and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer . . . .

Our courts have interpreted this statute to require physical contact between the vehicle operated by the insured motorist and the vehicle operated by the hit-and-run driver for the uninsured motorist provisions of the statute to apply. *Hendricks v. Guaranty Co.*, 5 N.C. App. 181, 167 S.E. 2d 876, *cert. denied*, 275 N.C. 594 (1969). *See also East v. Insurance Co.*, 18 N.C. App. 452, 197 S.E. 2d 225 (1973). The physical contact requirement protects against fraudulent or fabricated hit-and-run claims by plaintiffs seeking to collect insurance from an accident actually caused by their own negligence. 7 Am. Jur. 2d, *Automobile Insurance* § 300.

The dispositive question for this appeal is whether the physical contact requirement is satisfied where the physical contact arises between the hit-and-run vehicle and plaintiff's vehicle through intermediate vehicles involved in an unbroken "chain collision" which involves the hit-and-run vehicle.

We hold that, if plaintiff can show at trial that a collision occurred between the hit-and-run vehicle and Ms. Carelli's vehicle and that this collision propelled Ms. Carelli's vehicle into Mr. Mumford's vehicle, and that this second collision propelled Mr. Mumford's vehicle into plaintiff's vehicle, then under these circumstances, the physical contact requirement has been satisfied, albeit intermediate and indirect.

Defendant presented evidence through the deposition of Ms. Carelli suggesting that Mr. Mumford's vehicle collided with plaintiff's *before* the hit-and-run vehicle collided with Ms. Carelli's. At trial, plaintiff will have the burden of proving that his damages

were indirectly caused by the hit-and-run vehicle's collision with Ms. Carelli's car and were not the result of an *earlier* collision between Mr. Mumford's vehicle and plaintiff's vehicle *prior to* the arrival of the hit-and-run vehicle. For now, however, the pleadings and discovery materials create a genuine issue of material fact as to whether the hit-and-run vehicle caused plaintiff's alleged damages in an unbroken "chain collision."

Accordingly, we hold that the trial court erred in granting defendant's N.C. Gen. Stat. § 1A-1, Rule 56 motion for summary judgment.

Reversed and remanded.

Judges MARTIN and PARKER concur.

MARVIN W. GRIFFIN v. THE BOARD OF COMMISSIONERS OF THE LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND

No. 8626SC521

(Filed 17 February 1987)

Pensions § 1— disability retiree employed—reduction in benefits—statute applicable to plaintiff

A 1980 amendment to N.C.G.S. § 143-166(y) which required defendant to determine whether disability retirees were gainfully employed and to reduce the benefits of those who were under a schedule which was set forth applied to plaintiff whose retirement became effective 1 September 1981, and there was no merit to plaintiff's argument that he was eligible to retire on disability earlier than he did and that he therefore should not have been subjected to the terms of the statute.

APPEAL by plaintiff from *Saunders, Chase B., Judge.* Judgment entered 10 January 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1986.

Boyle, Alexander, Hord and Smith, by Norman A. Smith, for plaintiff appellant.

Attorney General Thornburg, by Assistant Attorney General Norma S. Harrell, for defendant appellee.

PHILLIPS, Judge.

In September 1981 plaintiff, a retired Mecklenburg County law enforcement officer, began receiving disability retirement payments from the Law Enforcement Officers' Benefit and Retirement Fund established by G.S. 143-166, *et seq.* Because he had certain other earnings during 1982, in April 1983 defendant demanded, under the authority of G.S. 143-166(y), that plaintiff return a certain amount of the money that he received from the fund that year. Plaintiff paid the sum demanded under protest and brought this suit to recover it. In the complaint he alleged only that the provisions of G.S. 143-166(y) relied upon by defendant do not apply to him because his retirement rights had vested before those provisions were enacted, and that if the provisions are interpreted to affect his benefits they are unconstitutional. Judge Saunders overruled both contentions after hearing the matter on stipulated facts, the most pertinent of which follow:

Before 1980 G.S. 143-166, *et seq.*, the statutes governing the Law Enforcement Officers' Benefit and Retirement Fund, contained no provision reducing the benefits of disability retirees because they worked and earned other monies. In February 1979 while on duty as a Mecklenburg County police officer plaintiff fell and sustained an injury to his shoulder. Though he returned to work on 21 March 1979 he continued to have problems with the injured shoulder, and was unable to work at various times thereafter because of it. On 1 March 1980 his shoulder required surgery and he was not able to work until 26 September 1980 when he returned to light duty as a dispatcher. About 16 December 1980 plaintiff's shoulder was operated on again and he has not worked as a law enforcement officer since then, either on light or regular duty. During the months following this latter surgery plaintiff's shoulder did not materially improve and he was examined by his doctor several times, one of which was on 4 June 1981. At that time he and the doctor discussed as possibilities plaintiff either retiring as disabled or of undergoing another operation, and the doctor told him they would discuss the matter further the next time he was examined. When plaintiff went to the doctor on 9 July 1981 the shoulder was still not functioning properly and he told the doctor he had applied for disability retirement on 15 June 1981 and the doctor said he would agree to it. In the application, later supported by a certificate from the

doctor that plaintiff was disabled because of the injured shoulder, plaintiff requested that his retirement be effective 1 September 1981. In due course the application was approved as submitted and plaintiff was so notified by a letter from the fund dated 11 September 1981. The letter also stated that the fund's medical board was of the opinion that his condition could improve to the point of him being able to again perform the duties of a law enforcement officer, and that his status would be re-evaluated a year later. In the meantime, on 24 June 1980, the General Assembly amended G.S. 143-166(y) to require the defendant board to determine whether disability retirees were gainfully employed and to reduce the benefits of those that were under a schedule that was set forth and that is not in dispute. The act became "effective on July 1, 1980, for employees retiring on or after July 1, 1980," but for employees retiring prior to July 1, 1980, it became effective on July 1, 1981. The statute was further amended on the 8th day of October 1981, effective upon ratification, to make it applicable only tc those disability beneficiaries "who retired after July 1, 1981."

Quite plainly, it seems to us, the judgment appealed from was correct and we affirm it. Contrary to plaintiff's argument, G.S. 143-166(y) as amended cannot be properly interpreted as not applying to him. The enactment is not ambiguous; its application is expressly determined by the retirement date of each employee involved and the date of plaintiff's retirement clearly subjected him to the terms of the act. Plaintiff's argument, that he was permanently disabled almost from the time of his injury, and thus eligible to retire on disability earlier than he did, is unavailing. Under the statute his rights were established not by his condition at a certain time, which is debatable, but by the date of his retirement, which is not. Thus, we see no basis for plaintiff's argument that applying the act to him violates his constitutional rights. The legislation that first reduced the benefits of future disability retirees who work and earn money was enacted in 1980, more than a year before plaintiff retired, and we know of no authority for the proposition that plaintiff's retirement rights vested before then. The decisions that plaintiff relies upon involved employees whose benefits were reduced *after* their retirement, which is not plaintiff's situation, and a discussion of those authorities would serve no purpose. Nor was plaintiff adversely affected by the sec-

ond amendment to G.S. 143-166(y), enacted after his retirement. The first amendment to G.S. 143-166(y) which, under the conditions above stated, reduced the benefits of law enforcement officers who retired on disability after July 1, 1980 was still in effect when plaintiff retired on September 1, 1981; and the later amendment did only two things, neither of which is constitutionally impermissible. It continued his status established by the prior enactment as a retiree that was accountable for his future earnings and it increased the amount of money that plaintiff could earn without penalty.

Affirmed.

Judges PARKER and COZORT concur.

ANN McCOY WEBB v. TRIAD APPRAISAL AND ADJUSTMENT SERVICE, INC. AND PAT SCARLETT, D/B/A PAT'S BODY SHOP

No. 8621SC720

(Filed 17 February 1987)

Fraud § 9; Unfair Competition § 1— repair of auto—sufficiency of complaint to state claim

In an action arising out of defendant's agreement to repair plaintiff's car, the trial court erred in dismissing plaintiff's claims for fraud and unfair and deceptive trade practices where plaintiff alleged facts which, if proved, would support a finding of fraud, and proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices.

APPEAL by plaintiff from *Seay, Judge*. Order entered 30 April 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 December 1986.

Plaintiff alleged the following in her complaint:

On 30 August 1983, plaintiff contracted with Pat Scarlett doing business as Pat's Body Shop and Triad Appraisal and Adjustment Service, Inc. to repair her car which had been damaged in an accident. Defendants agreed to repair plaintiff's car for $1,631.60 and Pat's Body Shop agreed to guarantee the repairs. At that time, plaintiff paid Scarlett in full for the repairs.

During the time the repairs were purportedly being made, plaintiff entered the hospital. Scarlett visited plaintiff in the hospital and represented to her that he had completed all the contracted work and demanded an additional $200. He threatened her and told her that he would charge additional rent while she was in the hospital if she did not pay him immediately. Plaintiff gave him the $200.

After her release from the hospital, plaintiff went to Pat's Body Shop and discovered that most of the work on her car for which she had contracted had not been done. She told Scarlett of this and he agreed to complete the repairs. On the following day, plaintiff returned and observed that her car still had not been fixed. Scarlett told her to take her car and that he did not have time to fix it. On her way home, the new paint that defendants had placed on her car flew off as she was driving home. She immediately called Scarlett but he refused to talk with her. She subsequently called Scarlett numerous times but he continually refused to talk with her. During one of these calls, one of Scarlett's employees heckled plaintiff.

Plaintiff paid another body shop $1,550.48 to perform the same work that she had paid Scarlett to do.

On 3 July 1985, plaintiff filed a complaint alleging three causes of action: (1) breach of contract and fraud; (2) bad faith; and (3) unfair and deceptive trade practices.

Pursuant to defendants' motion to dismiss and motion to strike, the trial court determined that the portions of plaintiff's first cause of action as to breach of contract should be allowed to stand but that the remaining allegations in her first cause of action as to fraud and the damages for fraud, mental and emotional distress and punitive damages should be stricken and dismissed.

The trial court further determined that the allegations and damages in plaintiff's second and third causes of action should be stricken and dismissed.

From the order of the trial court, plaintiff appeals.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for plaintiff appellant.

Alexander, Wright & Parrish, by Melvin F. Wright, Jr., for defendant appellees.

ARNOLD, Judge.

Although the issue was not raised by defendants, we note that this appeal is interlocutory.

Appeals in civil actions are governed by G.S. 1-277, which permits an appeal from every judicial order involving a matter of law which affects a substantial right. Ordinarily, an appeal lies only from a final judgment, but an interlocutory order which will work injury if not corrected before final judgment is immediately appealable. *State Highway Comm'n v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967).

A substantial right is involved in the present case. *Cf. Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 225 S.E. 2d 797 (1976). If plaintiff's claims were not subject to dismissal, she has a substantial right to have all three causes tried at the same time by the same judge and jury.

Plaintiff contends that the trial court erred in dismissing and striking her claims for fraud, bad faith, and unfair and deceptive trade practices. While we agree that the trial court properly dismissed plaintiff's second cause of action alleging bad faith, we find that the trial court erred in dismissing plaintiff's causes of action for fraud and unfair and deceptive trade practices.

To make out an actionable case of fraud, plaintiff must show that defendant made a representation relating to some material past or existing fact, that the representation was false, that defendant knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion, that defendant made the representation with the intention that it should be acted upon by the plaintiff, that the plaintiff reasonably relied upon the misrepresentation and acted upon it, and that the plaintiff suffered injury. *See Odom v. Little Rock & I-85 Corp.*, 299 N.C. 86, 261 S.E. 2d 99 (1980).

In her complaint, plaintiff alleged the following:

VI. That at the time that the defendants entered into the contract and represented that they would complete the repairs to the plaintiff's vehicle, they had no intention of completing said repairs and fully performing the contract. That these representations were materially false, that the defendants knew they were false, and they were made with the intent to deceive the plaintiff, and the plaintiff relied on defendants' misrepresentations to her detriment. That the actions and conduct of the defendant in taking money from the plaintiff and failing to perform the work, and using shoddy materials in the small amount of work that was done constituted fraudulent conduct.

The facts alleged by plaintiff, if proven, could support a finding of fraud. Therefore it was error for the trial court to dismiss and strike plaintiff's claim for fraud.

Unfair or deceptive acts or practices in or affecting commerce are unlawful. G.S. 75-1.1. Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive trade practices. *Hardy v. Toler*, 288 N.C. 303, 218 S.E. 2d 342 (1975).

Since plaintiff has alleged facts which, if proven, could support a finding of fraud, she has also alleged facts which could support a finding of unfair and deceptive trade practices. Therefore it was error for the trial court to dismiss plaintiff's claim for unfair and deceptive trade practices.

The order of the trial court is

Affirmed in part, reversed in part and remanded.

Judges PHILLIPS and ORR concur.

CURVCRAFT, INCORPORATED v. J.C.F. & ASSOCIATES, INCORPORATED

No. 8611SC547

(Filed 17 February 1987)

Process § 14.3— nonresident corporation—insufficient contacts with N.C.—no jurisdiction in N.C.

In an action to recover damages for breach of contract arising out of the sale of office chairs, defendant's contacts with N.C. were insufficient to support the exercise of *in personam* jurisdiction where defendant was a resident of Maryland; plaintiff, a corporation authorized to do business in N.C., initiated contact with and solicited the services of defendant corporation; contract negotiations occurred outside N.C. and the services to be performed under the contract were to occur outside N.C.; there was no indication that defendant ever owned property in or maintained an office in N.C.; defendant never traveled to N.C. in connection with the contract; and defendant's only contact with N.C. in this case appeared to be through phone calls, the shipment of office chairs f.o.b. Dunn, N.C., and the receipt of one commission check.

APPEAL by plaintiff from *Herring, Judge.* Order entered 24 March 1986. Heard in the Court of Appeals 22 October 1986.

Plaintiff, Curvcraft, Incorporated, instituted this action seeking money damages for breach of contract arising out of the sale of goods between the parties. Defendant, J.C.F. & Associates, Incorporated, moved the court to dismiss the action for lack of personal jurisdiction. The trial court granted defendant's motion. From the order dismissing this action plaintiff appeals.

Lawrence, Evans & Mazer, by Lawrence F. Mazer, attorney for plaintiff appellant.

Maupin Taylor Ellis & Adams, P.A., by Mark S. Thomas, attorney for defendant appellee.

ORR, Judge.

The sole issue in this case is whether the trial court properly dismissed plaintiff's action for lack of personal jurisdiction. In affirming the trial court's dismissal, we hold that defendant's activities failed to meet the minimum contacts test, and therefore, exercise of jurisdiction would offend due process.

Defendant is a Maryland corporation which markets, sells, and distributes products for commission. Plaintiff is authorized to

do business in North Carolina and manufactures office chairs there. In August 1985 plaintiff's representatives, on plaintiff's initiative, visited defendant's offices in Silver Spring, Maryland. There the parties discussed a contract whereby defendant would represent and act as the local distributor for Curvcraft in Maryland, Virginia, and the District of Columbia. At this meeting Curvcraft and J.C.F. representatives reached a distribution agreement which was later reduced to writing.

Subject to this agreement, plaintiff shipped office chairs from its Dunn, North Carolina facilities to defendant's Maryland offices on three occasions. The first order was placed when Curvcraft representatives visited Maryland to enter into the distribution agreement. The order for the second shipment was made pursuant to a call from defendant's office to plaintiff's Dunn, North Carolina office. The third shipment resulted from an order placed with plaintiff at a Chicago trade show. Defendant received one commission check for chairs it sold in the contract service area. Contract performance between the parties came to a halt in November 1985.

The resolution of the question of *in personam* jurisdiction involves a two-pronged test: (1) whether North Carolina's long-arm statute permits courts in this jurisdiction to entertain the action, and (2) whether exercise of this jurisdictional power comports with due process of law. *E.g., Miller v. Kite*, 313 N.C. 474, 329 S.E. 2d 663 (1985); *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977).

In answer to the first inquiry Curvcraft contends that N.C.G.S. § 1-75.4(5)(d) justifies the assertion of jurisdiction over J.C.F. & Associates. This statute confers on our courts the authority to exercise personal jurisdiction in any action that "[r]elates to goods . . . shipped from this State by the plaintiff to the defendant on his order or direction." *Id.* Since this issue was not contested, we conclude that a statutory basis for jurisdiction exists.

Notwithstanding 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 State that satisfy "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washing-*

ton, 326 U.S. 310, 90 L.Ed. 95 (1945). On facts similar to those in the case *sub judice*, this Court has held that such "minimum contacts" do not exist. *Cameron-Brown Co. v. Daves*, 83 N.C. App. 281, 350 S.E. 2d 111 (1986).

In *Cameron-Brown Co.*, this Court upheld an order dismissing an action for lack of personal jurisdiction. The action had been instituted by a North Carolina corporation to recover unpaid insurance premiums from a South Carolina defendant. This Court's holding, that minimum contacts were insufficient, was based on the following facts: (1) defendant was a South Carolina resident; (2) the insured vehicles and equipment were located in South Carolina; (3) Cameron-Brown initiated contact with and solicited business from the defendant; (4) contract negotiations occurred in South Carolina; and (5) defendant owned no property in North Carolina nor had he ever traveled here to conduct business with Cameron-Brown. In essence defendant's only contact with North Carolina was the mailing of premium payments to Cameron-Brown's Charlotte office pursuant to the insurance contracts.

As was true in *Cameron-Brown Co.*, defendant in the case *sub judice* is a nonresident. Similarly, plaintiff, a corporation authorized to do business in North Carolina, initiated contact with and solicited the services of defendant corporation. Contract negotiations occurred outside of this State, and the services to be performed under the contract were to occur outside North Carolina. There is no indication that defendant has ever owned property in or maintained an office in North Carolina. Defendant has never traveled to North Carolina in connection with this contract. Defendant's only contact with North Carolina in this case appears to be through phone calls, the shipment of office chairs f.o.b. Dunn, North Carolina, and receipt of one commission check.

We therefore hold these contacts to be insufficient to support the exercise of *in personam* jurisdiction. The order of the court below is

Affirmed.

Judges WELLS and BECTON concur.

JOHN W. KENNEDY, JR. v. K-MART CORPORATION

No. 8611SC804

(Filed 17 February 1987)

Negligence § 57.6— nail polish remover on floor—fall by customer—sufficiency of evidence of negligence

In an action to recover for personal injuries sustained when plaintiff slipped and fell in some nail polish remover on the floor of defendant's store, the trial court did not err in denying defendant's motion for a directed verdict or its motion for judgment n.o.v. where the evidence tended to show that the bottle cap was missing, some portion of the glass was missing, and the remaining portion of the glass was in a neat pile up under the kickboard of the display counter, all of which indicated a hurried clean-up; and the jury could reasonably infer from the evidence that defendant was negligent in failing to maintain the aisles of the store in a reasonably safe condition.

APPEAL by defendant from *Bowen (Wiley F.), Judge.* Judgment entered 26 March 1986 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 17 December 1986.

On 28 January 1984, plaintiff and his wife entered defendant's store. After walking approximately one-third of the way down the main aisle, plaintiff slipped in what was subsequently determined to be a puddle of fingernail polish remover. Plaintiff was injured as a result of the fall.

At trial, defendant moved for a directed verdict at the close of plaintiff's evidence and again at the close of all the evidence. The motions were denied.

The jury found that plaintiff was injured as a result of defendant's negligence and awarded plaintiff $4,500.00 for personal injuries. Defendant moved for judgment notwithstanding the verdict, and in the event that that motion was denied, moved to set aside the verdict and grant defendant a new trial. The motions were denied and judgment was entered upon the verdict.

Plaintiff's evidence tended to show that the floor of the store where he fell consisted of light-colored, shiny tile. The store also had fluorescent lights. Plaintiff testified that after he fell and was lying on the floor, he noticed a few pieces of broken glass placed in a neat pile against the counter kickboard (the offset under a display counter). It appeared to plaintiff as if someone had pushed

or kicked the glass up under the kickboard. There was no glass in the aisle or anywhere near where plaintiff was lying. The glass in the pile was insufficient to make up a full bottle of fingernail polish remover. Also, there was no bottle cap lying anywhere within the debris. Plaintiff further testified that he observed some liquid on the floor located straight out from the glass underneath the counter.

During plaintiff's deposition an experiment was conducted, where counsel for defendant broke a bottle of fingernail polish remover. It required a great deal of force to break the bottle and when it did break it created a very loud noise with glass flying in all directions. After approximately five minutes, the nail polish remover was not completely evaporated and showed a white substance on the floor.

Defendant offered evidence that prior to the accident, none of the K-Mart employees had knowledge of the broken bottle of nail polish remover. Furthermore, none of the employees indicated that they heard the bottle break on the floor.

From the judgment for plaintiff, defendant appeals.

W. A. Holland, Jr., attorney for plaintiff appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey, attorney for defendant appellant.

ORR, Judge.

Defendant contends that the trial court erred in denying its motion for a directed verdict and in denying its motion for a judgment notwithstanding the verdict. We do not agree.

A motion by a defendant for a directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure challenges the sufficiency of the evidence to go to the jury. *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982).

> On such a motion, plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. . . . If, when so viewed, the evidence is such that reasonable minds could differ as to whether the

> plaintiff is entitled to recover, a directed verdict should not be granted and the case should go to the jury.

Id. at 634, 298 S.E. 2d at 71.

"A proprietor is charged with knowledge of an unsafe condition on his premises created by his own negligence, or the negligence of his employee acting within the scope of his employment, or of an unsafe condition of which his employee has notice." *Rives v. Great Atlantic & Pacific Tea Co.*, 68 N.C. App. 594, 596-97, 315 S.E. 2d 724, 726 (1984).

> It is well established that the owner or proprietor of a business is not an insurer of the safety of his customers, however, the proprietor has the duty to exercise ordinary care to keep the aisles and passageways of his store, where customers are expected to go, in a reasonably safe condition so as not to expose customers unnecessarily to danger, and to give warning of hidden dangers and unsafe conditions of which he knows or, in the exercise of reasonable supervision and inspection, should know.

Id. at 596, 315 S.E. 2d at 726.

"Direct evidence of negligence is not required. It may be inferred from facts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury, ..." *Whitson v. Frances*, 240 N.C. 733, 737, 83 S.E. 2d 879, 881 (1954).

In the case *sub judice* circumstantial evidence exists from which a jury could find that defendant failed to clean up the aisle in a proper manner after actual or constructive notice of the broken bottle's existence. The bottle cap was missing; some portion of the glass was missing; and the remaining portion of the glass was in a neat pile up under the kickboard, all of which indicates a hurried clean-up.

We believe the jury could reasonably infer from the evidence that defendant was negligent in failing to maintain the aisles of the store in a reasonably safe condition. Therefore, the trial court

did not err in denying defendant's motion for a directed verdict or his motion for judgment notwithstanding the verdict.

No error.

Judges ARNOLD and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 FEBRUARY 1987

AUSTIN v. AUSTIN No. 8620DC927	Union (84CVD713)	Affirmed
BALBONI v. JOHNSON No. 8610SC1004	Wake (85CVS7422)	Appeal Dismissed
BUNCOMBE COUNTY v. MARTIN No. 8628DC926	Buncombe (85CVD1281)	Remanded
DAVENPORT v. CARPENTER No. 8625DC706	Caldwell (86CVD116)	Appeal Dismissed
EPPS v. EPPS No. 868DC681	Wayne (83CVD1549)	Appeal Dismissed
FOLEY v. FOLEY No. 8622DC1083	Davidson (82CVD788)	Affirmed
GEER v. GEER No. 8626DC630	Mecklenburg (84CVD6328)	Vacated & Remanded
HARMON v. STEPHENS No. 8626SC107	Mecklenburg (83CVS12401)	No error
HUFFSTETLER v. HIATT No. 8613SC868	Columbus (85CVS144)	Affirmed
HUNTER v. HUTCHINS No. 8625DC1028	Burke (84CVD445)	Dismissed
IN RE WILL OF WATT No. 8526SC1394	Mecklenburg (84E884)	Affirmed
JOYE v. JOYE No. 865DC933	New Hanover (86CVD2286)	Appeal Dismissed
PIERMATTEI v. PINEHURST No. 8620SC881	Moore (85CVS263)	Affirmed
PREVETTE v. HOLLAR No. 8623DC742	Wilkes (80CVD915)	No error
STATE v. ARMFIELD No. 863SC889	Pitt (86CRS676) (86CRS677)	Affirmed
STATE v. ARNOLD No. 863SC947	Craven (83CRS13448) (83CRS13449)	No error

STATE v. BAKER No. 8616SC975	Robeson (85CRS3220) (85CRS3221) (85CRS3222)	No error
STATE v. BROWN No. 861SC913	Pasquotank (86CRS247)	No error
STATE v. DUCKETT No. 8619SC1040	Cabarrus (86CRS1057)	Affirmed
STATE v. FAISON No. 864SC1002	Sampson (86CRS3365)	Remanded for resentencing
STATE v. HANNAH No. 866SC1003	Northampton (84CRS2705-A)	Affirmed
STATE v. JACOBS No. 8616SC1014	Robeson (86CRS4052)	No error
STATE v. JONES No. 8619SC837	Cabarrus (85CRS16429)	Appeal Dismissed
STATE v. JOYCE No. 8621SC788	Forsyth (86CRS10487) (86CRS10489)	No error
STATE v. McLENDON No. 8620SC781	Anson (79CRS618)	No error
STATE v. MANGUM No. 8610SC955	Wake (86CRS3849)	No error as to trial. Remanded for resentencing
STATE v. MILLER No. 863SC964	Craven (85CRS12726)	Affirmed
STATE v. MOLLETT No. 861SC809	Dare (85CRS1985) (85CRS5713)	Remanded for resentencing
STATE v. MYERS No. 8617SC959	Stokes (85CRS2976)	No error
STATE v. PARKER No. 8629SC642	Polk (85CRS58) (85CRS59)	No error Judgment vacated
STATE v. PROULX No. 865SC916	New Hanover (85CRS26546) (85CRS26547) (85CRS26550)	No error
STATE v. RIDDICK No. 8612SC943	Cumberland (84CRS37735)	No error

STATE v. RUSSELL No. 8618SC1006	Guilford (86CRS41777) (86CRS41778)	No error
STATE v. SHUE No. 8626SC998	Mecklenburg (85CRS57293)	No error
STATE v. SMITH No. 8618SC884	Guilford (85CRS054482)	No error
STATE v. STANFIELD No. 869SC894	Person (85CRS2374)	No error
STATE v. THORPE No. 8625SC709	Catawba (84CRS16557)	No error
STATE v. WHITCRAFT No. 8616SC994	Robeson (86CRS177)	No error
W.R. GRACE CO. v. LEWIS No. 864SC925	Duplin (85CVS283)	Dismissed

CONTRACT STEEL SALES, INC. v. FREEDOM CONSTRUCTION COMPANY AND E. I. DU PONT DE NEMOURS AND COMPANY

No. 8618SC599

(Filed 3 March 1987)

1. **Laborers' and Materialmen's Liens § 3— furnishing of materials—definition**

Materials are furnished within the meaning of N.C.G.S. § 44A-18 if pursuant to a subcontract a subcontractor delivers materials to the site of improvement to real property.

2. **Laborers' and Materialmen's Liens § 3— materials furnished to job site by subcontractor—sufficiency of findings**

The trial court's findings established that plaintiff, pursuant to a subcontract with defendant general contractor, furnished materials to the site of improvement to real property where the court found that plaintiff delivered the amount of material which was required by the subcontract; defendant owner employed inspectors who knew that the material had been delivered to the job site; and some of the material furnished by plaintiff was actually incorporated into the building in question.

3. **Laborers' and Materialmen's Liens § 4— lien of subcontractor—notice to owner of claim—sufficiency**

Plaintiff, a first tier subcontractor, substantially complied with the requirements of N.C.G.S. § 44A-19 for giving adequate notice of a claim of lien by writing to defendant owner a letter which specifically stated that it was a notice of claim of lien and which included all the statutorily required information, though it was not in the form set out by the statute.

APPEAL by plaintiff from *John, Judge*. Judgment entered 4 April 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 12 November 1986.

In this action plaintiff, Contract Steel Sales, Inc., seeks to enforce a lien against funds owed by defendant E. I. Du Pont De Nemours and Company (hereinafter Du Pont) to defendant Freedom Construction Company (hereinafter Freedom).

On 18 April 1984, plaintiff filed its complaint against defendants. There were two claims for relief upon which plaintiff's complaint was based. The first claim for relief alleged that on 20 July 1983 plaintiff and Freedom entered into an agreement whereby plaintiff "was to fabricate and furnish steel for use by Freedom in the construction of the MMF Process Building at a plant owned by defendant E. I. Du Pont De Nemours and Company in Bladen County, North Carolina." Plaintiff further alleged that it had per-

formed its agreement by delivery of the steel to the site, but Freedom breached the agreement by refusing to pay $50,008.91 owed to plaintiff.

The second claim for relief in plaintiff's complaint was a claim against Du Pont. Plaintiff alleged that "sums in excess of $50,008.91 are being retained by Du Pont and are owed by Du Pont to Freedom arising out of Freedom's general construction work and materials furnished to the Project." Plaintiff alleged that pursuant to G.S. 44A-19, a notice of claim of lien was forwarded to Du Pont. Plaintiff alleged that a copy of the notice of claim of lien was attached to the complaint and was incorporated into the complaint. Attached to plaintiff's complaint was a letter dated 6 December 1983 from plaintiff addressed to Du Pont. Plaintiff alleged that it had perfected a lien, pursuant to its notice of claim of lien, on any sums owed by Du Pont to Freedom or on sums received by Freedom after receipt of said notice by Du Pont. Plaintiff pleaded in the alternative that pursuant to G.S. 44A-20 Du Pont was personally liable to plaintiff in the amount of $50,008.91 plus interest because after receipt of plaintiff's notice of claim of lien, Du Pont paid to Freedom all of the amounts that Du Pont was retaining. Attached to plaintiff's complaint was a claim of lien on property encompassing the project which plaintiff, pursuant to G.S. 44A-12, had filed in Bladen County, North Carolina.

Defendants answered plaintiff's complaint. Freedom denied that plaintiff had performed its agreement. Freedom specifically pleaded that "the product delivered by Contract Steel was unacceptable in that said product breeched [sic] its warranty of fitness for a particular purpose and warranty of merchantability as described under the uniform commercial code as adopted in the State of North Carolina." Du Pont generally denied all allegations that it had received a notice of a claim of lien from plaintiff.

On 18 July 1984, defendants amended their answer and filed a counterclaim against plaintiff. Freedom claimed as a direct and proximate result of Contract Steel's breach of an express warranty Freedom had incurred incidental and consequential damages. Du Pont claimed that Du Pont sustained damages for increased labor expenses incurred due to the delay in completing the building as a result of Contract Steel's breach of the contract and Con-

tract Steel's negligence. Contract Steel replied to Freedom and Du Pont's counterclaim and pursuant to Rule 12(b)(6), N.C. Rules Civ. P. made a motion to dismiss the counterclaim.

On 27 March 1986, the parties agreed to stipulations of fact and agreed "to waive a jury trial as to the issues of whether the letter mailed by Contract Steel on December 6, 1983 to Du Pont is a valid notice of claim of lien under N.C.G.S. Sec. 44A-19 and whether Contract Steel is entitled to a lien under the provisions of Part II, Article II, Chapter 44A, North Carolina General Statutes." On 4 April 1986, the trial court, sitting without a jury, after hearing the matter, made findings of fact, conclusions of law and entered judgment in favor of defendants. Plaintiff appeals.

Foster, Conner, Robson & Gumbiner, P.A., by Eric C. Rowe and Richard D. Conner, for plaintiff appellant.

Smith, Helms, Mulliss & Moore, by Robert A. Wicker and Catherine C. Eagles, for defendant appellees.

JOHNSON, Judge.

It is not disputed that plaintiff is a first tier subcontractor within the meaning of G.S. 44A-17(2) or that Du Pont is an owner obligor as defined by G.S. 44A-17(3), by virtue of funds that were owed to Freedom, the general contractor.

The two primary questions argued on appeal are (1) whether plaintiff furnished materials at the site of improvement to Du Pont's real property as contemplated by G.S. 44A-18(1), and (2) whether plaintiff's letter, dated 6 December 1983, substantially complied with the requirement of notice as stated in G.S. 44A-19.

If plaintiff, as a first tier subcontractor, furnished materials at the site of improvement then the lien granted pursuant to G.S. 44A-18(1), was perfected upon plaintiff giving written notice, as required by G.S. 44A-19, to Du Pont. Upon Du Pont's receipt of the requisite written notice, Du Pont was under a duty, pursuant to G.S. 44A-20, to retain any funds subject to plaintiff's lien. Du Pont, pursuant to G.S. 44A-20(b), would be personally liable to plaintiff for any payments Du Pont made to Freedom after receipt of plaintiff's notice of claim of lien.

I

[1] We first address the question of whether plaintiff, pursuant to a contract with Freedom, a general contractor, furnished materials at the site of improvement to Du Pont's real property. We hold that plaintiff furnished materials at the site of improvement to Du Pont's real property as called for by the contract between plaintiff and Freedom. We express no opinion on the main issues preserved for trial by jury, to wit: (1) whether plaintiff is entitled to recover against either defendant Du Pont or defendant Freedom pursuant to the subcontract between plaintiff and defendant Freedom, and (2) whether the steel fabricated pursuant to the subcontract was defective or properly rejected by defendants.

The statute, G.S. 44A-18(1), by which plaintiff seeks to assert its lien, states the following:

> (1) A first tier subcontractor who furnished labor or materials at the site of improvement shall be entitled to a lien upon funds which are owed to the contractor with whom the first tier subcontractor dealt and which arise out of the improvement on which the first tier subcontractor worked or furnished materials.

G.S. 44A-18(1).

In *Raleigh Paint and Wallpaper Co. v. Peacock & Associates, Inc.*, 38 N.C. App. 144, 247 S.E. 2d 728 (1978), *disc. rev. denied*, 296 N.C. 415, 251 S.E. 2d 470 (1979), this Court held that G.S. 44A-18 did not require a lien claimant who contracted with an owner to personally deliver materials to the site of improvement. Recently, this Court followed the example set in *Raleigh Paint, supra*, and made an exhaustive inquiry to determine whether the General Assembly intended that G.S. 44A-18 require a subcontractor to personally deliver materials to the site of improvement. *See generally, Queensboro Steel Corp. v. East Coast Machine & Iron Works, Inc.*, 82 N.C. App. 182, 346 S.E. 2d 248 (1986). In *Queensboro Steel Corp., supra*, this Court held the following:

> We now hold there is no such requirement under G.S. Sec. 44A-18. If a third tier subcontractor delivers to a second tier subcontractor with the intent that the materials ultimately *be delivered* at the site, and the materials are actually delivered at the site, the third tier subcontractor has a lien

> on the funds owed to the second tier subcontractor for those materials.

Queensboro Steel Corp., supra, at 191, 346 S.E. 2d at 254 (emphasis supplied). Although the holding in *Queensboro Steel Corp., supra,* is not dispositive of the case *sub judice* this Court did review relevant case law, legislative history, and legal commentary from which we may draw guidance.

[2] This Court in *Queensboro Steel Corp., supra,* noted the following: "[t]he term 'furnish' is used in almost every State's mechanics' lien statute. Annot., 32 A.L.R. 4th 1130, 1135 (1984). It is a 'key concept,' sometimes 'imposing a less stringent requirement.' " *Id. Queensboro Steel Corp., supra,* at 186, 346 S.E. 2d at 251. The meaning of furnish as construed by this Court is to supply, provide or equip. *Id.* at 185-86, 346 S.E. 2d at 250. This Court in *Queensboro Steel Corp., supra,* noted the following pertinent observation:

> In contrast to the State rules discussed in Annot., 32 A.L.R. 4th 1130, 1164-68, Secs. 11-13 (1984) and Annot., 39 A.L.R. 2d 394, 435-49, Secs. 11-16 (1955), North Carolina's current mechanics' and materialmen's lien statutes apparently do not require actual incorporation of materials into the improvement, even when the materials are furnished to a subcontractor. *See* Urban & Miles, *supra,* at 303-04, 354-55. *But see Fulp & Linville v. Kernersville Light and Power Company,* 157 N.C. 154, 72 S.E. 869 (1911) (interpreting an older statute that has since been repealed). In some states, proof of actual use is required when the materials are delivered to a contractor or subcontractor rather than directly to the owner. This protects the owner against liens based on materials that are never actually delivered and of which the owner has no notice. This function is served in our State, at least in part, by the requirement that the materials be delivered at the site, whether by the lien claimant or by another party.

Queensboro Steel, supra, at 190, 346 S.E. 2d at 253. We hereby adopt the reasoning in *Queensboro Steel, supra,* and hold that materials are furnished within the meaning of G.S. 44A-18 if pursuant to a subcontract a subcontractor delivers materials to the site of improvement to real property.

Bearing the foregoing in mind we now turn to the trial court's pertinent findings of fact to determine if they support a conclusion of law that plaintiff did not furnish materials to the site of improvement. The trial court's conclusion of law number 2 that "Contract Steel is not entitled to a lien on the funds or on the real property owned by Du Pont" indicates that the court concluded that plaintiff had not furnished materials at the site of improvement.

The trial court, sitting as the trier of fact, in pertinent part, made the following findings of fact:

> 4. In August and September, 1983, Contract Steel delivered reinforcing Steel to the jobsite. Some of these items, consisting of wire mesh and rebar, were incorporated into the improvement, and Contract Steel was paid $1,600. On September 6 and 15, angle frames, regalvanized angle frames and galvanized field bolts were delivered to the jobsite. On September 22, 1983, one load of galvanized structural steel was delivered to the jobsite. The total amount of the structural and fabricated miscellaneous steel at the jobsite on September 22, as a result of the deliveries on September 6, 15 and 22, was approximately 14 tons.
>
> 5. On September 28, 1983, the approximately 14 tons of steel was inspected at the site by a quality assurance inspector for Du Pont. Du Pont's inspector then inspected the remaining 9 tons of steel under the subcontract at the galvanizing plant in Aberdeen, North Carolina. The approximately 14 tons of steel were not accepted by Freedom and were refused for alleged defects. The approximately 14 tons of steel and the approximately 9 tons of steel were returned to Contract Steel's plant in Staley, North Carolina, for reworking. Staley, North Carolina, is located more than 80 miles from the jobsite. In connection with inspection of the steel, Du Pont's quality assurance inspector traveled to Staley, North Carolina.
>
> 6. On November 7, 1983, *approximately 14 tons of structural and fabricated miscellaneous steel were delivered to the jobsite.* On November 8, 1983, *the remaining approximately 9 tons of steel under the contract were taken from the galvanizing plant to the jobsite.* On November 8, 1983, Du Pont

and Freedom refused to accept the steel and so notified Contract Steel.

(Emphasis supplied.)

Three things are clear from the trial court's findings set forth hereinabove. First, plaintiff delivered the amount of material that was required by the subcontract. Second, Du Pont employed inspectors who knew that the material had been delivered to the job site. And third, some of the material furnished by plaintiff was actually incorporated into the MMF Process Building. The trial court's findings establish that plaintiff, pursuant to a subcontract with Freedom, furnished materials to the site of improvement to the real property improved. Therefore, pursuant to G.S. 44A-18, plaintiff was entitled to a lien upon funds owed by Du Pont to Freedom. This was true "whether or not amounts are due and whether or not performance or delivery is complete." G.S. 44A-18(5). Plaintiff's lien was perfected "upon giving of notice in writing to the obligor as hereinafter provided and shall be effective upon the receipt thereof by such obligor." G.S. 44A-18(6).

II

[3] Our second line of inquiry is whether plaintiff, a first tier subcontractor, substantially complied with the requirements of G.S. 44A-19 for giving adequate notice of a claim of lien. We hold that plaintiff substantially complied with G.S. 44A-19.

In pertinent part G.S. 44A-19 states the following:

44A-19. Notice to obligor.

(a) Notice of a claim of lien shall set forth:

(1) The name and address of the person claiming the lien,

(2) A general description of the real property improved,

(3) The name and address of the person with whom the lien claimant contracted to improve real property,

(4) The name and address of each person against or through whom subrogation rights are claimed,

(5) A general description of the contract and the person against whose interest the lien is claimed, and

(6) The amount claimed by the lien claimant under this contract.

(b) All notices of claims of liens by first, second or third tier subcontractors must be given using a form substantially as follows:

NOTICE OF CLAIM OF LIEN BY
FIRST, SECOND OR THIRD TIER SUBCONTRACTOR

To:

1. ....., owner of property involved.
(Name and address)

2. ....., general contractor.
(Name and address)

3. ....., first tier subcontractor against
(Name and address)
or through whom subrogation is claimed, if any

4. ....., second tier subcontractor against
(Name and address)
or through whom subrogation is claimed, if any

General description of real property where labor performed or material furnished:

.....

.....

.....

General description of undersigned lien claimant's contract including the names of the parties thereto: .....

.....

.....

The amount of lien claimed pursuant to the above described contract: $.....

The undersigned lien claimant gives this notice of claim of lien pursuant to North Carolina law and claims all rights of subrogation to which he is entitled under Part 2 of Article 2 of Chapter 44A of the General Statutes of North Carolina.

Dated ...., Lien Claimant

.....
(Address)

The 6 December 1986 letter by which plaintiff claims to have notified Du Pont that plaintiff was claiming a lien states the following:

> Dupont Company
> P. O. Drawer Z
> Fayetteville, N.C. 28302
>
> Re: Dupont Co.
> MMF Process Building
> Fayetteville, N.C.
>
> Gentlemen:
>
> Pursuant to our agreement with Freedom Construction Co., 315 S. Moore St., Sanford, N. C. to furnish structural, fabricated miscellaneous steel and reinforcing steel for the Dupont Co. MMF Process Building, Fayetteville, N. C. we have on November 7, 1983 actually furnished to the job site all structural steel.
>
> The amount of $50,008.91 remaing [sic] due and owing to us and Freedom Construction Co. has in our opinion, wrongfully refused payment. Please take notice that we hereby claim a lien in any and all funds owing from you to Freedom Const. to the extent of $50,008.91 and claim and reserve all of our rights under Chapter 44A of the North Carolina General Statute.
>
> On receipt of this notice of claim of lien please confirm to us in writing that such funds have been withheld from Freedom Const. Co.
>
> While we deem this action unfortunate in view of our desire to maintain our working relationship with you, we are taking this action in a timely manner to protect our legal right, and hope that a prompt settlement will be made. You will find attached a copy of our letter to Freedom Const. Co.
>
> Very truly yours,
>
> CONTRACT STEEL SALES, INC.
>
> Philip A. Hutson
> President
>
> Encl.
>
> cc: Freedom Const. Co.

In support of its conclusion of law that the letter set forth, hereinabove, did not substantially comply with the notice requirements of G.S. 44A-19, the trial court made the following findings of fact:

> 12. The letter (a) is not labeled as a 'Notice of Claim of Lien,'
>
> (b) is not separated into paragraphs numbered 1 through 4,
>
> (c) does not indicate on the signature line that it is being signed by a 'Lien claimant,' and
>
> (d) does not list the address of the lien claimant at the end of the letter, although the letter was sent on stationery of Contract Steel, whose address and telephone number appear on the letterhead.
>
> 13. The letter was sent to 'Du Pont Company, P. O. Drawer Z, Fayetteville, North Carolina, 28302,' and refers to the real property as 'the Du Pont Co., MMF Process Building, Fayetteville, N. C.'

The trial court's findings of fact, with the exception of finding of fact number 13, pertain to the form of plaintiff's notice of a claim of lien and not its substance. Finding of fact 12(a) is directly attributable to the form's caption as set forth in G.S. 44A-19. Plaintiff's letter clearly stated that Du Pont was to "take notice that we hereby claim a lien." Moreover, the exact statutory language was utilized in paragraph five as follows: "On receipt of this *notice of claim of lien* please confirm to us in writing that such funds have been withheld from Freedom Const. Co." (Emphasis supplied.) Although, as the trial court found as fact, plaintiff's notice of claim of lien "is not separated into paragraphs numbered 1 through 4," we do not deem this deviation to be fatally deficient. Plaintiff's notice of a claim of lien informed Du Pont that plaintiff was thereby claiming a lien and said notice was signed by Philip A. Hutson in his capacity as president of the corporate plaintiff. Therefore, we deem that it was sufficiently indicated by plaintiff's notice of a claim of lien that said notice was signed by a lien claimant. The trial court also found that although plaintiff's address appeared on its business stationery the letter "does not list the address of the lien claimant at the end of the letter." We hold that this finding does not warrant a conclusion of

law that plaintiff's notice did not substantially comply with G.S. 44A-19.

Defendants argue and the trial court agreed that plaintiff failed to substantially comply with G.S. 44A-19(a)(3) by not setting forth a general description of the real property improved. Plaintiff's letter describes the subject real property as follows: "Dupont Co. MMF Process Building, Fayetteville, N.C." We conclude that the foregoing description substantially complies with G.S. 44A-19(a)(3) by serving the purpose of giving Du Pont, the owner of the real property involved, sufficient notice of the real property being improved. Du Pont argues that the subject real property is actually located more than sixteen (16) miles away from Fayetteville, North Carolina. Therefore, defendants argue, "[a]lthough the plant has a Fayetteville, North Carolina post office or mailing address, the mailing address is not what is required by the statute." We find this argument unpersuasive. The purpose of G.S. 44A-19 is to provide the obligor with notice. Defendants do not seriously dispute the fact that there has never been any question about what real property plaintiff referred to in its notice of claim of lien. Moreover, we note that Du Pont had actual notice of the real property referred to by plaintiff by virtue of Du Pont's employees inspecting the steel furnished by plaintiff at the site of improvement.

We reject Du Pont's invitation to analogize the case *sub judice* to cases where a contractor may actually file a lien against real property instead of against funds owed by the obligor. *See Mebane Lumber Co. v. Avery & Bullock Builders, Inc.*, 270 N.C. 337, 154 S.E. 2d 665 (1967). *See also Neal v. Whisnant*, 266 N.C. 89, 145 S.E. 2d 379 (1965); *Lowery v. Haithcock*, 239 N.C. 67, 79 S.E. 2d 204 (1953). The notice of claim of lien filed by plaintiff is for the purpose of giving the owner obligor notice. The notice is not intended to protect innocent third parties and does not affect the title to the real property being improved. Plaintiff's notice of claim of lien fulfilled the purpose of G.S. 44A-19. Du Pont's employees even referred to the location of site of improvement as the "Fayetteville work site." There was only one building at the "Fayetteville work site" designated as the "MMF Process Building."

In conclusion we hold that the trial court's findings do not support its conclusion of law that plaintiff's "letter dated December 6, 1983, does not substantially comply with the requirements of G.S. 44A-19, and does not constitute a valid notice of claim of lien." To the contrary, plaintiff's letter, set forth hereinabove, does as a matter of law substantially comply with the notice requirements set forth in G.S. 44A-19.

Because plaintiff was entitled to a lien and perfected that lien, the judgment must be reversed. Therefore, the cause is remanded so that a trial may be had on those issues that were stipulated to by the parties as preserved for a trial by jury.

Reversed and remanded.

Judges ARNOLD and EAGLES concur.

LINDA LOU KINSER GEER v. ROBERT DONALD GEER

No. 8615DC517

(Filed 3 March 1987)

1. Divorce and Alimony § 30— equitable distribution—debts of the parties

N.C.G.S. 50-20(c)(1) requires the court in an equitable distribution action to consider all debts of the parties, whether a debt is one for which the parties are legally jointly liable or one for which only one party is legally liable.

2. Divorce and Alimony § 30— equitable distribution—marital debts

For the purposes of equitable distribution, a marital debt is a debt incurred during the marriage for the joint benefit of the parties regardless of who is legally obligated for the debt. When determining what constitutes an equitable distribution of the marital assets, the court has the discretion to apportion or distribute the marital debts in an equitable manner.

3. Divorce and Alimony § 30— equitable distribution—value and distribution of marital debts

The evidence supported the trial court's finding that two loans from defendant husband's parents were legitimate marital debts and that the value of the two debts totaled at least $9,000. Furthermore, the court had the discretion to assign one-half of the marital debts to each party and then to award defendant additional funds sufficient to pay his parents plaintiff's one-half share of the debts.

4. Divorce and Alimony § 30— equitable distribution—sacrifice of career for wife's education

The evidence supported a finding by the trial court in an equitable distribution action that defendant husband gave up his career so that plaintiff wife could obtain a medical education and a license to practice medicine.

5. Divorce and Alimony § 30— equitable distribution—findings of costs supported by exhibits

The trial court's findings as to costs in the sale of a home, moving expenses, costs for extra child care and payments for medical school supplies were supported by exhibits introduced by defendant husband.

6. Divorce and Alimony § 30— equitable distribution—value of contributions to spouse's education

In valuing the direct and indirect contributions made by a spouse to help educate or develop the career potential of the other spouse, N.C.G.S. 50-20(c)(7), it is a matter of discretion what weight the court assigns a particular factor in any given case. Appellate review is thus limited to a determination of whether the court, in arriving at a value, clearly abused its discretion, and reversal is in order only upon a showing that the court's actions were manifestly unsupported by reason.

7. Divorce and Alimony § 30— equitable distribution—wife's contributions to own education

Where the trial court found that plaintiff wife contributed funds withdrawn from her retirement to her medical education, the court must value plaintiff's contribution from retirement and credit her contribution against the total cost of her medical education in valuing defendant husband's contributions to her medical education for equitable distribution purposes.

8. Divorce and Alimony § 30— equitable distribution—educational expenses—moving costs—costs of selling homes

The trial court in an equitable distribution action properly considered moving costs as expenses of plaintiff wife's medical education. However, costs incurred in selling two homes could not be considered as expenses of plaintiff's medical education where the marital estate profited from both sales.

9. Divorce and Alimony § 30— equitable distribution—educational expenses—extra child care costs

Evidence that the parties spent more for child care after plaintiff went to medical school than they had previously spent supported the trial court's finding as to extra child care costs as an expense of plaintiff's medical education.

10. Divorce and Alimony § 30— equitable distribution—compelling conveyance of residence to other spouse

N.C.G.S. 50-20(c)(4) does not require that a party must be a custodial parent in order to be awarded ownership of the marital residence in an equitable distribution action. Rather, the court has the authority, within its power in equity, to compel one former spouse to convey title to the other former spouse when justice requires.

APPEAL by plaintiff from *Hunt, Judge.* Judgment signed 18 December 1985 in District Court, ORANGE County. Heard in the Court of Appeals 11 November 1986.

On 6 October 1983, plaintiff filed an action seeking an absolute divorce from defendant based on a separation exceeding one year. On 7 December 1983, defendant answered and counterclaimed for an equitable distribution of the marital property. On 16 December 1983 plaintiff replied, joining in defendant's request for an equitable distribution. On 29 December 1983, the court entered judgment for an absolute divorce. On 26 April 1986, defendant moved the court to consolidate this action with civil action 83CVD507, a child custody action between the parties. In 83CVD507 an order entered 6 April 1984 granted custody of the two minor children to plaintiff. Defendant moved to change custody. This motion was pending in action 83CVD507 at the time defendant moved for consolidation. On 12 July 1985, the equitable distribution action 83CVD591 and the motion to change custody in action 83CVD507 were heard together after both parties stipulated to defendant's motion to consolidate. On 18 December 1985, the court entered judgment denying defendant's motion to change custody, ordering visitation, and distributing the marital assets. Plaintiff appeals only those portions of the judgment pertaining to the property distribution.

Long & Long, by Lunsford Long, for plaintiff appellant.

Lewis and Associates, by Susan H. Lewis, for defendant appellee.

JOHNSON, Judge.

Plaintiff and defendant were married in 1970. During the first year of the marriage, plaintiff worked in Dayton, Ohio as a school teacher, and defendant went to school. After graduation in 1972 defendant worked for Roberts Consolidated as a research and development chemist. Defendant was subsequently promoted to quality control supervisor and, during his last year with Roberts Consolidated, to technical director.

Plaintiff taught full time in the public school system in Ohio until the birth of their two children in 1974 and 1976, at which time plaintiff taught part time at Sinclair College. When the

children were four years old and two years old respectively, plaintiff enrolled in Ohio State Medical School in Columbus, Ohio. The entire family moved to Columbus, Ohio in order for plaintiff to go to medical school there. Defendant gave up his job with Roberts Consolidated. In Columbus defendant was unable to find comparable employment. After one month and a half of trying to find work he took a job working from 11:00 p.m. to 7:00 a.m. Approximately six months later he found day work as a chemist.

After plaintiff completed her medical degree the family moved to Chapel Hill so that plaintiff could obtain specialization in radiology at the University of North Carolina. Defendant took odd jobs to support the family from May to October 1981. In October 1981, he found permanent work with U. S. Floor Systems as the manager of chemical products.

At the time of trial defendant worked as a general manager for Carolina Aerosol in Durham earning $25,000.00 annually. At the time of trial plaintiff worked half time as a radiologist with Wayne Radiology in Goldsboro earning $50,000.00 annually. Plaintiff has custody of the two children and is remarried to a radiologist. Defendant pays no child support and plaintiff has not requested a child support order.

The court found as fact that the parties owned the following marital property: the marital home, net value $64,800.00; a 1974 Mazda pickup truck, net value $300.00; a 1981 Subaru automobile, net value $4,000.00; a 1974 Peugeot automobile, net value $800.00; household effects previously distributed between the parties, net value to plaintiff $4,320.00, net value to defendant $4,859.00; household effects desired by neither party, to be sold, net value $650.00; bank accounts, including IRA's previously distributed between the parties, net value to plaintiff $2,900.00, net value to defendant $1,300.00; and two marital debts, each for loans from defendant's parents, one valued at $5,000.00 including interest and one valued at $4,000.00 including interest. The court concluded that an equal distribution of the marital property would not be equitable "because of the direct and indirect contributions made by the Defendant to help educate or develop the career potential of the Plaintiff and the consequent disparity in the income of the Plaintiff at the time of the distribution." To effectuate defendant's reimbursement for the costs of plaintiff's

medical education, plaintiff was ordered to execute a deed of the marital residence to defendant and defendant assumed liability for the marital debts to his parents.

[1, 2] In plaintiff's first Assignment of Error plaintiff contends that the court exceeded the scope of North Carolina's equitable distribution statute when it distributed an unsecured marital debt by assigning one-half of the loan to each party. Specifically, plaintiff contends that unsecured debts do not qualify as marital property as defined in G.S. 50-20(b)(1) and therefore are not subject to distribution by the court. In a separate Assignment of Error, plaintiff contends that the evidence is insufficient to support the finding of fact that the value of the marital debt is $9,000.00.

In *Dorton v. Dorton*, 77 N.C. App. 667, 336 S.E. 2d 415 (1985), the appellant assigned error to the court's failure to consider and assign liabilities for "all the parties' *marital debts.*" *Id.* at 678, 336 S.E. 2d at 422 (emphasis added). However, this Court in *Dorton* did not define marital debts and discussed only debts that were incurred individually by one former spouse. The Court acknowledged that pursuant to G.S. 50-20(c)(1), the court is required to consider the liabilities of each party when making an equitable distribution. *Id.* We hold that G.S. 50-20(c)(1) requires the court to consider all debts of the parties, whether a debt is one for which the parties are legally, jointly liable or one for which only one party is legally, individually liable. Regardless of who is legally obligated for the debt, for the purpose of an equitable distribution, a marital debt is defined as a debt incurred during the marriage for the joint benefit of the parties. *Allen v. Allen*, 287 N.C. 501, 506, 339 S.E. 2d 872, 875-76 (1986). The court has the discretion, when determining what constitutes an equitable distribution of the marital assets, to also apportion or distribute the marital debts in an equitable manner. *See id.* In today's society debt is commonplace and distribution of the debts can be as great a concern to divorced persons as distribution of the assets. Distribution of marital debts has the benefit of resolving all issues flowing from the former marriage relationship. In particular, "loans from close family members must be closely scrutinized for legitimacy." *Id.* at 507, 339 S.E. 2d at 876. It is incumbent upon the court distributing a debt to ensure that it was a marital debt, that is, incurred during the marriage for the joint benefit of the parties during the marriage. *Id.* at 506, 339 S.E. 2d at 875-76. According-

ly, when the court distributes debts the court must make findings to show it considered all debts of the parties and to identify those which comprise marital debts.

[3] In the case *sub judice*, there was evidence to support the court's finding of fact that the parties borrowed $5,000.00 from defendant's parents in 1970 for the purchase of a mobile home with the promise that it would be repaid with interest. There is also evidence to show that subsequently the parties bought defendant's parents' Peugeot automobile by paying them $800 at the time of the purchase and promising to pay the balance of $3,700.00 plus 6% interest at a later time. Plaintiff did not deny the existence or amount of the loan from defendant's parents in her testimony. This evidence is sufficient to support the court's finding that the loans from defendant's parents were legitimate debts and that the value of the two debts totaled at least $9,000.00, inclusive of interest; therefore, this finding of fact is conclusive on appeal. *Little v. Little*, 9 N.C. App. 361, 365, 176 S.E. 2d 521, 523-24 (1970). We note that the evidence would have supported a finding that the parties owed defendant's parents $11,500.00, as shown on defendant's Exhibit 9. However, it was not prejudicial to plaintiff that the court found as fact that the marital debt was less in amount. Further, the court was required to consider the evidence pursuant to G.S. 50-20(c)(1). The court had the discretion to assign one-half of the marital debts to each party and to then award defendant additional funds sufficient to pay his parents plaintiff's one-half share of the debt. *See White v. White*, 312 N.C. 770, 777, 324 S.E. 2d 829, 833 (1985). The court properly made findings to support the conclusion and award with respect to the parties' marital debts. Plaintiff's first two Assignments of Error are overruled.

[4] In plaintiff's next Assignment of Error she contends that the evidence is insufficient to support the finding of fact that defendant "gave up his career so that Plaintiff could obtain a medical education and license to practice medicine."

We find that the record on appeal and the transcript of the proceedings is replete with evidence from which the court could find that defendant interrupted his career to its likely detriment as he followed plaintiff while she pursued a medical career, notwithstanding the fact that it was a joint decision that plaintiff go

to medical school. Accordingly, this finding of fact is conclusive on appeal, *see Little, supra*, and this Assignment of Error is overruled.

Finding of Fact 14 states in pertinent part as follows:

> 14. Pursuant to a plan of the parties to improve the economic situation of the family, the Defendant gave up his career so that the Plaintiff could obtain a medical education and license to practice medicine. . . . These costs are approximately $29,824.50 and consist of the following items of expenditure:
>
> Costs of Medical Education
>
> | | |
> |---|---|
> | Costs Incurred in Sale of First Home and Move | $ 4,465.70 |
> | Cost Incurred in Sale of Second Home | 5,126.04 |
> | Moving Expenses to Chapel Hill | 4,046.00 |
> | Extra Child Care | 4,756.09 |
> | Payments for Medical School | 10,736.67 |
> | Payments for Medical School Supplies | 694.00 |
> | Total Out-of-Pocket Payments Directly Attributable to Plaintiff's Medical Education: | $29,824.50 |

[5] In plaintiff's next Assignment of Error she contends that the evidence is insufficient to support four of the itemized amounts shown as costs of plaintiff's medical education, to wit: the costs incurred in the sale of the second home ($5,126.04), the moving expenses to Chapel Hill ($4,046.00), the costs for extra child care ($4,756.09), and payments for medical school supplies ($694.00). Specifically, plaintiff contends that the record contains no testimony to support these figures and that the exhibits upon which defendant relies were never offered or received into evidence, leaving the record silent as to these itemized amounts. Plaintiff's argument is without merit. All the exhibits upon which defendant relies to establish these itemized amounts were submitted to the court and marked as defendant's exhibits. At the close of all the evidence, counsel for defendant stated, "I have no further evidence, Your Honor, but want to be sure all my exhibits are in." The court excluded no exhibits. Further, the 7 May 1986 order settling the record on appeal ordered that "the Record on

Appeal shall include all trial exhibits entered into evidence at the hearing. . . ." This Assignment of Error is overruled.

In plaintiff's last and most lengthy Assignment of Error plaintiff contends that the order directing plaintiff to reimburse defendant for the direct and indirect costs of plaintiff's medical education constitutes an abuse of discretion. Plaintiff lists eight grounds for error in her argument. We will address each in turn.

North Carolina's equitable distribution statute expressly provides that professional licenses are separate property. G.S. 50-20(b)(2). Hence, professional licenses are not subject to valuation and distribution. Even so, our legislature recognized a need to consider the contributions of one spouse that enhance the career of the other when determining what constitutes an equitable result. One of the twelve statutory factors, which the court is required to consider, is "[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse." G.S. 50-20(c)(7); *Smith v. Smith*, 71 N.C. App. 242, 248, 322 S.E. 2d 393, 397 (1984), *disc. rev. allowed*, 313 N.C. 174, 326 S.E. 2d 33, *modified and affm'd*, 314 N.C. 80, 331 S.E. 2d 682 (1985). Such consideration is especially appropriate when, as here, the evidence shows that defendant sacrificed in order to contribute toward plaintiff's career goals by interrupting his career, relocating twice, and assuming a greater role than plaintiff in child care and homemaking duties. Because the parties separated shortly before plaintiff completed her medical training, defendant was prevented from realizing any of the expected benefits to the marriage of the joint decision that plaintiff pursue a medical degree with defendant's financial, child care, and homemaking support.

[6] The legislature gives no guidance on the thorny issue of how to value the direct and indirect contributions of the nonstudent spouse. (An Indiana statute expressly limits a monetary award for the financial contributions of one spouse to contributions for "tuition, books, and laboratory fees for the higher education of the other spouse." Ind. Code sec. 31-1-11.5-11(d) (Supp. 1986).) This question has never before been addressed in North Carolina. As with any statutory factor under G.S. 50-20(c), it is a matter of discretion what weight the court assigns a particular factor in any given case. *See White, supra*, at 777, 324 S.E. 2d at 833. Ap-

pellate review is thus limited to a determination of whether the court, in arriving at a value, clearly abused its discretion. *See id.* Reversal is in order only upon a showing that the court's actions were manifestly unsupported by reason. *Id.*

In the case *sub judice* the court made the following pertinent conclusions of law:

> 8. An equal distribution of the marital property would require the Defendant to pay $29,824.50 to the Plaintiff as a distributive award to make an equal distribution of the marital property pursuant to North Carolina General Statute sec. 50-20(b)(3).
>
> 9. An equal distribution of the marital property in this case is inequitable because of the direct and indirect contributions made by the Defendant to help educate or develop the career potential of the Plaintiff and the consequent disparity in the income of the Plaintiff at the time of the distribution. Therefore, the Plaintiff shall pay the sum of $29,824.50 to the Defendant for his direct and indirect contributions during the marriage to the Plaintiff's acquisition of a medical education and the license to practice medicine pursuant to North Carolina General Statutes sec. 50-20(c)(7).
>
> 10. Since the distributive awards in (8) and (9) cancel each other, no distributive payments are required of the Plaintiff or the Defendant. However, the Plaintiff shall execute a deed of the marital residence to the Defe[n]dant promptly.

[7] First, plaintiff contends that the court abused its discretion by failing to consider the direct contributions plaintiff made to the costs of her medical education. We agree. Plaintiff testified that she worked evenings before medical school to earn $800.00 for medical books, that she received a $1,000.00 cash scholarship, and that she contributed $3,848.00 in retirement that had accrued when she taught school. The court was not compelled to find as fact that plaintiff made the contributions she claimed. However, the court did find in the last sentence of Finding of Fact No. 11 that "Plaintiff left her teaching job at a community college and withdrew her retirement to assist financially in the plan for her to go to medical school." Having found that plaintiff made this direct contribution to her medical education, the court then

should have valued her contribution and credited her direct contribution against the total costs of her medical education. *DeLa Rosa v. DeLa Rosa*, 309 N.W. 2d 755 Minn. (1981). To reimburse defendant, for a direct contribution the court found plaintiff made, is not supported by reason. Accordingly, that part of the order which values defendant's contributions to plaintiff's medical education must be vacated and remanded. On remand the court must value plaintiff's contribution from retirement and subtract that amount from the total costs of defendant's contributions to plaintiff's medical education.

[8] Secondly, plaintiff contends that the court abused its discretion by including as educational expenses the moving expenses and the costs incurred in selling two homes. We hold that moving expenses are expenses which are indirectly attributable to plaintiff pursuing a medical career. However, a conclusion that the sale of the parties' home in Dayton, Ohio and later the sale of their home in Columbus, Ohio are costs directly or indirectly attributable to the cost of plaintiff's medical education is not manifestly supported by reason based upon the evidence presented at trial. The evidence shows that the parties purchased a home in Dayton, Ohio for $42,000.00. When they moved to Columbus, Ohio in order that plaintiff could attend medical school they sold the home for $65,000.00. Hence, the value of the marital estate increased $23,000.00, minus the costs of selling the home. The parties did not suffer a loss from selling the Dayton home; they made a profit which they rolled over into a home in Columbus. The parties paid $52,000.00 in cash for the Columbus home. The record does not show for what price this house sold, but the record does indicate that the parties also made a profit from its sale. It is a manifest abuse of discretion to consider the expenses of selling these homes as medical school costs since the marital estate profited from both sales. Reason does not support the conclusion that these are costs associated with plaintiff's education. Accordingly, the court must subtract these costs from defendant's contribution to plaintiff's education, while retaining moving expenses to Columbus and later to Chapel Hill as indirect costs of the medical education.

[9] Next plaintiff contends that it was error to consider "extra" child care costs a legitimate educational expense. Defendant presented evidence which tended to show that the parties spent

more for child care after plaintiff went back to medical school than they had previously spent. Although not the most rigorous method of proof, the increase in child care costs afforded the court some measure supported by reason for this indirect cost of plaintiff's education. The court did not abuse its discretion.

[10] Next, plaintiff contends that the court did not consider as required by G.S. 50-20(c)(4) defendant's need, or more specifically, his lack of need to occupy or own the marital residence when the court ordered plaintiff to execute a deed of the marital residence to defendant. G.S. 50-20(c)(4) requires the court to consider the custodial parent's need to occupy the marital residence. There is no basis for construing G.S. 50-20(c)(4) to require that a party must be a custodial parent in order to be awarded ownership of the marital residence. The court has the authority, within its power in equity, to compel one former spouse to convey title to property to the other former spouse when justice requires. *See* G.S. 50-20(g); *Wade v. Wade*, 72 N.C. App. 372, 383, 325 S.E. 2d 260, 270, *disc. rev. denied*, 313 N.C. 612, 330 S.E. 2d 616 (1985). This argument is totally without merit.

Next, plaintiff contends that the court's calculations include mathematical errors. All mathematical errors are insubstantial, and more importantly, are in plaintiff's favor; hence, plaintiff can claim no prejudice. Plaintiff's remaining arguments are without merit and do not warrant further discussion.

In conclusion, this cause must be remanded to value plaintiff's retirement contribution to the medical education expenses, to credit this contribution against the total amount of defendant's contributions, and to value and subtract the costs of the sale of the Dayton home and the sale of the Columbus home. Further, a new trial would be unnecessarily wasteful. *Wade v. Wade, supra*, at 387, 325 S.E. 2d at 272. Accordingly, the trial court may rely on the existing record, free of evidentiary error, on remand.

Affirmed in part, vacated in part and remanded for further proceedings not inconsistent with this opinion.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; CAROLINA POWER & LIGHT COMPANY, APPLICANT; CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC., INTERVENOR; CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES, INTERVENOR; KUDZU ALLIANCE, INTERVENOR APPELLEES v. LACY H. THORNBURG, ATTORNEY GENERAL, INTERVENOR, AND PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION, INTERVENOR APPELLANTS

No. 8610UC373

(Filed 3 March 1987)

Utilities Commission § 38; Electricity § 3— consideration of past fuel cost under-recovery—true-up not authorized

N.C.G.S. 62-133.2(d), which authorizes the Utilities Commission to consider the actual recovery of fuel costs incurred by the utility during a test period, does not authorize a "true-up" system and the Utilities Commission exceeded its authority by allowing CP&L to recoup past under-recoveries of fuel costs. There is nothing in the legislative history that would indicate the General Assembly's intent to allow true-ups; statutory language authorizing true-up procedures in other states tends to be much more explicit and direct than that employed here; and the General Assembly must be presumed to be aware of the judicial prohibition against retroactive rate making and it is doubtful that the General Assembly would have intentionally modified or overruled established judicial decisions without language that made its intent manifest and unambiguous. The correct interpretation is that the Commission is permitted, but not required, to consider actual costs and actual recovery as additional indications of how future fuel costs should be recovered.

APPEAL by the Attorney General and the Public Staff—North Carolina Utilities Commission, intervenors, from Final Order of the North Carolina Utilities Commission entered 18 September 1985. Heard in the Court of Appeals 8 December 1986.

On 21 May 1985, Carolina Power & Light (CP&L) filed an application with the North Carolina Utilities Commission requesting authority to adjust its electric rates and charges pursuant to G.S. 62-133.2 and NCUC Rule R8-54. CP&L sought to charge a uniform increment of 0.42 cent/kWh, including gross receipts tax, as a rider to each of its North Carolina retail electric rate schedules effective no later than 18 September 1985. This increase was based upon the difference between the cost of fuel and the fuel component of purchased power established in CP&L's last general rate case, Docket No. E-2, Sub 481, and the actual cost of fuel over an historical 12-month test period, as adjusted, ending 31 March 1985. CP&L included in its request an amount which would

permit CP&L to recoup prospectively for an actual undercollection of fuel expense for the period 22 September 1984 through 31 March 1985, as well as a projected under-recovery of fuel expense for the period 1 April 1985 through 30 September 1985.

Carolina Industrial Group for Fair Utility Rates-II (CIGFUR-II), Carolina Utility Customers Association, Inc. (C.U.C.A.) and the Kudzu Alliance filed petitions to intervene, which were allowed by appropriate orders. The Public Staff and the Attorney General were deemed intervenors pursuant to NCUC Rule R8-19. Thereafter, C.U.C.A. filed a Motion to Dismiss the application, alleging that the Commission was without authority to grant the application. C.U.C.A. alleged, among other things, that CP&L's attempt to recover dollar for dollar for past undercollections of fuel costs amounted to impermissible retroactive ratemaking. The Motion to Dismiss was joined in by the Attorney General, the Public Staff, and the Kudzu Alliance.

The Commission deferred a decision on the Motion to Dismiss until after the presentation of all of the evidence. CP&L, CIGFUR-II, C.U.C.A, and the Public Staff all presented expert testimony. On 18 September 1985, the Commission issued an order denying the motion to dismiss and granting CP&L a 0.168 cent/kWh fuel clause increment, which raised CP&L's approved fuel factor to 1.750 cents/kWh. Of this increment, 0.068 cent/kWh was provided to allow CP&L to recover 90% of its actual $15,644,406 undercollection of fuel costs for the period 22 September 1984 through 30 June 1985. The Commission termed this 0.068 cent/kWh increment an "Experience Modification Factor." From this order, the Attorney General and the Public Staff have appealed.

Lacy H. Thornburg, Attorney General, by Karen E. Long, Assistant Attorney General, for intervenor-appellant Attorney General.

Robert P. Gruber, Executive Director, by Antoinette R. Wike, Chief Counsel, and Paul L. Lassiter, Staff Attorney, for intervenor-appellant Public Staff—North Carolina Utilities Commission.

Richard E. Jones, Vice President and Senior Counsel, for applicant-appellee Carolina Power & Light Company.

MARTIN, Judge.

The primary issue presented by this appeal involves the Utilities Commission's interpretation of G.S. 62-133.2(d). Basically stated, the question is whether, by enacting G.S. 62-133.2(d), the General Assembly modified the judicially adopted rule prohibiting retroactive ratemaking, heretofore extant in this State, so as to authorize the Utilities Commission to employ an Experience Modification Factor (EMF) in connection with an electric utility's fuel charge adjustment proceedings in order to provide for a "true-up" of the utility's past over-recoveries or under-recoveries of fuel costs. We hold that G.S. 62-133.2(d) does not authorize such a "true-up" system.

The standard of review of a decision of the Utilities Commission is contained in G.S. 62-94(b). The Court

> may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made upon unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary and capricious.

G.S. 62-94(b). Appellants contend that the adoption of the EMF was in excess of the Commission's statutory authority, thus our review is conducted pursuant to G.S. 62-94(b)(2).

In its Order, the Commission utilized an EMF in order to allow CP&L to recoup past under-recoveries of fuel costs. Such true-up procedures have traditionally been prohibited in North Carolina because they constitute retroactive ratemaking. In *Utilities Comm. v. Edmisten, Atty. General*, 291 N.C. 451, 232 S.E. 2d 184 (1977), the Supreme Court stated: "Prospective rate making to recover unexpected past expense, or to refund expected past

expense which did not materialize, is as improper as is retroactive rate making." *Id.* at 469, 232 S.E. 2d at 195. This is because "[s]uch rate making throws the burden of such past expense upon different customers who use the service for different purposes than did the customers for whose service the expense was incurred." *Id.* at 470, 232 S.E. 2d at 195.

The Commission, however, based its authority to implement the EMF on the following language contained in G.S. 62-133.2(d), which became effective on 17 June 1982: "The Commission may also consider, but is not bound by, the fuel costs incurred by the utility and the actual recovery under the rate in effect during the test period. . . ." CP&L contends that this provision allows the Commission to rectify, or true-up, differences between actual fuel costs incurred by an electric utility and recoveries for those costs under established rates. The Attorney General and the Public Staff, on the other hand, contend that the provision upon which the Commission relied only enables it to consider actual recovery of fuel costs as one indication of the need for future adjustment, thereby leaving intact the judicial prohibition against retroactive ratemaking.

The rules regarding statutory construction are well established. It is the function of the judiciary to construe a statute when the meaning of the statute is doubtful. *Lithium Corp. v. Bessemer City*, 261 N.C. 532, 135 S.E. 2d 574 (1964). However, judicial construction is controlled by the intent of the General Assembly in enacting the statute. *State ex rel. Utilities Commission v. Public Staff*, 309 N.C. 195, 306 S.E. 2d 435 (1983) (*Public Staff*). "In seeking to discover this intent, the courts should consider the language of the statute, the spirit of the act, and what the act seeks to accomplish." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E. 2d 281, 283 (1972). All statutes dealing with the same subject matter are to be construed *in pari materia*—i.e., in such a way as to give effect, if possible, to all provisions. *Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969). Further, where one statute deals with certain subject matter in particular terms and another deals with the same subject matter in more general terms, the particular statute will be viewed as controlling in the particular circumstances absent clear legislative intent to the contrary. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966). It is

presumed that, in enacting a law, the legislature acted with full knowledge of prior and existing law. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). Applying these rules to G.S. 62-133.2(d), we conclude that the statute does not authorize the Commission's use of a true-up system such as the EMF employed in this case.

There is nothing in the legislative history of G.S. 62-133.2 that would indicate the General Assembly's intent to allow true-ups. G.S. 62-133.2, entitled "Fuel charge adjustments for electric utilities," replaced G.S. 62-134(e), which had been enacted in 1975 to provide an expedited, statutory procedure whereby a utility could apply for adjustments in its rates and charges based upon an increase or decrease in the cost of fuel. *See Utilities Commission v. Virginia Electric and Power Company*, 48 N.C. App. 453, 269 S.E. 2d 657, *disc. rev. denied*, 301 N.C. 531, 273 S.E. 2d 462 (1980). However, under G.S. 62-134(e), the Commission was not empowered to consider efficiency of management or how prudently the fuel costs had been incurred; only the actual increase or decrease in cost could be taken into account. *Id.* This limitation required the Commission, in effect, to automatically pass all fuel costs through to ratepayers without an investigation of the reasonableness of those costs or of the factors causing the change in costs. Nor did G.S. 62-134(e) permit a utility to obtain an adjustment in a fuel cost proceeding for any costs or expenses for purchased power; such costs and expenses were recoverable only in a general rate case. *Public Staff, supra.*

G.S. 62-133.2 was enacted by the General Assembly in order to eliminate these undesirable limitations which existed under G.S. 62-134(e). The new statute specifically includes the fuel component of purchased power among the fuel rates that may be adjusted. G.S. 62-133.2(a). The statute also requires that the electric utility provide the Commission with specified data from an historic twelve-month test period, G.S. 62-133.2(c), and mandates that the Commission consider that data in reaching its decision. G.S. 62-133.2(d). The statute permits the Commission to consider, in addition to the required data, "the fuel costs incurred by the utility and the actual recovery under the rate in effect during the test period as well as any and all other competent evidence that may assist the Commission in reaching its decision. . . ." *Id.* The utility bears the "burden of proof as to the correctness and reason-

ableness of the charge. . . ." *Id.* Only one adjustment proceeding within a twelve-month period is allowed for each electric utility. G.S. 62-133.2(b).

CP&L asserts that the General Assembly also intended G.S. 62-133.2(d) to allow true-ups for past over-recoveries or under-recoveries of fuel costs. CP&L argues that the legislature must have been aware that most other jurisdictions allow true-ups, and that the portion of G.S. 62-133.2(d) permitting Commission consideration of fuel costs incurred and those actually recovered discloses an intent by the legislature to allow a similar procedure in North Carolina. We find this assertion untenable.

Though we agree with CP&L's contention that the General Assembly was no doubt aware of true-up procedures that existed in other states, such awareness, alone, certainly cannot indicate an actual intent to institute such procedures in this State. At the time G.S. 62-133.2 was enacted, true-up procedures were statutorily authorized in at least nine states and are currently statutorily authorized in thirteen states. *See,* Conn. Gen. Stat. Ann. § 16-19b(f) (1986); Del. Code Ann. tit. 26, § 303(b) (1986); Ga. Code Ann. § 46-2-26(c), (g) (1982); Ill. Ann. Stat. ch. 111-2/3, § 9-220 (Smith-Hurd 1986); Me. Rev. Stat. Ann. tit. 35, § 131(6) (1986); Md. Ann. Code, art. 78 § 54F(e) (1980); Mass. Gen. Laws Ann. ch. 164, § 94G(b) (West 1986); Mich. Comp. Laws Ann. § 460.6j(14)-(15) (West 1986); Nev. Rev. Stat. §§ 704.110(5), 704.185 (1985); Ohio Rev. Code Ann. § 4909.191(E) (Page 1986); 66 Pa. Cons. Stat. Ann. § 1307(e)(3) (Purdon 1979); S.C. Code Ann. § 58-27-865(B) (Law. Co-op. 1986); Va. Code § 56-249.6 (1986). An examination of these statutes shows that the language utilized in each of them tends to be much more explicit and direct than that employed by our General Assembly in G.S. 62-133.2(d), often including procedural aspects of true-ups and considerations for determining the proper amount of true-up. For example, South Carolina law provides that:

> The Commission shall direct the electrical utilities to account monthly for the *differences between the recovery of fuel costs through base rates and the actual fuel costs experienced, by booking the difference to unbilled revenues with a corresponding deferred debit or credit, the balance of which will be included in the projected fuel component of the*

> *base rates for the succeeding period.* The Commission shall direct the electrical utilities to submit monthly reports of fuel costs, and monthly reports of all scheduled and unscheduled outages of generating units with a capacity of one hundred megawatts or greater.

S.C. Code Ann. § 58-27-865(B) (Law. Co-op. 1986) (emphasis added). Virginia law provides the following:

> Recovery of fuel costs.—Each electric utility which purchases fuel for the generation of electricity shall submit to the Commission its estimate of fuel costs, including the cost of purchased power, for the twelve-month period beginning on the date prescribed by the Commission. Upon investigation of such estimates and hearings in accordance with law, the Commission shall direct each company to place in effect tariff provisions designed to recover the fuel costs determined by the Commission to be appropriate for that period, *adjusted for any over-recovery or under-recovery of fuel costs previously incurred.* . . .

Va. Code § 56-249.6 (1986) (emphasis added).

G.S. 62-133.2, on the other hand, contains no such explicit references to true-ups of over-recoveries or under-recoveries of fuel costs. Rather, the Commission is authorized to "allow electric utilities to charge a uniform increment or decrement as a rider to their rates for changes in the cost of fuel and the fuel component of purchased power used in providing their North Carolina customers with electricity from the cost of fuel and the fuel component of purchased power established in their previous general rate case." G.S. 62-133.2(a). No mention is made of rectifying past over-recoveries or under-recoveries as well. Perhaps more telling is the title of the Act: "An Act to Amend Chapter 62 of the General Statutes to Provide for Utilities Commission Consideration of Annual Fuel Adjustment to Electric Utilities Rates Established Pursuant to G.S. 62-133." 1981 Sess. Laws (Reg. Sess. 1982) c. 1197. Again, there is no mention of recouping past over-recoveries or under-recoveries, only of adjustment of established rates. We consider it more probable that if the General Assembly had intended to follow the example of other states in permitting a true-up, it would have done so in the more specific language exemplified in those statutes. Indeed, the fact that the North Carolina statute

lacks direct references to over-recoveries and under-recoveries could well be some indication that the General Assembly was aware of practices for true-ups elsewhere and simply rejected the implementation of such practices here. Moreover, the General Assembly must be presumed to have been aware of the judicial prohibition against retroactive ratemaking, *State v. Benton*, *supra*; it is doubtful that the General Assembly would have intentionally modified or overruled established judicial decisions without language that made its intent manifest and unambiguous.

In short, to adopt the statutory interpretation offered by CP&L, this Court would have to assume that, because the General Assembly was probably aware of true-up procedures in use in other jurisdictions, it intended to allow similar procedures to be used in this State, without the benefit of any evidence supporting the accuracy of such an assumption. We would further have to assume that the General Assembly authorized such procedures by using vague language, despite the fact that the legislature must be presumed to have known that to do so would overrule or modify the existing decisional law of this State, and despite the fact that almost all other state statutes authorizing true-ups do so much more explicitly. This is more than this Court can or should safely assume.

G.S. 62-133.2(d) provides that "[t]he Commission may also consider, but is not bound by, the fuel costs incurred by the utility and the actual recovery under the rate in effect during the test period. . . ." We believe that the correct interpretation of the foregoing provision is that the Commission is permitted, but not required, to consider actual costs and actual recovery as additional indications of how future fuel costs should be recovered. For example, appreciable differences between actual cost and actual recovery would be some indication that an inadequate formula was utilized in setting the previous fuel charge. This interpretation does not, as CP&L contends, violate the *in pari materia* rule of construction by simply duplicating what is contained in G.S. 62-133.2(a); G.S. 62-133.2(a) defines what decision the Commission is authorized to make, while G.S. 62-133.2(d) directs how the Commission should reach its decision. This interpretation also avoids the anomaly of allowing true-ups in fuel adjustment cases but not in general rate cases under G.S. 62-133, which even CP&L concedes the legislature could not have intended. CP&L's argu-

ment that G.S. 62-133.2(d) modifies G.S. 62-133 in that respect is completely unsupportable. The argument ignores the rule that particular statutes control only in the particular situation addressed, *Food Stores v. Board of Alcoholic Control, supra*, and indeed seems refuted by G.S. 62-133.2(f), which imposes upon the Commission the obligation to continue to set reasonable rates in general rate cases pursuant to G.S. 62-133.

We recognize that true-ups have been allowed in this State in very limited circumstances. In *Utilities Comm. v. CF Industries, Inc.*, 299 N.C. 504, 263 S.E. 2d 559 (1980), the Supreme Court upheld as valid a true-up where, because of the impossibility of estimating future variations in the availability of natural gas, no general fixed rate had been established pursuant to G.S. 62-130. *See also, State ex rel. Utilities Comm. v. Thornburg, Atty. Gen.*, 316 N.C. 238, 342 S.E. 2d 28 (1986). Both of these cases involved provisional, non-fixed rates which were adjusted at later hearings. G.S. 62-133.2(d) does not extend this use of true-ups to fuel cost adjustment proceedings because G.S. 62-133.2 only provides for a rider to final rates set pursuant to G.S. 62-133. G.S. 62-133.2(a), (f). Thus, the use of true-ups is still limited to the provisional rate cases in which they have previously been allowed.

In summary, we hold that G.S. 62-133.2 was not intended by the General Assembly to authorize true-ups for past over-recoveries or under-recoveries of fuel costs or the fuel component of purchased power of electric utilities. The Commission, therefore, exceeded its statutory authority in implementing the EMF. Accordingly, the Commission's Order is vacated and remanded for proper calculation of fuel cost adjustments in a manner not inconsistent with this opinion. In view of our holding, we need not address the Public Staff's contention that the EMF adopted by the Commission in this case was arbitrary and capricious.

Vacated and remanded.

Judges COZORT and ORR concur.

In re Paul

IN THE MATTER OF: JEROME PAUL, ATTORNEY

No. 8610SC95

(Filed 3 March 1987)

1. **Contempt of Court § 6.2— criminal contempt—soliciting another to disrupt trial—sufficiency of evidence**

Evidence was sufficient to support the trial judge's finding that respondent attorney solicited a third person to disrupt the trial of his client, thereby committing willful behavior during the sitting of a court which tended to interrupt its proceedings in violation of N.C.G.S. § 5A-11(a).

2. **Contempt of Court § 5.1— soliciting another to disrupt trial—sufficiency of notice in show cause order**

Although the State introduced evidence tending to show that respondent attorney and his friend conspired to solicit a third person to interrupt court, respondent was not found guilty of this conduct but was instead found guilty of soliciting the third person himself, and the show cause order was clearly sufficient to give respondent notice of the conduct alleged to be contemptuous.

3. **Contempt of Court § 6.1— public statements by lawyer—admissibility in contempt hearing**

In a proceeding to show cause why respondent should not be held in contempt and disbarred for his alleged solicitation of disruptive behavior in open court during a criminal trial in which he represented the defendant, the trial court did not err in admitting evidence that respondent violated a court order by making certain public statements, since the evidence was relevant to show respondent's motive and intent to make the public aware of his belief that the prosecution of his client was racially motivated, even if to do so would violate a court order; furthermore, in a trial before a judge without a jury it is presumed that the judge disregarded any incompetent evidence. N.C.G.S. 8C-1, Rule 404(b).

4. **Contempt of Court § 6.1— attorney's public statements—consideration in determining motive or intent**

The trial judge properly considered the evidence of respondent's statements made during a rally in Virginia to raise money for his client as relevant only to the issue of motive or intent and did not base his finding of contempt on this evidence in violation of N.C.G.S. § 5A-11(b) or respondent's constitutional rights.

5. **Attorneys at Law § 12— attorney's solicitation of person to disrupt criminal trial—contempt conviction—disbarment proper**

Where respondent was convicted of contempt for soliciting someone to disrupt a criminal trial in which he, respondent, represented the defendant, such conduct clearly amounted to misconduct or a dereliction of duty other than mere negligence or mismanagement so that the order of the trial court disbarring respondent was a proper exercise of its inherent authority to

discipline attorneys and was necessary to protect the court and the public from an unworthy practitioner.

6. Attorneys at Law § 12— disbarment—no reliance on lawyer's statements at public rally

There was no merit to respondent's contention that the judgment of disbarment must be reversed because the trial court improperly relied upon evidence of respondent's statements made at a rally to raise money for his client in a criminal case, because the trial court penalized him for exercising his First Amendment rights, and because the show cause order did not notify him that he could be disbarred for such conduct, since the trial judge did not make any findings of fact in the judgment of disbarment relating to this conduct, and respondent was not disbarred for making public statements at the rally, as he contended.

APPEAL by respondent from *Stephens, Judge.* Judgments entered 9 August 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 25 August 1986.

On 24 July 1985, respondent Paul was ordered to show cause why he should not be held in contempt and disbarred for his alleged solicitation of disruptive behavior in open court during a criminal trial in which he represented the defendant. At the hearing, the State introduced evidence tending to show the following: During the trial of *State v. Percy Robert Moorman*, Angelo Barnes, a friend of respondent Paul, who was seated in the first row behind the defense table, stood up in open court after the trial judge had sustained an objection to a question asked by respondent Paul and stated, "Judge please give this man a chance to represent his client. You acting like a D.A." The trial judge had Barnes removed from the courtroom and found him in contempt. Following his conviction in that trial, Moorman hired George Rogister, Jr., to represent him in a motion for a new trial. Prior to the hearing on the motion, Moorman and his mother, Dorothy Moorman, told Rogister that respondent Paul had planned with Angelo Barnes to interrupt the trial in the manner described above. Moorman testified at the hearing in the present case that on the morning of the incident, respondent Paul and Barnes discussed a "protest" of the case in the car on the way to the court and that during the discussion respondent Paul told Barnes to "pick an appropriate time to protest." Dorothy Moorman testified that Golden Frinks, a friend of respondent Paul, told her prior to Barnes' outburst in court "what was going to happen."

Respondent Paul denied that he solicited Barnes to disrupt the trial and testified that he had advised Barnes against the plan. Barnes corroborated respondent Paul's testimony and testified that the protest was his idea. Mark McGill testified that he drove respondent Paul to court the day of the incident and Barnes was not in the car with them.

At the close of the evidence, the trial court made the following findings of fact:

> The Court specifically finds beyond a reasonable doubt that Attorney Jerome Paul did solicit, encourage and cause Angelo Barnes to stand up in open court during the trial of STATE v. PERCY MOORMAN on 18 February 1985 in the Superior Court of Wake County for the purpose of interrupting the trial and protesting the rulings of the presiding Judge. Attorney Paul acted intentionally, knowing that this conduct of Angelo Barnes would constitute willful behavior tending to disrupt and interrupt the Court proceedings constituting criminal contempt in violation of G.S. 5A-11(1). The Court finds that, as a result of the aforesaid solicitation and encouragement from Attorney Paul, Angelo Barnes did in fact stand up in open court to protest and object to the trial Court's rulings and that this conduct did in fact disrupt and interrupt the trial proceedings.

Based on these findings of fact, the trial court found respondent Paul guilty of criminal contempt beyond a reasonable doubt and ordered him confined to Wake County jail for a period of thirty days for such contempt.

Following the entry of judgment in the contempt proceeding, the trial judge conducted a hearing to determine whether respondent Paul should be disbarred for his actions. Following the introduction of documentary evidence and arguments of counsel, the trial court made findings of fact and conclusions of law. The court ordered that respondent Paul be disbarred from the practice of law in the State of North Carolina and that he shall not practice law in this State until and unless his license may be restored pursuant to the reinstatement procedures of the North Carolina State Bar.

From the orders adjudging respondent Paul to be guilty of criminal contempt and disbarring him from the practice of law in North Carolina, respondent Paul appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Christopher P. Brewer and Assistant Attorney General Charles H. Hobgood, for the State.

Max D. Stern, G. Henry Temple, Jr., and Wayne Eads, for respondent, appellant.

HEDRICK, Chief Judge.

[1] Respondent first contends the trial court erred in denying his motions to dismiss because the evidence was insufficient to sustain a verdict of guilty of criminal contempt. Respondent argues that the only evidence that he committed the offense charged was the testimony of Percy Moorman, his former client, and that his testimony is "inherently unreliable" to support a conviction for contempt arising out of respondent's conduct in this trial. We disagree.

In a proceeding for contempt pursuant to G.S. 5A-15, the judge is the trier of fact. G.S. 5A-15(d). When a trial judge sits as "both judge and juror" in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom. *In re Whisnant*, 71 N.C. App. 439, 322 S.E. 2d 434 (1984). The general rule in North Carolina is that the testimony of a single witness will support a verdict of guilty; the only exceptions to this rule involve prosecutions for perjury, treason and abduction of a married woman. *State v. Vehaun*, 34 N.C. App. 700, 239 S.E. 2d 705 (1977), *disc. rev. denied*, 294 N.C. 445, 241 S.E. 2d 846 (1978).

Although much of the evidence at the hearing in the present case, tending to show that respondent solicited Barnes to disrupt the Moorman trial, was Moorman's testimony, other witnesses corroborated his testimony. Moorman testified that on the morning of Angelo Barnes' courtroom outburst, respondent and Barnes discussed a "protest" on the "racial aspect of my case or the unfairness" in the car on the way to court. He further testified that respondent asked Barnes, "you know what you are going to do?"

and when Barnes replied affirmatively, respondent stated, "Just pick an appropriate time to protest." Moorman also testified that following Barnes' statements to the judge in open court, respondent said to him, "I think they got that." Dorothy Moorman testified that Golden Frinks, a friend of respondent, had told her prior to the outburst "what was going to happen," and that he approached her after the incident and asked her for "ten dollars to take to the Barnes fellow because he helped us out." Thomas Adams, who was in the Wake County jail while Barnes was serving his sentence for contempt of court, testified that Barnes told him that respondent knew what he was going to do in the courtroom because they had discussed it on the way to court that morning. George Rogister, the attorney Moorman hired to file a motion for a new trial, testified that Dorothy Moorman had told him that Golden Frinks and respondent planned "that whole incident with the man who stood up" and that when he asked Moorman about the incident, he told him about the conversation in the car. This evidence is clearly sufficient to support the trial judge's finding that respondent solicited Barnes to disrupt the trial, thereby committing willful behavior during the sitting of a court which tended to interrupt its proceedings, in violation of G.S. 5A-11(a).

[2] Respondent next contends the trial court erred by denying respondent's motion to dismiss and request for a bill of particulars. Respondent alleged in his motion and argues on appeal that the show cause order did not give him notice of the conduct which allegedly supports the charge of contempt. Respondent contends that the State's evidence at the hearing tended to show that he conspired with Golden Frinks to solicit Angelo Barnes to disrupt the trial and that he was found guilty of conspiracy with Frinks, although he was not given notice of this charge in the show cause order. Respondent's contentions are without merit.

The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, "he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf." *In re Paul*, 28 N.C. App. 610, 614, 222 S.E. 2d 479, 482, *disc. rev. denied and appeal dismissed*, 289 N.C. 614, 223 S.E. 2d 767 (1976). (Citations omitted.) The show cause order in the present case contained a transcript of Angelo Barnes' statements in open court

and stated that according to the sworn testimony of Percy Moorman the following conversation occurred in the car on the way to court the morning of the incident:

> Barnes was advised by Paul that there was a need to protest the unfairness and prejudice of the trial against Attorney Paul and Moorman and that Paul wanted Barnes to stand up during the trial and protest the Court's rulings so that the news media would publicize this protest and focus on the prejudice. Barnes agreed and was advised by Paul that he would probably be put in jail for contempt by Judge Bailey. According to this testimony, Paul instructed Barnes to pick a time when Judge Bailey had sustained objections by Prosecutor Hart to questions asked by Paul of a witness.

The order further alleged that respondent had "solicited Angelo Barnes to engage in an intentional act of protest in open court as described above for the purpose of disrupting the trial proceedings and that by doing so Attorney Jerome Paul is himself guilty of contempt of court."

In the order entered 9 August 1985, the trial court found respondent guilty of criminal contempt upon its finding that respondent "did solicit, encourage and cause" Angelo Barnes to disrupt court, as charged in the show cause order. Although the State introduced evidence tending to show that respondent and Golden Frinks conspired to solicit Angelo Barnes to interrupt court, respondent was not found guilty of this conduct. We hold, therefore, that the show cause order was clearly sufficient to give respondent notice of the conduct alleged to be contemptuous.

[3] Respondent next contends the trial court erred in admitting into evidence testimony that respondent violated a court order by making certain public statements. Respondent argues that this evidence was inadmissible pursuant to G.S. 8C-1, Rule 404, because it was evidence of another wrong or act offered to prove his character and to show that he was more likely to have committed the act charged in the present case. Respondent further argues that any probative value of the evidence is outweighed by its prejudicial effect and that it should have been excluded pursuant to G.S. 8C-1, Rule 403. We disagree.

G.S. 8C-1, 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.

This rule is consistent with North Carolina practice prior to its enactment. *State v. DeLeonardo*, 315 N.C. 762, 340 S.E. 2d 350 (1986). Evidence of a defendant's attendance at prior meetings and his conduct at such meetings has been held admissible to show motive and intent, even though such evidence may disclose the commission of another offense. *State v. Grant*, 19 N.C. App. 401, 199 S.E. 2d 14, *cert. denied and appeal dismissed*, 284 N.C. 256, 200 S.E. 2d 656 (1973).

At the hearing in the present case, Moorman testified that respondent spoke about his case at a rally in Danville, Virginia "to raise money and just get the people involved in my case, let them know it was racially motivated." Moorman further testified that in his speech, respondent said "that 'if we let this young man go down slowly' that a lot of other black athletes would be in a lot of trouble and that all a white girl would have to say is 'rape.' " Moorman also testified that respondent told him that he was under a "gag order," but that "he was going to say it anyway." This evidence is relevant to show respondent's motive and intent to make the public aware of his belief that the prosecution of Moorman was racially motivated, even if to do so would violate a court order. The trial court, therefore, properly admitted this evidence pursuant to G.S. 8C-1, Rule 404(b). Also, respondent has failed to demonstrate that the trial court erred in refusing to exclude this evidence pursuant to G.S. 8C-1, Rule 403. In a trial before a judge without a jury, it is presumed that the judge disregarded any incompetent evidence and did not draw inferences from testimony otherwise competent which would render such testimony incompetent. *Bowen v. Bowen*, 19 N.C. App. 710, 200 S.E. 2d 214 (1973).

[4] By his next assignment of error, respondent contends the trial court improperly relied upon the evidence relating to the contents of the statements made in Danville. Respondent argues

the trial court "explicitly" based the conviction of contempt upon the evidence of these statements in violation of G.S. 5A-11(b), which provides, in pertinent part, that no person may be held in criminal contempt of court "on the basis of the content of any broadcast, publication, or other communication. . . ." Respondent also argues that the trial court's reliance on this evidence is error because his statements "constituted lawful protest protected by the First Amendment as there was no evidence of a lawful valid and applicable court order restraining his speech."

At the close of the evidence in the present case, the trial judge explained his decision and stated that he had considered the evidence concerning the Danville statements for the purpose of weighing the credibility of respondent's assertions that he had not solicited Barnes' outburst because he [respondent] felt that the case did not warrant a public protest or demonstration. The judgment clearly discloses that the trial judge based the finding of contempt upon his findings that respondent "did solicit, encourage and cause" Angelo Barnes to disrupt the Moorman trial. Thus it appears that the trial judge properly considered the evidence of respondent's statements in Danville as relevant only to the issue of motive or intent and did not base his finding of contempt on this evidence in violation of G.S. 5A-11(b) or respondent's constitutional rights. The judgment finding respondent Paul in contempt will be affirmed.

[5] With reference to the judgment of disbarment, respondent first contends the trial court erred in entering a judgment of disbarment because "[t]he facts underlying this conviction of criminal contempt are insufficient as a matter of law to sustain a disciplinary order of disbarment." In the judgment of disbarment, the trial court made the following findings of fact:

> 2. That Jerome Paul was convicted by this Court on this date of the offense of criminal contempt and was sentenced to 30 days confinement, a copy of which judgment is attached.
>
> . . . .
>
> 5. The offense for which Attorney Paul has been convicted directly involved his practice as an attorney and di-

rectly reflected upon his fitness to engage in the profession of attorney and counselor at law.

6. Attorney Paul's conduct is such as to demean and bring into disrepute and disgrace the practice and profession of an attorney and to bring contempt upon the administration of justice.

7. Attorney Paul has been previously held in contempt for similar misconduct in 1975 [IN RE PAUL, 28 NC App 610 (1976)] and has twice been disciplined by the suspension of his license to practice law by the North Carolina State Bar for serious attorney misconduct; however, he still does not appear to appreciate the necessity of complying with the rules and conduct expected of attorneys licensed by the State of North Carolina and willfully refuses to do so.

8. The Courtroom is not a public hall for the expression of views, nor a political arena or a street. It is a place for the trial of cases on their merits in accordance with rules of law and standards of demeanor and conduct for judges, jurors, parties, witnesses, spectators and counsel. (IN RE PAUL, 28 NC App at 619). Attorney Paul by his conduct refuses to accept that basic principle of his profession.

In his brief, respondent does not challenge the findings of fact upon which the judgment of disbarment was based, but argues that those findings do not support the order disbarring him. We do not agree.

In North Carolina attorneys may be disciplined by two methods—statutory and judicial. *In re Burton*, 257 N.C. 534, 126 S.E. 2d 581 (1962). The judicial method is not dependent upon statutory authority, but arises because of a court's inherent authority to take disciplinary action against attorneys licensed to practice before it. *In re Bonding Co.*, 16 N.C. App. 272, 192 S.E. 2d 331, *cert. denied and appeal dismissed*, 282 N.C. 426, 192 S.E. 2d 837 (1972); G.S. 84-36. Judicial disciplinary action may take the form of an order of disbarment or suspension of the attorney's privilege to practice law. *In re Hunoval*, 294 N.C. 740, 247 S.E. 2d 230 (1977). Unprofessional conduct subject to this power includes "misconduct, malpractice, or deficiency in character" and "any dereliction of duty except mere negligence or mismanagement."

Id. at 744, 247 S.E. 2d at 233. (Citations omitted.) This power to discipline or disbar attorneys is essential in order that the court may protect itself from fraud and impropriety and to serve the administration of justice. *Swenson v. Thibaut*, 39 N.C. App. 77, 250 S.E. 2d 279 (1978), *disc. rev. denied and appeal dismissed*, 296 N.C. 740, 254 S.E. 2d 181 (1979). An order of disbarment is not a punishment of the attorney disbarred but is a protection to the public against an unworthy practitioner. *State v. Spivey*, 213 N.C. 45, 195 S.E. 1 (1938).

We hold that the findings of fact support the conclusions of law and the order disbarring respondent, and affirm the order from which this appeal was taken. It is true, as respondent contends, that his conduct does not amount to a felony, but it is not true, as respondent contends, that his conduct would not support an order of disbarment. Respondent was convicted of contempt for soliciting someone to disrupt a criminal trial in which he, respondent, represented the defendant. This conduct clearly rises to the level of misconduct or a dereliction of duty other than mere negligence or mismanagement. The order of the trial court disbarring respondent was a proper exercise of its inherent authority to discipline attorneys and was necessary to protect the court and the public from an unworthy practitioner.

[6] Respondent further contends the judgment of disbarment must be reversed because the trial court improperly relied upon evidence of respondent's statements in Danville. Respondent again argues that the trial court penalized him "for exercising his First Amendment rights" and that the show cause order did not notify him that he could be disbarred for such conduct. Although the trial judge indicated that he disapproved of respondent's conduct in Danville, he did not make any findings of fact in the judgment of disbarment relating to this conduct. All of the findings of fact relate to the judgment of contempt for respondent's solicitation of Angelo Barnes to disrupt Moorman's trial. As we stated above, these findings support the judgment entered. Respondent was not disbarred for making public statements in Danville, as he contends. The judgment of disbarment is proper and will be affirmed.

Finally, respondent contends the trial court erred in ordering that respondent not practice law during the pendency of the ap-

peal of his conviction for criminal contempt. G.S. 15A-536 provides that the trial court may release a defendant, pending appeal, and may impose restrictions on the defendant. The terms of the release are within the discretion of the court. *State v. Crabtree*, 66 N.C. App. 662, 312 S.E. 2d 219 (1984). We find no abuse of discretion in the restrictions imposed in the present case.

The judgments appealed from are affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

PEGGY LYNN DETORRE AND HUSBAND, JAMES B. W. DETORRE, AND RAYMOND W. ALLEN v. SHELL OIL COMPANY AND QUALITY OIL COMPANY

No. 8610SC828

(Filed 3 March 1987)

Landlord and Tenant §§ 7, 20— demolition of service station—construction of new station—no waste or injury to premises

In an action for breach of contract and waste arising out of a lease between the parties, the trial court properly granted defendants' motion for judgment on the pleadings where plaintiffs alleged that defendants tore down existing buildings and tore up existing pavement so as to demolish a service station and built new buildings and poured new pavement so as to construct a larger service station, but, pursuant to the terms of the lease, defendants were specifically allowed to construct a service station and make any alterations to the premises and buildings they desired; the lease was for vacant land and did not require defendants to construct any buildings thereon; plaintiffs' interest in the value of the premises as originally rented was not shown to be permanently injured by returning the lot to its original condition; and defendants in this case improved rather than permanently injured the premises.

APPEAL by plaintiffs from *Farmer, Judge*. Judgment entered 27 May 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 13 January 1987.

Plaintiffs Peggy Lynn and James B. W. DeTorre (DeTorres) entered into a lease agreement with defendant Shell Oil Company (Shell) on 15 November 1971 permitting Shell to build and operate a gas station on plaintiffs' property. Plaintiffs' complaint incor-

porates the lease agreement by reference. Paragraph four of the lease required that the premises be delivered to defendants cleared of all structures, personalty and debris. Paragraph five provided that Shell could use the premises for "any lawful purpose," including installation of an automobile service station, addition of any buildings or improvements Shell desired, and making any alterations Shell desired in the premises, buildings, improvements and equipment at any time while in possession. Paragraph sixteen required Shell to surrender the premises to the DeTorres upon termination of the lease subject to Shell's rights under paragraph five, and Shell's right to remove all gasoline pumps and Shell identification.

Soon after taking possession of the premises in 1972, Shell constructed a self-service gas station consisting of a main building, an out-building, gasoline pumps, and an overhead canopy. On 19 February 1972, the DeTorres executed an assignment of rent, incorporated into the complaint by reference, to plaintiff Raymond W. Allen, assigning to Allen all rents due under the lease with Shell. On 14 September 1981, Shell executed an assignment of lease, incorporated into the complaint by reference, with reversion whereby certain of Shell's rights under the lease with plaintiffs were assigned to Quality Oil Company of Elizabeth City, Inc. On 15 December 1983, Quality Oil Company of Elizabeth City, Inc., assigned its interest in the original DeTorre-Shell lease to defendant Quality Oil Company (Quality). Shell remains liable under the original lease pursuant to a provision therein allowing Shell to assign a sublease of its rights but not its liabilities under the lease.

Plaintiffs allege that on or about 1 May 1985 defendant Quality destroyed and removed all existing structures and pavement on the premises, and erected new buildings and repaved the surface.

Plaintiffs further allege that defendants wilfully breached the lease by Quality removing and destroying the existing structures and pavement, and that plaintiffs are therefore entitled to termination of the lease and forfeiture of the leasehold, including all improvements, by the defendants. Plaintiffs also allege that the destruction and removal of the original structures and pavement

constitute waste and damaged plaintiffs' reversionary interest in the premises in excess of $10,000.

Defendants' answer admits destroying the original structures and pavement and erecting new structures and repaving the property, but denies breaking the lease agreement with plaintiffs or committing waste while in possession of the premises.

Defendants' first defense says that plaintiffs' complaint fails to state a claim upon which relief can be granted and should be dismissed with prejudice pursuant to Rule 12, N.C. Rules Civ. P.

Addressing plaintiffs' breach of contract claim, defendants' second defense says that its destroying and replacing the original buildings was within the language of paragraph five of the lease agreement. That paragraph, say defendants, gives them the right to use the premises for any lawful purpose, including but not limited to constructing a gas station and any additional buildings they may desire, and to make any alterations they may desire to the premises and to any building or improvements thereon at any time. Paragraph sixteen obligates defendants to surrender the premises to plaintiffs DeTorres at the end of the lease term subject to defendants' rights to use the premises for any lawful purpose pursuant to paragraph five. Defendant claims that as of early 1985 the premises had become inadequate to properly serve customer demand, and incorporates into its answer photos of the premises before and after alterations. To remain competitive with other nearby gas stations, defendants destroyed the existing structures and built a new facility with a larger sales area and repaved surface. Another building on the premises was refurbished rather than destroyed. Their actions, contend defendants, were within their rights pursuant to the lease and were not in breach of contract.

As to plaintiffs' claim of waste, defendants' answer contends that the fair market value of the premises has greatly increased due to defendants' destroying and rebuilding in 1985, and therefore plaintiffs' claim of waste is unfounded.

Defendants filed a motion for judgment on the pleadings pursuant to Rule 12(c), N.C. Rules Civ. P. on 25 March 1986. The trial court granted defendants' motion on 4 June 1986, dismissing plaintiffs' complaint with prejudice. Plaintiffs appeal.

Newsom, Graham, Hedrick, Bryson & Kennon, by Charles F. Carpenter, for plaintiff appellants.

Petree Stockton & Robinson, by Leon E. Porter, Jr., and R. Rand Tucker, for defendant appellees.

JOHNSON, Judge.

Plaintiffs' only Assignment of Error challenges the trial court's granting of defendants' motion for judgment on the pleadings pursuant to Rule 12(c). At issue is whether the trial court properly granted defendants' motion as a matter of law. We find no error.

Our scope of review of a Rule 12(c) motion is to determine whether granting the motion was proper or in error. A motion for judgment on the pleadings, or a Rule 12(c) motion, is proper when all the material allegations of fact are admitted on the pleadings and only questions of law remain. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E. 2d 494, 499 (1974). The movant must show, even when viewing the facts and permissible inferences in the light most favorable to the nonmoving party, that he is clearly entitled to judgment as a matter of law. *Cathy's Boutique v. Winston-Salem Joint Venture*, 72 N.C. App. 641, 642-43, 325 S.E. 2d 283, 284 (1985). Because judgment on the pleadings is a summary procedure and the judgment is final, the movant is held to a strict standard and must show that no material issue of fact exists. *Ragsdale v. Kennedy, supra*, at 137, 209 S.E. 2d at 499.

Plaintiffs argue that defendants wilfully breached the lease agreement by "removing and destroying the existing structures and pavement on said leasehold." Defendants admit as much in their answer. Plaintiffs incorporated a copy of the lease agreement into the complaint by reference, thereby making the lease part of the pleadings for purposes of Rule 12(c). The trial court properly looked at the lease to see if the terms were plain and unambiguous when deciding defendants' motion. When language of a contract is plain and unambiguous its construction is a matter of law for the court. *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 453, 325 S.E. 2d 493, 496 (1985).

We find the language of the lease to be unambiguous. Under paragraph five of the lease, defendants may construct on the

premises an automobile service station and any additional buildings they desire, and may make any alterations to the premises and buildings they desire. Furthermore, defendants may use the premises for any lawful purpose. Plaintiffs have not alleged that defendants' use of the premises is for an illegal purpose, or that defendants have failed to pay rent. Defendants' removal of the buildings and pavement was clearly within their right under the lease to "alter" the premises and buildings thereon. We hold that, taken in the light most favorable to plaintiffs, the pleadings do not raise a genuine issue of fact as to whether defendants' removing and destroying buildings and pavement on the lease premises constitutes a breach of that lease agreement.

Plaintiff further alleges that the buildings originally constructed by defendants after taking possession became fixtures, and that plaintiffs as lessors have acquired an interest in such fixtures; defendant, therefore, cannot remove these fixtures without breaching the lease agreement, and whether defendants' actions constitute a breach is a genuine issue of material fact sufficient to survive a Rule 12(c) dismissal. We disagree.

This Court said in *Ilderton Oil Co. v. Riggs*, 13 N.C. App. 547, 551, 186 S.E. 2d 691, 694 (1972) that:

> The general rule is that any erection, even by the tenant, for the better enjoyment of the land becomes part of the land; but if it be purely for the exercise of a trade . . . it belongs to the tenant, and may be severed during the term.

(Quoting *Pemberton v. King*, 13 N.C. 376 (1828-30).) Following *Ilderton*, the gas station and other buildings constructed by defendants in the case *sub judice*, being only for the exercise of trade, belong to the defendants and may be severed during the lease term. Furthermore, the lease did not require that any improvements be constructed on the vacant premises. This is simply a ground lease. If the plaintiffs had leased to defendants the premises with buildings thereon, defendants could not then tear down those buildings without injuring plaintiffs' interest in them. But that is not the case here.

Plaintiffs further argue that defendants' actions constitute waste of plaintiffs' reversionary interest, and that the pleadings raise a genuine issue of material fact as to waste sufficient to sur-

vive dismissal under Rule 12(c). Defendants' answer denies all allegations of waste, and further answers and defends that the new buildings defendants constructed have increased the fair market value of the premises.

This Court recently said that, at common law, waste "was any permanent injury with respect to lands, houses, gardens, trees, or other corporeal hereditaments by the owner of an estate less than a fee." *Homeland, Inc. v. Backer*, 78 N.C. App. 477, 481, 337 S.E. 2d 114, 117 (1985). We noted further that in "the lessor-lessee situation, waste has been defined as an implied obligation . . . to treat the premises in such a manner that no injury is done to the property." *Id.*

Plaintiffs allege that defendants' acts constitute waste "resulting in permanent injury or destruction to plaintiffs' reversionary estate therein in that said acts consisted of the removal and destruction of existing buildings and pavement." We disagree. The buildings destroyed were not existing at the beginning of the lease term. Defendants built the buildings after taking possession of the vacant lot, and later removed *their own* buildings which they had a right to do under the lease. Plaintiffs' interest in the value of the premises as originally rented was not shown to be permanently injured by returning the lot to its original condition. Furthermore, we found in *Homeland, Inc., supra*, that plaintiff failed to make a prima facie case for waste when there was plenary evidence that defendants extensively improved the property. 78 N.C. App. at 482, 337 S.E. 2d at 117. Here, defendants have improved rather than permanently injured the premises. We fail to see how plaintiffs' interest in the premises has been permanently injured, and hold that the trial court correctly found as a matter of law that there was no genuine issue of material fact supporting plaintiffs' claims for breach of contract and waste and properly granted defendants' motion to dismiss on the pleadings under Rule 12(c).

Affirmed.

Judges BECTON and PHILLIPS concur.

JOHN GLEN TAYLOR AND WIFE, NADA TAYLOR v. DOROTHY WALKER, AND C&R AMUSEMENTS, D/B/A BJ'S LOUNGE

No. 8618SC736

(Filed 3 March 1987)

Negligence § 35.1— plaintiff injured after altercation in bar—contributory negligence as matter of law

Plaintiff's own conduct so clearly contributed as at least one of the proximate causes of his injury that he was barred as a matter of law from any recovery based upon the alleged negligent operation of a bar by defendants where plaintiff had knowledge at least equal to that of defendants of the violent nature of other patrons and of the volatile atmosphere present in the bar when he confronted one of the patrons over the shoving of plaintiff's brother-in-law; with that knowledge plaintiff confronted the patron and invited him outside to fight; when the patron refused plaintiff continued to stand beside him, repeating the invitation, even though he could have left; the potential for danger and physical harm inherent in the confrontation with the patron was as well known to plaintiff as to defendants, but with such knowledge plaintiff exposed himself to the danger by approaching the patron, engaging in a heated verbal exchange, and delivering the first and only blow; it was foreseeable to plaintiff that his physical attack on the patron would provoke a violent response from the patron's companions; and plaintiff clearly violated his duty not to expose himself needlessly to danger.

Judge WELLS dissenting.

APPEAL by plaintiffs from *Albright, Judge.* Judgment entered 7 February 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 16 December 1986.

On 19 December 1981, John Glen Taylor was shot and seriously wounded by an unknown assailant outside BJ's Lounge, a Greensboro bar. The shooting occurred shortly after Taylor had been involved in an altercation with another patron of the bar, and as Taylor, his wife, Nada, and his brother-in-law, Victor Huffman, were attempting to reach their automobile in the bar's parking lot. Plaintiffs brought this suit to recover for John Glen Taylor's personal injuries and Nada Taylor's loss of consortium with her husband.

In their complaint, plaintiffs alleged that the bar was operated by C & R Amusements and that defendant Walker was the bartender and manager of the establishment at the time of the shooting. Plaintiffs alleged that defendants were negligent in

that they violated several administrative regulations promulgated by the State Board of Alcoholic Control (now North Carolina Alcoholic Beverage Control Commission) for the control of alcoholic beverage sales and the protection of the public, as well as common law duties to protect patrons from the criminal acts of third persons, and that such negligence was a proximate cause of John Glen Taylor's injuries.

Defendants answered, denying negligence and alleging as an affirmative defense that John Glen Taylor, by his own conduct at the bar, was contributorily negligent in bringing about the situation which resulted in his injury. A jury answered the issues of negligence and contributory negligence in favor of John Glen Taylor and awarded compensatory damages of $382,400. The jury answered the issue of loss of consortium unfavorably to Nada Taylor.

The trial court allowed defendants' motion for judgment notwithstanding the verdict, concluding that John Glen Taylor was contributorily negligent as a matter of law. Plaintiffs appeal.

Gabriel, Berry, Weston & Weeks, by M. Douglas Berry for plaintiff-appellant.

Craige, Brawley, Lipfert & Ross, by William W. Walker for defendants-appellees.

MARTIN, Judge.

Although both plaintiffs gave notice of appeal, the only assignments of error contained in the record and brought forward in the brief relate to the granting of defendants' motion for judgment notwithstanding the verdict with respect to the claim of John Glen Taylor. Therefore, we conclude that Nada Taylor has abandoned her appeal. App. R. 10, 28.

Defendants have moved, pursuant to App. R. 13(c), to dismiss the appeal for plaintiff-appellant's failure to timely file and serve his brief; plaintiff-appellant has moved, pursuant to App. R. 27(c), for a three-day extension of time within which to file the brief. Plaintiff's motion is allowed; defendant's motion is denied.

No question is raised on appeal as to the sufficiency of the evidence to support the jury finding that negligence on the part

of the bar's owner and manager was a proximate cause of John Glen Taylor's injuries. We do not, therefore, consider that issue. The only question before us is whether John Glen Taylor's recovery is, as a matter of law, barred by his contributory negligence. We conclude that it is and affirm the trial court's entry of judgment notwithstanding the verdict.

A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, tests the legal sufficiency of the evidence to take the case to the jury. *Everhart v. LeBrun*, 52 N.C. App. 139, 277 S.E. 2d 816 (1981). In ruling on the motion, the court must consider the evidence in the light most favorable to the nonmoving party, giving him the benefit of all reasonable inferences to be drawn therefrom and resolving all conflicts in the evidence in his favor. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E. 2d 333 (1985). When, as in the present case, defendants' motion for judgment notwithstanding the verdict is grounded upon plaintiffs' contributory negligence as a matter of law, the motion should be granted only when the contributory negligence is so clearly established that no other reasonable inference may be drawn from the evidence. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981).

Viewed in the light most favorable to plaintiff, the evidence tended to show that plaintiff, his wife Nada, and Nada's brother, Victor Huffman, went to BJ's Lounge at approximately 9:00 p.m. on 18 December 1981. They sat with friends, talking and drinking beer. Plaintiff noticed a group of men, described by him as "Indians," in the poolroom at the back of the lounge. Plaintiff testified that these men had reputations as "guntoters and knifetoters" and for engaging in fights. He testified that he knew of the bar formerly frequented by these men, and that he knew, prior to 18 December 1981, that they had begun to frequent BJ's Lounge. He was also aware that BJ's Lounge did not employ a "bouncer" or security guard.

After plaintiff had been at the lounge for approximately 45 minutes, he observed one of these men, Bear Suits, chase another man from the back of the lounge and around behind the bar. Suits and defendant Walker, who was the bartender, beat the man about the head and shoulders. Walker then ordered the man to leave the lounge, but permitted Suits to remain. Suits was very

intoxicated. Plaintiff knew Suits and knew that he had a reputation for carrying a gun.

As the evening progressed, the atmosphere in BJ's Lounge grew louder and more "rowdy." Due to the situation, the friends with whom plaintiff had been sitting began to leave, a few at a time, to go to a different lounge. By about 12:30, plaintiff, his wife, and Victor Huffman were the only ones remaining at BJ's Lounge, other than defendant Walker and the group of men, including Bear Suits.

Plaintiff went to the restroom and when he returned he saw Bear Suits shove Victor Huffman, who, according to the evidence, suffers from some mental disability. Plaintiff went over to Suits and told Suits that "Victor wasn't right mentally, and if he said anything to you, just overlook it." Suits laughed at plaintiff and suggested that he "take up" Huffman's fight. Plaintiff responded, "if that's the way it's going to be, we'll just go outside." Suits continued to laugh at plaintiff, but declined to go outside. This exchange continued for several minutes and then Suits dropped his hand from the bar. Thinking that Suits was probably reaching for a gun, plaintiff struck Suits with his fist, knocking him off the bar stool and onto the floor unconscious. A crowd quickly gathered around Suits. Plaintiff saw a pistol on the floor where Suits had fallen and picked it up. One of the men in the crowd reached into his pocket, but defendant Walker intervened and positioned herself between the man and plaintiff. While holding the pistol, plaintiff made sure that his wife and Victor Huffman got out of the lounge safely and then he backed out the door. As he was attempting to reach his car, he was struck by a shot which was apparently fired from the door of BJ's Lounge.

It is well established in this State that a plaintiff's claim will be barred by the doctrine of contributory negligence when he fails to exercise ordinary care for his own safety, and such failure, concurring with the actionable negligence of the defendant, contributes to his injury. *Smith v. Fiber Controls Corp.*, 300 N.C. 669, 268 S.E. 2d 504 (1980). Contributory negligence is

> an act or omission on the part of the plaintiff amounting to a want of ordinary care concurring and cooperating with some negligent act or omission on the part of the defendant as

> makes the act or omission of the plaintiff a proximate cause or occasion of the injury complained of.

Adams v. Board of Education, 248 N.C. 506, 511, 103 S.E. 2d 854, 857 (1958). The existence of contributory negligence does not depend upon the plaintiff's subjective appreciation of danger; the standard of ordinary care is applied objectively such that the plaintiff is held to that level of care which an ordinarily prudent person would exercise to avoid injury in the same or similar circumstances. *Allen v. Pullen*, 82 N.C. App. 61, 345 S.E. 2d 469 (1986), *disc. rev. denied*, 318 N.C. 691, 351 S.E. 2d 738 (1987). When a person deliberately exposes himself to a danger of which he is, or in the exercise of reasonable care should be, aware, he is contributorily negligent as a matter of law. *Burgess v. Mattox*, 260 N.C. 305, 132 S.E. 2d 577 (1963).

Applying these principles to the present case, we conclude that plaintiff's own conduct so clearly contributed as at least one of the proximate causes of his injury that he is barred as a matter of law from any recovery based upon the alleged negligent operation of the bar by defendants. Plaintiff had knowledge at least equal to that of defendants of the violent nature of Suits and his companions and of the volatile atmosphere present in the bar when he confronted Suits over the shoving of Huffman. With that knowledge, plaintiff confronted Suits and invited him outside to fight. When Suits refused, plaintiff continued to stand beside him, repeating the invitation, even though he could have left. The potential for danger and physical harm inherent in the confrontation with Suits was as well known to plaintiff as to defendants, yet, with such knowledge, plaintiff exposed himself to the danger by approaching Suits, engaging in a heated verbal exchange and delivering the first, and only, blow. It was certainly foreseeable to plaintiff that his physical attack on Suits would provoke a violent response from Suits' companions. Plaintiff had a duty not to needlessly expose himself to danger, which he clearly violated in this case. *See Witherspoon v. Owen*, 251 N.C. 169, 110 S.E. 2d 830 (1959). Moreover, plaintiff voluntarily participated in the affray, thereby helping to create the situation from which his injuries arose. It is elementary that one may not recover damages for injuries resulting from a hazard he helped to create. *Blevins v. France*, 244 N.C. 334, 93 S.E. 2d 549 (1956); *Blake v. Great Atlan-*

tic & Pacific Tea Co., 237 N.C. 730, 75 S.E. 2d 921 (1953). The trial court's entry of judgment notwithstanding the verdict is affirmed.

Affirmed.

Judge PARKER concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

I cannot agree that it can be said as a matter of law that plaintiff John Glen Taylor (Taylor) acted unreasonably in failing to anticipate the violent and unlawful conduct which resulted in his injury. In my opinion, reasonable minds might differ as to whether Taylor needlessly exposed himself to the type of danger which led to his injury, and therefore the question of Taylor's contributory negligence was correctly submitted to the jury.

For the reasons stated, I vote to reverse the trial court and to order that judgment for Taylor be entered on the jury's verdict.

CLARICE D. ATWATER v. J. C. CASTLEBURY, D/B/A CASTLEBURY EGG FARM

No. 8610SC645

(Filed 3 March 1987)

Negligence § 57.4— *entranceway higher than interior floor*—negligence of proprietor—no contributory negligence of invitee

In an action to recover for injuries sustained by plaintiff when she fell upon entering defendant's place of business, evidence was sufficient to support an inference of negligence on the part of defendant and was insufficient to conclude as a matter of law that plaintiff was contributorily negligent where it tended to show that plaintiff stepped from bright sunlight into a dark room, and her vision was momentarily impaired; she was not required to anticipate the unusual construction of defendant's entranceway which was eight inches higher than the interior floor, nor could she anticipate the lack of continuity between the doorsill and the interior floor; plaintiff had never before entered this building and knew nothing of its hazardous construction; and plaintiff was

given no notice of the dangerous situation, even though defendant was present and knew that people had fallen there before.

APPEAL by plaintiff from *Hight, Judge.* Judgment entered 8 January 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 13 November 1986.

Plaintiff, Clarice D. Atwater, fell at defendant's place of business after having gone there to purchase eggs for the Atwater Rest Home, where she was manager. The rest home normally purchased its eggs from defendant, but plaintiff had never before visited the particular building in which she fell.

Defendant handled his egg sales from the front room of a small farm building. This building was made of concrete block set on a level concrete slab. An eight-inch-high row of blocks was built in front of the building's entrance to prevent water from draining into it. The interior floor of the building, being level with the exterior concrete slab, was eight inches lower than the concrete block threshold.

Plaintiff testified that she stepped up on the eight-inch-high threshold to enter. She thought that the interior of the building would be the same level as the threshold. As she stepped into the interior of the building she lost her balance and fell forward to the concrete floor injuring herself. The evidence further showed that it was a bright, sunny day and that the interior of the building appeared dark to plaintiff as she entered.

In addition, defendant Castlebury was aware that people had tripped and fallen over the entrance in the past, although no one had been seriously injured before. Plaintiff testified that defendant was standing outside the building when she entered, but gave no verbal warning to her that there was a step down from the entrance. Additionally, no posted warning existed.

At the close of plaintiff's evidence, defendant moved for a directed verdict. From the order granting a directed verdict, plaintiff appeals.

Hatch, Little, Bunn, Jones, Few & Berry, by Thomas D. Bunn, attorney for plaintiff appellant.

Broughton, Wilkins, Webb & Gammon, P.A., by Charles P. Wilkins, attorney for defendant appellee.

ORR, Judge.

Plaintiff contends that the trial court erred in granting defendant's motion for a directed verdict. We agree.

A motion for a directed verdict tests the sufficiency of the evidence to go to the jury. *West v. Slick*, 313 N.C. 33, 326 S.E. 2d 601 (1985).

> When a motion for a directed verdict is made under Rule 50, the trial judge must determine whether the evidence taken in the light most favorable to the plaintiff and giving him the benefit of every reasonable inference which can be drawn therefrom, was sufficient to withstand defendant's motion for a directed verdict. In ruling on a motion for a directed verdict, the court must resolve any discrepancies in the evidence in favor of the party against whom the motion is made.

Cook v. Tobacco Co., 50 N.C. App. 89, 90-91, 272 S.E. 2d 883, 885 (1980). If reasonable minds could differ over whether plaintiff should recover, the evidence should go to the jury. *Koonce v. May*, 59 N.C. App. 633, 298 S.E. 2d 69 (1982).

An owner or proprietor of a place of business owes an invitee the duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn the invitee of hidden dangers or unsafe conditions of which he has knowledge. *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 279 S.E. 2d 559 (1981). In addition, the owner is "obligated to keep the approaches and entrances to his store in a reasonably safe condition for the use of customers entering or leaving the premises." *Garner v. Greyhound Corp.*, 250 N.C. 151, 155, 108 S.E. 2d 461, 464 (1959).

> The mere fact that a step up or down . . . is maintained at the entrance or exit of a building is no evidence of negligence, if the step is in good repair and in plain view. . . . If the step is properly constructed, but poorly lighted, and by reason of this fact one entering the store sustains an injury, recovery may be had. On the other hand, if the step is properly constructed and well lighted so that it can be seen by one entering or leaving the store, by the exercise of reasonable care, then there is no liability.

Id. at 159, 108 S.E. 2d at 467.

In *Hockaday v. Morse*, 57 N.C. App. 109, 290 S.E. 2d 763, *disc. rev. denied*, 306 N.C. 384, 294 S.E. 2d 209 (1982), this Court reversed an order granting summary judgment to the defendant. In that case, plaintiff fell from a poorly lit step at defendant's motel after visiting a guest there. The Court found that summary judgment was improperly granted because plaintiff offered sufficient evidence from which the jury could find that defendant was negligent. Plaintiff's evidence showed that the step itself was unlighted and that the only available light came from an upstairs room and was blocked by high shrubbery surrounding the steps. The evidence further showed that defendant failed to use ordinary care to remedy an unsafe condition of which he knew or should have known, and that such failure proximately caused plaintiff's injury.

In *Harrison v. Williams*, 260 N.C. 392, 132 S.E. 2d 869 (1963), the plaintiff also fell from a step down in a dimly lit area. The Supreme Court allowed defendant's motion for involuntary nonsuit in that case, only because plaintiff's evidence was too vague and indefinite to establish defendant's negligence and a right to recover. In *Harrison*, plaintiff failed to offer sufficient evidence, although available, as to the step's location and as to the lighting conditions which caused her fall.

In the case *sub judice*, however, plaintiff presented sufficient evidence from which an inference of negligence could be drawn. Plaintiff shows that she stepped up eight inches to the threshold, from brilliant sunlight to a comparatively dark interior, and that her vision was momentarily impaired. Plaintiff testified that it was a very clear, bright, sunshiny day, but that it was very dark in the building. She testified that the building had very dark flooring and very dark walls "[a]nd it makes a dark room. From a bright sunlight, to walk in is like a flash bulb hits you in the face. You don't expect this kind of darkness. . . ."

Plaintiff also expected the floor to be continuous and on the same level as the threshold. Her testimony states: "I assumed that the floor would be level with the top of the block. Common sense will tell you to expect to find a floor, unless you have been told that there is a drop or to watch your step. When you go into a house or a building you expect continuity of flooring."

Defendant, who was standing outside the building and watched plaintiff enter, did not give her any warning of the eight-inch drop, even though he was aware that other people had fallen before. In his deposition, defendant testified that people had stumbled there before, but that no one had been hurt to the extent of suing. Defendant also stated that he had considered moving the obstruction and that such construction was unusual.

We hold that there clearly existed sufficient evidence to go to the jury on the issue of defendant's negligence.

Defendant contends that the evidence shows that plaintiff was contributorily negligent. We do not agree.

An invitee is under a duty to exercise care for his own safety, and he may not recover if he is guilty of contributory negligence which is a proximate cause of his injury. *Blake v. Tea Co.*, 237 N.C. 730, 75 S.E. 2d 921 (1953). However, "a plaintiff cannot be guilty of contributory negligence unless he acts or fails to act with knowledge and appreciation, either actual or constructive, of the danger of injury which his conduct involves." *Chaffin v. Brame*, 233 N.C. 377, 380, 64 S.E. 2d 276, 279 (1951). In addition, "[a] customer is not contributorily negligent where the only way he or she could protect theirself [sic] would be to focus their attention towards the floor which a customer is not required to do. However, the customer does have an obligation to keep a lookout in her path of travel and to see what she ought to have seen as the ordinary prudent person would have done in the exercise of ordinary care under the same or similar circumstances." *Norwood v. Sherwin-Williams Co.*, 303 N.C. at 471, 279 S.E. 2d at 564.

In *Mulford v. Hotel Co.*, 213 N.C. 603, 197 S.E. 169 (1938), the Supreme Court held that nonsuit on the grounds of contributory negligence should have been denied. In that case, the plaintiff fell when leaving defendant's coffee shop at the basement exit. Plaintiff stated that "[t]here was no notice or sign to step down. There was no hand-railing advising you that there was a change in the level." *Id.* at 604, 197 S.E. at 170. The shop was brilliantly lighted in comparison with the basement entrance. The Court said that "it may be inferred that her eyes had not become accustomed to the difference in illumination when she encountered the step." *Id.* at 606, 197 S.E. at 171.

Finally, in *Norwood*, the Supreme Court concluded that the trial court erred in holding the plaintiff contributorily negligent, when she stumbled over a store display platform. The Court found that the lighting in the store was poor and that the extension of the platform into the aisle was not obvious to her because of the poor lighting conditions.

In the case *sub judice*, we find the evidence is insufficient to conclude that plaintiff was contributorily negligent as a matter of law. Plaintiff stepped from bright sunlight into a room of considerably less light and her vision was momentarily impaired. She was not required to anticipate the unusual construction of defendant's entranceway. Nor could she anticipate the lack of continuity between the doorsill and the interior floor. Plaintiff had never before entered this building and knew nothing of its hazardous construction. Furthermore, plaintiff was given no notice of the dangerous situation, even though defendant was present and knew of its existence.

From the facts presented, we hold that there was sufficient evidence to support an inference of negligence on the part of defendant. Furthermore, the evidence was insufficient to conclude as a matter of law that plaintiff was contributorily negligent. Therefore, the directed verdict must be reversed and the case remanded for a new trial on both issues.

Reversed and remanded.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. RUSSELL JEROME TOZZI

No. 869SC825

(Filed 3 March 1987)

1. Criminal Law § 143.13— probation revocation—appeal—original judgment allegedly fatally defective—time for raising objection

In a probation revocation proceeding there was no merit to defendant's contention that the original probationary judgment was fatally defective pursuant to N.C.G.S. § 15A-1301 because the caption on the original filed judgment misstated the file number in the indictment for breaking and entering,

larceny and possession of stolen goods, since the trial court imposed a suspended sentence and probation pursuant to N.C.G.S. § 15A-1342 and 15A-1343(b)(1) so that N.C.G.S. § 15A-1301 was inapplicable; furthermore, defendant could not raise on appeal an initial objection to a condition of probation, that sentencing and probation were based on a defective judgment, but was first required to object no later than the revocation hearing.

2. **Criminal Law § 143.5— probation revocation hearing—State's burden of proof**

The State's burden of proof during probation revocation hearings is to present evidence that reasonably satisfies the trial court in its discretion that defendant has violated a valid condition of probation, and the evidentiary standard and State's burden of proof applied to probation revocation hearings pursuant to N.C.G.S. § 15A-1345(e) are therefore not unconstitutionally indefinite.

3. **Criminal Law § 143.9— probation revocation hearing—failure to report to probation officer—change of residence without permission**

The trial court did not err by finding that defendant had violated valid conditions of his probation where the evidence showed that defendant chose not to seek permission from his probation officer as required before moving permanently from his authorized residence and chose not to appear at required probation meetings which he was otherwise able to attend.

APPEAL by defendant from *Hobgood, Judge.* Judgment entered 11 March 1986 in Superior Court, VANCE County. Heard in the Court of Appeals 13 January 1987.

On 11 July 1984, before Judge McLaughlin in Superior Court, Vance County, defendant pleaded guilty to burning a building used in trade or manufacture and breaking and entering and larceny. He was sentenced to fifteen years and ten years respectively, which sentences were suspended to probation for five years.

On 11 March 1986, Judge Hobgood, after considering and evaluating all the evidence including the evidence presented by defendant, revoked defendant's probation and activated an amended sentence of fifteen years for both convictions. At the hearing the trial court found as fact that defendant wilfully and without legal excuse violated the conditions of probation by (1) failing three times between December 1984 and May 1985 to report to his probation officer as instructed, and (2) leaving his authorized place of residence in Henderson, North Carolina around May 1985, and moving to an unknown address without the prior consent or knowledge of his probation officer as required.

During the revocation hearing, on 11 March 1986, defendant's probation officer James B. Powell, III, testified that he met with defendant several weeks before each of the missed meetings and instructed defendant to report. Powell said that defendant's authorized residence in Henderson, North Carolina, was three or four blocks from Powell's office, and noted that defendant had difficulties maintaining employment during probation. Powell further testified that from 1 May 1985 until December 1985, he did not know of defendant's whereabouts, and that as of 4 June 1985 defendant was $870.00 in arrears to the Vance County Superior Court for court costs, attorney fees, and supervision fees.

Defendant testified at the hearing that he resided five or six blocks from his probation officer's office in Henderson, North Carolina. He admitted that there were times when he failed to meet with his probation officer as instructed, but added that he was often out of town looking for work and therefore could not make the meetings. He further testified that he was arrested on numerous charges during probation, and admitted that he chose to leave Vance County and move to Raleigh without telling his probation officer.

From the judgment revoking probation and activating an amended fifteen year suspended sentence, defendant appeals.

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

Hubbard, Galloway, and Cates, by Mark Galloway for defendant appellant.

JOHNSON, Judge.

Defendant presents five Assignments of Error on the part of the trial court for revoking his probation and activating an amended fifteen year suspended sentence. We find no error in the trial court's judgment.

[1] Defendant's first two Assignments of Error raise the issue of whether the original judgment stands fatally defective pursuant to G.S. 15A-1301 because the caption on the original filed judgment misstated the file number in the indictment for breaking and entering, larceny, and possession of stolen goods. The file number on the indictment in question is 83CRS8053. The judg-

ment suspending sentence shows the file number of the indictment as 84CRS8053.

G.S. 15A-1301, which requires, *inter alia*, that an order of commitment include identification of the offense, provides "a blanket authorization for the preparation of orders of commitment when there is no other specific authorization," *see* Official Commentary to G.S. 15A-1301. The trial court, in its 11 July 1984 judgment, imposed a suspended sentence and probation pursuant to G.S. 15A-1342 and 15A-1343(b)(1). The judgment, therefore, was based on "other specific authorization," making G.S. 15A-1301 inapplicable.

Furthermore, defendant waived this exception by failing to object to the misstatement at the revocation hearing. G.S. 15A-1342(g) provides, *inter alia*, that defendant's failure to object to a condition of probation imposed pursuant to 15A-1343(b)(1) does not constitute a waiver of the right to object at a later time to that condition. In *State v. Cooper*, 304 N.C. 180, 183, 252 S.E. 2d 436, 439 (1981), the North Carolina Supreme Court held that defendants may not raise an initial objection to a condition of probation (here, that sentencing and probation were based on a defective judgment) on appeal, but must first object no later than the revocation hearing. The record on appeal in this case contains no written or oral objections by defendant raising the issue of a defect in the original judgment at the revocation hearing. Defendant waives on appeal any issues not presented at trial. *State v. Brown*, 33 N.C. App. 84, 234 S.E. 2d 32 (1977). *Cooper, supra*, therefore, requires us to reject defendant's first Assignment of Error as waived.

[2] Defendant's next Assignment of Error raises the issue of whether the evidentiary standard and the State's burden of proof in probation revocation hearings as per G.S. 15A-1345(e) are indeterminate and therefore unconstitutional.

Defendant has waived appellate review of this issue by failing to contest the constitutionality of G.S. 15A-1345(e) at the probation revocation hearing. *See State v. Cooper, supra.* Nevertheless, we have held that evidence at a probation revocation hearing "need be such that reasonably satisfies the trial judge in the exercise of his sound discretion that the defendant has violat-

ed a valid condition on which the sentence was suspended." *State v. Freeman*, 47 N.C. App. 171, 175, 266 S.E. 2d 723, 725 (1980). In *Freeman, supra*, we held further that probation matters are "not governed by the rules of a criminal trial. Consequently, a jury is not required . . . nor must the proof of violation be beyond a reasonable doubt." *Id.* (citing *State v. Ducan*, 270 N.C. 241, 154 S.E. 2d 53 (1967)). Because probation revocation hearings are not formal criminal proceedings requiring proof beyond a reasonable doubt, and the evidentiary standard therein is clear, we find that the State's burden of proof during probation revocation hearings is to present evidence that reasonably satisfies the trial court in its discretion that defendant has violated a valid condition of probation. We hold that the evidentiary standard and State's burden of proof applied to probation revocation hearings pursuant to G.S. 15A-1345(e) are not unconstitutionally indefinite.

[3] Defendant's last two Assignments of Error raise the issue of whether the trial court erred by failing to make findings of fact concerning the defendant's necessity to leave his authorized residence in order to find work.

Any violation of a valid condition of probation is sufficient to revoke defendant's probation. *State v. Freeman, supra*, at 176, 266 S.E. 2d at 725 (citing *State v. Braswell*, 283 N.C. 332, 196 S.E. 2d 185 (1973)). All that is required to revoke probation is evidence satisfying the trial court in its discretion that the defendant violated a valid condition of probation without lawful excuse. *State v. Robinson*, 248 N.C. 282, 287, 103 S.E. 2d 376, 380 (1958). The burden is on defendant to present competent evidence of his inability to comply with the conditions of probation; and that otherwise, evidence of defendant's failure to comply may justify a finding that defendant's failure to comply was wilful or without lawful excuse. *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E. 2d 833, 835 (1985).

Defendant does not challenge the validity of the conditions of his probation. He testified in essence that the reason he left his authorized residence in Vance County permanently without first seeking permission from his probation officer as required was because he could not find gainful employment there, but could find such employment in Wake County. He further testified that

the reason he missed some of the required probation meetings was because he was job-hunting in other counties at these times.

Defendant's evidence shows that he was indeed able to appear for the required meetings as instructed, but instead chose to be elsewhere without notifying his probation officer. He failed to show why he was unable to first notify his probation officer that he wanted to move to Raleigh to find work. Defendant's choices are not lawful excuses; he could have been at the meetings as instructed, and could have requested permission to move to Raleigh, but chose to do otherwise. A person on probation "carries the keys to his freedom in his willingness to comply with the court's sentence." *State v. Robinson, supra,* at 285, 103 S.E. 2d at 379. Defendant has failed to meet his burden of putting on competent evidence of his inability to comply with certain conditions of probation in order to justify such non-compliance. The evidence shows he chose not to seek permission from his probation officer as required before moving permanently from his authorized residence and chose not to appear at required probation meetings that he was otherwise able to attend. We hold that the trial court did not err by finding as fact that defendant had violated valid conditions of his probation despite defendant's proffered reasons for his non-compliance. The trial court's judgment is

Affirmed.

Judges BECTON and PHILLIPS concur.

WILLIAM C. LAWTON, ADMINISTRATOR OF THE ESTATE OF JOHN GULLEY, SR., DECEASED v. GEORGE A. YANCEY TRUCKING COMPANY AND JOYCE RIGGS, PERSONAL REPRESENTATIVE OF THE ESTATE OF IVEY VANCE RIGGS, DECEASED

No. 8610SC649

(Filed 3 March 1987)

Automobiles and Other Vehicles § 53— deceased not negligent—subsequent action to determine defendant's negligence—evidence that deceased crossed center line—admissibility

In a wrongful death action arising from a fatal automobile accident, the trial court did not err in admitting evidence that deceased's vehicle crossed

the center line, though it had been determined in a prior action that deceased was not negligent, since the court specifically instructed the jury that deceased was not negligent and this was not an issue before them.

Judge WELLS dissenting.

APPEAL by plaintiff from *Lee, Judge.* Judgment entered 11 December 1985 in Superior Court, WAKE County. Heard in the Court of Appeals 19 November 1986.

On 13 July 1979, a pickup truck driven by John Gulley collided with a dump truck driven by Ivey Vance Riggs and owned by Yancey Trucking Company. Gulley was killed in the accident. Three passengers in the Gulley vehicle brought personal injury actions against Riggs, Yancey Trucking and the Estate of John Gulley.

Riggs and Yancey Trucking cross claimed against Gulley's Estate for indemnity and contribution and alleged that Gulley caused the accident by negligently crossing the center line. Gulley's Estate cross claimed against Riggs and Yancey Trucking for contribution and wrongful death and alleged negligence by those defendants.

The trial court bifurcated the first trial into liability and damage phases, due to the multiple claims involved. At the close of the liability phase, two questions were submitted to the jury: (1) was the driver of the dump truck (Riggs) negligent? and (2) was the driver of the pickup truck (Gulley) negligent? The jury answered "No" to the second question but could not reach a verdict on the first question. Judgment was entered on the jury's verdict that Gulley was not negligent and a mistrial was declared on the question of Riggs' negligence.

Riggs and Yancey appealed from the judgment that Gulley was not negligent. In *Sanders v. Yancey Trucking Co.; Johnson v. Yancey Trucking Co.*, 62 N.C. App. 602, 303 S.E. 2d 600, *disc. rev. denied*, 309 N.C. 462, 307 S.E. 2d 366 (1983), this Court found no error in the judgment of the trial court.

Prior to the retrial on the question of Riggs' negligence, the three passengers took voluntary dismissals of their claims against Riggs and Yancey Trucking. These dismissals and the judgment

in favor of Gulley disposed of all the claims between the parties, with the exception of Gulley's wrongful death claim.

At the second trial, the court instructed the jury that Gulley was not negligent in causing the collision and that they were not to concern themselves with whether Gulley was negligent because it had already been judicially determined. Evidence was introduced over objection that Gulley's vehicle had crossed the center line.

The court then submitted the following issue to the jury: "Was the death of John Gulley, Sr. caused by the negligence of Ivey Vance Riggs?" The jury answered "No." From judgment entered on the verdict, plaintiff appeals.

McMillan, Kimzey, Smith & Roten, by James M. Kimzey, attorney for plaintiff appellant.

Moore, Ragsdale, Liggett, Ray & Foley, P.A., by Jane Flowers Finch, attorney for defendant appellees.

ORR, Judge.

Plaintiff contends that the trial court erred in admitting evidence that Gulley's vehicle crossed the center line. There are three areas of testimony that plaintiff contends were inadmissible. First, since Riggs died prior to the second trial, his deposition at the first trial was allowed to be read into evidence at the second trial. In that deposition Riggs testified that Gulley's vehicle had crossed the center line moments before impact. Second, Mabel Davenport, who testified at the first trial, was allowed over objection to state that she saw Gulley's truck pull over into the oncoming lane and collide with Riggs' vehicle. Third, Dr. Rolin Barrett, an expert witness, testified that in his opinion the collision occurred in Riggs' lane. Plaintiff maintains that the trial court improperly admitted this evidence, thus allowing defendants to relitigate the same issues which were the subject of a prior judicial determination. We disagree.

At the first trial all admissible evidence was presented for the purpose of determining whether Riggs was negligent and whether Gulley was negligent. The jury determined that Gulley was not negligent. However, the jury could not reach a verdict on

the issue of Riggs' negligence and a mistrial was declared as to that aspect of the case.

Plaintiff now contends that the jury in the retrial of the case can only hear a select portion of the evidence that was originally introduced at the first trial. Such a conclusion is grounded in neither logic nor law. The jury must hear all admissible evidence with such limiting instructions as the situation dictates.

In this case, the trial court specifically instructed the jury before any evidence was presented as follows:

> It is the law of the case in this matter that the operator of the pickup truck, John Gulley, deceased, was not negligent in causing the collision. That is, you are not to concern yourself with whether or not the driver of the pickup truck was negligent in causing this collision because it has been judicially determined that he was not and that issue is not before you.

This instruction was also included in the court's final charge to the jury. Furthermore, plaintiff's counsel emphasized this point in both his opening statement and closing argument.

Plaintiff argues that this Court's decision in *Sanders* invoked the doctrine of "law of the case." He asserts that the trial court should have excluded evidence that Gulley crossed the center line, since the issue of Gulley's negligence had been previously determined.

In *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673 (1956), the Supreme Court stated:

> [A]s a general rule when an appellate court passes on a question and remands the case for further proceedings, the questions there settled become the law of the case, both in subsequent proceedings in the trial court and on subsequent appeal, provided the same facts and the same questions which were determined in the previous appeal are involved in the second appeal.

243 N.C. at 536, 91 S.E. 2d at 681-82.

The question of Gulley's negligence is, in fact, the law of the case, and the trial court so instructed the jury. However, plaintiff would extend the doctrine of the law of the case further by re-

quiring the trial court to exclude evidence as to whether Gulley crossed the center line. That issue was not directly submitted to the jury and thus it could only be surmised as the jury's conclusion on that factual question. All we know is that the jury found that Gulley was not negligent—nothing more.

"The rule that a decision of an appellate court is ordinarily the law of the case, binding in subsequent proceedings, is basically a rule of procedure rather than of substantive law, and must be applied to the needs of justice with a flexible, discriminating exercise of judicial power." *Id.* at 537, 91 S.E. 2d at 682.

Plaintiff advocates that defendants retry this case using only a portion of the evidence available to defendants at the first trial. This would result in an inequitable application of justice. By virtue of the trial court's instruction as to Gulley not being negligent, plaintiff's rights were adequately protected.

In view of the above, we find no error.

No error.

Judge BECTON concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In my opinion, a proper application of the law of the case doctrine in this case required that any and all evidence tending to show negligent driving on Mr. Gulley's part be excluded from the second trial. The instructions given by the trial court did not cure the error of allowing such evidence to be brought out.

I therefore vote to award plaintiff a new trial.

GRACE PERRY v. K. C. WILLIAMS AND WIFE, MARY ANN WILLIAMS; J. C. HOLLOMAN AND WIFE, LILLIAN EARL HOLLOMAN

No. 866DC593

(Filed 3 March 1987)

Easements § 6.1— road to farmland—easement by prescription—sufficiency of evidence

Plaintiff presented sufficient evidence at trial to establish each essential element of an easement by prescription and thus permit submission of the question to the jury where plaintiff's evidence tended to show that her use of the roadway was without permission and was under a claim of right; she and her agent used the roadway at all hours of the day during the farming seasons; plaintiff and her predecessors in title began using the roadway in 1942 and used it every season that the land was farmed until the roadway was blocked by defendants in May 1985; and the roadway in question had been in existence for substantially more than forty years and had remained in essentially the same location.

APPEAL by plaintiff from *Long (Nicholas), Judge.* Judgment entered 4 February 1986 in District Court, BERTIE County. Heard in the Court of Appeals 18 November 1986.

Grant, Lewis & Grant, by W. Rob Lewis, attorney for plaintiff appellant.

Pritchett, Cooke & Burch, by William W. Pritchett, Jr., attorney for defendant appellees.

ORR, Judge.

The single issue on appeal is whether plaintiff presented sufficient evidence at trial to establish each essential element of an easement by prescription, and, thus, permit submission of the question to a jury. We hold that she did and the trial court's entry of judgment notwithstanding the verdict was error.

Plaintiff instituted this action in June 1985 seeking a permanent injunction against defendants to restrain them from obstructing a roadway over lands of the defendants in which plaintiff claims an easement by prescription.

Plaintiff alleged in her complaint that she and her predecessors in title have used the roadway over defendants' land for ingress and egress to plaintiff's farm for the purpose of cultivating,

harvesting, and transporting crops grown thereon. Plaintiff further contends this use of the roadway has been hostile, open, notorious, and continuous for a period of at least forty years. Defendants denied the material allegations of the complaint.

At trial, plaintiff's evidence tended to show that her use of the roadway was without permission; was under a claim of right; and that she and her agent used the roadway at all hours of the day during the farming seasons. Plaintiff and her predecessors in title began using the roadway in 1942, and have used it every season the land was farmed until the roadway was blocked by defendants in May 1985. The roadway in question has been in existence for substantially more than forty years and has remained in essentially the same location.

After the trial court denied defendants' motion for a directed verdict, the issue of whether an easement by prescription had been created in the roadway was submitted to the jury. The jury returned judgment in plaintiff's favor, granting plaintiff a permanent easement in the roadway over defendants' land. Defendants filed a motion under N.C.G.S. § 1A-1, Rule 50(b) for judgment notwithstanding the verdict, which the trial court granted, setting aside the judgment for plaintiff, and entering judgment for defendants. Plaintiff appeals to this Court.

Other facts pertinent to this decision will be set out below.

A motion for a judgment notwithstanding the verdict, like a motion for a directed verdict, will be granted only if the evidence, considered in the light most favorable to the plaintiff, is insufficient as a matter of law to justify a verdict for the plaintiff. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285 (1981); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974). In judging the sufficiency of the evidence, the plaintiff is entitled to the benefit of every reasonable inference which may be drawn, and all evidentiary conflicts must be resolved in her favor. *Potts v. Burnette*, 301 N.C. 663, 273 S.E. 2d 285.

To obtain a prescriptive easement plaintiff must establish four 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. at 666, 273 S.E. 2d at 287-88; *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897.

The first element, a hostile use, is defined as "simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E. 2d 873, 875 (1966). A heated controversy or a manifestation of ill will is not required to establish hostility; however, there must be some evidence refuting the inference that the use is permissive and with the owner's consent. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897.

In *Dickinson* and *Potts*, actions taken by the plaintiffs to maintain or improve the roadway underlying the prescriptive easement were sufficient to rebut the presumption of permissive use. In *Dickinson*, plaintiffs raked leaves and scattered oyster shells in the roadway, performing the slight maintenance required to keep the road in passable condition. *Dickinson*, 284 N.C. 576, 201 S.E. 2d 897. In *Potts*, plaintiffs, on at least one occasion, smoothed, graded, and graveled the road, and on other occasions, attempted to work on it. *Potts*, 301 N.C. 663, 273 S.E. 2d 285.

In the case *sub judice* David White, plaintiff's agent, testified at trial that he placed brickbats and rocks in holes, hauled sand to fill in low areas, and cut trees and bushes in order to maintain the roadway for plaintiff's use. White's testimony is corroborated in part by defendant K. C. Williams' testimony that he found brickbats and rock debris in the roadway, when the roadway was washed out by flooding. No permission was ever asked or given to use the farm path, and statements made by plaintiff and her agent to defendants show they believed their use of the road was by right and not by privilege. This evidence was sufficient to rebut the presumption of permissive use.

The second element, open and notorious use, requires that the use be "not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim." *Snowden v. Bell*, 159 N.C. 497, 500, 75 S.E. 721, 722 (1912). Plaintiff presented evidence that the roadway was used for the transportation of all the large farming equipment—tractors, wag-

ons, and harvesters—used in conducting the farming operation, and that the roadway was used for ingress and egress by this equipment at all hours of the day during the farming season. Such use, being neither covert nor hidden, was sufficient to give open and notorious notice to defendants that plaintiff was acting under a claim of right. *Warmack v. Cooke*, 71 N.C. App. 548, 322 S.E. 2d 804 (1984), *disc. rev. denied*, 313 N.C. 515, 329 S.E. 2d 401 (1985).

The third element, continuous and uninterrupted use for a period of at least twenty years, requires that the use be exercised more or less frequently, according to the nature and purpose of the easement. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897. In the present case the use was confined to supplying the farm's agricultural needs during the farming season. According to plaintiff's testimony, the use began in 1942, when plaintiff's brother-in-law began farming the property, and continued every farming season thereafter until the roadway was blocked by defendants in May 1985. Such use for over a twenty-year period was consistent with the purpose of the easement and was sufficient to satisfy this element. *Williams v. Buchanan*, 23 N.C. 535 (1841); J. Webster, *Real Estate Law in North Carolina* § 321 (1981).

The fourth and final element, that there be substantial identity of the easement claimed throughout the twenty-year period, was not in issue at the trial. The exhibits presented by both plaintiff and defendants clearly identified the roadway as being in the same location, and both parties agreed that its location had not deviated substantially since 1942.

Plaintiff presented sufficient evidence, through the use of exhibits and testimony, establishing each of the four elements required for finding the existence of a permanent prescriptive easement.

Defendants did not challenge the competency of plaintiff's evidence. The single issue remaining at trial was the credibility of plaintiff's evidence, a question reserved exclusively for the jury's determination. "Appellate courts, absent error of law, are bound by the jury's verdict." *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 473, 279 S.E. 2d 559, 565 (1981). Having found that the evidence at trial was sufficient to go to the jury and that no errors of law were committed, we hold that the judgment notwithstanding the verdict must be reversed and the judgment in favor of

plaintiff reinstated. We remand, therefore, to the District Court, Bertie County, for entry of judgment in accordance with the jury verdict in favor of plaintiff.

Reversed and remanded.

Judges WELLS and BECTON concur.

STAR AUTOMOBILE COMPANY v. SAAB-SCANIA OF AMERICA, INC.

No. 8610SC617

(Filed 3 March 1987)

Automobiles and Other Vehicles § 5— new auto dealership—petition for hearing before Commissioner of Motor Vehicles—timeliness

Petitioner's petition for a hearing before the Commissioner of Motor Vehicles to review whether petitioner's trade area could support an additional Saab franchise was timely filed where the evidence tended to show that it had until 1 November 1982 to file its petition; it mailed its petition on 26 October 1982 but the petition was not stamped "filed" until 2 November 1982; the party responsible for processing such petitions testified that he was on vacation the week preceding 1 November 1982 and that no documents were processed in his absence; he was uncertain as to whether he was in his office on 1 November; when he got to his desk on the morning of 2 November, the petition was already there, prior to receipt of the morning mail; and he testified that, in his opinion, the petition was received before 2 November.

APPEAL by respondent from *Farmer, Judge*. Order entered 28 February 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 13 November 1986.

Respondent, the United States distributor for the manufacturer of Saab automobiles, and Petitioner, a Durham automobile dealer, entered into a franchise agreement on 24 March 1981. Under the agreement, petitioner became an authorized Saab dealer. On 30 September 1982, petitioner received a letter from respondent notifying it of respondent's intent to establish an additional Saab dealership in Raleigh.

Under N.C.G.S. § 20-305(5) petitioner had thirty days from such notification to request a hearing before the Commissioner of Motor Vehicles to review whether petitioner's trade area could

support an additional Saab franchise. Petitioner had until Monday, 1 November 1982 to file its petition since the thirtieth day of the period fell on the previous Saturday. Petitioner mailed its petition to the Commissioner of Motor Vehicles, "Attention: Robert A. Pruett," on 26 October 1982. However, the petition was not stamped "filed" until 2 November 1982.

Respondent filed a motion to dismiss the petition on the grounds of late filing. The Hearing Officer denied the motion and found that the petition had been timely filed concluding that the Division of Motor Vehicles received it on or before 1 November 1982.

After a full hearing, the Commissioner dismissed the petition and issued a final order which stated that the petition was filed on 2 November 1982. Upon appeal, the Wake County Superior Court held that, because the Commissioner found as a fact that the petition was filed on 2 November 1982, petitioner had filed too late. Petitioner appealed to this Court which held that the factual issue of whether petitioner's petition was timely filed has not been properly resolved. The case was remanded to the Superior Court of Wake County, which remanded it to the Commissioner.

On remand, the Hearing Officer issued an order finding that the petition had been filed on 2 November 1982. Petitioner appealed to the superior court, which reversed the Commissioner. From the decision of the superior court, respondent appeals.

Rivenbark & Kirkman, by James B. Rivenbark, John W. Kirkman, Jr. and Rodney D. Tigges, attorneys for Star Automobile Company, petitioner appellee.

Smith Helms Mulliss & Moore, by David M. Moore, II, Stephen W. Earp and Catherine C. Eagles, attorneys for Saab-Scania of America, Inc., respondent appellant.

ORR, Judge.

Respondent contends that the superior court exceeded the bounds of appropriate judicial review by engaging in independent fact finding when it reversed the Commissioner's decision. We do not agree.

Since this case began before 1 January 1986, N.C.G.S. § 150A-51, recodified as N.C.G.S. § 150B-51, governs the scope of judicial review of the superior court with respect to its review of final agency decisions. It provides in pertinent part that:

> The court . . . may reverse or modify the decision if the substantial rights of the [petitioner] may have been prejudiced because the agency findings, inferences, conclusions, or decisions are:
>
> . . .
>
> (5) Unsupported by substantial evidence . . . in view of the entire record as submitted;
>
> . . .
>
> If the court reverses or modifies the decision of the agency, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or modification.

In determining whether an agency decision should be reversed or modified, the reviewing court must use the "entire record" test. This test requires that the reviewing court examine all of the competent evidence, pleadings, etc., to determine if there is "substantial evidence" in the record to support the agency's findings. *Savings & Loan Assoc. v. Savings & Loan Comm.*, 43 N.C. App. 493, 259 S.E. 2d 373 (1979). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It is more than a scintilla or a permissible inference." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 238, 293 S.E. 2d 171, 176 (1982).

When there are two reasonably conflicting views of the evidence, the superior court cannot replace the agency view of the evidence with its own. *Chestnutt v. Peters, Comr. of Motor Vehicles*, 300 N.C. 359, 266 S.E. 2d 623 (1980).

> On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's

result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E. 2d 538, 541 (1977).

The trial court was faced with the task of determining whether the Commissioner's decision was supported by substantial evidence. Upon a review of the whole record, Judge Farmer found that the findings of fact and conclusions of law set out by the Commissioner were unsupported by substantial evidence.

In particular, there was one critical finding of fact in the Hearing Officer's Order that was not supported by substantial evidence. The Hearing Officer found "[t]hat no evidence has been offered by petitioner or respondent as to when said petition was received in the offices of the Division of Motor Vehicles in Raleigh, North Carolina." However, an essential fact may be established by circumstantial evidence alone. *Bridges v. Graham*, 246 N.C. 371, 98 S.E. 2d 492 (1957).

The record shows the existence of the following circumstances: Petitioner mailed its petition to the Division of Motor Vehicles on 26 October 1982, by United States mail. Robert A. Pruett, the party responsible for processing petitions for the Division of Motor Vehicles, testified that he was on vacation the week preceding 1 November 1982 and that no documents were processed in his absence. Pruett was also uncertain as to whether he was in his office on Monday, 1 November 1982. Pruett further testified that when he got to his desk on the morning of 2 November 1982, the petition was already there, prior to the receipt of the morning mail. In addition, Pruett, who was familiar with the mail handling process at the Division of Motor Vehicles, testified that in his opinion, the petition was received *before* 2 November 1982. Therefore, there was circumstantial evidence as to when the petition was received by the Division of Motor Vehicles.

The Hearing Officer concluded "[t]hat Star Automobile Company's petition was filed with the Division of Motor Vehicles in Raleigh on November 2, 1985 [sic]." In fact, Pruett stamped the petition filed on that day but the critical evidentiary point is when the petition was received by the Division of Motor Vehicles.

"File" is defined as, "[t]o deliver an instrument or other paper to the proper officer or official for the purpose of being kept on file by him . . . in the proper place." Black's Law Dictionary 566 (rev. 5th ed. 1979) (citations omitted). Therefore, the actual stamping of the petition on 2 November 1982 did not constitute the required filing but instead the receipt of the petition by the Division of Motor Vehicles.

Since there was circumstantial evidence, as well as Pruett's opinion testimony as to the receipt of the petition by the Division of Motor Vehicles, the trial court properly concluded that the Hearing Officer's decision that the petition was not timely filed was unsupported by substantial evidence in view of the entire record.

Having made this determination, the court reversed the Commissioner's decision and concluded that the petition in this matter was timely filed.

As required by N.C.G.S. § 150A-51, the court set out its reasons for reversing the Commissioner's decision, denominating them as findings of fact.

We conclude, therefore, that the trial court did not exceed the bounds of appropriate judicial review and its decision should be affirmed.

Affirmed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. RONALD C. VANSTORY

No. 8618SC609

(Filed 3 March 1987)

1. Rape and Allied Offenses § 7; Criminal Law § 138.24— first degree rape—age of victim—no aggravating factor

The rape of a victim under thirteen by a defendant at least twelve and at least four years older than the victim makes the defendant more blameworthy because rape victims under thirteen are in fact more vulnerable to the crime of rape than they would otherwise be if older than twelve; however, this does

not allow the age of the victim to be considered in sentencing for first degree rape because (1) age is an element of first degree rape under N.C.G.S. § 14-27.2(a)(1) and as such cannot be considered an aggravating factor upon sentencing for that crime, and (2) first degree rape is a Class B felony which carries a mandatory life sentence without consideration of aggravating and mitigating factors.

2. **Rape and Allied Offenses § 7— second degree rape of 11 year old—age of victim as aggravating factor**

Because age of the victim is not a necessary element of second degree rape, and determination by a preponderance of the evidence in the sentencing phase that the defendant raped a child eleven years old is reasonably related to the purpose of sentencing, the age of a victim under thirteen may be considered as a nonstatutory aggravating factor in sentencing for second degree rape.

3. **Criminal Law §§ 138.35, 138.37— mitigating factors—immaturity—aid in apprehending another felon—reliable supervision—insufficient evidence**

The trial court in a rape case did not err in failing to find as statutory mitigating factors that defendant's immaturity significantly reduced his culpability for the offense, that he aided in the apprehension of another felon, and that he was a minor and had reliable supervision available, since defendant's age of sixteen at the time of the rape, by itself, failed to show that his immaturity significantly reduced his culpability; the evidence indicated that defendant and his brother, the codefendant, talked with a police officer at the same time and both admitted that they had sexual intercourse with the victim at the time of the offense charged, but this failed to show that defendant's testimony was instrumental in apprehending his brother; nor did defendant's evidence show that he had reliable supervision available.

APPEAL by defendant from *Albright, Judge*. Judgment entered 9 January 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 9 December 1986.

On 18 November 1985, defendant, then age sixteen, was charged with the first-degree rape of an eleven year old girl in violation of G.S. 14-27.2(a)(2). On 9 January 1986, the defendant, pursuant to a plea arrangement, pled guilty to second-degree rape. The trial court found as a nonstatutory aggravating factor that "[t]he victim was a child 11 years old," to which defendant excepted. The court also found as mitigating factors that defendant had no criminal record and voluntarily acknowledged wrongdoing in connection with the offense at an early stage in the criminal process. Upon finding that the aggravating factor outweighed the mitigating factors, the trial court imposed a sentence in excess of the presumptive.

Defendant assigns as error (1) the court's finding of the above stated nonstatutory aggravating factor; and (2) the court's failure to find as mitigating factors: (a) his immaturity at the time of the offense significantly reduced his culpability, (b) he aided in the apprehension of another felon, namely his eighteen year old brother who was also arrested and charged with first-degree rape of the same victim on the same occasion, and (c) the defendant is a minor and has reliable supervision available.

From the imposition of a fifteen year prison sentence for second-degree rape, defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Doris J. Holton, for the State.

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

JOHNSON, Judge.

I

Defendant first assigns as error the trial court's finding as a nonstatutory aggravating factor that "[t]he victim was a child 11 years old." Defendant contends that the age of his victim can enhance his sentence only if her age made her more vulnerable than she otherwise would have been to the crime committed. We disagree.

In *State v. Hines*, 314 N.C. 522, 525, 335 S.E. 2d 6, 8 (1985), the North Carolina Supreme Court said:

> Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. A victim's age does not make a defendant more blameworthy unless the victim's age causes the victim to be more vulnerable than he or she otherwise would be to the crime committed against him or her, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized.

From the transcript of the plea proceedings taken at the sentencing hearing in this case, it seems the State argued that the victim's being eleven years old in and of itself made her more

vulnerable than she otherwise would be to the crime committed. The State did not offer evidence tending to show how *this* victim's age—i.e. her being eleven years old—made her more vulnerable to the crime committed than if she was not eleven.

[1] The General Assembly saw fit to punish as first-degree rape any vaginal intercourse with a child under thirteen by someone at least twelve and at least four years older than the victim. G.S. 14-27.2(a)(1). This legislation protects children under thirteen who, because of their age, are deemed incapable of defending themselves from the sexual advances of others at least four years older than the victim. Children under thirteen are usually physically and emotionally less mature than persons several years older than they are. They do not have the physical or mental ability to repel attack by someone at least twelve and at least four years older than themselves. We are mindful that *State v. Hines, supra,* says that the victim's age must cause the victim to be more vulnerable to the crime than he or she otherwise would be in order to make a defendant more blameworthy for purposes of finding age an aggravating factor. Due to the General Assembly giving children under thirteen greater protection from first-degree rape than victims over thirteen, we hold that the rape of a victim under thirteen by a defendant at least twelve and at least four years older than the victim makes the defendant more blameworthy because rape victims under thirteen are in fact more vulnerable to the crime of rape than they would otherwise be if older than twelve. This holding does not, however, allow the age of the victim to be considered in sentencing for first-degree rape because (1) age is an element of first-degree rape under G.S. 14-27.2(a)(1) and as such cannot be considered an aggravating factor upon sentencing for that crime, *see* G.S. 15A-1340.4(a)(1)(p), and (2) first-degree rape is a Class B felony which carries a mandatory life sentence without consideration of aggravating and mitigating factors, *see* G.S. 14-1.1(a)(2).

[2] Because age of the victim is not a necessary element of second-degree rape, and a determination by a preponderance of the evidence in the sentencing phase that the defendant raped a child eleven years old is reasonably related to the purpose of sentencing, *State v. Melton,* 307 N.C. 370, 376, 298 S.E. 2d 673, 678 (1983), we hold that the age of a victim under thirteen may be considered as a nonstatutory aggravating factor in sentencing for

second-degree rape. We find that the trial court properly found the eleven year old victim's age to be a nonstatutory aggravating factor upon sentencing defendant for second-degree rape. Such finding is reasonably related to the purposes of sentencing. *Id.*

II

[3] In his second Assignment of Error, defendant contends the court erred in failing to find as a statutory mitigating factors: (a) his immaturity significantly reduced his culpability for the offense pursuant to G.S. 15A-1340.4(a)(2)(e), (b) he aided in the apprehension of another felon pursuant to G.S. 15A-1340.4(a)(2)(h), and (c) he is a minor and has reliable supervision available pursuant to G.S. 15A-1340.4(a)(2)(n). We disagree.

Defendant has the burden of persuading by a preponderance of the evidence that these mitigating factors exist. *State v. Michael*, 311 N.C. 214, 219, 316 S.E. 2d 276, 279 (1984). That evidence must be uncontradicted, substantial and manifestly credible. *State v. Freeman*, 313 N.C. 539, 551, 330 S.E. 2d 465, 474-75 (1985).

(a)

Defendant being sixteen at the time of the rape, by itself, fails to show that his immaturity significantly reduced his culpability. Similar evidence was rejected in *State v. Jones*, 72 N.C. App. 610, 615, 325 S.E. 2d 309, 313 (1985), wherein this Court held that such sparse evidence did not address whether defendant understood the nature or severity of the offense he committed. Also, defendant's claimed ignorance of the victim's age is manifestly unbelievable considering his testimony that he had known the victim for over a year before the present crime occurred.

(b) and (c)

The transcript does not reveal, as defendant asserts, that he made a statement implicating his brother in the commission of a felony. Rather, the evidence indicates that defendant and his codefendant talked with the police officer at the same time and both admitted during that session that they had sexual intercourse with the victim at the time of the offense charged. This fails to show how defendant's testimony was instrumental in ap-

prehending his brother. Nor does defendant's evidence show that he has reliable supervision available.

For the foregoing reasons, we hold that the court did not err in failing to find that the mitigating factors for which defendant contends had been proven by a preponderance of the evidence. This Assignment of Error is overruled.

The judgment appealed from is

Affirmed.

Chief Judge HEDRICK and Judge GREENE concur.

STATE OF NORTH CAROLINA v. WILLIAM WALKER

No. 869SC754

(Filed 3 March 1987)

1. **Rape and Allied Offenses § 3— second degree rape—indictment proper**

An indictment for second degree rape was not fatally defective where it stated the name of defendant, the date of the offense, the county in which the offense took place, and that defendant "unlawfully, willfully and feloniously did ravish and carnally know [the victim], a female person, by force and against her will." N.C.G.S. 15-144.1(a).

2. **Rape and Allied Offenses § 5; Kidnapping § 1.2— conviction for both crimes—restraint not element of rape**

In a prosecution for rape and kidnapping the restraint of the victim was not an element of the crime of rape and defendant could properly be convicted of both where defendant, after threatening the victim with physical harm and forcing her back into his car, drove the car to a more secluded area behind a church building before committing the rape, though he could have perpetrated the crime when he first stopped the car, thus taking greater precautions to prevent others from witnessing or hindering his crimes.

3. **Rape and Allied Offenses § 5; Kidnapping § 1.2— rape used to raise kidnapping to first degree—conviction for both crimes improper**

Since the rape was used to raise the kidnapping to first degree in this case, defendant was convicted more than once for the same offense in violation of the prohibition against double jeopardy where he was convicted of second degree rape and first degree kidnapping.

4. Jury § 7.13— peremptive challenges—number based on number of defendants

The trial court did not err in refusing to enlarge the number of defendant's peremptive challenges after consolidating rape and kidnapping charges for trial, since peremptive challenges are allotted to a defendant on the basis of the number of defendants and not the number of charges against any one defendant.

APPEAL by defendant from *Hobgood, Judge.* Judgments entered 19 July 1984 in Superior Court, PERSON County. Heard in the Court of Appeals 16 December 1986.

Defendant was tried on indictments charging him with rape and kidnapping.

The State's evidence tended to show that on 17 March 1984 defendant offered to drive the fifteen-year-old victim and her girl friend home from the Desert Sand, a night club catering to minors. After leaving the girl friend with her brother, defendant proceeded, over the victim's protests, to drive into the country, stopping at the Cedar Grove Church, where he ordered the victim to "put out or get out." The victim refused defendant's demands and exited the car. She was ordered by defendant to reenter the car and complied only after defendant threatened to harm her. Defendant drove the car around for five to ten minutes finally stopping behind a church building, where he forcibly undressed and raped the victim. Defendant then took the victim home, where she notified her parents and police of the rape.

Defendant was subsequently indicted for rape and kidnapping. After consolidation of the two charges for trial, defendant was tried by a jury, convicted of second-degree rape and first-degree kidnapping, and sentenced to a twelve year term for each charge, with sentences to run concurrently.

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

Mark Galloway for defendant-appellant.

ORR, Judge.

I.

[1] Defendant brings forward three assignments of error. First, he contends the indictment for second-degree rape failed to state

the necessary elements of the crime and was, therefore, fatally defective.

N.C.G.S. § 15-144.1(a) specifically authorizes a "short form" indictment for the crime of rape and provides as follows:

> In indictments for rape it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the offense of rape was allegedly committed, and . . . it is sufficient in describing rape to allege that the accused person unlawfully, willfully, and feloniously did ravish and carnally know the victim, naming her, by force and against her will. . . . Any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for rape in the first degree and will support a verdict of guilty of rape . . . in the second degree.

In enacting N.C.G.S. § 15-144.1, the legislature eliminated the requirement that every element to be proven at trial must be alleged in the indictment. *State v. Lowe*, 295 N.C. 596, 247 S.E. 2d 878 (1978). In *Lowe* the Supreme Court determined that such an indictment was constitutional if it permitted the defendant to prepare a defense and to be protected from subsequent prosecution for the same offense. *Lowe*, 295 N.C. 596, 247 S.E. 2d 878.

The indictment, which defendant contends was fatally defective, stated the name of the defendant, the date of the offense, and the county in which the offense took place. The body of the indictment said that "[t]he jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did ravish and carnally know, [the victim], a female person, by force and against her will."

This indictment meets the criteria specified in N.C.G.S. § 15-144.1 for a proper indictment for rape. And because second-degree rape is a lesser included offense of first-degree rape, the indictment was sufficient to allow defendant to prepare a defense and to be protected from double jeopardy. For the above reasons, this Court finds no error in the indictment.

II.

[2] Defendant next assigns as error the trial court's refusal to dismiss the charge of kidnapping, because the restraint of the victim, upon which the charge was based, was an element of the crime of rape.

Although some restraint is inherent in the crime of forced rape, "the restraint, confinement and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape." *State v. Silhan*, 297 N.C. 660, 673, 256 S.E. 2d 702, 710 (1979).

Asportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape. Such asportation is separate and independent of the rape, is removal for the purpose of facilitating the felony of rape, and is, therefore, kidnapping pursuant to N.C.G.S. § 14-39. *State v. Whittington*, 318 N.C. 114, 347 S.E. 2d 403 (1986); *State v. Tucker*, 317 N.C. 532, 346 S.E. 2d 417 (1986); *State v. Newman and State v. Newman*, 308 N.C. 231, 302 S.E. 2d 174 (1983).

The facts in the instant case show that defendant, after threatening the victim with physical harm and forcing her back into the car, drove the car to a more secluded area, in back of one of the church buildings, before committing the rape. Defendant could have perpetrated the crime when he first stopped the car, but instead decided to take greater precautions to prevent others from witnessing or hindering his crimes. This additional action on defendant's part was sufficient to prevent dismissal of the kidnapping charge.

[3] Although not raised by defendant as a defense to the conviction for first-degree kidnapping, the record discloses that the trial court instructed the jury that it could find defendant guilty of first-degree kidnapping, if it found, in addition to the elements set forth in N.C.G.S. § 14-39(a), that the victim had been sexually assaulted before being released. Based on these instructions the jury returned a verdict of guilty of first-degree kidnapping. However, in *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35 (1986), the Supreme Court held that the legislature did not intend a defend-

ant to be convicted and punished for both first-degree kidnapping and the underlying sexual assault.

In this case there was only one sexual assault, the second-degree rape, which could have formed the "sexual assault" element of the first-degree kidnapping conviction. Since the rape was used to raise the kidnapping to first-degree in this case, defendant was convicted more than once for the same offense in violation of the prohibition against double jeopardy. *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35; *State v. Belton*, 318 N.C. 141, 347 S.E. 2d 755 (1986).

Therefore, this case must be remanded to the trial court for a new sentencing hearing. *State v. Freeland*, 316 N.C. 13, 340 S.E. 2d 35. The trial court may arrest judgment on the first-degree kidnapping conviction and resentence defendant for second-degree kidnapping, or it may arrest judgment on the second-degree rape conviction.

III.

[4] Defendant, in his third assignment of error, contends that the trial court erred in refusing to enlarge the number of defendant's peremptive challenges after consolidating the rape and kidnapping charges for trial.

State v. Boyd, 287 N.C. 131, 214 S.E. 2d 14 (1975), states clearly that peremptive challenges are alloted to a "defendant on the basis of the number of defendants and not the number of charges against any one defendant. . . . [W]hen two or more indictments for the same offense are consolidated, they are to be treated as separate counts of the same bill." 287 N.C. at 139, 214 S.E. 2d at 19.

This Court concludes defendant's argument is without merit, and finds no error.

Other than the violation of the prohibition against double jeopardy, as noted above, this Court finds no error in the trial of this case. For the reasons stated, this case is remanded to the trial court for a new sentencing hearing in conformity with our instructions.

Remanded for a new sentencing hearing.

Judges ARNOLD and PHILLIPS concur.

CHARLES CALVIN TEAGUE v. KATHY S. TEAGUE

No. 8615DC716

(Filed 3 March 1987)

1. **Divorce and Alimony § 25.9— child custody—changed circumstances—change of custody proper**

The trial court's course of conduct in changing a joint custody arrangement to award primary custody to plaintiff was proper where the court initially found that both parents were fit to have joint custody and that the child's best interests required joint custody; the court's later findings as to the child's poor health and conduct when with defendant, and as to her improved state when with plaintiff justified changing the joint custody arrangement since these findings indicated changed circumstances which were affecting the welfare of the child; the determinative findings as to the child's welfare were supported by much competent evidence as to her conduct, habits, health, schedule, treatment, and response at different times; and that other facts found by the court, not essential to the order entered, may not have been so supportive was immaterial.

2. **Trial § 3— motion for continuance because of no counsel—denial proper**

There was no merit to defendant's contention that the trial court erred in denying her motions to continue because she had no counsel where defendant had notice two months before the hearing that her counsel was withdrawing and had three weeks notice of the hearing but did not move for continuance until plaintiff and his witnesses were in court ready to proceed with the hearing.

APPEAL by defendant from *Hunt, Judge*. Orders entered 6 December 1985 and 14 January 1986 in District Court, ORANGE County. Heard in the Court of Appeals 11 December 1986.

Defendant's appeal is from an order changing the arrangements previously ordered with respect to the custody of the parties' daughter, who is now four years and four months old. The parties, married in 1981, separated on 26 September 1984 and immediately thereafter this action for custody and divorce from bed and board was filed. A week later, pending further hearings, a temporary order was entered awarding legal custody to the par-

ties jointly and primary physical custody to the defendant. The further hearings were held on five different days in November and December 1984 and January 1985 and a permanent custody order was entered on 4 February 1985, giving physical custody to the defendant from September 1st to June 1st of each year and to the plaintiff the other three months. During the course of the hearings much evidence was presented as to the irresponsible conduct of both parties and based thereon the court found various facts, prohibited the parties from doing a number of things, and directed them to do several others, only some of which need to be stated. Among the court's findings were that the conduct of both parties "reflected poorly" on their ability to accept parental responsibility and that substantial changes in their lifestyles were required to assure the safety and welfare of the child. Some things that the court ordered the parties *not* to do were to use drugs, alcohol or profane language in the child's presence; to take the child to bars; to engage in illicit sex while physical custody was had; and to make disparaging comments to the child about the other. The things that the parties were ordered to do included substantially reducing their consumption of alcoholic beverages and informing each other about the medical and educational needs and problems of the child. The order also provided that "[v]iolations of this Order will constitute grounds for a change of custody pursuant to a change of circumstances as described in Chapter 50 of the North Carolina General Statutes." Though the order brought forth a spate of motions, hearings and orders only the following developments are material to the appeal.

On 7 June 1985, after a hearing, an order was entered keeping the earlier custody provisions in effect, except for some minor modifications irrelevant hereto, but the court made the following findings: That defendant had failed to communicate with plaintiff concerning the child's medical condition and needs; that plaintiff showed more affection for the child than did the defendant, and the child showed more affection for plaintiff than she did for defendant; and that the joint custody arrangement was not working properly and would have to be re-evaluated at a later hearing. Thereafter, pursuant to plaintiff's motion alleging a change of circumstances, a hearing was held on 25 November 1985 and an order was entered on 9 December 1985 awarding plaintiff primary custody of the child. Among the court's many findings of fact

were the following, at least in substance: That plaintiff had complied with all the conditions earlier ordered; that defendant had violated the terms of the earlier order by cohabiting with a man while the child was in her custody and by not communicating with plaintiff about the child's medical condition and needs; that the child's conduct and health were better when she was in plaintiff's custody than they were when she was in defendant's custody; that defendant failed to keep the child on a regular schedule, which was "reflected in the child's poor sleeping habits and failure to thrive" while in defendant's care; that continuing the joint custody arrangement was not in the child's best interest; and her best interests required that primary custody be changed to the plaintiff.

Northern, Blue, Little, Rooks, Thibaut & Anderson, by J. William Blue, Jr., for plaintiff appellee.

Pfefferkorn, Pishko & Elliot, by David C. Pishko, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's main argument is that the course the trial court followed in awarding and changing custody in this case was contrary to law. The argument, in substance, is that instead of determining custody initially on the basis of the facts that then existed and requiring the other party to show a substantial change of circumstances as G.S. 50-13.7 requires, that the court in effect left the determination in abeyance for several months by imposing conditions designed to improve the future conduct of the parties and that defendant's conduct thereafter was not a change of circumstances under our law. While the argument is not entirely without basis and the course that the court followed was certainly irregular, in our opinion it was not invalid. In custody matters the child's welfare, rather than the conduct of the parties, is the controlling factor; and both initially and later the court's findings with respect to the child's welfare fully justify the orders that were entered. Leaving aside the superfluous reformative provisions of the initial order, the unchallenged and accepted findings that both parents were fit to have custody and that the child's best interests required joint custody were enough to support it. And, of course, the court's later findings as to the child's poor

health and conduct when with defendant, and as to her improved state when with plaintiff, if supported by competent evidence, justify changing the joint custody arrangement that was in force; for these findings indicate changed circumstances that were affecting the welfare of the child. *In re Harrell*, 11 N.C. App. 351, 181 S.E. 2d 188 (1971). The determinative findings as to the child's welfare are supported by much competent evidence as to her conduct, habits, health, schedule, treatment and response at different times; thus they are binding upon us. *Pritchard v. Pritchard*, 45 N.C. App. 189, 262 S.E. 2d 836 (1980). That other facts found by the court, not essential to the order entered, may not have been so supported, as defendant argues, is immaterial. *Dawson Industries, Inc. v. Godley Construction Co., Inc.*, 29 N.C. App. 271, 224 S.E. 2d 266 (1976).

[2] Defendant's other contention, that the trial court erred in denying her motions to continue the 25 November 1985 hearing and to grant her a new hearing because she then had no counsel, is also without merit. The stated basis for this contention is that the trial judge permitted her counsel, Robert C. Bryan, to withdraw just four days before the hearing, too late for her to obtain other counsel, and that she had to represent herself to her clear disadvantage. While the court did permit Mr. Bryan to withdraw from the case almost on the eve of the hearing, this did not cause defendant to be unrepresented in the hearing. For the record indicates that Mr. Bryan, as defendant knew, was in the case not to handle or even participate in any hearing required, but merely to advise Attorney Susan Lewis, whose motion to withdraw as defendant's counsel was filed two months before the hearing involved and was granted two weeks later. The record also indicates that defendant knew when Ms. Lewis asked to be relieved as her lawyer that she had to obtain counsel to handle the case but failed to do so during the two months that intervened; and that though defendant was notified of the hearing three weeks ahead of time she did not move for a continuance until the plaintiff and his witnesses were in court ready to proceed with the hearing. Under the circumstances neither the court nor Mr. Bryan's belated withdrawal can properly be blamed for defendant not being represented at the hearing, and the denial of her motion was not an abuse of discretion.

Affirmed.

Judges ARNOLD and ORR concur.

JAMES HOOPER, JR. v. LIBERTY MUTUAL INSURANCE COMPANY

No. 8617SC489

(Filed 3 March 1987)

Insurance § 149; Master and Servant § 69.3— workers' compensation—settlement not reached—action for bad faith refusal—dismissal proper

The trial court correctly granted defendant's motion for dismissal under N.C.G.S. 1A-1, Rule 12(b)(6) of plaintiff's claims for a bad faith refusal to pay benefits and for unfair and deceptive trade practices where plaintiff had pursued a claim for a back injury under the Workers' Compensation Act; payments had been made by defendant and accepted by plaintiff; the parties had not reached a mutually acceptable agreement to conclude the case; and plaintiff's only factual allegations consisted of letters from defendant which represented nothing more than an effort to settle the claim.

APPEAL by plaintiff from *Wood, Judge.* Order granting defendant's motion to dismiss the complaint entered 12 December 1985 in Superior Court, ROCKINGHAM County. Heard in the Court of Appeals 20 October 1986.

Bethea and Sands, by Alexander P. Sands, III and J. Michael Thomas, attorneys for plaintiff appellant.

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall and Laurie H. Woltz, attorneys for defendant appellee.

ORR, Judge.

Plaintiff attempts to raise the single issue of whether an employee can maintain an action against his employer's insurer for bad faith refusal to continue the payment of benefits.

However, the pleadings and record in the case *sub judice* are such that we need not address that question. We instead address the basic issue of whether plaintiff's complaint states a claim upon which relief can be granted. It did not, and accordingly, we affirm the trial court's dismissal.

From 1957 to 1969 plaintiff James Hooper, Jr. worked as a dock worker for J. P. Stevens & Co.; from 1969 to 14 October 1984 he worked for Stevens as a truck driver. During the course and in the scope of that employment, Mr. Hooper apparently suffered several accidental injuries to his back. A letter dated 14 September 1984 from Liberty Mutual Insurance Company, the employer's insurer, to Mr. Hooper's attorney, and incorporated in plaintiff's complaint, disclosed that Liberty Mutual had paid Hooper five weeks of temporary total disability at a compensation rate of $158.00 per week. The letter noted that Mr. Hooper had been paid compensation in accord with a 10 percent permanent partial disability rating to his back as well as medical expenses.

In the September 14th letter, the adjuster states that plaintiff has been given a 17 percent permanent partial disability rating; that 15 percent of this rating has been paid; and that the insurer was "waiting for Mr. Hooper to sign the agreement forms to pay the remaining 2%." In oral argument, counsel for Liberty Mutual explained that this phrase referred to "Form 21," the "Agreement for Compensation for Disability" form. To be binding this agreement must be signed by both parties and approved by the Industrial Commission. N.C.G.S. § 97-82 (1985). The letter further offers to increase the cash payment from $1,297.32 to $2,000.00 if a clincher agreement was signed.

A second letter dated 19 October 1984 from Liberty Mutual remarked upon Hooper's response to the September letter (the response is not in the record before this Court), in which Mr. Hooper apparently refused to sign the clincher agreement. Likewise, there is no indication that plaintiff signed the Form 21 agreement either. The October letter stated "it is our position that we are not responsible for the claimant's underlying arthritic condition[,] only the aggravation that his injury caused." It further stated that Liberty Mutual "would not be willing to pay anything further except by clincher agreement on this case," leaving the $2,000.00 offer to settle still open.

At this point, the dealings of the parties had been entirely within the scope and practice of the Workers' Compensation Act. Payments had been made by defendant and accepted by plaintiff based on agreed upon disability ratings. The parties, however, had not reached a mutually acceptable agreement to conclude the

case either through the signing of a Form 21 Agreement or a clincher agreement.

The second letter motivated Mr. Hooper to file a complaint alleging that the insurer's actions as set forth in the two letters constituted a bad faith refusal to pay benefits and unfair and deceptive trade practices in contravention of N.C.G.S. §§ 58-54.4(11) and 75-1.1. Plaintiff asked for compensatory and punitive damages. The trial court granted defendant's motion pursuant to Rule 12 of the North Carolina Rules of Civil Procedure to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.

> Dismissal of a complaint is proper under the provisions of Rule 12(b)(6) of the North Carolina Rules of Civil Procedure when one or more of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim. *Forbis v. Honeycutt*, 301 N.C. 699, 701, 273 S.E. 2d 240, 241 (1981); *Schloss Outdoor Advertising Company v. City of Charlotte*, 50 N.C. App. 150, 272 S.E. 2d 920 (1980).

Oates v. JAG, Inc., 314 N.C. 276, 278, 333 S.E. 2d 222, 224 (1985).

We turn now to an examination of plaintiff's allegations of fact as set forth in the complaint. The letters of 14 September and 19 October are incorporated into the complaint and comprise the only factual allegations upon which to judge the merits of plaintiff's complaint. The facts set forth in the letters and taken as true, represent nothing more than an effort to settle a claim by an insurance carrier. Even in the 19 October letter, the facts on their face only show that defendant had reevaluated the claim and determined that there was no responsibility for "claimant's underlying arthritic condition." Despite declining to pay additional compensation, the defendant still left open the settlement of the case for $2,000.00 if a clincher agreement was signed. No cause of action rests upon those factual allegations.

Beyond that, plaintiff's complaint merely reaches conclusions rather than alleging facts to sustain a cause of action. For pur-

poses of a Rule 12(b)(6) motion, ". . . the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E. 2d 161, 163 (1970).

Of particular note is that plaintiff had proceeded under the Workers' Compensation Act for an extended period of time. However, upon reaching the point where an agreement could not be reached, plaintiff failed to pursue the appropriate steps under the Workers' Compensation Act. Instead plaintiff improvidently pursued a civil action which could not be sustained upon the particular facts alleged, although under certain circumstances a bad faith claim against an insurer could state a claim for relief. For the above stated reasons, the trial court's dismissal of plaintiff's claim is

Affirmed.

Judges WELLS and BECTON concur.

B. B. WALKER AND HRUB CORPORATION (FORMERLY HARRELSON RUBBER COMPANY) v. LIBERTY MUTUAL INSURANCE COMPANY

No. 8618SC760

(Filed 3 March 1987)

Appeal and Error § 6.9— order compelling discovery—no right of appeal

An order compelling discovery which is not enforced by sanctions is not a final judgment, does not affect a substantial right, and is not immediately appealable.

APPEAL by defendant from *Wood, Judge*. Order entered 16 May 1986 in Superior Court, GUILFORD County. Heard in the Court of Appeals 17 December 1986.

Hutchins, Tyndall, Doughton & Moore, by Richard Tyndall, H. Lee Davis, Jr., and Thomas G. Taylor for defendant-appellant.

Smith Helms Mulliss & Moore, by Jack W. Floyd, James A. Medford and Ramona J. Cunningham for plaintiff-appellees.

GREENE, Judge.

Defendant, Liberty Mutual Insurance Co. (hereinafter Liberty Mutual), appeals from an interlocutory order directing it to comply with plaintiff's motion to compel production of certain documents.

Plaintiff HRUB Corporation uses a rubber-based cement in its business of manufacturing tread rubber for use in retreading automobile tires. A number of tires failed as a result of HRUB's use of defective cement purchased from Midwest Rubber Manufacturing Co. (hereinafter Midwest) and The General Tire and Rubber Co. (hereinafter General Tire). Consequently, HRUB was forced to defend or settle numerous claims for product liability. Liberty Mutual insured HRUB under a comprehensive general liability policy and an umbrella excess liability policy. HRUB alleges in its complaint that Liberty Mutual paid $571,036.20 over a period of time to HRUB to reimburse it for payments to third party claimants under the terms of the policies. HRUB alleges the losses it suffered by reason of the third party claims are in excess of $1,856,056.58.

On 10 February 1981 HRUB sued Midwest and General Tire for damages arising from the defective cement. In July 1983 HRUB filed this action against Liberty Mutual, seeking further reimbursement under its insurance policies. In its complaint, HRUB admitted it had already received partial reimbursement but also requested the court declare Liberty Mutual liable for all future judgments against HRUB arising from the defective cement.

HRUB recovered $1,200,000.00 from Midwest and General Tire. Liberty Mutual filed an amended answer and counterclaim in this action alleging it was entitled to a subrogation interest in the recovery HRUB received against Midwest and General Tire. Liberty Mutual alleges HRUB agreed in a letter dated 8 March 1982 to protect the subrogation interest of Liberty Mutual.

It is important to an understanding of this appeal to note that Liberty Mutual was the insurer of General Tire as well as HRUB's insurer at the time HRUB sued General Tire and Midwest. Liberty Mutual's Raleigh office handled General Tire's defense. Its Greensboro office handled all matters pertaining to

HRUB's policies—both the claims made against HRUB for the defective cement and the defense of the present action.

HRUB denies Liberty Mutual's counterclaim for subrogation and also asserts the defense of estoppel. It contends Liberty Mutual should be estopped because Liberty Mutual did not request subrogation until after the prior suit was settled. HRUB contends documents in the Greensboro file were improperly made available to the Raleigh office during the defense of the prior suit against General Tire. HRUB also contends General Tire's general liability policy with Liberty Mutual is identical to its policy and contends discovery of the Raleigh file containing the policy with General Tire is relevant to this case so that it might ascertain the effect Liberty Mutual has given to particular clauses of the policy in the past.

On 7 April 1986, HRUB filed a motion to compel discovery, requesting Liberty Mutual be ordered to produce both the Greensboro and the Raleigh files. Liberty Mutual objected on the grounds the files contained attorney-client communications and many of the documents were prepared in anticipation of litigation, thus entitled to qualified-immunity from discovery. N.C.R. Civ. P., Rule 26(b).

On 16 May 1986, the trial court granted HRUB's motion but allowed Liberty Mutual to excise portions of the documents "which refer to legal advice or correspondence between Liberty Mutual and its attorneys and the mental impressions of those working on the case." Liberty Mutual appeals from this order.

The issue before this Court is whether the order granting discovery presents an appealable issue.

Appeal may be had from either a final judgment or an interlocutory order which affects a substantial right. N.C. Gen. Stat. Sec. 1-277(a). An order compelling discovery is not a final judgment. Neither does it affect a substantial right. Consequently, it is not appealable. *Alexander v. United States*, 201 U.S. 117, 121 (1906); *Casey v. Grice*, 60 N.C. App. 273, 298 S.E. 2d 744 (1983) (defendant's appeal from an order directing discovery was premature).

However, when the order is enforced by sanctions pursuant to N.C.R. Civ. P., Rule 37(b), the order is appealable as a final

judgment. *See Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 294 S.E. 2d 386 (1982); *Alexander*, 201 U.S. at 121 (a right of review arises from a contempt order to enforce an order compelling discovery); *Willis v. Duke Power Co.*, 291 N.C. 19, 229 S.E. 2d 191 (1976) (both civil and criminal contempt orders are immediately appealable).

Orders denying discovery, of course, need no Rule 37 sanctions for enforcement. They are appealable if they affect a substantial right of the party requesting discovery. *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E. 2d 522 (1980); *Tennessee-Carolina Trans. Co. v. Strict Corp.*, 291 N.C. 618, 625, 231 S.E. 2d 597, 601 (1977) (order denying a deposition of an out-of-state witness did affect a substantial right); *Starmount Co. v. City of Greensboro*, 41 N.C. App. 591, 255 S.E. 2d 267, *disc. review denied*, 298 N.C. 300, 259 S.E. 2d 915 (1979) (trial court's denial of a motion to compel plaintiff to answer certain interrogatories did not affect a substantial right because the interrogatories were redundant).

While the appellate court has discretionary review over interlocutory appeals and may treat such an appeal as a petition for writ of certiorari and address the merits, *Industrotech Constructors v. Duke University*, 67 N.C. App. 741, 742-43, 314 S.E. 2d 272, 274 (1984), we decline to treat this appeal as a writ of certiorari.

Appeal dismissed.

Chief Judge HEDRICK and Judge JOHNSON concur.

DAVID H. WAGNER, ROYAL LANE APARTMENTS, LTD. AND URBAN HOUSING, INCORPORATED v. R, J & S ASSOCIATES, STUART M. FRIED AND R, J & S MANAGEMENT CORPORATION

No. 8621SC869

(Filed 3 March 1987)

Partnership § 1.1— amendment to limited partnership agreement—amendment not signed by all partners—invalidity

An amendment to a limited partnership agreement which removed plaintiff as a co-general partner was invalid where plaintiff was a "member" of the

limited partnership for purposes of N.C.G.S. § 59-25; the amendment was neither signed nor sworn to by plaintiff; and the amendment thus failed to comply with the N.C.G.S. § 59-25(b)(2) requirement that it be "signed and sworn to by all members. . . ."

APPEAL by plaintiffs from *Seay, Judge*. Judgment entered 13 March 1986 in FORSYTH County Superior Court. Heard in the Court of Appeals 14 January 1987.

On 14 October 1980 plaintiff David H. Wagner and defendant, R, J & S Associates and defendant Stuart Fried entered into a limited partnership agreement for the express purpose of developing, constructing, owning and operating an apartment project in Clinton, North Carolina. The partnership was to be operated under the name of Royal Lane Apartments, Ltd. (Royal). The original 14 October agreement designated Wagner as general partner and R, J & S as a special limited partner.

On 22 May 1984 R, J & S executed an amendment to the 14 October agreement. Pursuant to this amendment, R, J & S exercised its option under the terms of the 14 October agreement to become a co-general partner with Wagner. Subsequently, on 23 July 1984 R, J & S, Fried and other Royal partners with the exception of Wagner executed a second amendment to the 14 October agreement. This amendment removed Wagner as a co-general partner, leaving R, J & S Associates as the sole general partner. The amendment further provided that Wagner would remain in the partnership as a limited partner. Wagner did not sign or swear to either amendment.

Plaintiffs brought this action seeking declaratory relief that the 23 July amendment to the Royal partnership agreement was invalid, recovery of misappropriated funds, damages for breach of contract and unfair and deceptive trade practices and punitive damages. The trial court granted defendants' N.C. Gen. Stat. § 1A-1, Rule 56 motion for summary judgment as to all claims except plaintiffs' claim of alleged misappropriation of funds. Plaintiffs appealed.

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by Geraldine Sumter, for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by Joseph T. Carruthers, for defendant-appellees.

WELLS, Judge.

At the outset we note that plaintiffs' appeal from the court's order granting partial summary judgment may be premature. *See, e.g., Beam v. Morrow, Sec. of Human Resources*, 77 N.C. App. 800, 336 S.E. 2d 106 (1985), *disc. rev. denied*, 316 N.C. 192, 341 S.E. 2d 575 (1986). However, in the exercise of our discretion, we consider the appeal on its merits. *See Smith v. Watson*, 71 N.C. App. 351, 322 S.E. 2d 588 (1984), *disc. rev. denied*, 313 N.C. 509, 329 S.E. 2d 394 (1985).

The dispositive question for this appeal is whether the 23 July amendment to the Royal partnership agreement complies with the statutory requirements of N.C. Gen. Stat. § 59-25(a)(2) governing the amendment of limited partnership agreements. For the reasons set forth below, we hold that the 23 July amendment is invalid under G.S. § 59-25(a)(2).

G.S. § 59-25(a)(2) provides that "[t]he writing to amend a certificate shall . . . [b]e signed and sworn to by all members. . . ." G.S. § 59-25(c) further provides that "[a] person desiring the . . . amendment of a certificate, if any person designated in [G.S. § 59-25(b)(2)] as a person who must execute the writing refuses to do so, may petition the superior court to direct . . . [an] amendment thereof."

It is undisputed that, as co-general partner, Wagner was a "member" of Royal Lane Apartments, Ltd. for purposes of G.S. § 59-25 and that the 23 July amendment was neither signed nor sworn to by him. This amendment thus fails to comply with the G.S. § 59-25(b)(2) requirement that it "[b]e signed and sworn to by all members . . . ." Accordingly, it is invalid.

We note that, despite plaintiffs' contention to the contrary, Wagner's participation in the 22 May amendment was not necessary under G.S. § 59-25, since, under the express terms of original agreement to form the Royal partnership, Wagner, as general partner, gave R, J & S power of attorney "to make, execute, consent to, swear to, acknowledge, record and file any and all documents and amendments . . . of this Agreement as might be required in order to cause [R, J & S] to be admitted into the Partnership as a Co-General Partner. . . ."

Accordingly, the judgment is reversed, and the cause is remanded for entry of a judgment in favor of plaintiffs declaring the 23 July amendment invalid.

We note that defendants subsequently may attempt to execute a valid amendment removing Wagner as co-general partner by petitioning the superior court pursuant to G.S. § 59-25(c) in the event that Wagner refuses to sign and swear to such an amendment.

Plaintiffs contend that the court erred in allowing defendants to include in the record on appeal certain discovery materials. Given our disposition of plaintiffs' first argument, we do not reach this argument.

Plaintiffs do not challenge on appeal the court's granting of summary judgment dismissing plaintiffs' claims for breach of contract and unfair and deceptive trade practices. We thus do not consider whether the court properly entered summary judgment as to these claims but simply affirm that portion of the summary judgment order dismissing plaintiffs' claims for breach of contract and unfair and deceptive trade practices. We also affirm that portion of the trial court's order dismissing plaintiffs' claim for punitive damages without considering plaintiffs' argument regarding this claim since it is raised for the first time in plaintiffs' reply brief instead of their original brief as required by N.C.R. App. Proc. 28(a).

In summary, the court's order granting partial summary judgment is affirmed except for that portion of the order dismissing plaintiffs' claim for declaratory relief regarding the validity of the 23 July amendment to the Royal partnership agreement. That portion of the court's order dismissing this claim is reversed and remanded for entry of a judgment in favor of plaintiffs declaring the 23 July amendment invalid.

Affirmed in part, reversed in part, and remanded.

Judges EAGLES and GREENE concur.

In re Mickle

IN THE MATTER OF: LISA MICKLE, DOB 9/9/69

No. 8614DC911

(Filed 3 March 1987)

Parent and Child § 2.2— child whipped as punishment—temporary bruises on buttocks—no disfigurement—no abuse

Temporary bruisings of a sixteen year old's buttocks caused by whippings with a belt and a switch administered by her father as a means of discipline were not "disfigurement" under N.C.G.S. § 7A-517(1)a, despite opinion testimony from two doctors that the bruises, though temporary, were nevertheless disfiguring, and the petition alleging that the child was abused, neglected, and dependent was therefore properly dismissed.

APPEAL by petitioner Durham County Department of Social Services and Guardian *ad litem* from *Chaney, Judge*. Order entered 29 July 1986 in District Court, DURHAM County. Heard in the Court of Appeals 14 January 1987.

The Durham County Department of Social Services brought this action, alleging that Lisa Mickle, then 16 years old, was an abused, neglected and dependent juvenile within the meaning of G.S. 7A-517. The basis alleged for the petition is that on one occasion her father whipped her with a belt and on another with a switch, in each instance leaving temporary marks and bruises on her buttocks and thighs, and that such injuries would probably be repeated if the child remained with her parents. Following a hearing on the merits the District Court made findings of fact to the effect that: Her parents punished the child because she had repeatedly misbehaved and disobeyed their instructions in various ways, a recital of which here would serve no purpose. Based on the findings the court concluded that the child was not abused, neglected, and dependent as defined by G.S. 7A-517 and dismissed the petition.

John W. Woodson, Guardian ad litem, for appellants.

Richard B. Harper for respondent appellees Billy and Donna Mickle.

PHILLIPS, Judge.

An abused juvenile is variously defined in G.S. 7A-517; the definition that governs this case is contained in G.S. 7A-517(1)a as follows:

> (1) Abused Juveniles.—Any juvenile less than 18 years of age whose parent or other person responsible for his care:
>
> a. Inflicts or allows to be inflicted upon the juvenile a physical injury by other than accidental means which causes or creates a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ; . . .

In essence the appeal of the Department of Social Services and Guardian *ad litem* rests upon the contention that the trial court erred in finding as a fact that the whippings above described did not cause or create a substantial risk of any disfigurement or impairment of health or bodily function and in concluding as a matter of law that the temporary bruising of the child's buttocks was not a "disfigurement" under the statute. The basis for this contention is that two doctors testified without contradiction that though the bruises on the juvenile's buttocks and thighs were temporary and had no permanent effect upon her body or health that they were nevertheless "disfiguring" in their opinion. Sifted down, the appellants' position is that the court was obliged to accept the doctors' interpretation of the word "disfigurement" as used in G.S. 7A-517(1)a. This contention—reminiscent of the declaration of Humpty-Dumpty in *Through the Looking-Glass and What Alice Found There*, by Lewis Carroll, that

> "When I use a word, it means just what I choose it to mean—neither more nor less"

—is patently fallacious. Witnesses, even those who are medical experts, do not determine the meaning of words used in legislative enactments; courts do that, and the trial court correctly determined that a temporary bruising is not a "disfigurement" under G.S. 7A-517(1)a. By using the word "disfigurement" instead of words of transient import such as bruise, abrasion, contusion, discoloration, marks, or stripes in context with other words clearly indicating permanency—"death," "impairment of physical health," "loss or impairment of function of any bodily organ"—the General Assembly obviously intended to limit the application of this statute to injuries permanent in their effect. We know of no authority for the proposition that a bruise of temporary effect is a "disfigurement" within contemplation of either the criminal or civil law, and appellants cite none. On the other hand, the implica-

tion of permanency that attaches to the word "disfigurement" has been recognized by our Supreme Court in several different settings. *State v. Malpass*, 226 N.C. 403, 38 S.E. 2d 156 (1946); *Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 25 S.E. 2d 865 (1943).

The child having sustained no disfigurement within the contemplation of G.S. 7A-517(1)a, the petition had no legal basis and it was properly dismissed by the court.

Affirmed.

Judges BECTON and JOHNSON concur.

CHARLES J. TRAVIS v. KNOB CREEK, INC. AND ETHAN ALLEN, INC.

No. 8625SC404

(Filed 3 March 1987)

Master and Servant § 10.2— discharge of employee—release executed by employees as bar to action—jury question

In an action to recover for breach of an employment contract where defendants denied liability based in part on a release executed by plaintiff, the trial court did not err in submitting an issue to the jury as to whether the release served to bar plaintiff's recovery where the release was worded very broadly to include "all claims, demands, actions, causes of action, on account of, connected with, or growing out of any matter or thing whatsoever . . ."; the release was executed by plaintiff and other officers of Knob Creek, Inc. who were retained by Ethan Allen, Inc. in consideration for a favorable price for their Knob Creek stock; plaintiff signed the release within a month after signing the paper writing determined by the jury to be plaintiff's employment contract; and the question whether the release was intended by the parties to cover any "claims, demands, actions [or] causes of action . . . growing out of . . ." this employment contract was one for the jury.

APPEAL by plaintiff from *Ferrell, Judge*. Judgment entered 17 January 1986 in Superior Court, CATAWBA County. Heard in the Court of Appeals 18 September 1986.

Plaintiff was employed by defendant Knob Creek, Inc. from 1977 until the company was bought by defendant Ethan Allen, Inc. in 1979. During negotiations for sale of the company, the president of Knob Creek and plaintiff entered into discussions

about a long-term employment contract to ensure plaintiff's continued employment by Ethan Allen, Inc. after the sale. The two executed a sketchy, handwritten document calling for a ten-year term of employment at an annual salary of $40,000 with minimum annual increases of seven percent. The document was signed by both the president of Knob Creek and plaintiff.

Upon completion of the sale of Knob Creek to Ethan Allen, Inc., the upper-level managers of Knob Creek who had been retained by Ethan Allen, including plaintiff, were asked to execute releases in connection with the sale of their Knob Creek stock to Ethan Allen. This release read, in pertinent part, as follows:

> . . . [T]he said officer doth hereby release and forever discharge Knob Creek . . . from all claims, demands, actions, causes of action, on account of, connected with, or growing out of any matter or thing whatsoever . . . .

On 27 January 1984, plaintiff was discharged by Ethan Allen, Inc. He sued for breach of his employment contract. Defendants denied liability based, in part, on the release quoted above. The jury found that there had been, in fact, a breach of plaintiff's employment contract, but that the release barred his action. Plaintiff's motions to set aside the verdict and for a new trial were denied. He appeals.

Patrick, Harper and Dixon by Stephen M. Thomas and R. Allen Ingram, Jr., for plaintiff-appellant.

Whiteford S. Blakeney for defendants-appellees.

PARKER, Judge.

Plaintiff assigns as error the trial judge's submission of the following issue to the jury:

> 4. Did the release executed by the plaintiff in December 1979 serve to bar the plaintiff from recovery upon the contract of employment?

Plaintiff contends that, as a matter of law, a release executed in December of 1979 could not act to bar a claim which did not arise until plaintiff was discharged on 27 January 1984. We disagree.

Under North Carolina law, releases are contractual in nature and their interpretation is governed by the same rules as those governing interpretation of contracts. *Econo-Travel v. Taylor*, 45 N.C. App. 229, 262 S.E. 2d 869, *rev'd on other grounds*, 301 N.C. 200, 271 S.E. 2d 54 (1980). The scope and extent of the release should be governed by the intention of the parties, which is to be determined by reference to the language, subject matter and purpose of the release. *Id.* Where a contract does not clearly and unambiguously set out its scope, the parties' intentions become a question for the jury. *See Gore v. George J. Ball, Inc.*, 279 N.C. 192, 182 S.E. 2d 389 (1971). *See generally* 66 Am. Jur. 2d *Release* § 30 (1973).

In this case, the release signed by plaintiff was worded very broadly to include "all claims, demands, actions, causes of action, on account of, connected with, or growing out of any matter or thing whatsoever . . . ." The release was executed by plaintiff and the other officers of Knob Creek, Inc. who were retained by Ethan Allen, Inc. in consideration for a favorable price for their Knob Creek stock. Plaintiff signed the release within a month after signing the paper writing determined by the jury to be plaintiff's employment contract. The question whether the release was intended by the parties to cover any "claims, demands, actions [or] causes of action . . . growing out of . . ." this employment contract was one for the jury. The trial court did not err in submitting the issue of the release to the jury and instructing the jury thereon.

Plaintiff also contends that the trial court erred in denying his motion for a new trial on the issue of the release. A Rule 59 motion for a new trial is addressed to the sound discretion of the trial judge. *Hord v. Atkinson*, 68 N.C. App. 346, 315 S.E. 2d 339 (1984). A discretionary ruling granting or denying a new trial is reversed only where an abuse of discretion is clearly shown resulting in a substantial miscarriage of justice. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E. 2d 599 (1982). Here, plaintiff is unable to show any abuse of discretion where the trial court submitted the issue to the jury under proper instructions and entered judgment on the jury verdict. Nothing in the record would support a conclusion that the trial court in any way abused its discretion.

Finally, plaintiff contends that the trial court erred in entering judgment for defendants. An exception to the entry of judgment after a jury trial presents for review only the question of whether the judgment is regular in form and whether it is supported by the verdict. *See Green v. Maness*, 69 N.C. App. 403, 316 S.E. 2d 911 (1984). *See also* N.C. Rule App. Proc. 10(a). A review of the record reveals no error on the face of the judgment.

In light of our disposition of plaintiff's assignment of error, we need not address the cross-assignment of error brought forth by defendants.

No error.

Judges PHILLIPS and COZORT concur.

PINEWOOD MANOR MOBILE HOMES, INC. v. NORTH CAROLINA MANUFACTURED HOUSING BOARD

No. 8613SC662

(Filed 3 March 1987)

Administrative Law § 5— appeal from ruling of administrative board—proper county for filing petition

The trial court properly granted respondent's motion to dismiss the petition for review of two administrative rulings by respondent on the ground that the court lacked subject matter jurisdiction where N.C.G.S. § 150A-45 provided that the person seeking review must file a petition in the Superior Court of Wake County; that statute was rewritten and became N.C.G.S. § 150B-45, providing that a petition for review could be filed either in the Superior Court of Wake County or in the superior court of the county where the petitioner resided; N.C.G.S. § 150B-45 was not to affect contested cases commenced before 1 January 1986; both the complaints and the notices of hearing in this case were filed prior to 1 January 1986, and the case was therefore commenced prior to 1 January 1986; and the Superior Court of Columbus County was therefore without jurisdiction.

APPEAL by petitioner from *Clark, Judge*. Order entered 7 April 1986 in Superior Court, COLUMBUS County. Heard in the Court of Appeals 9 December 1986.

Pinewood Manor Mobile Homes, Inc. v. N.C. Manufactured Housing Bd.

Petitioner, Pinewood Manor Mobile Homes, Inc. (Pinewood), filed a petition for review in the Superior Court of Columbus County for review of two administrative rulings of the North Carolina Manufactured Housing Board (the Board). These rulings found Pinewood in violation of N.C.G.S. § 143-143.20 for misrepresenting the length of a mobile home that it sold and in violation of N.C.G.S. § 143-143.13(8) for failing to appear before the Board upon due notice of a hearing. The rulings were issued on 16 January 1986 and 5 March 1986, but both resulted from contested cases commenced prior to 1 January 1986.

The Board filed a motion to dismiss the petition for review pursuant to N.C.G.S. § 150A, on the ground that the court lacked subject matter jurisdiction. The trial court granted the Board's motion. From this decision, petitioner appeals.

Ralph G. Jorgensen, attorney for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Angeline M. Maletto, attorney for respondent appellee.

ORR, Judge.

Petitioner contends that the trial court erred in granting the Board's motion to dismiss pursuant to the provisions of N.C.G.S. § 150A. We do not agree.

N.C.G.S. § 150A-45 of the Administrative Procedure Act provides that "[i]n order to obtain judicial review of a final agency decision under this Chapter, the person seeking review must file a petition in the Superior Court of Wake County . . . ." N.C.G.S. § 150A-45 was rewritten and became N.C.G.S. § 150B-45 in 1985. N.C.G.S. § 150B-45 allows a person seeking review of an administrative decision to file a petition either "in the Superior Court of Wake County or in the superior court of the county where the petitioner resides." However, 1985 N.C. Sess. Laws ch. 746, § 19 provides that N.C.G.S. § 150B "shall not affect contested cases commenced before January 1, 1986."

Petitioner maintains that no contest existed prior to 1 January 1986 and therefore N.C.G.S. § 150B should apply. However, both the complaints and the notices of hearing were filed prior to 1 January 1986. While N.C.G.S. § 150A is silent as to the time of commencement of an action, under Rule 3 of the North

Carolina Rules of Civil Procedure, a case begins with the filing of a complaint and issuance of a notice of hearing to the affected parties. In *Ready Mix Concrete v. Sales Corp.*, 36 N.C. App. 778, 245 S.E. 2d 234 (1978), this Court stated that "[u]nder G.S. 1A-1, Rule 3, an action is commenced when a complaint is filed or when a summons is issued." 36 N.C. App. at 780, 245 S.E. 2d at 235. Therefore, by analogizing the Administrative Procedure Act to the North Carolina Rules of Civil Procedure, the case was commenced prior to 1 January 1986.

We find that N.C.G.S. § 150B has no application in this case, as the action was clearly commenced before 1 January 1986. The decision below should be affirmed.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 MARCH 1987

ARCHER v. TRI-CITY No. 8618SC566	Guilford (84CVS4174)	Reversed and remanded for entry of judgment consistent with this opinion
ARCHER CONSTRUCTION v. BRUMMER No. 8628DC872	Buncombe (85CVS1947)	Affirmed
BLISS v. CYRIL BATH No. 8620SC886	Union (85CVS761)	Appeal Dismissed
CHATHAM MOTORS v. PURVIS No. 8615DC934	Chatham (85CVD421)	Affirmed
HAMRICK v. PUTT-PUTT No. 8629SC231	Rutherford (83CVS372)	New Trial
HORTON v. RIVENBARK No. 8626SC479	Mecklenburg (85CVS10970)	Affirmed
HOUGH v. MARTIN No. 8620SC945	Union (84CVS0040)	No error
IN RE BRACEY No. 8614DC829	Durham (83J96)	Affirmed
IN RE SWANSON No. 8629DC749	Transylvania (86J4)	Affirmed
JONES v. HINTON No. 8615SC871	Chatham (85CVS338)	Appeal Dismissed
MATTER OF WILSON No. 869DC958	Person (86J14)	Affirmed
SHULAR v. HAMMONDS No. 8627SC901	Gaston (86CVS900)	Appeal Dismissed
SIMPSON v. CHARLOTTE PIPE No. 8626SC522	Mecklenburg (85CVS11959)	Affirmed
SMITH v. LYON No. 8614SC471	Durham (85CVS2009)	Affirmed
STATE v. AMANCHUKWA No. 861SC816	Pasquotank (86CRS1)	The appeal as to the misdemeanor count is dismissed; as to the felony conviction, we find no error

STATE v. BUSH No. 8627SC887	Cleveland (86CRS355) (86CRS357) (86CRS358) (86CRS359)	No error
STATE v. COLEY No. 8617SC820	Rockingham (85CRS8438)	Appeal Dismissed
STATE v. DANIELS No. 8626SC866	Mecklenburg (85CRS88681)	No error
STATE v. DEAN No. 8614SC597	Durham (85CRS21131)	Remanded for resentencing
STATE v. DULA No. 8621SC903	Forsyth (82CRS1609) (82CRS9710)	Affirmed
STATE v. HALE No. 8622SC993	Davidson (85CRS11330)	Affirmed
STATE v. HAWKINS No. 8621SC824	Forsyth (85CRS61122)	No error
STATE v. HILL No. 8629SC951	Rutherford (85CRS8447)	No error
STATE v. MILLER No. 8613SC730	Columbus (83CRS1582) (83CRS5918)	Affirmed
STATE v. REID No. 8626SC776	Mecklenburg (85CRS38543)	Appeal Dismissed
STATE v. SOUTHARD No. 8623SC835	Yadkin (84CRS4677) (84CRS4678)	Affirmed
STATE v. WILLIAMS No. 863SC876	Pitt (85CRS11571) (85CRS11572) (85CRS11573) (85CRS11574) (85CRS11575)	Appeal Dismissed
STATE v. WOOD No. 866SC811	Hertford (81CRS4005)	Remanded
WHITTINGTON v. WILKERSON No. 8618SC366	Guilford (83CVS4331)	No error
WITTE v. BROWN No. 8619SC456	Rowan (85CVS022)	Affirmed

STATE OF NORTH CAROLINA v. RUBY LAWLESS LAMB

No. 8611SC818

(Filed 17 March 1987)

1. **Criminal Law § 99.7— witness' admission of lying—court's admonition proper**

The trial court did not commit prejudicial error in admonishing a witness, out of the presence of the jury but in the presence of other witnesses, that she could be subject to perjury and contempt of court because of her testimony, since the trial judge made his remarks in a proper and non-threatening manner after the witness had admitted several times that she had lied.

2. **Criminal Law § 91— speedy trial—indictment dismissed—time properly excluded from computation**

In a case in which the district attorney has dismissed an indictment pursuant to N.C.G.S. § 15A-931 and then reinstated charges, N.C.G.S. § 15A-701(b)(5) specifically excludes from computation of the 120-day period of the Speedy Trial Act "any period of delay from the date the initial charge was dismissed to the date the time limit for trials under this section would have commenced to run as to the subsequent charge"; furthermore, the fact that the district attorney improperly took the dismissal "with leave," that the criminal investigation continued, and that defendant's bail bond was not discharged as it should have been did not prejudice defendant, since she was not required to appear or to render herself amenable to the orders and processes of the court at any time during the challenged time period.

3. **Constitutional Law § 50— speedy trial—failure to argue claim to trial judge**

There was no merit to defendant's contention that the trial judge erred in failing to rule on her claim that the State violated her constitutional right to a speedy trial, since defendant failed to present evidence on, or even to argue, her constitutional speedy trial claim to the trial judge.

4. **Criminal Law §§ 21, 148.1— denial of motion in limine to exclude evidence—reviewability on appeal**

The denial of defendant's motion *in limine* in a homicide case to exclude evidence implicating defendant in three earlier unrelated murders was reviewable even though defendant did not testify at the trial. A different result was not required by the decision of *Luce v. United States*, 469 U.S. 38 (1984), because (1) a non-constitutional decision of the U.S. Supreme Court cannot restrict how N.C. courts interpret and apply N.C. evidence law, and (2) this case is distinguishable from *Luce* since the evidence was not probative of defendant's character for truthfulness under N.C.G.S. 8C-1, Rule 608(b), and thus no weighing of probative value and prejudicial effect was necessary, and since the record indicates defendant's intention to testify had the motion *in limine* been allowed.

5. **Criminal Law § 34.7— defendant's involvement in other killings—inadmissibility to show motive—motion in limine improperly denied**

The trial judge in a homicide case abused his discretion in denying defendant's motion *in limine* to exclude evidence implicating defendant in three

earlier killings since such evidence was not admissible under N.C.G.S. 8C-1, Rule 404(b) to show motive, and the court's ruling effectively denied defendant her right to testify.

APPEAL by defendant from *Bowen, Wiley F., Judge.* Judgment entered 24 January 1986 in Superior Court, JOHNSTON County. Heard in the Court of Appeals 13 January 1987.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Laura E. Crumpler, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant appellant.

BECTON, Judge.

From a judgment imposing a fifteen-year sentence following her conviction of second degree murder, defendant appeals. On appeal, defendant contends that the trial court committed prejudicial error (1) in admonishing a witness, out of the presence of the jury but in the presence of other witnesses, that she could be subject to perjury and contempt of court because of her testimony; (2) in denying defendant's motion to dismiss on grounds that her statutory right to a speedy trial was violated; (3) in failing to rule on defendant's motion to dismiss on grounds that her constitutional right to a speedy trial was violated; (4) in denying defendant's motion *in limine* to exclude any evidence implicating defendant in other killings; and (5) in failing to give defendant's requested jury instructions and in giving improper and prejudicial instructions. Believing the trial court committed prejudicial error in denying defendant's motion *in limine*, we award defendant a new trial.

I

During the fall of 1983 defendant, Ruby Lawless Lamb, lived in Cowpens, South Carolina, with her three grandchildren. Her husband, David Lamb, worked on a construction job 200 miles away in Clayton, North Carolina, and Mr. and Mrs. Lamb saw each other on weekends. On Monday, 3 October 1983, David Lamb was found dead in his trailer at Clayton. A pistol was in his left hand, a gun cleaning rod was in his right hand, and a fatal bullet wound was in his chest. Preliminary investigation indicated that

the gun "could have been accidentally fired." The investigation continued however, and law enforcement officers interviewed family members and neighbors in Cowpens and in Clayton regarding what they saw or heard. The family members denied having knowledge of the circumstances surrounding David Lamb's death. On 7 April 1984, defendant was indicted for first degree murder of her husband, David Lamb. On 14 August 1984, the district attorney "enter[ed] a . . . dismissal [w]ith leave pending the completion of the investigation . . . ." Defendant was reindicted for the first degree murder of David Lamb on 22 July 1985.

In October 1985, two years after David Lamb's death, Albert Wesley Warlick, then aged sixteen, left the home of his grandmother, the defendant, and traveled to Bessemer City, North Carolina. There, on 14 October 1985, Albert told law enforcement officers that he was present when defendant killed David Lamb. Albert's statement, which was reduced to writing, was totally inconsistent with his prior October 1983 statement to law enforcement officers, totally inconsistent with Albert's later 12 November 1985 tape recorded statement to defendant's attorney, and it also varied slightly from Albert's trial testimony. Several of defendant's other relatives testified either for the State or the defendant, but their trial testimony was also inconsistent with prior statements they had given.

II

[1] Defendant first contends that her relatives would have testified consistently with their original statements—that they knew nothing about the circumstances surrounding David Lamb's death—had the trial court not improperly and unconstitutionally "stifled the free presentation of testimony by warning and threatening witness Gayles Faye Crooks, in the presence of witnesses James Stephen Moody and Sheila Jones, that she could be subject to perjury and contempt of court because of her testimony."

The applicable legal rules supporting defendant's contentions are familiar:

> (1) "[J]udicial warnings and admonitions to a witness . . . made in or out of the presence of the jury . . . with reference to perjury are not to be issued lightly or impulsively. Unless

given discriminately and in a careful manner they can upset the delicate balance of the scales which a judge must hold even-handedly. Potential error is inherent in such warnings, and in a criminal case, they create special hazards." *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E. 2d 631, 636 (1976);

(2) Conduct or warnings by a district attorney with reference to a witness's alleged perjured testimony can "likewise deprive defendant[s] of due process of law" and constitute reversible error. *State v. Mackey*, 58 N.C. App. 385, 388, 293 S.E. 2d 617, 619 (1982), *pet. for review denied*, 306 N.C. 748, 295 S.E. 2d 484; and

(3) Other witnesses present in the courtroom can be intimidated by improper warnings about perjury, whether given by the court or the district attorney, so as to stifle the full and free submission of evidence. *See State v. Rhodes*, 290 N.C. at 24, 224 S.E. 2d at 636.

We do not question the prudential value of these rules. The evil they are designed to prevent is obvious. For example, in *Rhodes*, the trial judge actually accused the witness of not telling the truth; in *Locklear*, the trial judge repeatedly admonished the witness for her failure to respond to questions and also accused the witness of not being truthful. In this case, however, we find nothing in the following colloquy suggesting that the trial judge's statements were accusatory and threatening, that the district attorney's admonitions were reversibly prejudicial, or that any action of the trial judge or district attorney caused witnesses Crooks, Moody, or Jones to violate their oaths to tell the truth:

A. Maybe I lied, maybe I was the one that lied.

Q. I didn't ask you that. I asked you didn't Ruby Lawless Lamb tell you that she shot David Lee Lamb and that Wesley Warlick was present at the time in his trailer in Clayton?

A. I lied.

Q. Did you tell, did you make that statement to Detective Eatman?

A. If I made it, I lied.

Q. Well, a moment ago you said she may have been drinking. Were you lieing [sic] then?

A. Yes.

Q. *So you have lied since you have been on the witness stand?* [Emphasis added.]

A. I lied on it all the way.

. . . .

Q. You do not deny making a statement to Detective Eatman that Ruby Lawless Lamb told you that she shot David Lee Lamb at his trailer and Wesley Warlick was present and she set it up to look like an accident—you admit telling Detective Eatman that, do you not?

A. I said it, but I lied.

Q. Well, why would you lie to Detective Eatman?

A. I'm just a liar.

. . . .

Q. I want you to think about this real carefully—you were sworn before you took the witness stand?

A. That's right.

Q. *And you are telling this court you have lied while you have been on the witness stand*—you understand the meaning of talking [sic] the oath, do you not? [Emphasis added.]

A. *Yes.* [Emphasis added.]

Q. And I am going to ask you again whether or not Ruby Lamb told you how she killed David Lee Lamb and if she didn't set it up to look like an accident?

A. No.

Q. Was that a lie?

A. That was a lie.

. . . .

Q. And since you have gotten on the stand you have changed your mind about testifying against your sister, haven't you?

A. I didn't want to testify to begin with.

Q. And you don't want to testify now?

A. That's right.

. . . .

Q. And now you don't want to tell the truth about it and you don't want to testify against her, is that true?

A. Would you testify against your sister?

COURT: Ma'am, that is not the question. The question is—you were subpoenaed to be here. You have taken an oath to tell the truth. You are under a duty to answer the lawyer's questions and I must respectfully inform you that if you refuse to answer the lawyer's question, I have no alternative except to hold you in contempt of court, and I must further inform you that if you intentionally lie on this stand, you are subjecting yourself to perjury. Do you understand that?

A. I understand.

MR. TWISDALE: Your Honor, that's all I have to ask at this time out of the presence of the jury.

. . . .

MR. TWISDALE: Your Honor, I would like to ask one other question out of the presence of the jury.

COURT: All right.

Q. I would like to ask you, Mrs. Crooks, if you understood the warning concerning contempt?

A. Yes, sir, I did.

Q. Well, now I would like to ask you at this time if you are willing to proceed to answer my questions under oath and tell the truth?

A. Yes, sir.

MR. TWISDALE: I am ready to proceed, Your Honor.

COURT: Bring the jury in, please.

After the witness Crooks had admitted several times that she had lied, the trial judge in a proper and non-threatening man-

ner, reminded the witness of the significance of the oath and of the consequences of perjury. Neither the district attorney's remarks nor the fact that witnesses Moody and Jones were in the courtroom elevates the colloquy into an accusatory, threatening and prejudicial exchange. This assignment is overruled.

III

[2] A. Defendant next contends that the trial court abused its discretion by denying her pretrial motion to dismiss the indictment because the State violated the Speedy Trial Act. The following chronology helps put their argument in focus.

14 March 1984	Arrest warrant issued
23 March 1984	Defendant waived extradition and submitted to arrest
2 April 1984	Original indictment
6 April 1984	State opposes, and defendant denied, appearance bond
10 April 1984	Defendant requests discovery
10 May 1984	Defendant released on $20,000 secured appearance bond
15 June 1984	State agrees to provide discovery
28 June 1984	Discovery order entered
14 August 1984	Discovery provided. Indictment dismissed, defendant having appeared in court prepared for trial 4 times between May and August 1984
22 July 1985	New indictment
15 October 1985	Defendant rearrested in North Carolina
17 October 1985	Defendant requests discovery
28 October 1985	Defendant files motion for discovery
31 October 1985	Defendant files speedy trial motions based on statutory and constitutional grounds
15 November 1985	Court denied motion to dismiss for failure to comply with speedy trial act. Defendant's constitutional claim not addressed.

15 November 1985	State's motion to continue until 2 December 1985 granted over defendant's objection.
5 December 1985	State's motion to continue until 20 January 1986 granted over defendant's objection.
16 January 1986	Defendant filed renewed motion to dismiss on statutory and constitutional speedy trial grounds
20 January 1986	Court denied renewed motion.
20 January 1986	Case called for trial 668 days after defendant was first arrested.

In its 15 November 1985 ruling on defendant's original "Motion to Dismiss Indictment for Failure to Comply with Speedy Trial Act," the trial court included ten days and excluded 590 days for the 609-day time period from the 2 April 1984 original indictment to the 2 December 1985 scheduled session of court. However, the sole basis for defendant's contention that her statutory speedy trial rights were violated is that the trial judge improperly excluded the 342-day time period between the dismissal of the first indictment on 14 August 1984 and the reindictment on 22 July 1985.

B. The North Carolina Speedy Trial Act, N.C. Gen. Stat. Sec. 15A-701, *et seq.* (1983), provides that a criminal defendant shall be brought to trial "[w]ithin 120 days from the date the defendant is arrested, served with criminal process, waives an indictment, or is indicted, whichever occurs last." G.S. Sec. 15A-701(a)(1). However, in a case in which the district attorney has dismissed an indictment "under the authority of G.S. 15A-931"[1] and then reinstated charges, the statute specifically excludes from com-

1. G.S. 15A-931 (1983) which provides for voluntary dismissal of charges by the State states:

(a) Except as provided in G.S. 20-138.4, the prosecutor may dismiss any charges stated in a criminal pleading by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.

(b) No statute of limitations is tolled by charges which have been dismissed pursuant to this section.

putation of the 120-day period "any period of delay from the date the initial charge was dismissed to the date the time limit for trials under this section would have commenced to run as to the subsequent charge." G.S. 15A-701(b)(5).

Defendant argues that the G.S. Sec. 15A-701(b)(5) exclusion is not applicable because (1) the 2 April 1984 indictment was not dismissed under the authority of G.S. Sec. 15A-931 since the notice of dismissal stated that the "prosecutor enters a dismissal . . . with leave"[2] and (2) the indictment remained pending after the dismissal with leave because (a) defendant remained on the $20,000 secured bail bond which she executed before the dismissal with leave and (b) law enforcement officials continued to investigate the case after the dismissal with leave.

Defendant relies in part on *Klopfer v. North Carolina*, 386 U.S. 213, 18 L.Ed. 2d 1 (1967) in which the Supreme Court declared the North Carolina *"nolle prosequi* with leave" procedure unconstitutional because it had the unlawful effect of "indefinitely postpon[ing] prosecution" and holding the defendant "subject to trial throughout [an] unlimited period" after an indictment had issued. 386 U.S. at 214, 216. Defendant also relies on *State v. Hearld*, 65 N.C. App. 692, 309 S.E. 2d 546 (1983), *cert. denied*, 310 N.C. 479, 312 S.E. 2d 887 (1984), in which this Court stated: "[u]nder the present system of voluntary dismissals, no indictment is left pending. G.S. 15A-931." 65 N.C. App. at 695, 309 S.E. 2d at 548.

Defendant's reliance on *Klopfer* is misplaced. The issue in *Klopfer* was whether the State could indefinitely postpone prosecution on an indictment. As the *Klopfer* Court explained, "[a] *nolle prosequi* discharged the defendant but not the indictment; the indictment remained alive, and the State could institute proceedings on that indictment at any time." In this case, the defendant was reindicted. The provisions of G.S. 15A-931 which allows a

2. The notice of dismissal read, in pertinent part, as follows:

/X/ DISMISSAL

The undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons:

/X/ Other (specify) With leave pending the completion of the investigation by the appropriate authorities.

prosecutor to take a voluntary dismissal "at any time" do not bar the initiation of subsequent charges, if jeopardy has not attached and if an applicable statute of limitations has not run. Commentary, G.S. 15A-931.

Similarly, *Hearld* allows no relief for defendant. Indeed, this Court's language in *Hearld*, that no indictment is left pending when the State takes a voluntary dismissal under 15A-931, supports the State's argument that the district attorney had no authority to take a dismissal with leave and that the " 'with leave' language added nothing to the notice of dismissal . . . and took nothing away." And although criminal investigations can always continue following a 15A-931 voluntary dismissal, we deem it important to express our disapproval of the insertion of the "with leave" language in 15A-931 notices of dismissal. No defendant whose indictment has been dismissed under G.S. Sec. 15A-931 should be made to feel that he or she is subject to prosecutorial control.

In this case, no criminal proceedings took place during the period from 14 August 1984 until the new indictment on 22 July 1985, and defendant was not subject to prosecutorial control. We therefore hold that the dismissal in this case was proper, and it terminated all proceedings against the defendant. By necessity, this holding means that defendant's bail bond should have been discharged. However, we find no prejudice to the defendant since defendant was not required to appear or to render herself amenable to the orders and processes of the court at any time during the challenged time period.

IV

[3] In addition to defendant's motion to dismiss based on the Speedy Trial Act, defendant also moved to dismiss the indictment because the State violated her constitutional right to a speedy trial. Defendant now contends that the trial judge erred in failing to rule on her constitutional claim. Normally, a trial judge's failure to rule on a speedy trial motion, and to support its ruling with appropriate factual findings and conclusions of law, entitles a defendant to a new trial, or at least a remand for a new hearing. *See State v. Rogers*, 49 N.C. App. 337, 341, 271 S.E. 2d 535, 539 (1980) (this Court suggested that trial judges should "detail for the record findings of fact and conclusions of law in support of

their rulings") and *State v. Smith*, 70 N.C. App. 293, 297-98, 319 S.E. 2d 647, 650 (1984) (new trial warranted if trial judge fails to make required findings). However, in the case *sub judice*, defendant failed to present evidence on, or even to argue, her constitutional speedy trial claim to the trial judge. Perhaps defendant concluded after losing on her Speedy Trial Act claim that the following four well-recognized factors, considered in determining one's constitutional claim to a speedy trial, did not weigh in her favor since she could not show an unreasonable delay or prejudice: (1) the length of the delay; (2) the reason for the delay; (3) any waiver of right by the defendant; and (4) any prejudice to the defendant. In any event, defendant never objected to or timely mentioned the trial judge's failure to rule on her motion. In fact, at the close of the hearing regarding defendant's statutory speedy trial claim, the trial judge asked if there was anything further, and defense counsel indicated on two separate occasions that nothing else need be decided. Under these circumstances, defendant has waived her right now to complain.

V

Defendant next contends that the trial judge erred in denying her motion *in limine*. During the State's investigation of David Lamb's death, several of defendant's relatives gave voluntary statements to the police in which they said defendant told them she took part in three earlier unrelated murders. These other murders were alleged to have occurred in 1958 and 1967.

Before trial, defendant moved to exclude any evidence concerning the alleged murders; however, the trial judge deferred his ruling. The district attorney did not elicit any of the evidence concerning the alleged murders from any witness during trial. Before defendant rested her case, she renewed her motion *in limine*. The trial judge denied the motion, saying he was "not going to put the muzzle on cross-examination." Defendant then chose not to testify.

Defendant argues that the trial judge's ruling to admit the evidence of other alleged killings was prejudicially erroneous and effectively denied her her right to testify. The State argues that the denial of defendant's motion is not reviewable on appeal and that, even if it were, the denial was proper.

[4] The State's argument that the denial of the defendant's motion *in limine* is not reviewable on appeal is based on its interpretation of the United States Supreme Court's holding in *Luce v. United States*, 469 U.S. 38, 83 L.Ed. 2d 443 (1984). We conclude (a) that *Luce* is not binding on this Court, (b) that *Luce* is distinguishable from the case at bar, and (c) that the trial judge committed reversible error in denying the motion *in limine* in this case.

A. In *Luce* the Supreme Court held that the denial of a motion *in limine* which was based on the trial judge's decision to admit evidence under Rule 609 of the Federal Rules of Evidence[3] was not reviewable on appeal because the defendant did not testify. The Court reasoned that

> [a] reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context. This is particularly true under Rule 609(a)(1) which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify.

Id. at 41, 83 L.Ed. 2d at 447.

The United States Supreme Court's non-constitutional *Luce* decision cannot bind or restrict how North Carolina courts interpret and apply North Carolina evidence law. This Court is free to disagree with the holding in *Luce* as other state courts have done. *See State v. McClure*, 298 Or. 336, 692 P. 2d 579, 584 n.4 (1984) (en banc). *United States v. Kiendra*, 663 F. 2d 349, 352 (1st Cir. 1981) and *United States v. Lipscomb*, 702 F. 2d 1049, 1069 (D.C. Cir. 1983) both list cogent policy reasons in favor of appellate review:

> First, when a defendant seeks an advance ruling on admission of a prior conviction, it is reasonable to presume that the ruling will be an important factor in his decision whether to testify. *See Kiendra*, 663 F. 2d at 352. Second, advance rul-

3. The North Carolina Rules of Evidence mirror almost completely the Federal Rules of Evidence. Thus rulings on the Federal Rules of Evidence are often helpful.

> ings on admissibility are preferable because "[c]ounsel need to know what the ruling will be on this important matter so that they can make appropriate tactical decisions." 3 J. Weinstein & M. Berger, *Weinstein's Evidence* P.609[05], at 609-82 (1981), *quoted in Jackson*, 627 F. 2d at 1209. To limit review of advance rulings would undercut the value of such rulings. *See Kiendra*, 663 F. 2d at 352-53. Third, and most important, the [contrary] rule will probably serve merely as a trap for unwary defendants or defense counsel. (Footnote omitted.)

709 F. 2d 1049, 1069.

The requirement that a defendant must testify to preserve reviewability of rulings renders motions *in limine* ineffective. Our decision not to follow *Luce* creates no boon for defendants; it creates no legally recognized disadvantage for the district attorney. If a district attorney has a good faith basis to question a particular defendant's willingness to testify or the potential impact of defendant's testimony, the district attorney can apprise the trial judge of its doubts by filing a response to the motion *in limine*. *See United States v. Kiendra*, 663 F. 2d at 352. But when, as in the case *sub judice*, the district attorney does not challenge the defendant's motives[4] and the trial judge denies defendant's motion *in limine*, we will review the ruling.

B. The case *sub judice* is distinguishable from *Luce* because (1) our review of the challenged evidence does not require the balancing of probative value against prejudicial effect; and (2) the record indicates defendant's intention to testify were it not for the ruling. While recognizing the concerns expressed by the Supreme Court in *Luce*, we find these two distinctions valid and important, and we also find strong policy favoring reviewability in this case.

1. The United States Supreme Court's paramount concern in *Luce* was that review would be impracticable without a fully developed record, including the defendant's testimony, because the reviewing court could not determine whether the probative value of the evidence outweighed its prejudicial effect. In the case

4. The district attorney stated "throughout the trial . . . I had been led to believe that the defendant was going to testify."

sub judice, defendant maintains the evidence of the other killings was inadmissible, and that Rule 608(b) of the North Carolina Rules of Evidence provides no solace to the State. That Rule provides in pertinent part that "specific instances of the conduct of a witness, for the purposes of attacking or supporting his credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They *may*, however, in the discretion of the court, *if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness. . . .*" (Emphasis added.) The specific instances of conduct regarding defendant's alleged participation in three unrelated murders were not probative of defendant's character for truthfulness. We agree with defendant that the evidence was not admissible under Rule 608(b).

In *State v. Morgan*, 315 N.C. 626, 340 S.E. 2d 84 (1986), our Supreme Court noted that "Rule 608(b) represents a drastic departure from the former traditional North Carolina practice which allowed . . . cross-examin[ation] for impeachment purposes regarding *any* prior act of misconduct. . . ." 315 N.C. at 634, 340 S.E. 2d at 89 (emphasis in original), and that "evidence routinely disapproved as irrelevant to the question of a witness' [truthfulness] includes specific instances of conduct relating to . . . *violence against other persons.*" 315 N.C. at 635, 340 S.E. 2d at 90, quoting 3 D. Louisell & C. Mueller, Federal Evidence Sec. 305 (1979) (emphasis in original). The *Morgan* Court then held that the cross-examination in that case about the defendant's conduct, in twice assaulting people by pointing a gun at them, "was improper under Rule 608(b) because extrinsic instances of assaultive behavior, standing alone, are not in any way probative." Considering *Morgan* and the clear language of Rule 608(b) the evidence of defendant's alleged involvement in other murders was manifestly inadmissible.

Seeking to avoid the compelling force of *Morgan* and the distinguishing fact that *Luce* was based on Rule 609(b), not Rule 608(a) of the Federal Rules of Evidence, the State during oral argument contended that the evidence of the other alleged murders was admissible under Rule 404(b) to prove motive. This, the State maintained, makes the *Luce* decision an appropriate guidepost, because once the evidence is deemed admissible to prove

motive, the court must then decide whether its probative value outweighs its prejudicial effect. That was the same inquiry under Rule 609(b) in *Luce*. If the evidence concerning the other murders was admissible to show motive, then the State would be correct, and our decision would turn solely on whether we adopt *Luce* in this case. However, if the critical inquiry is instead whether the evidence is relevant, then this case is, as defendant argues, clearly distinguishable from *Luce*. We find, as more fully set forth in subsection C *infra*, that the challenged evidence was inadmissible under Rule 404(b) and that this case is distinguishable from *Luce* since no weighing of probative value and prejudicial effect was necessary.

2. Additionally, the record shows that defendant renewed her motion *in limine* just prior to closing her case. Her intent to testify, were it not for the ruling, seems clear.

Strong policy favors reviewability in such a case. The purpose in allowing a motion *in limine* is to permit a witness to testify without threat of use of inadmissible evidence. If the threatened use of inadmissible evidence can prevent the defendant from testifying altogether and also deny her the opportunity to appeal an erroneous ruling on the admissibility of the evidence, the State would have multiple illegitimate opportunities to silence defendants, and the very purpose of the motion *in limine* would be lost.

[5] C. The trial court committed prejudicial error in denying defendant's motion *in limine* because the evidence regarding defendant's alleged participation in other killings was not admissible to prove motive. Rule 404(b) provides that "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." (Emphasis added.) These "other purposes" are not catchalls, but rather operate in specific factual contexts in which there is a special relationship between the past acts and the one for which the person is being tried. For example, other bad acts may be used to prove motive in a case in which the State alleged that defendant's motive for committing the crime for which he was tried was to

silence the victim because the victim knew about defendant's prior bad acts. Thus the evidence of defendant's prior bad acts would be admissible to show defendant's motive for committing the more recent crime. If we interpreted Rule 404(b) as the State suggests, use of other bad acts to show motive would be tantamount to using character evidence to prove propensity which is the very evil the Rule proscribes. There is not the slightest hint that the three allegedly professed killings provided a motive for killing David Lamb. Nor is there the slightest likelihood that the evidence was admissible for any of the other purposes listed in Rule 404(b).

The erroneous denial of defendant's motion *in limine* was prejudicial because much of the State's evidence hinged on the credibility of the various witnesses, many of whom had changed their accounts of the events before and after David Lamb's death. Almost all of the witnesses were related to the defendant and some of their testimony was based on conversations with the defendant. Certainly the defendant was prejudiced by being wrongfully discouraged from giving her side of the story.

We hold that the trial court erred in denying defendant's motion *in limine* to prevent the district attorney from using the inadmissible evidence to impeach defendant. Because of this disposition it is not necessary to discuss defendant's remaining assignment of error regarding jury instructions.

VI

In summary we hold that the trial judge did not err in admonishing a witness out of the presence of the jury, but in the presence of other witnesses, that she could be subject to perjury and contempt of court because of her testimony, nor in denying defendant's motion to dismiss on grounds that her statutory and constitutional rights to a speedy trial were violated. However, we hold that the trial judge abused his discretion in denying defendant's motion *in limine* to exclude evidence implicating defendant in other killings. We therefore award defendant a new trial.

New trial.

Judges JOHNSON and PHILLIPS concur.

In re Will of Hester

IN THE MATTER OF THE WILL OF HUGH B. HESTER, DECEASED

No. 8628SC531

(Filed 17 March 1987)

1. **Wills § 24— three purported wills—submission of issues as to one will only improper**

The trial court abused its discretion by failing simultaneously to present issues to the jury on all three scripts purporting to be the decedent's will as indicated by the pleadings and the evidence, and the court's attempt to conduct a "bifurcated" trial in which one script was rejected as decedent's will during one "phase" of the trial before two other scripts were considered in the second "phase" constituted fatal error.

2. **Wills § 9.2— court's failure to enter final judgment in caveat proceeding—subsequent probate of another will—improper collateral attack**

Because the trial judge refrained from entering a final judgment regarding decedent's purported 1983 will, no further entry upon the page of the will book setting aside the 1983 will could have been made, and, until such entry was made setting aside the probated 1983 will, it conclusively stood as the last will of decedent so that the subsequent probate of decedent's purported 1982 will by the clerk of superior court, as ordered by the court subsequent to the jury's rejection of the 1983 will, constituted an impermissible collateral attack; moreover, the superior court retained jurisdiction of decedent's estate, as the court stated in its order, and the clerk of superior court accordingly was without jurisdiction to receive other purported wills into probate.

3. **Wills § 16— caveat proceeding—failure to give notice to decedent's relatives—dismissal not required**

The trial court did not err by failing to dismiss the caveat proceeding due to caveators' failure to give notice of the caveat proceeding to several first cousins of deceased as required by N.C.G.S. § 31-33, since caveators had no knowledge of other relatives of deceased until after trial had begun, and the heirs at law of a deceased testator who have no knowledge of a caveat proceeding and who are not cited under N.C.G.S. § 31-33 are not estopped to file a second caveat nor are they bound by the former judgment sustaining the validity of the script.

4. **Wills § 26— caveat proceeding—caveators' interest in estate**

There was no merit to propounders' contention that the trial court erred by failing to dismiss the caveat proceeding at the close of the first phase of the trial on the ground that caveators did not prove that they were persons who were interested in the estate, and that, though caveators as beneficiaries under a prior will did have standing to caveat, they were required, in the same proceeding, to prove their alleged interest.

5. **Wills § 22.5— caveat proceeding—statements by testator—testimony of named executor not excluded by dead man's statute**

A named executor is not a person interested in the event of the caveat proceeding within the meaning of the dead man's statute so as to require ex-

clusion of his testimony concerning communications with the testator. N.C.G.S. 8C-1, Rule 601(c).

Judge EAGLES dissenting.

APPEAL by propounders from judgment entered 21 November 1985 by *Lewis, Judge*, in Superior Court, BUNCOMBE County. Appeal by caveators Meredith College from order for attorneys' fees entered 13 March 1986 by *Lewis, Judge*, in Superior Court, BUNCOMBE County. Heard in the Court of Appeals 28 October 1986.

Retired Brigadier General Hugh B. Hester (General Hester) died in Buncombe County on 25 November 1983. General Hester, a widower, was eighty-eight years old at the time of his death. His wife Polly died in 1981. He had no children or direct issue. His closest blood relatives were a niece, Katherine Hester Watson, and several unidentified relatives, all having the same degree of kinship. General Hester's death certificate listed the causes of death as prostate cancer, senile dementia, and gastrointestinal bleeding. At the end of 1982, General Hester's estate was valued at approximately $880,000.00 and, at the time of the trial, exceeded one million dollars. On 28 November 1983 a writing dated 18 November 1983 (the 1983 will) was submitted for probate in common form before the Clerk of Superior Court, Buncombe County. The 1983 will named Colonel Ted P. Watson, the husband of Katherine Watson, as executor and left the major portion of General Hester's estate to his niece, Katherine Watson, and the rest to members of her family. On 14 June 1984 a caveat to the 1983 will was filed by Mars Hill College (Mars Hill), Meredith College (Meredith), the University of North Carolina at Greensboro (UNC-G), and Ms. Eleanor Pittenger, one of the surviving sisters of General Hester's deceased wife Polly. The caveat alleged that the caveators were beneficiaries, along with First Baptist Church of Asheville, under a writing dated 18 June 1982 (the 1982 will). The caveators challenged the 1983 will on three grounds: (1) improper execution, (2) lack of mental capacity of the testator and (3) undue influence by General Hester's niece Katherine Watson or her husband Colonel Watson upon General Hester. The 1982 will named Arthur Price, General Hester's accountant since 1979 who also prepared the 1982 will, as executor. General Hester gave Arthur Price his power of attorney in a separate instrument dated 1

October 1981. Arthur Price served on the Board of Deacons at First Baptist Church of Asheville, a named beneficiary under the 1982 will.

On 24 September 1985 this matter went to trial. The 1983 will was produced in court, and the 1982 will was offered into evidence. During the caveat proceeding a third paper writing dated 8 June 1981 (the 1981 will) was produced. The 1981 will provided for equal division of the estate among Katherine Watson, his niece, Eleanor Pittenger, his deceased wife's sister, and five other relatives. Arthur Price was named as executor.

After the court received evidence from both caveators and propounders as well as evidence regarding the 1981 will, the court submitted issues to the jury regarding the validity of the 1983 will only. Propounders did request that all three writings be submitted to the jury, but the court denied their motion. On 1 October 1985 the jury returned its verdict, declaring the 1983 will invalid. No judgment was entered. The court ordered the jury to reconvene on 18 November 1985 and ordered that "[i]nterested persons shall offer any purported will or wills to the Superior Court for probate during the week of 7 October 1985; and any caveat shall be filed within ten (10) days after the will is offered for probate before the Superior Court." The caveators of the 1983 will submitted the 1982 will to the Clerk of Superior Court for probate; the propounders of the 1983 will filed a caveat to the 1982 will. On 18 November 1985 the jury reconvened and the trial continued before the same jury. The court received evidence relevant to both the 1982 and 1981 wills and submitted issues to the jury regarding the 1981 and the 1982 wills. On 20 November 1985 the jury returned a verdict declaring the 1982 will valid. Judgment was entered accordingly 21 November 1985. Propounders of the 1983 will appealed. On 13 March 1986 the court ordered attorneys' fees of all parties to the court proceedings to be paid from the estate of General Hester pursuant to G.S. 6-21(2). Caveator Meredith appealed regarding that part of the attorney fee award which orders the payment of propounders' attorneys' fees.

Roberts Stevens & Cogburn, P.A., by Landon Roberts and Glenn S. Gentry, for propounder appellants.

Boyce, Mitchell, Burns & Smith, P.A., by Susan K. Burkhart, for caveator appellee Meredith College.

Patla, Straus, Robinson & Moore, P.A., by Richard S. Daniels, for caveator appellees Mars Hill College and Eleanor Pittenger.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles J. Murray, for caveator appellee University of North Carolina at Greensboro.

JOHNSON, Judge.

The threshold issue in this case is whether the bifurcated proceeding, whereby the jury decided the validity of the 1983 will separately from its determination of the validity of the 1981 and 1982 wills, is in fact two proceedings and therefore void and erroneous under the authority of *In re Will of Charles*, 263 N.C. 411, 139 S.E. 2d 588 (1965).

Propounders also raise two related issues, to wit: whether the court erred in failing to sign a written judgment after the 1 October 1985 verdict determined the invalidity of the 1983 will; and whether the court erred by ordering the filing of propounder's caveat to the 1982 will within ten days of its being offered for probate. As all three issues are procedural issues regarding the probate of a will and a caveat proceeding, we will address them together.

The word "probate" when used in reference to a document purporting to be a will means the judicial process by which a court of competent jurisdiction in a duly constituted proceeding tests the validity of the instrument before the court and ascertains whether it is the last will of the deceased. *In re Will of Lamb*, 303 N.C. 452, 459, 279 S.E. 2d 781, 786 (1981). The Clerk of the Superior Court has exclusive and original jurisdiction for the probate of wills. *Morris v. Morris*, 245 N.C. 30, 32, 95 S.E. 2d 110, 112 (1956). *See* G.S. 31-12. The purpose of probate is to establish that the instrument in question was executed in a manner prescribed by law and that it constitutes the last will of the deceased. North Carolina recognizes two methods of probating a will. The will may be probated in common form or solemn form. 1 N. Wiggins, *Wills and Administration of Estate in N.C.* sec. 118 (2d ed. 1983). The probate of a will in solemn form is in the nature of a decree pronounced in open court where all interested parties

have been duly cited and is irrevocable. *In re Will of Ellis*, 235 N.C. 27, 32, 69 S.E. 2d 25, 28 (1952). Because the result cannot be attacked by subsequent caveat, probate in solemn form calls for the observance of a more complex procedure than is required for probate in common form. *See* 1 N. Wiggins, *supra*, sec. 118, at 200. The probate of a will in common form is an *ex parte* proceeding, and no one interested is before the clerk except the propounders and witnesses. *In re Will of Chisman*, 175 N.C. 420, 421, 95 S.E. 769, 770 (1918). "It is settled law that where the clerk of the superior court probates a will in common form and records it properly, the record and probate are conclusive as to the validity of the will until vacated on appeal or declared void by a competent tribunal." *In re Will of Spinks*, 7 N.C. App. 417, 423, 173 S.E. 2d 1, 5, *disc. rev. denied*, 276 N.C. 575, --- S.E. 2d --- (1970). Hence, a will probated in common form still stands as the last will and testament until declared void in a direct proceeding in the nature of a caveat. *In re Will of Burton*, 267 N.C. 729, 733, 148 S.E. 2d 862, 865 (1966). After recordation of probate in common form, the clerk is limited to the correction of only an error in expression rather than an error in judgment. *In re Will of Hine*, 228 N.C. 405, 410, 45 S.E. 2d 526, 530 (1947). The power of the clerk does not extend to setting aside the probate of a will in common form upon grounds which should be raised by caveat. *Id.*

The right to contest a will directly by caveat is statutory and in derogation of the common law; hence, the statutory procedures must be strictly construed. *In re Will of Winborne*, 231 N.C. 463, 466, 57 S.E. 2d 795, 799 (1950). When a caveat is filed the clerk of superior court transfers the proceeding to the civil issue docket of the superior court to the end that the issue *devisavit vel non* may be tried by a jury. *Brissie v. Craig*, 232 N.C. 701, 704, 62 S.E. 2d 330, 333 (1950). *See* G.S. 31-33. The caveat suspends proceedings under the probated will upon the giving of the bond. G.S. 31-36. When a caveat is filed with the clerk of superior court, it is the statutory duty of the clerk to make an entry upon the page of the will book where such last will is recorded, evidencing that such caveat has been filed. G.S. 31-37. When such caveat results in final judgment with respect to such will, the clerk of superior court shall make a further entry upon the page of the will book "to the effect that final judgment has been entered, either sustaining or setting aside such will." G.S. 31-37.

In a majority of jurisdictions, an after-discovered will can be admitted to probate, although a previously probated will has not been set aside. 1 N. Wiggins, *supra*, sec. 113, at 190. North Carolina follows the minority rule whereby the first will must be set aside before the second will can be admitted to probate. *See id.* The attempt to probate the after-discovered will is considered to be a collateral attack upon the probate of the first will. *Id.* A will cannot be attacked in a collateral manner. *Mills v. Mills*, 195 N.C. 595, 143 S.E. 130 (1928). Where a paper writing has been duly probated in common form, the offer of proof of a will alleged to have been subsequently executed by the testator is an impermissible collateral attack, and the clerk is without jurisdiction to set aside the probate upon such proof. *In re Will of Puett*, 229 N.C. 8, 47 S.E. 2d 488 (1948).

Here, propounders probated the 1983 will in common form. Caveators filed a caveat wherein they alleged that the 1983 will "is not the Last Will and Testament of the deceased [Hugh B. Hester]" but that the 1982 will "is the duly executed and proper Last Will and Testament of Hugh B. Hester, deceased." On 14 June 1984, after caveators gave a $200 cash bond, the Clerk of Superior Court of Buncombe County entered an order transferring the cause to the Superior Court Division for a jury trial. The caveat proceeding came on for hearing before a jury on 24 September 1985. Although the majority of the evidence focused on the execution of the 1983 will, the court received evidence concerning all three wills at issue. All three wills were introduced as exhibits. Both propounders and caveators rested their cases. The court gave the jury four issues to decide. Each issue concerned only the 1983 will, despite requests by propounders for issues on all three wills. After the jury decided that the 1983 will was invalid, the court stated the following:

> THE COURT: Members of the jury, in this case the law seems to require that in these types of proceedings where there may be more than one will applicable that all the wills should be considered and probated in the same case.
>
> The procedure, then, as suggested in some of the cases, would mean that upon the rejection of one of the wills the jury has to consider the other will or wills to the end that the estate can be properly processed without undue delay.

I concluded that to do that in this particular case would have led to some confusion, because the Propounders of this will, the latest will, would become the Caveators in the will of 1982, and the Caveators of the will in '83 become the Propounders of the will of '82.

So now that we have your verdict in which you have rejected the 1983 will we are going to need your help in considering the other will or wills, applying some of the same facts and most of the same law. In other words, I have, in effect, bifurcated or divided the trial into two stages.

These litigants will perhaps need some additional work to do before we consider the other two wills, and I am, therefore, going to adjourn this proceeding as not completed to final judgment and hope to convene again on the 18th of November of 1985 to complete the work necessary to properly administer the estate of Hugh B. Hester. So what I am saying is that I'm asking you to bear with us and return on November the 18th for a conclusion of this trial.

On 18 November 1985, court reconvened before the same jury. The court received testimony regarding only the 1982 and 1981 wills. Issues regarding these wills went to the jury, which returned a verdict that the 1982 will was Hester's true and final testament.

[1] On the one hand, the conduct of the trial rests in the sound discretion of the trial court. *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 508, 320 S.E. 2d 892, 899 (1984), *disc. rev. denied*, 312 N.C. 797, 325 S.E. 2d 631 (1985). Absent an abuse of discretion, the result will not be disturbed on appeal. *Id.* The order of proof is likewise within the discretion of the trial court. *In re Westover Canal*, 230 N.C. 91, 95, 52 S.E. 2d 225, 228 (1949). On the other hand, it has been held that any script purporting to be the decedent's will should be offered and its validity determined in *the* caveat proceeding. *In re Will of Charles, supra*, at 416, 139 S.E. 2d at 592 (emphasis added). The Court in *Charles* held that it would be error to exclude consideration of a writing purported to be the will by those attempting to intervene in the caveat, so long as objection was made. *Id.* Here propounders timely made objection to only the 1983 will being considered on 1 October 1985. It is

immaterial whether those appearing and objecting are propounders rather than intervenors. *See In re Will of Puett, supra,* at 11, 47 S.E. 2d at 491. We hold that in light of *In re Will of Charles, supra,* the court abused its discretion by failing to simultaneously present issues to the jury on all scripts purporting to be the decedent's will as indicated by the pleadings and the evidence. To characterize the two "phases" of the "bifurcated" trial as one proceeding is to engage in fiction. It is not possible to determine the likelihood that the jury would have reached a different result had it had all purported wills together at one sitting. The error is fatal.

This same error perpetuated further procedural errors that twist logic and law. Prior to the second "phase" of the trial the court refused to sign a proffered judgment holding the 1983 will invalid. Instead the court issued an order requiring caveators to offer their will for probate and requiring propounders to file a caveat to the 1982 will within ten days thereof. Propounders assigned error to both these judicial actions. At the opening of the second phase of the trial the court informed the jury as follows:

> So now with the parties reversed, the Propounders now are of the 1982 will. . . .
>
> . . . .
>
> The Caveators now become the Propounders in the first proceeding. . . . Otherwise the parties are the same.

[2] In a contrived effort to satisfy the *Charles* rule the court refrained from entering a final judgment regarding the 1983 will. The last entry made by the Clerk of Court of Buncombe County regarding the probated 1983 will noted the filing of a caveat to the 1983 will in compliance with G.S. 31-37. Because final judgment had not been entered, no further entry upon the page of the will book setting aside the 1983 will could have been made. G.S. 31-37. Until such entry was made setting aside the probated 1983 will, it conclusively stood as the last will of Hugh B. Hester. Hence, the subsequent probate of the 1982 will by the Clerk of Superior Court, as ordered by the court on 1 October 1985, constituted an impermissible collateral attack. Moreover, Superior Court retained jurisdiction of General Hester's estate, as the

court stated in its 1 October 1985 order. Accordingly, the Clerk of Superior Court was without jurisdiction to receive other purported wills into probate. For all the foregoing reasons we vacate the judgment and remand for a new trial.

We will address those remaining Assignments of Error, which if left unresolved, could lead to error at the new trial.

[3] In the next Assignment of Error, propounders contend that the court erred by failing to dismiss the caveat proceeding due to caveators' noncompliance with G.S. 31-33. G.S. 31-33 provides, in pertinent part, that after filing a caveat and giving bond, the "caveator shall cause notice of the caveat proceeding to be given to all devisees, legatees, or other persons in interest. . . ." G.S. 31-33. Specifically, propounders contend that the caveators failed to give notice to "several first cousins who were also related to General Hester at the same level of consanguinity" as Hester's niece Katherine Watson, a major beneficiary under the 1983 will, and that these cousins are interested persons to whom service is mandatory under G.S. 31-33. We disagree.

According to the evidence, caveators had no knowledge of other relatives of the deceased until this information was elicited in the first phase of the trial. We note that propounders did not move to dismiss the entire proceeding on this ground until 19 November 1985, near the close of the second phase of the trial. Persons who will share in the estate under the law governing intestacy in case a script which purports to be the will of the deceased is adjudged invalid are proper persons to receive notice and participate in the proceedings within the meaning of G.S. 31-33. *Brissie v. Craig, supra*, at 705, 62 S.E. 2d at 333. However, persons who qualify as persons interested in the estate are not necessarily equivalent to necessary parties. *In re Will of Brock*, 229 N.C. 482, 488, 50 S.E. 2d 555, 559 (1948). The decision whether certain persons are necessary parties to the caveat proceeding is within the court's discretion. *Id.* Under these facts the court did not abuse its discretion by denying propounders' motion to dismiss on the ground that all persons interested in the estate had not been notified. G.S. 31-32 affords protection to any interested persons who do not receive notice. The heirs at law of a deceased testator who have no knowledge of a caveat proceeding and who were not cited under G.S. 31-33 are not estopped to file a

second caveat nor are they bound by the former judgment sustaining the validity of the script. *Mills v. Mills, supra,* at 599, 143 S.E. at 132. This Assignment of Error is overruled.

[4] Propounders contend in their next Assignment of Error that the court erred by failing to dismiss the caveat proceeding at the close of the first phase of the trial on the ground that caveators did not prove that they are persons who are interested in the estate. Specifically propounders contend that "[a] beneficiary under a prior will does have standing to caveat a will but such a beneficiary must, in the same proceeding, prove the interest alleged." We disagree.

A caveat is an *in rem* proceeding, *In re Will of Ashley,* 23 N.C App. 176, 181, 208 S.E. 2d 398, 401, *disc. rev. denied,* 286 N.C. 335, 210 S.E. 2d 56 (1974), perhaps more strictly so regarded than any other proceeding with which the courts deal, *In re Will of Brock, supra,* at 488, 50 S.E. 2d at 559. The rules peculiar to a caveat stem from the *in rem* nature of the proceeding. *Id.* Here, as in *In re Will of Belvin,* 261 N.C. 275, 134 S.E. 2d 225 (1964), the caveators alleged the probated will was invalid on grounds of undue influence and lack of mental capacity and alleged that they are beneficiaries under a will of the deceased made at a time when the testator possessed mental capacity. "If the facts be as caveators allege, they are interested in the estate. . . ." *Id.* at 276, 134 S.E. 2d at 226. Because the proceeding is *in rem,* the proceeding must go on until the issue *devisavit vel non* is appropriately answered; nonsuit cannot be taken by the propounders or the caveators. *In re Will of Brock, supra,* at 488, 50 S.E. 2d at 559. This Assignment of Error is overruled.

[5] In propounders' next Assignment of Error, they contend the court impermissibly allowed the executor under the 1982 will to testify regarding "contents of oral communications between himself and [the deceased] General Hester." Propounders contend that the admission of such communications is in violation of Rule 601(c), N.C. Rules Evid., also known as "the dead man's statute." We disagree.

Propounders group eleven exceptions under this Assignment of Error. After reviewing the record on appeal and the entire transcript of the proceedings we have determined that of these eleven exceptions, five exceptions address testimony elicited from

Arthur Price concerning oral communications between Arthur Price and General Hester. Our Rules of Appellate Procedure require that our review be confined to those exceptions which pertain to the argument presented. Exceptions "in support of which no reason or argument is stated or authority cited, will be taken as abandoned." Rule 28(b)(5), N.C. Rules App. P.

Rule 601, N.C. Rules Evid., disqualifies certain witnesses from testifying. A witness' testimony is incompetent under the dead man's statute if the witness is a party or is interested in the event; his testimony relates to a personal communication with the decedent; the action is against a personal representative of the decedent or a person deriving title or an interest from, through, or under the decedent; or the witness is testifying in his own behalf. *See* Rule 601(c), N.C. Rules Evid.; *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 528, 131 S.E. 2d 456, 462 (1963). The purpose of this statute is to exclude evidence of statements of deceased persons, since those persons are not available to respond. *Culler v. Watts*, 67 N.C. App. 735, 737, 313 S.E. 2d 917, 919 (1984). In a proceeding for the probate of a will, both propounders and caveators are parties interested in the event within the meaning and spirit of section (c). *In re Will of Brown*, 194 N.C. 583, 595, 140 S.E. 192, 199 (1927). A beneficiary under a will may not testify as to communications with the deceased, but he may give his opinion, based on his own observations, as to the issue of the decedent's mental capacity at the time of the execution of the will and testify to transactions with the deceased as being a part of the basis of his opinion. *Id.* To be disqualified as a witness interested in the event of the action, the witness must have a direct legal or pecuniary interest in the outcome of the litigation. *Etheridge v. Etheridge*, 41 N.C. App. 39, 42, 255 S.E. 2d 735, 738 (1979).

In the case at hand, Arthur Price was named as executor of the 1982 will. He also drafted the 1982 will. At a proper caveat proceeding wherein all three wills are considered at once, Arthur Price would be a named executor under the writing submitted by the caveators. We agree with the Minnesota court which stated, "[w]hether the witness would ever be appointed executor or, if appointed, whether he would ever receive any pecuniary benefit therefrom, [is] neither certain nor immediate." *Geraghty v. Kilroy*, 103 Minn. 286, 289, 114 N.W. 838, 839 (1908). Hence, we

hold that a named executor is not a person interested in the event of the caveat proceeding within the meaning of the dead man's statute.

Propounders contend that between General Hester's death and trial, Arthur Price had already incurred time and expenses in anticipation of being the executor and had billed the estate accordingly. Arthur Price, propounders contend, would be compelled to refund or forego these fees if propounders proved successful in the action. Propounders cite *Owens v. Phelps*, 92 N.C. 231 (1885) as authority for their position. *Owens v. Phelps, supra*, is inapposite. In *Owens v. Phelps, supra*, the plaintiffs sought to rescind a contract to purchase land entered into by the deceased. Propounders' further contention that Arthur Price is interested in the action because he is a Deacon of the First Baptist Church of Asheville, a beneficiary under the 1982 will, is equally without merit. Membership in a church congregation, albeit distinguished membership, is too tenuous an interest to come within the meaning of the dead man's statute. *Lawrence v. Hyman*, 79 N.C. 209 (1878). Because Arthur Price does not qualify as a person interested in the outcome of the caveat proceeding, his testimony regarding oral communications with General Hester is competent. Further, because Price drafted the 1982 will, his testimony regarding General Hester's mental capacity was properly admitted for the purpose of showing the basis for his opinion that at the crucial time General Hester had the requisite mental capacity. *In re Will of Simmons*, 43 N.C. App. 123, 128, 258 S.E. 2d 466, 470 (1979), *disc. rev. denied*, 299 N.C. 121, 262 S.E. 2d 9 (1980). This Assignment of Error is overruled.

In light of our holding we need not address the Assignment of Error regarding attorneys' fees. For the foregoing reasons, the judgment is vacated and this matter is remanded for a

New trial.

Judge ARNOLD concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. Here the trial court fashioned, in its discretion, an orderly procedure by which the traditional require-

ment that the several purported wills be considered in one proceeding could be reconciled with the paramount concern that the jury understand the evidence and not be unnecessarily confused. In bifurcating the trial but maintaining the required unity by having the same jury hear all the evidence, the trial court assured that the parties' competing claims as to the testator's competency at various times and the validity of the several purported wills were fully heard in one proceeding but were considered one at a time rather than all at once. In my judgment the trial court's innovative solution offends no mandate of our probate law, makes extraordinary good sense, and does not constitute an abuse of the trial court's discretion. I would vote that under these facts the bifurcated procedure is permissible in the trial court's discretion and that no abuse of discretion occurred here.

The majority maintains that the trial court's bifurcation of the trial amounted to separate trials, even though the same judge and jury were involved throughout. The majority's reading of *In re Will of Charles*, 263 N.C. 411, 139 S.E. 2d 588 (1965), would restrict the trial court's discretion so as to bar bifurcated trials in caveat proceedings no matter how complex or convoluted the evidence. I suggest that *Charles* is primarily directed at the potential for conflicting results arising from separate trials with different juries, judges and parties. It does not address the issue of the trial court's discretion as to order of proof, recesses in the proceeding or authority to bifurcate a complex caveat proceeding.

Similarly I disagree with the majority's assertion that the trial court's decision to bifurcate the trial is an error of fatal proportions. The majority asserts that "it is not possible to determine the likelihood that the jury would have reached a different result. . . ." From that broadside conclusion the majority assumes the alleged error is fatal and requires a new trial. There is no showing of prejudice, no showing of the likelihood of a different result and no indication of what harm to appellants may have occurred.

The majority has substituted its own discretion for that of the trial court in an area which traditionally has been, and should continue to be, reserved to the trial judge. Though the majority asserts an abuse of discretion, I perceive none. The trial court was faced with an exceptionally prolix proceeding involving three

purported wills and allegations of undue influence and lack of testamentary capacity at the time each document was signed. A finding that the latest executed document was the testator's will, i.e., that it was executed by the testator with the requisite intent and formality and in the absence of undue influence, would have had the practical effect of mooting the issues involving the two earlier executed documents. If the trial had not been bifurcated, the jury would have been instructed to do precisely what they did here, i.e., evaluate the purported wills, assertions of undue influence and the testator's competency in the reverse chronological order of the purported dates of execution. Since that was done here, albeit in a recessed, bifurcated proceeding but before the same jury and judge, no prejudice can be shown.

I agree with the majority that the additional issues raised on appeal present no reversible error. I would go further and would vote that in the entire proceeding there is no prejudicial error.

MAUDE EXUM CHERRY, AND WILLIAM E. CHERRY v. MAGGIE LOUISE HARRELL

No. 867SC703

(Filed 17 March 1987)

Evidence § 50.2— expert medical testimony—cause of injury—testimony helpful to jury and admissible

In an action to recover for personal injuries allegedly sustained in an automobile accident, a medical expert's testimony was not inadmissible for failure to state that it was based on "reasonable medical probability"; rather, the expert opinion testimony on causation was admissible if it assisted the jury's understanding of the evidence or determination of a fact in issue. In this case, the expert's opinion on causation was adequately based both on his treatment of plaintiff and on statements plaintiff made to him for the purpose of treatment so that the opinion testimony would have been helpful to the jury and it should have been admitted. N.C.G.S. 8C-1, Rules 702-05.

APPEAL by plaintiffs Maude Exum Cherry and William E. Cherry from *Fountain, Judge.* Judgment entered 25 September 1985. Heard in the Court of Appeals 10 December 1986.

Hopkins and Allen, by Jesse Matthewson Baker, for plaintiff-appellant Maude E. Cherry.

Evans and Lawrence, by Antonia E. Lawrence, for plaintiff-appellant William E. Cherry.

Don Evans for defendant-appellee.

GREENE, Judge.

This is a personal injury suit arising from an automobile accident. At trial, the evidence tended to show that, on 19 September 1981, defendant Harrell's car struck the car in which plaintiff Maude Cherry was a passenger. During treatment at a hospital emergency room, plaintiff tested positive in response to a standard "straight-leg-raising" test. Such positive response indicates a protruded or ruptured disk. On 28 September 1981, plaintiff consulted her family physician who determined she had muscle strain in her neck and upper back. Plaintiff continued to complain of back pain and saw her family physician on several other occasions until January 1982. Because of her continuing back problems, plaintiff was referred to Dr. Robert Appert, an orthopedic surgeon. Plaintiff first saw Dr. Appert on 6 January 1982. During this first visit, plaintiff complained primarily of neck pain. She told Dr. Appert of her automobile accident and stated her pain began about two days after the accident. Plaintiff first mentioned her back pain to Dr. Appert on 9 February 1982. Dr. Appert x-rayed plaintiff's back and diagnosed her condition as chronic L-4 disk disease.

In May 1982, Dr. Appert gave plaintiff a straight-leg-raising test and found no apparent ruptured disk. On 30 November 1982, plaintiff again complained of back pain. Dr. Appert conducted another straight-leg-raising test which also proved negative. On 25 January 1983, Dr. Appert indicated no further treatment was necessary. Plaintiff subsequently received ten chiropractic treatments after 25 January 1983. On 18 March 1983, plaintiff consulted Dr. Appert again. On 14 June 1983, Dr. Appert conducted a myelogram which disclosed a probable herniated disk. Spinal surgery was performed which confirmed the herniated disk.

Dr. Appert's deposition revealed the following testimony on the cause of plaintiff's herniated disk:

Q. Now, was this ruptured disk related to her—her automobile collision of September 18th [sic], 1981?

A. It is my impression that her back problems are related to the accident that she was involved in in 1981.

* * *

Q. Now, based on your examination of Ms. Cherry, have you an opinion as to what most likely caused her herniated disk?

A. The assumption that I have to make as a physician is that if she is not complaining of back discomfort previous to the time that I saw her in January of 1982, and has the onset of back pain following that that continues on for a year and a half, I have to look for an event in time.

And the only event in time I can find, in taking care of this patient, is an automobile accident.

* * *

Q. Doctor, we've talked about possibilities, but based on your examinations, what is most likely to have happened to Ms. Maude Exum Cherry in this incident, based on the factors, to your knowledge?

A. Well, I'd have to look at it in temporal sequence. I see a lady or a patient in the office who is complaining of back pain temporally related to an automobile accident that occurred in the same period of time, and it never got better.

If she'd fallen down the stairs, then I'd have a choice. Well, was it the automobile accident or falling down the stairs? I have no alternative but to believe the patient. She relates it to an event in time, and that's what I have to base my judgment on, since that's the only, quote, "exertion" around that time, when the back pain started was an automobile accident. So I have to relate it to that.

At the deposition, defendant objected to all of the questions above and subsequently moved to strike them at trial. The court sustained the objections to the questions and allowed defendant's motion to strike all the answers.

On cross-examination, Dr. Appert also testified as follows:

> Q. And would you agree, Doctor, that—that her ruptured or herniated disk that you found could just have easily have been caused by one of these other strenuous activities as by the accident in September 1981?
>
> A. It could be caused by any event, as well as an overload on the spine.

The jury found the defendant negligent and awarded plaintiff $7,917.00. Plaintiff William E. Cherry, husband of Maude Exum Cherry, had claimed loss of consortium arising from his wife's injuries. The jury found against William E. Cherry on this claim.

Plaintiffs appeal.

The Court must consider whether the trial court properly excluded Dr. Appert's opinion: (1) for Dr. Appert's failure to state his opinion was "reasonably probable" or (2) for any other reason?

I

Exclusion of Dr. Appert's expert opinion was crucial for plaintiff since our courts have long held the cause of back injuries can only be established by expert medical testimony. *E.g., Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E. 2d 753, 760 (1965); *accord, Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 168, 265 S.E. 2d 389, 391 (1980).

In her appeal, plaintiff contends Dr. Appert's testimony was competent expert opinion admissible under N.C. Gen. Stat. Sec. 8C-1, Rules 702-705 (1984). Rule 702 states that:

> If scientific, technical or other specialized knowledge *will assist the trier of fact to understand the evidence or to determine a fact in issue*, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. [emphasis added]

Simply put, "under Rule . . . 702, opinions must be helpful to the trier of fact . . . ." N.C. Gen. Stat. Sec. 8C-1, Rule 704 advisory committee note. Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived

> by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 704 simply states, "Testimony 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." Finally, Rule 705 states in part:

> The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise, in which event the expert will be required to disclose such underlying facts or data on direct examination or *voir dire* before stating the opinion. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Defendant contends the above-mentioned Rules are irrelevant in this instance and argues the trial court properly struck Dr. Appert's testimony as inadmissible on the ground that neither the questions presented to Dr. Appert nor his answers stated it was "reasonably probable" that plaintiff's accident "could have" caused her ruptured disk. In *Lockwood v. McCaskill*, 262 N.C. 663, 668-69, 138 S.E. 2d 541, 545 (1964), our Supreme Court stated:

> "If the opinion asked for is one relating to cause and effect, the witness should be asked whether in his opinion a particular event or condition *could* or *might* have produced the result in question, not whether it did produce such a result." Stansbury: North Carolina Evidence (2d Ed.), sec. 137, p. 332. (Emphasis ours.) The "could" or "might" as used by Stansbury refers to probability and not mere possibility. It is contemplated that the answer of the expert will be based on scientific knowledge and professional experience. [citations omitted]. . . . The expert may express the opinion that a particular cause "could" or "might" have produced the result—indicating that the result is capable of proceeding from the particular cause as a scientific fact, *i.e., reasonable probability* in the particular scientific field. [emphasis added].

Echoing *Lockwood*, the Court rejected a claim in *Gillikin* that a back injury was caused by a prior accident since there was "not

a scintilla of medical evidence that plaintiff's ruptured disk might, with *reasonable probability*, have resulted from the accident . . . ." 263 N.C. at 324, 139 S.E. 2d at 759 (emphasis added). It is clear Dr. Appert's testimony was not expressly qualified by the *Lockwood* formula of "reasonable probability." Instead, Dr. Appert testified in part that: (1) his impression was that the accident and injury were "related"; (2) when asked what "most likely" caused plaintiff's ruptured disk, he stated the only "event in time" he could find was the automobile accident; (3) when asked what "most likely happened" to plaintiff, he again responded that, based on what plaintiff told him, he would have to relate the injury to the accident.

At the time of *Lockwood* and *Gillikin*, expert testimony on ultimate issues was prohibited. Experts could neither indulge in baseless conjecture, *Lockwood*, 262 N.C. at 667, 138 S.E. 2d at 544-45, nor could they testify with outright certainty since that would supposedly invade the "province of the jury." Thus evolved the formulation that the expert testify it was "reasonably probable" that an accident "could have" or "might have" caused plaintiff's injury. *See Lockwood*, 262 N.C. at 668, 138 S.E. 2d at 545. In *Lockwood*, our Supreme Court based its formula in part on Stansbury's *North Carolina Evidence*. Later editions of that work made the following note:

> In *Lockwood v. McCaskill* [citation omitted], . . . the Court held that to be admissible, medical causation testimony must indicate a reasonable scientific probability that the stated cause produced the stated result. . . . *This seems to confuse admissibility with sufficiency, and it is to be hoped that no attempt will be made to follow it.*

Stansbury, *North Carolina Evidence*, Sec. 137, p. 108 n. 67a (2d ed. Supp. 1970) (emphasis added).

Dean Brandis has summarized the dilemma as follows:

> *Lockwood v. McCaskill* [citation omitted] interpreted literally, created a dilemma—*i.e.*, "could or might" was not positive enough to justify a finding, but no more positive opinion was admissible. In practice, the dilemma was resolved by treating "could or might" as sufficient, though the questions were frequently embroidered by such phrases as "to a reasonable

> degree of medical certainty." [citations omitted] . . . [P]ositive causation testimony ordinarily will settle the matter of sufficiency, provided it is not *inherently incredible.*

1 H. Brandis, *Brandis on North Carolina Evidence*, Sec. 137, p. 549 n. 57 (2d Rev. Ed. 1982) (emphasis added).

With the adoption of Rule 704, expert testimony was no longer "objectionable" though it embraced "an ultimate issue to be decided by the trier of fact." Consequently, our Supreme Court has cited Rule 704 in specifically rejecting the requirement of "could" or "might" phraseology. *State v. Smith*, 315 N.C. 76, 100, 337 S.E. 2d 833, 849 (1985). Even prior to the new Rules, there were several exceptions to the *Lockwood* requirement that experts could only state their opinions to a "reasonable medical certainty." *E.g., Kennedy v. Martin Marietta Chemicals*, 34 N.C. App. 177, 181, 237 S.E. 2d 542, 545 (1977); *see generally* 1 H. Brandis, *supra*, sec. 137, p. 549 n. 56 (2d rev. ed. 1982 & Cum. Supp. 1986) (collecting cases).

In short, the "could" or "might" formula circumvented the prohibition against ultimate issue testimony. "Reasonable probability" was employed to increase the degree of certainty allowed within the confines of the *Lockwood* formula. However, once the absolute prohibition on ultimate issue testimony is lifted, there is clearly no rationale for such limits on expert testimony. Thus, we hold Dr. Appert's testimony was not inadmissible for failure to state it was based on "reasonable medical probability."

The touchtone issue governing the admissibility of Dr. Appert's expert opinion is instead Rule 702: did Dr. Appert's testimony on causation assist the jury's understanding of the evidence or determination of a fact in issue? While it is true Dr. Appert elsewhere stated events other than plaintiff's 1981 car accident could have caused her ruptured disk, such testimony does not render his opinion of no "assistance" to the jury. Dr. Appert clearly testified that, based on the facts and data available to him, the event which "most likely" caused the ruptured disk was plaintiff's car accident. We note that the *Smith* Court admitted unqualified testimony that a penis caused the victim's injuries in that case; however, the Court noted parenthetically that, on cross-examination, the expert had conceded the injuries could have been caused by some other object of the same size and shape. 315

N.C. at 100, 337 S.E. 2d at 849; *see also Largent v. Acuff*, 69 N.C. App. 439, 443, 317 S.E. 2d 111, 113, *disc. rev. denied*, 312 N.C. 83, 321 S.E. 2d 896 (1984) (stating one factor "quite likely" caused injury held sufficient). Accordingly, while the existence of other possible causes of plaintiff's ruptured disk might reduce the weight accorded Dr. Appert's opinion, we hold such other possibilities do not alone render his opinion inadmissible.

While baseless speculation can never "assist" the jury under Rule 702 and is therefore inadmissible, an expert need not reveal the basis of his opinion absent a specific request by opposing counsel under N.C. Gen. Stat. Sec. 8C-1, Rule 705. Under Rule 705, opposing counsel can challenge the basis of the expert's opinion by request or through *voir dire* or cross-examination. *Id.* The bases of Dr. Appert's medical opinion were clearly revealed during his direct examination and cross-examination.

First, Dr. Appert's opinion was based on his own personal diagnosis and treatment of plaintiff. N.C. Gen. Stat. Sec. 8C-1, Rule 703 states that an expert may base his or her opinion on facts and data perceived before trial. Dr. Appert's diagnosis and treatment of plaintiff's injuries constitutes a pre-trial personal perception upon which he was entitled to base his opinion pursuant to Rule 703. Second, Dr. Appert stated that his opinion was based on plaintiff's own statements made to Dr. Appert during the course of plaintiff's treatment. Prior to adoption of Rule 703, the Supreme Court ruled in *State v. Wade*, 296 N.C. 454, 462, 251 S.E. 2d 407, 412 (1979) that:

> A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, *if such information is inherently reliable even though it is not independently admissible into evidence* . . . . [emphasis added]

Statements made by a patient to his or her physician for purposes of treatment are "inherently reliable" within the meaning of the rule enunciated in *Wade*. *Id.* at 463, 251 S.E. 2d at 412; *Booker v. Duke Medical Center*, 297 N.C. 458, 479, 256 S.E. 2d 189, 202 (1979). In *State v. Gary*, 78 N.C. App. 29, 38, 337 S.E. 2d 70, 76, *disc. rev. denied*, 316 N.C. 197, 341 S.E. 2d 586 (1986), we

assumed the "reasonably relied upon" standard of Rule 703 is equivalent to the "inherently reliable" standard enunciated in *Wade*. Plaintiff's statements made to Dr. Appert for the purpose of treatment were adequate to support his opinion as a statement "reasonably relied upon by experts in the particular field" under Rule 703.

Thus, Dr. Appert's opinion on causation was adequately based both on his treatment of plaintiff and on statements plaintiff made to him for the purpose of treatment. As defendant failed to demonstrate Dr. Appert's opinions were so baseless they could not help the jury's determinations under Rule 702, Dr. Appert's opinions on causation should have been admitted. The doctor's opinions were certainly not "inherently incredible." *See* 1 H. Brandis, *supra*, Sec. 137, p. 549 n. 57.

II

Plaintiff's husband, William E. Cherry, alleged he lost the consortium of his wife as a result of defendant's negligence in this case. The consortium issue was appropriately submitted to the jury which specifically found that defendant's negligence did not proximately cause plaintiff William E. Cherry to lose the consortium of his wife. As the trial court inappropriately excluded the testimony of Dr. Appert on causation, plaintiff's husband argues on appeal that this exclusion prejudiced the jury on the issue of lost consortium. As neither plaintiff has made any argument nor pointed to any facts showing why the trial court's evidentiary rulings prejudiced the consortium claim, we decline to overturn the jury's verdict on this issue.

III

Plaintiff Maude Cherry is entitled to a new trial of her negligence claim. We find no error with respect to plaintiff William E. Cherry's claim of lost consortium.

Affirmed in part, reversed in part and remanded.

Judge JOHNSON concurs.

Chief Judge HEDRICK concurs in the result.

SHIRLEY T. HARRIS v. W. F. MAREADY, WILLIAM H. PETREE, C. ROGER HARRIS, AND PETREE, STOCKTON, ROBINSON, VAUGHN, GLAZE AND MAREADY

No. 8621SC620

(Filed 17 March 1987)

Attorneys at Law § 5— representation of client's interest—summary judgment for defendant attorneys proper

In an action to recover damages allegedly sustained by plaintiff because of defendants' handling of legal matters pertaining to her divorce and property settlement, the trial court properly entered summary judgment for defendants where plaintiff's allegations of damages and affidavits with statements to the effect that but for defendants' conduct she would have received a "property settlement" and a larger alimony award were at best speculative; and there was nothing in the record on appeal to substantiate the bare allegation in plaintiff's complaint that defendant lawyer entered into an oral contract with plaintiff to pursue litigation against her former husband for his fraudulent misconduct in forging her signature on deeds.

APPEAL by plaintiff from *Lamm, Judge*. Judgment entered 16 January 1986 in Superior Court, FORSYTH County. Heard in the Court of Appeals 9 December 1986.

This is a civil action instituted 26 January 1982 by plaintiff, Shirley T. Harris, against four named defendants: (1) W. F. Maready, (2) William H. Petree, (3) C. Roger Harris, and (4) the law firm of "Petree, Stockton, Robinson, Vaughn, Glaze and Maready, P.A." Plaintiff, being a former client, sued the law firm of Petree, Stockton, Robinson, Vaughn, Glaze and Maready, along with the individual defendants, W. F. Maready and William H. Petree, for professional malpractice. From July 1976 to January 1979, the law firm, principally through W. F. Maready, represented Shirley Harris in domestic matters against defendant, Roger Harris, her former husband. Because defendant William H. Petree, a partner in the law firm, and defendant Roger Harris were involved in some independent business enterprises, a conflict of interest allegedly existed between the law firm and its representation of plaintiff.

Plaintiff's complaint, which constitutes nineteen (19) pages of the record on appeal, designates nine (9) "COUNTS" by which she alleges defendants' liability, to wit: (1) negligence, (2) breach of contract, (3) improper conduct, (4) fraud and misrepresentation, (5)

interference with contract, (6) civil conspiracy, (7) respondeat superior, (8) damages—sealed instruments, and (9) constructive trust.

Plaintiff, in her complaint, alleged the following:

7. This is an action to recover damages:

a. From Maready, Petree, and the Petree Stockton Law firm for malpractice based on negligence, breach of contract, improper conduct due to conflict of interests and fraudulent misrepresentation in the legal representation of plaintiff both in domestic claims and in claims against C. R. Harris for forging or causing the forgery of plaintiff's signature on various deeds and other instruments.

b. From Petree, Harris and the Petree, Stockton law firm for interfering with plaintiff's contract with Maready for legal representation and for civil conspiracy to induce Maready to withdraw from representing plaintiff.

c. From C. R. Harris for forging Plaintiff's signature on various deeds and to impose a constructive trust on funds derived from the sale of properties by means of deeds containing Plaintiff's forged signature.

The amount in controversy . . . exceeds $5,000.00.

The section of plaintiff's complaint entitled "FACTUAL Allegations" contains the following alleged factual basis representative of plaintiff's claims for damages:

29. As a direct and proximate result of the conduct of the Defendants, Plaintiff has been injured in the following respects:

a. Plaintiff lost a long-term professional relationship and has been forced to hire numerous other attorneys in an effort to pursue the claims Maready and the Petree, Stockton law firm agreed to pursue but failed to pursue.

b. Plaintiff lost a significant litigation advantage in that her claims against C. R. Harris for the forged signatures were not pursued in a timely fashion.

c. Plaintiff received no compensation for interest in property prior to her divorce at a time when she was entitled to be compensated for such interest.

d. Plaintiff has expended additional sums for attorney's fees in order for newly hired lawyers to familiarize themselves with her claims.

e. Plaintiff received a lesser alimony award than she was otherwise entitled to receive by reason of the conduct of defendant C. R. Harris.

f. Plaintiff has incurred physical and emotional pain, suffering, worry, discomfort, humiliation, embarrassment, loss of assets and property.

Plaintiff alleged in paragraph 77 of her complaint that her damages may exceed five million dollars and in paragraph 78 she requested no less than five million dollars in punitive damages.

After process was served, defendants Maready, Petree, and the law firm made a special appearance on 1 March 1982, and filed a motion to dismiss. The trial court dismissed the summons and complaint against defendant law firm upon the grounds of lack of jurisdiction over the person, insufficiency of process and insufficiency of service of process. The trial court dismissed the summons and complaint against defendant Maready for insufficiency of process and insufficiency of service of process. The trial court denied plaintiff's oral motion to amend her complaint to delete the "P.A." from the name of defendant law firm. Also denied was defendants' motion to dismiss for plaintiff's violation of Rule 8(a)(2), N.C. Rules Civ. P.

On plaintiff's appeal this Court affirmed the trial court's dismissal of the complaint and summonses against defendants for lack of jurisdiction, insufficiency of process, and insufficiency of service of process. However, this Court reversed the trial court's denial of defendants' motion to dismiss the complaint and summonses for violation of Rule 8(a)(2), N.C. Rules Civ. P. *Harris v. Maready*, 64 N.C. App. 1, 306 S.E. 2d 799 (1983). The North Carolina Supreme Court granted plaintiff's petition for certiorari and held (1) that the summonses and the complaint against defendants were improperly dismissed, and (2) that the trial court properly denied defendants' motion to dismiss for violation of Rule 8(a)(2), N.C. Rules Civ. P. *Harris v. Maready*, 311 N.C. 536, 552, 319 S.E. 2d 91 (1984) (For additional statements of the early procedural history of this case, *see id. See also Maready, supra*, 64 N.C. App.

1, 306 S.E. 2d 799 (1983)). The Supreme Court remanded the case to superior court for an exercise of its discretion on the issue of whether to allow an amendment of the summons directed to the law firm.

On 15 November 1985 defendants filed a motion for summary judgment. On 23 December 1985 plaintiff, pursuant to Rule 41(a)(1), N.C. Rules Civ. P., took a voluntary dismissal of all claims in this action against C. Roger Harris ("counts" eight and nine were alleged exclusively against C. Roger Harris). Defendants' motion was calendared to be heard by the trial court on 13 January 1986.

On 13 January 1986, prior to a hearing on defendants' summary judgment motion, plaintiff, pursuant to Rule 41, N.C. Rules Civ. P., took a voluntary dismissal as to counts Three (3), Five (5), Six (6), Eight (8), and Nine (9) of her complaint. The trial court conducted hearings in this matter from 13 January 1986 to 15 January 1986. In an order, filed 16 January 1986, the trial court granted defendants a summary judgment as follows:

Summary Judgment (Filed January 16, 1986)

> THIS CAUSE coming on to be heard and being heard, at the January 13, 1986, Non-Jury Civil Session of the General Court of Justice, Superior Court Division of Forsyth County, North Carolina, before the Honorable Charles C. Lamm, Jr., Judge Presiding, upon the motion of defendants W. F. Maready, William H. Petree, and Petree, Stockton, Robinson, Vaughn, Glaze & Maready for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, and the Court having on January 13, 14, and 15, 1986, carefully considered the pleadings, affidavits, depositions of Shirley T. Harris, W. F. Maready, William H. Petree, and C. Roger Harris, and other documents in the record of this action, and also the court file and Record on Appeal in the alimony action entitled 'Shirley T. Harris vs. C. Roger Harris,' 77CVD1765, and the court file in the divorce action entitled, 'C. Roger Harris vs. Shirley T. Harris,' 77CVD3522, which court files and Record on Appeal were offered into the record at the hearing by consent of the parties, and the Court having considered the briefs and heard oral arguments of counsel for

> the parties; and the Court having determined at the conclusion of said hearing that there is no genuine issue as to any material fact and that said defendants are entitled to summary judgment in their favor as a matter of law as to all remaining claims of plaintiff;

(Exceptions omitted.)

Plaintiff appeals from the summary judgment in favor of defendants.

James, McElroy & Diehl, P.A., by William K. Diehl, Jr., for plaintiff appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Hubert Humphrey and Jill R. Wilson, for defendant appellees.

JOHNSON, Judge.

We must determine if the trial court properly granted summary judgment on the counts which plaintiff has not voluntarily dismissed, to wit: (1) Count I negligence, (2) Count II breach of contract, (3) Count IV fraud and misrepresentation, (4) Count VII respondeat superior. The dispositive issue that we must decide is whether plaintiff's forecast of evidence presented a material issue of fact with respect to damages she would not have incurred but for defendants' conduct. If so, defendants were not entitled to summary judgment. We hold that there is no triable material issue of fact regarding plaintiff's allegations that she has suffered damages as a proximate result of defendants' conduct. Accordingly, we affirm the summary judgment entered by the trial court in favor of defendants.

Rule 56, N.C. Rules Civ. P. states, *inter alia*, the following:

> 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.

"The rules governing summary judgment motions are now familiar and need not be repeated here." *Rorrer v. Cooke*, 313 N.C. 338, 340, 329 S.E. 2d 355, 358 (1985) (summary judgment was appropriate in an attorney malpractice action where affidavits

presented by plaintiff in response to defendant's motion for summary judgment failed to forecast evidence that would show that defendant's alleged negligence was a proximate cause of the loss of her medical malpractice suit in that they failed to establish that if the attorney had done anything differently plaintiff would have been successful in a medical malpractice action).

Although plaintiff's complaint sets forth several causes of action there is one requisite element that is common to each cause of action that plaintiff alleges in her complaint, to wit: damages. Plaintiff's allegations of damages and affidavits with statements to the effect that but for defendants' conduct she would have received a "property settlement" and a larger alimony award, at best, are speculative.

The record on appeal in the case *sub judice* reveals that in the alimony action against her husband, plaintiff, represented by defendant Maready, submitted an affidavit stating her monthly needs as $4,563.15. However, the evidence, which was not substantially in dispute, established that for several years Mr. Harris had provided plaintiff with approximately $2,000.00 per month for her personal expenses (this amount was taken from Mr. Harris' after-tax income).

The trial court ordered Mr. Harris to pay $3,000.00 per month as an alimony award (77CVD1765). Mr. Harris appealed from that order to this Court. In an unpublished opinion this Court upheld the trial court's award of alimony. This Court noted, as the record on appeal in the case *sub judice* bears out, that the trial court followed the requirements of G.S. 50-16.5 in determining the amount of alimony *to meet the needs of plaintiff*. Defendant Maready, in his deposition, which was uncontradicted by plaintiff, states that this $3,000.00 per month alimony award was the largest alimony award ordered by a Forsyth County judge and successfully defended on appeal.

We have *thoroughly* reviewed the record on appeal and as the trial court concluded, there is no material issue of fact upon which to base a denial of defendants' motion for summary judgment. The forecast of evidence that was before the trial court did not reveal any way in which defendant Maready's conduct in the representation of Ms. Harris proximately caused any damages which plaintiff alleged.

Defendant Maready, in his representation of plaintiff, relied upon and presented to the trial court the most reliable and accurate information pertaining to C. R. Harris' financial status, to wit: supporting documentation of C. R. Harris' financial status and income which was tendered by C. R. Harris to lending institutions, and C. R. Harris' income tax returns. There is no question that defendant Maready successfully apprised the trial court that C. R. Harris was a man of considerable wealth. The financial statement Mr. Harris had filed with a bank showed net assets of over $2,750,000.00 and a net worth of $2,500,000.00. The income tax statement defendant Maready relied upon revealed Mr. Harris' gross income to be $125,000.00. In this regard we find no basis for any assertions that the law firm in any way is liable to her for damages or affected defendant Maready's representation of plaintiff such that she was deprived of a larger alimony award.

Plaintiff contends that defendant Maready breached a duty to her and breached an "oral contract" with her by not instituting separate lawsuits against C. R. Harris for alleged forgeries of her name on deeds in which she merely held a marital interest, and that she lost a "litigation advantage" and possible causes of action against her former husband because defendant Maready did not institute separate lawsuits against C. R. Harris prior to her divorce. We find that there is no merit to plaintiff's argument and that summary judgment was proper.

Plaintiff's complaint alleges that defendant Maready breached an "oral contract" with her as follows:

> SECOND COUNT (BREACH OF CONTRACT)
>
> . . . .
>
> 40. In July, 1976, Maready entered into an oral contract with Plaintiff whereby in consideration for Plaintiff's payment of legal fees, Maready agreed to perform professional legal services for her, including the pursuit of litigation against C. R. Harris for his fraudulent misconduct in forging signatures on deeds to property.
>
> 41. Plaintiff has, at all times, performed all the agreements in the contract to be performed on her part. At the time and manner specified.

42. Maready refused to perform the conditions of the contract on his part as hereinbefore alleged and *as a result, Plaintiff has been damaged.*

43. Maready abandoned the contract and refused to render professional services without reasonable cause.

44. Plaintiff discovered Defendant['s] breach of contract on or about January 18, 1979.

(Emphasis supplied.)

In her breach of contract claim plaintiff merely makes a generalized assertion that she has been "damaged." We find nothing in the forecast of evidence that would justify a jury determination of plaintiff's breach of contract claim. In the record on appeal there is nothing in the forecast of evidence to indicate that defendant Maready filed any action on plaintiff's behalf against C. R. Harris for the alleged forged deeds or that he agreed to do so. We have found nothing in the record on appeal to substantiate the bare allegation in plaintiff's complaint that defendant Maready entered into an "oral contract" with plaintiff to pursue "litigation against C. R. Harris for his fraudulent misconduct in forging signatures on deeds to property." Plaintiff, in her brief, states the following: "Mrs. Harris testified that Maready told her the forged instruments would not be used in the alimony claim but would be there 'when we need them.' (S. Harris Dep. I, 190)." Plaintiff also asserts that defendant Maready told her the deeds were "on the back burner." However, we find nothing in the record on appeal that constitutes a sufficient forecast of evidence from which a jury could determine that defendant Maready agreed to represent plaintiff in separate lawsuits against C. R. Harris for his alleged forgeries. Moreover, there is nothing in the forecast of evidence to show that any legal fees paid by plaintiff were at all connected with any alleged agreement by defendant to institute lawsuits against C. R. Harris for his "fraudulent misconduct in forging signatures on deeds to property."

Assuming arguendo that defendant Maready did orally agree to represent plaintiff in separate actions against C. R. Harris, there is no merit to plaintiff's argument that the trial court erred in granting defendants' motion for summary judgment. This Court has held that an attorney-client relationship may be terminated as follows:

> As between the attorney and his client, the relationship may in good faith, be dissolved at any time, but the attorney may not be released from litigation in which he appears for the client without first satisfying the court that his withdrawal therefrom is justified, and whether he is justified will depend on the circumstances of that particular situation.

High Point Bank & Trust Co. v. Morgan-Schultheiss Inc., 33 N.C. App. 406, 414, 235 S.E. 2d 693, 698-699, *cert. den.*, 293 N.C. 258, 237 S.E. 2d 535, *cert. den.*, 439 U.S. 958, 58 L.Ed. 2d 350, 99 S.Ct. 361 (1977). The forecast of evidence in the instant case reveals that defendant Maready never appeared in court or filed any pleadings on behalf of plaintiff in reference to the alleged forged deeds.

The forecast of evidence presented to the trial court shows that based upon her needs the trial court properly awarded her $3,000.00 per month as alimony. An attorney does not breach a duty to a client by declining to institute a lawsuit that in his or her professional judgment would be fruitless or that he or she considers to be an abuse of process. Moreover, the record on appeal bears out defendants' assertion that defendant Maready protected plaintiff's rights when he assisted plaintiff in her efforts to retain a new lawyer. Defendant Maready turned over all relevant files to plaintiff's newly retained counsel at least a year before the statutes of limitations had run on any of the claims plaintiff sought to have litigated.

For the aforementioned reasons the judgment is

Affirmed.

Chief Judge HEDRICK and Judge GREENE concur.

STATE OF NORTH CAROLINA v. ROGER LEE GARDNER

No. 8618SC514

(Filed 17 March 1987)

1. **Indictment and Warrant § 3; Receiving Stolen Goods § 2— theft in Guilford County—goods received in Davidson County—indictment in Guilford County proper**

Where the uncontroverted evidence was that a theft took place in Guilford County and receipt of the stolen goods took place in Davidson County, pursuant to N.C.G.S. § 14-71, defendant could be indicted in Guilford County for receiving stolen goods because the thief could also be indicted there.

2. **Receiving Stolen Goods § 2— sufficiency of indictment**

An indictment charging defendant with receiving stolen goods met the requirements of N.C.G.S. § 15A-924 where it alleged that defendant "unlawfully, willfully and feloniously did receive [certain property specifically described] having reasonable grounds to believe the property to have been feloniously stolen, taken and carried away," and facts supporting each element of the offense were set out so as reasonably to apprise defendant of the conduct which was the subject of the accusation.

3. **Receiving Stolen Goods § 2— place of receipt improperly alleged—indictment not fatally flawed**

There was no merit to defendant's contention that because the indictment alleged that the receipt of stolen goods took place in Guilford County rather than in Davidson County, the indictment was fatally flawed. N.C.G.S. 15A-924(a)(3).

4. **Criminal Law § 15— receiving stolen goods—venue—which statute controls**

For purposes of determining venue for the offense of feloniously receiving stolen property, N.C.G.S. § 14-71 supersedes the general venue provisions of Article 3 of the Criminal Procedure Act, since § 14-71 deals with specific subject matter, and the more specific statute controls over a general one; in the same year that conflicting provisions of the statutes became effective, the legislature looked at, changed, but deleted none of § 14-71; and though the Criminal Procedure Act included language repealing all statutes in conflict with its provisions, such repealer was not operative where an arguably conflicting statute was subsequently scrutinized and amended.

Judge BECTON dissenting.

APPEAL by defendant from *Long (James M.), Judge*. Judgment entered 21 November 1985 in Superior Court, GUILFORD County. Heard in the Court of Appeals 20 October 1986.

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

Ferguson, Stein, Watt, Wallas & Adkins, P.A., by Adam Stein and C. Richard Tate, Jr., for defendant appellant.

ORR, Judge.

On 10 December 1984, defendant was indicted for and later convicted of the offense of receiving stolen property in two separate bills by a grand jury sitting in Guilford County. The fact was uncontested that three individuals had feloniously stolen certain personal property from a household in Guilford County in early November of 1984. The thieves brought at least some of this property to defendant's place of business in Davidson County, "The Gold and Silver Shop."

The indictments both charged that:

> on or about the date of offense shown [5 November 1984] and in the county named above [Guilford County] the defendant named above [Roger Lee Gardner] unlawfully, willfully and feloniously did receive and have . . . the personal property of Janet Cecil . . . having reasonable grounds to believe the property to have been feloniously stolen, taken, and carried away.

[1] Defendant first argues that the Guilford County Grand Jury had no power to return an indictment for a crime committed in another county. Defendant filed a timely pretrial motion to dismiss the indictments based upon his contention that "[n]o act or omission to act constituting any part of the offense charged occurred in Guilford County. All of the acts alleged in the warrants, if said acts took place at all, took place at the defendant's place of business, The Gold and Silver Shop [,] which is located . . . in Davidson County." Defendant's motion was denied.

In essence, defendant contends that the Guilford County Grand Jury did not have jurisdiction. "At common law a grand jury had jurisdictional power to indict only for crimes committed within the county in which it convened. *State v. Randolph*, 312 N.C. 198, 321 S.E. 2d 864 (1984); *State v. Mitchell*, 202 N.C. 439, 163 S.E. 581 (1932). The legislature has power to extend the grand

jury's power beyond the territorial limitation imposed by the common law . . . ." *State v. Flowers*, 318 N.C. 208, 213, 347 S.E. 2d 773, 777 (1986).

In this case, *sub judice*, the indictment returned by the Guilford County Grand Jury alleged that the offense of receiving stolen goods had occurred in Guilford County. The uncontroverted evidence was that, in fact, the receipt of the stolen goods took place in Davidson County. Only the theft took place in Guilford County.

Absent a particular statute conferring jurisdiction on Guilford County under the facts of this case, the defendant's motion to dismiss would have been well taken. However, N.C.G.S. § 14-71, dealing with "Receiving Stolen Goods," states in part: ". . . and any such receiver may be dealt with, *indicted*, tried and punished . . . in any county in which the thief may be tried . . . ." (Emphasis added.) Thus, the legislature has empowered grand juries to indict persons for receiving stolen goods in any county in which the thief may be tried. The evidence was uncontradicted that the theft took place in Guilford County. It follows that the defendant could be indicted in Guilford County for receiving the stolen goods because the thief could also be indicted there.

[2] We now address whether the indictment was sufficient to meet the requirements of N.C.G.S. § 15A-924. The requirements of N.C.G.S. § 15A-924 mandate that a criminal pleading contain, *inter alia*, "facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (1983). "Every defendant has the constitutional right to be informed of the accusation against him and the . . . indictment must set out the charge with such exactness that he can have a reasonable opportunity to prepare his defense . . . ." *State v. Rogers*, 273 N.C. 208, 211, 159 S.E. 2d 525, 527 (1968).

The elements of receiving stolen goods are: (1) the receipt or concealment of property; (2) stolen by another; (3) knowing, or with reasonable grounds to believe, that it was stolen; and (4) with a dishonest purpose. *See* N.C.G.S. § 14-71 (1986); *State v.*

Davis, 302 N.C. 370, 275 S.E. 2d 491 (1981); *State v. Haywood*, 297 N.C. 686, 256 S.E. 2d 715 (1979).

The indictments in the case *sub judice* clearly met the test set out in N.C.G.S. § 15A-924. The indictments allege that the defendant "unlawfully, willfully and feloniously did receive [certain property specifically described] having reasonable grounds to believe the property to have been feloniously stolen, taken and carried away." Facts supporting each element of the offense are set out so as to reasonably apprise defendant of the conduct which is the subject of the accusation.

[3] Defendant contends that because the indictment alleges that the receipt took place in Guilford County rather than in Davidson County, the indictment is fatally flawed. We disagree. The location of the receipt of stolen goods is not an element of the offense and as such, a variance between the allegations in the indictment and proof at trial will not be fatal. *State v. Currie*, 47 N.C. App. 446, 267 S.E. 2d 390, *cert. denied*, 301 N.C. 237, 283 S.E. 2d 134 (1980).

N.C.G.S. § 15A-924(a)(3) requires that the indictment must allege "that the offense charged therein was committed in a designated county," a requirement which existed at common law. *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977). Defendant contends the trial court should have dismissed the indictment because the allegation stated the crime took place in Guilford when in fact it took place in Davidson.

The purpose behind requiring that the county in which the offense took place be alleged is obviously to establish a basis for jurisdiction and venue. *State v. Rogers*, 273 N.C. 208, 159 S.E. 2d 525 (1968) (jurisdiction); *State v. Haywood*, 297 N.C. 686, 256 S.E. 2d 715 (1979) (venue). The indictment in the case *sub judice* technically complies with N.C.G.S. § 15A-924(a)(3) in that it alleges that the crime took place in Guilford County. The fact that the evidence proved that the crime took place in Davidson County rather than Guilford County, can only be fatal if the variance affected jurisdiction or venue. We have previously determined that the grand jury had jurisdiction, despite the variance. We now address the issue of venue.

Venue is different from jurisdiction. As pointed out in *State v. Flowers*, 318 N.C. 208, 347 S.E. 2d 773 (1986), venue is "the

location of the tribunal where a defendant may be compelled to stand trial. Venue becomes an issue, however, only after a grand jury has determined that probable cause to go forward with criminal proceedings against an accused exists." 318 N.C. at 215, 347 S.E. 2d at 778.

[4] Defendant's final contention is that the venue provisions of Article 3 of the Criminal Procedure Act do not permit venue in Guilford County for receipt of stolen goods occurring in Davidson County. Defendant further argues that N.C.G.S. § 14-71 which would allow venue in such circumstances has been supplanted by the venue provisions of Article 3. We disagree.

For purposes of determining venue for the offense of feloniously receiving stolen property, we hold that N.C.G.S. § 14-71 supersedes the general venue provisions.

Three reasons based on the principles of statutory construction convince us that N.C.G.S. § 14-71 is still viable for determining venue. First, the older section deals with specific subject matter and is not a general venue statute. Unless the General Assembly clearly intended to make the general act controlling, the more specific statute will control. "It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application." *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E. 2d 663, 670 (1969).

Second, the rule of specific provisions controlling general ones "is true *a fortiori* when the special act . . . [is] later in point of time." *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 629, 151 S.E. 2d 582, 586 (1966). The general venue provisions of the Criminal Procedure Act became law in 1973 and were most recently amended in 1983. The amendment itself did not affect language in that section positing that venue lies in the county where the charged offense occurred. Statutory provisions specifically addressing the indictment and trial of those accused of receiving stolen goods have been codified as N.C.G.S. § 14-71 since 1943. However, these provisions were most recently amended in 1975, the same year in which the Criminal Procedure Act, which includes N.C.G.S. § 15A-131(c), became effective.

Although the *Food Stores* rule of recency does not technically apply to this chronology, the reasoning behind the rule does: in the same year conflicting provisions became effective, the legislature looked at N.C.G.S. § 14-71, made certain changes in it, but deleted none of it. "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E. 2d 793, 804 (1970). And, because at the time it passed N.C.G.S. § 15A-131(c), the General Assembly did not overtly modify or expunge N.C.G.S. § 14-71, we can assume it did not intend to do so. "Courts will not presume that the legislature intended a repeal by implication . . . ." *Id.* at 658, 174 S.E. 2d at 804; *Person v. Garrett, Comr. of Motor Vehicles*, 280 N.C. 163, 184 S.E. 2d 873 (1971). In addition, the cross reference in N.C.G.S. § 15A-131 specifically refers the readers to N.C.G.S. § 14-71.

Third, although the Criminal Procedure Act included language repealing all statutes in conflict with its provisions, 1973 N.C. Sess. Laws ch. 1286, § 26, we do not consider this repealer operative where an arguably conflicting statute has since been scrutinized and amended.

We thus conclude that the trial court correctly denied defendant's motions to dismiss and we accordingly find

No error.

Judge WELLS concurs.

Judge BECTON dissents.

Judge BECTON dissenting.

Were I a legislator I could endorse wholeheartedly the "what ought to be the law" rule that permeates the majority's decision. After all, cogent policy reasons favor a rule that requires the receiver of stolen goods, not the victim whose goods are stolen, to travel to any county where the thief may be tried. But I am bound by the rules of law that courts should interpret the law, not legislate, and that criminal statutes are to be strictly construed against the State. Consequently, believing that the general venue provisions in G.S. Sec. 15A-131 supersede the specific

venue provisions in our "Receiving Stolen Goods" statute, and further, that in any event, there exists in this case a fatal variance between the allegations in the indictments and the proof at trial, I dissent.

First, in my view, the majority has improperly applied the "rule of recency" stated in *Food Stores v. Board of Alcoholic Control, ante* p. 620. The specific venue provisions in G.S. Sec. 14-71 are not more recent in time merely because that statute has been amended since the Criminal Procedure Act was passed. The majority's reasoning is unconvincing because the 1975 amendments to G.S. Sec. 14-71 did not involve the portion of the statute relating to venue, and we thus may not assume that the legislature's scrutiny extended to those provisions.

A direct conflict exists between G.S. Sec. 14-71 which extends venue for receiving goods to counties where the goods are possessed, or where the thief may be tried, and G.S. Sec. 15A-131 which expressly limits venue "[e]xcept as otherwise provided in this subsection" to "the county where the charged offense occurred. . . ." Significantly, G.S. Sec. 15A-131 contains no exception for "receiving stolen goods" cases. Moreover, the Criminal Procedure Act specifically provides: "All laws and clauses of laws in conflict with this Act are hereby repealed." 1973 N.C. Sess. Laws c. 1286, s.30. In *Nytco Leasing Co. v. Southeastern Motels*, 40 N.C. App. 120, 252 S.E. 2d 826 (1979), this Court relied upon an identical general repealer in holding that Rule 32 of the Rules of Civil Procedure regarding the use of depositions at trial took precedence over an older, conflicting statute, G.S. Sec. 8-83, *despite* the fact that G.S. Sec. 8-83 had not been explicitly repealed. In my view, once the legislature has unambiguously stated its intent to repeal conflicting statutes, we cannot require continuous legislature re-expression of that intent by demanding that every amendment thereafter to any affected statute explicitly delete or modify the previously supplanted portions.

Second, regardless of which venue statute controls this case, the indictment must correctly allege the facts that establish venue. Admittedly the indictments here are valid on their faces since a Guilford County grand jury alleged that the goods were received in Guilford County. *See State v. Vines*, 317 N.C. 242, 345 S.E. 2d 169 (1986). However, since all the evidence shows that the

receiving occurred in Davidson County and that the theft occurred in Guilford County, the indictments cannot stand. Although the location of the crime is not an element of the offense, *ante* p. 619, I believe the requirement that an indictment allege that the offense was committed in a designated county is intended to provide adequate notice to the defendant of the facts relied upon by the State to establish the grand jury's power to indict in that location as well as to more "clearly . . . apprise the defendant . . . of the conduct which is the subject of the accusation," G.S. Sec. 15A-924(a)(5), *ante* p. 618, so that he may properly prepare his defense.

Because the cases in which venue exists in a county other than where the alleged crime occurred are rare, accuracy in alleging the facts that establish venue in such cases is especially important. Here the State failed to allege that the "thief" stole the property or could otherwise be tried in Guilford County so as to come within the special venue provision of G.S. Sec. 14-71 upon which the State relies. In my view, the State may not allege one set of facts in the indictment to establish venue and rely upon another at trial, even if venue would exist under either set of facts.

Based on the foregoing, I vote to reverse.

STATE OF NORTH CAROLINA v. DAVID OTTIS MERCER

No. 8616SC766

(Filed 17 March 1987)

1. Criminal Law § 23.2— guilty plea—concurrent sentence promised as inducement—plea not voluntary

The evidence and findings of fact did not support the trial court's conclusion that defendant's guilty plea was voluntarily and intelligently entered where defendant alleged and produced competent evidence tending to show that his plea of guilty was induced by an unkept promise of the district attorney made through his attorney but not shown on the transcript of plea that, if he testified against his drug supplier, any sentence in the case would run concurrently with his previous sentence, the transcript of plea and the district attorney's testimony tended to support the State's contention that the plea arrangement did not exist, and the trial court failed to make any findings of fact assessing the credibility of defendant's evidence or resolving conflicts with the State's evidence.

2. Criminal Law § 23.2— guilty plea in exchange for testimony against drug supplier—value of testimony improperly considered in ruling on motion for appropriate relief

Where defendant made a motion for appropriate relief on the ground that his guilty plea was induced by an unkept promise made by the district attorney's office through his attorney that he would not have to serve any additional time if he testified against his drug supplier and that a consecutive seven-year sentence did not conform to that plea agreement, to the extent that the trial court's denial of defendant's motion for appropriate relief resulted from the court's assessment of the defendant's assistance to law enforcement improperly measured by the "substantial assistance" standard of N.C.G.S. § 90-95(h), the order must be reversed and remanded.

ON writ of certiorari to review order entered by *E. Lynn Johnson, Judge.* Order entered 21 November 1985 in Superior Court, ROBESON County. Heard in the Court of Appeals 3 February 1987.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel C. Oakley, for the State.

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

BECTON, Judge.

I

Defendant, David Ottis Mercer, was indicted on 23 January 1984 for carrying a concealed weapon, possession of a firearm by a felon, two counts of trafficking in cocaine by possession with intent to sell and deliver, and two counts of trafficking in cocaine by selling and delivering. The four indictments involved occurrences on two separate days—4 November and 12 December 1983. On 26 March 1984, the defendant pleaded guilty to the charges arising out of the 12 December events which included all charges except one count each of trafficking by possession and trafficking by sale. Pursuant to a plea arrangement, the defendant was given a consolidated sentence in case Nos. 83CRS19087, 19088, and 19090, consisting of seven years in prison and a $50,000 fine.

On 19 July 1984, the defendant pleaded guilty to the remaining charges in case No. 83CRS19089. Prayer for judgment was continued until no later than 15 December 1984, and on 6 December 1984, the defendant was sentenced in case No.

83CRS19089 to a $50,000 fine and seven years in prison to be served at the expiration of his other sentence.

On 17 May 1985, the defendant made a motion for appropriate relief in case No. 83CRS19089, on the grounds that his guilty plea in that case was induced by a promise made by the district attorney's office through his attorney that he would not have to serve any additional time if he testified against his supplier, and that the consecutive seven-year sentence did not conform to that plea agreement. Defendant's motion was denied. On writ of certiorari granted by this Court on 31 December 1985, defendant now contends that the trial court improperly denied the motion. We agree, and we reverse and remand.

II

The record shows that the defendant's guilty plea in case No. 83CRS19089 was accepted by the trial court only after the defendant had been properly examined under oath and had signed a standard "transcript of plea" indicating, *inter alia*, that he had not agreed to plead guilty as a part of any plea arrangement or as a result of any promises or threats. The court then signed an order concluding that the plea was "the informed choice of the defendant and [was] made freely, voluntarily, and understandingly."

At the hearing on his motion for relief before Superior Court Judge E. Lynn Johnson, the defendant presented testimony from his former attorney, from the prosecutor involved in the plea discussions, and from the S.B.I. agent who investigated the case. Mr. Regan, counsel for defendant at the time the guilty plea was entered, testified in relevant part as follows. In March of 1984, after the first three cases were called for trial and jury selection began, plea negotiations began which resulted in the agreement whereby defendant withdrew his plea of not guilty, entered a plea of guilty, and received the initial seven-year consolidated sentence. An additional part of the plea bargain, not reflected in the plea transcript, was that the defendant would assist law enforcement officers in attempting to apprehend other persons involved in drug trafficking, including testifying against his supplier, and that service of his active sentence would be postponed for 60 days in order for him to render the agreed upon assistance. Mr. Regan further stated, in reference to case No. 83CRS19089, that

> [t]here was an understanding, all at the same time, back in March of 1984, that depending on Mister Mercer's testimony, Mister Mercer's effort, that that case could as much as be dismissed or he could have a sentence imposed at a later time to run concurrently with the first one.

According to Regan, in July of 1984, there was further discussion regarding case No. 83CRS19089 during which Mr. Bowen, the Assistant District Attorney, indicated on behalf of his office that the defendant's supplier was to be indicted, that they would need the defendant's testimony against him, and that if the defendant testified truthfully, the sentence in that case would run concurrently with his previous sentence. Mr. Regan discussed the proposed agreement with the defendant and advised him to plead guilty based upon the representations by the district attorney's office that "he would be permitted to testify in the . . . case against his supplier and that would give him the green fence for no additional time, or either dismiss it." Furthermore, prayer for judgment was to be continued to give the defendant an opportunity to testify or otherwise assist law enforcement officers. The agreement was not shown on the plea transcript because it might prejudice the State's future case against the supplier. The defendant remained ready and willing to testify, but the district attorney decided not to prosecute the supplier.

The Assistant District Attorney, Mr. Bowen, testified that in March of 1984 there were discussions about defendant assisting law enforcement officers, but denied making any specific promises, stating that the district attorney's office had a firm policy not to give promises to induce a defendant to offer evidence or help law enforcement. Mr. Bussel, the S.B.I. agent on the case, testified that he was familiar with the district attorney's office's policy "that no promises specifically be made" in this situation. He further stated that the defendant never contacted him or gave him any information other than two statements and a list of possible targets, which information was of very little value.

After the hearing, Judge Johnson made findings of fact, and concluded that the defendant's plea in case No. 83CRS19089 was "voluntarily, knowingly, and intelligently given . . . and not the product of promises or other inducements," and that the defendant had not rendered "substantial assistance" so as to be relieved

from the mandatory sentencing provisions of N.C. Gen. Stat. Sec. 90-95(h) (1985).

III

[1] The defendant first contends that the evidence and findings of fact do not support Judge Johnson's conclusion that the guilty plea was voluntarily and intelligently entered. We agree that the findings are insufficient.

A conviction on an involuntary guilty plea involves a violation of rights under the United States Constitution and thus, a defendant is entitled to collaterally attack a judgment entered on his guilty plea, on the grounds that the plea was not voluntarily and knowingly given. *Blackledge v. Allison*, 431 U.S. 63, 52 L.Ed. 2d 136 (1977); *State v. Loye*, 56 N.C. App. 501, 289 S.E. 2d 870 (1982). A guilty plea is not voluntary and intelligent unless it is "entered by one fully aware of the direct consequences, including the actual value of any commitments made to him *by the court, prosecutor, or his own counsel . . .*," *Brady v. United States*, 397 U.S. 742, 755, 25 L.Ed. 2d 747, 760 (1970) (*quoting Shelton v. United States*, 246 F. 2d 101, 115 (5th Cir. 1957) (Tuttle, J., dissenting)) (emphasis added); *Bryant v. Cherry*, 687 F. 2d 48, 49 (4th Cir. 1982), *cert. denied*, 459 U.S. 1073, 74 L.Ed. 2d 637, and is not "the product of such factors as misunderstanding, duress, or misrepresentation by others." *Blackledge* at 75, 52 L.Ed. 2d at 147-48.

The defendant has alleged, and produced competent evidence tending to show, that his plea of guilty was induced by a promise of the district attorney not shown on the transcript of plea, and was based on his understanding of information received from his attorney that if he testified against his supplier, any sentence in case No. 83CRS19089 would run concurrently with his previous sentence. On the other hand, the transcript of plea and the district attorney's testimony tend to support the State's contention that the alleged plea arrangement did not exist. The trial court failed to make any findings of fact assessing the credibility of, or resolving the conflicts in, this evidence and therefore we cannot determine the propriety of the conclusion regarding voluntariness. Consequently we must reverse and remand for further findings of fact regarding whether the alleged plea agreement existed, what the defendant was told by his attorney, and whether defendant relied on anything his attorney told him.

The sole finding of fact relating to the entry of the plea states:

> 6. That on July 19, 1984 the defendant appeared before the Honorable B. Craig Ellis and entered a plea of guilty to the charge of trafficking in cocaine contained in 83CRS19089 with no plea agreement appearing of record; that judgment was continued by Judge Ellis to a date not later than December 15, 1984.

We are not unmindful of cases of this Court which, in upholding guilty pleas as voluntary and intelligent, have appeared to give conclusive weight to evidence that a particular defendant signed a plea transcript and the judge made careful inquiry of the defendant regarding his plea. *See State v. Crain*, 73 N.C. App. 269, 326 S.E. 2d 120 (1985); *State v. Thompson*, 16 N.C. App. 62, 190 S.E. 2d 877, *cert. denied*, 282 N.C. 155, 191 S.E. 2d 604 (1972); *State v. Hunter*, 11 N.C. App. 573, 181 S.E. 2d 752, *aff'd*, 279 N.C. 489, 183 S.E. 2d 665 (1971), *cert. denied*, 405 U.S. 975, 31 L.Ed. 2d 249 (1972). However, although

> the representations of the defendant, his lawyer, and the prosecutor at [the original plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings, . . . the barrier of the plea or sentencing proceeding record . . . is not invariably insurmountable.

Blackledge at 74, 52 L.Ed. 2d at 147.

We believe that the defendant's allegations in this case, if believed, would entitle him to relief and that the evidence presented raises issues of fact which may not be resolved solely on the basis of the written transcript of plea. If, in fact, the defendant's plea was induced by an actual unkept promise of the district attorney *or* resulted from misunderstanding due to misinformation from his attorney regarding the existence or terms of any such promise, then the defendant is entitled to have his guilty plea vacated as involuntary and proceed to trial on the charges against him.

IV

[2] Defendant further contends that Judge Johnson's findings of fact regarding whether the defendant rendered "substantial as-

sistance" to law enforcement officers are not supported by the evidence. In turn, counsel for the State argues (1) that the plea agreement alleged by the defendant would have been illegal because the defendant's only opportunity to mitigate his sentence was pursuant to the provisions of G.S. Sec. 90-95(h)(5) which allows the sentencing judge to impose a reduced sentence upon a finding that the defendant has rendered "substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals," and (2) that the evidence shows that the defendant did not, in fact, render "substantial assistance" so as to be entitled to relief under that statute from its otherwise mandatory sentencing provisions. Indeed, the trial court, in its findings of fact determined that "any relief for any 'substantial assistance' is a judicial determination and not within the province of the District Attorney's office."

However, the critical issue is not whether the alleged plea agreement was one which the prosecutor could legally enter or whether defendant rendered "substantial assistance," but whether the defendant was induced to plead by his belief that an agreement existed. Assuming without deciding that such an agreement was beyond the authority of the district attorney but the agreement was made, the defendant is entitled to withdraw his guilty plea as based on an improper inducement. If, on the other hand, the alleged agreement existed and *was* proper, the actual assistance rendered by the defendant must be measured by the terms of the agreement and not by the "substantial assistance" standard of G.S. Sec. 90-95(h). Of course, if no agreement was made, defendant may still be entitled to relief if he relied upon an assurance of his attorney regarding the consequences of the plea.

We conclude that to the extent the trial court's denial of defendant's motion for appropriate relief resulted from the court's assessment of the defendant's assistance to law enforcement improperly measured by the "substantial assistance" standard of G.S. Sec. 90-95(h), the order must be reversed and remanded.

V

Due to the inadequacies of the trial court's order discussed above, the order is reversed and this cause remanded to the trial court for entry of a new order supported by proper and sufficient

findings of fact and conclusions of law consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and PHILLIPS concur.

O. S. STEEL ERECTORS v. JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA

No. 8610SC779

(Filed 17 March 1987)

1. **Master and Servant § 114— working without safety rope—willful-serious violation of OSHA regulation—sufficiency of evidence**

Evidence before the Safety and Health Review Board was sufficient to support a conclusion that petitioner had committed a willful-serious violation of an OSHA regulation where the evidence showed that petitioner's employee walked along 10-inch wide steel beams at a height of 40 to 60 feet; he performed tasks while balanced on the beams; at no time was he secured by a safety rope; petitioner had been cited at least four previous times for similar violations; the employee stated to the inspectors that his supervisor knew he was not using his safety belt; the employee testified that he could "get along with" not using his belt; and the supervisor was present at this job site at times when the employee was not using his belt.

2. **Master and Servant § 114— violation of OSHA regulation—defense of isolated employee misconduct not established**

In a proceeding for judicial review of citations for violations of OSHA regulations with regard to wearing safety belts, petitioner failed to establish the defense of isolated employee misconduct where the evidence showed that the supervisor had observed the employee working on 10-inch wide steel beams on the third and fourth floors without tying off, giving the employer actual knowledge of the violation; the employer had no effectively communicated and enforced work rule on safety belts; and no disciplinary action had been taken against the employees involved in four previous citations, one of which involved this same employee.

3. **Master and Servant § 114— OSHA violations—time for respondent to file complaint enlarged—no error**

Petitioner was not prejudiced where the Safety and Health Review Board enlarged the time available to respondent Commissioner of Labor to file its complaint, since petitioner's original notice of contest was not timely, and, had the Board not exercised its discretion to reopen the case, the citations against petitioner would not have been reviewable at all.

O. S. Steel Erectors v. Brooks, Com'r. of Labor

APPEAL by petitioner from *Brannon, Judge.* Order entered 17 March 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 6 January 1987.

Petitioner-appellant O. S. Steel Erectors is in the business of constructing the steel frames of buildings. In August of 1978, petitioner was the subcontractor erecting the structural steel for the state Agriculture Building in Raleigh. On 22 August 1978, an inspector for the Occupational Safety and Health Act (OSHA) Division of the respondent-appellee North Carolina Department of Labor conducted an inspection of appellant's construction site. As a result of the inspection, appellant was issued two citations. The first was for a "willful-serious" violation of OSHA regulations in allowing workers to work on steel beams over 30 feet off the ground without safety nets or a safety belt. The proposed fine for this violation was $1800. Another citation issued to appellant charged a "serious" violation in failing to provide ladders for safe access to all elevations on the job site. This citation carried a proposed penalty of $900.

Both citations and proposed penalties were upheld on administrative review. Petitioner applied for judicial review to the Superior Court of Wake County. On 13 October 1983, Judge James H. Pou Bailey entered an order dismissing the second citation and remanding the first to the agency for further findings on whether the violation was willful-serious, serious, or non-serious. Neither side appealed this ruling. On 17 December 1984, the Safety and Health Review Board again upheld the first citation. Upon judicial review of that agency decision, Judge Brannon affirmed the agency finding of a "willful-serious" violation of the OSHA regulations. Petitioner appeals.

Seavy A. Carroll for petitioner-appellant.

Attorney General Lacy H. Thornburg by Special Deputy Attorney General Ralf F. Haskell for respondent-appellee.

PARKER, Judge.

The central question presented on this appeal is whether there was substantial evidence in the record before the Safety and Health Review Board justifying a conclusion that petitioner had committed a willful-serious violation of an OSHA regulation.

A "serious violation" is defined in G.S. 95-127(18) as being the existence of a condition in the work place from which there is a "substantial probability that death or serious physical harm could result . . . ." Although "willful" is not defined in the statute, G.S. 95-138 provides that "[a]ny employer who willfully or repeatedly violates the requirements of this Article, any standard, rule or order promulgated pursuant to this Article, or regulations prescribed pursuant to this Article, may . . . be assessed . . . a civil penalty of not more than ten thousand dollars . . . ." A violation is deemed to be willful when there is shown " 'a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another.' " *Brewer v. Harris*, 279 N.C. 288, 297, 182 S.E. 2d 345, 350 (1971), quoting *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37 (1929).

As a preliminary matter, we note that respondent's contention that the findings and conclusions of the Review Board should be binding on this appeal because petitioner noted no exceptions thereto is without merit. An appeal to the judiciary from an adverse agency decision under OSHA is made subject to the provisions of the North Carolina Administrative Procedure Act, G.S. 150A-1, *et seq.*, by G.S. 95-141. Although G.S. 150A has since been replaced by G.S. 150B-1, *et seq.*, the provisions of G.S. 150A still apply to this case, as it is a contested case begun before 1 January 1986. *See* 1985 N.C. Sess. Laws ch. 746, s. 19. Under G.S. 150A-46, the exceptions taken by a party aggrieved by a final agency decision are to be specifically set out in the party's petition for judicial review. There is no requirement to note exceptions on the agency decision itself. In its petition for judicial review, petitioner states that it "excepts to each of the . . . findings of fact and . . . conclusions of law" made by the Safety and Health Review Board. This notation is sufficient for superior court review of the "whole record" under G.S. 150A-51(5). Review in this Court, however, is limited to the exceptions and assignments of error set forth by petitioner to the order of the superior court. G.S. 150A-52; N.C. Rule App. Proc. 10(a).

Petitioner first assigns error to the findings by the superior court that there was substantial evidence supporting the conclusion of the Review Board that the violation was willful and serious. Petitioner had been fined for a violation of 29 CFR §§ 1926.28(a) and 1926.104, federal regulations adopted as a part

of the state regulatory scheme pursuant to G.S. 95-131(a). The regulations require all workers who are working over twenty-five feet above the ground to wear safety belts with a lifeline, if safety nets are not provided.

The evidence presented at the administrative hearing showed that on 22 August 1978, petitioner was the steel erector subcontractor for an addition to the Agriculture Building in Raleigh. The job was a relatively small one, so only Mr. Edwin G. Ostendorf, the general manager and owner of O. S. Steel Erectors, and one employee were required. Mr. Ostendorf operated the company's crane, lifting steel beams up to the employee who bolted them in place. The employee, William Kiernan, wore a safety harness but did not "tie off," that is, use a safety line to connect the belt to something which could hold him should he fall.

At one point in the day, Mr. Ostendorf left the job site while the employee continued to work on the steel structure. Directly adjacent to the Agriculture Building, where petitioner was working, is the Labor Building which houses, among other things, the state OSHA inspections department. The Chief of Inspections, Mr. Willard Quinn, testified that he looked out an office window in the Labor Building and saw Mr. Kiernan working on the steel frame without a safety belt. Mr. Quinn got a camera and another inspector and took pictures of the job site. The two then identified themselves to the employee as OSHA inspectors. The employee admitted not wearing his safety belt and, according to the inspectors, said that it was common for him not to wear it and that Mr. Ostendorf knew this. Mr. Kiernan signed a handwritten statement which read, in relevant part: "I have work [sic] on the 3rd and 4th stories on the structural steel without hooking up any safety belt. Mr. Ostendorf observed me without my safety belt hooked-up."

Petitioner's evidence tended to show that Mr. Kiernan did not understand the statement when he signed it. He testified that he only meant to say that his supervisor had seen him without the safety belt only at times when he believed a safety belt was not required, while he was "connecting" the structural steel beams. Mr. Ostendorf testified that he had given Mr. Kiernan explicit instructions to wear his safety belt while doing the work while Mr. Ostendorf was gone.

Other evidence presented showed that O. S. Steel had been cited at least four previous times for the same violation, resulting in fines totaling $1335, and that petitioner had no written safety program and no specific policy on instructing employees on safety.

Our scope of review of the agency decision is limited to an examination of the entire administrative record to determine whether the findings and conclusions of the agency are supported by evidence which is competent, material and substantial. *In re Appeal from Environmental Management Comm.*, 80 N.C. App. 1, 341 S.E. 2d 588 (1986). If this Court determines that the agency's findings are so supported, those findings are conclusive on appeal. *Id.* This Court may not substitute its judgment for that of the agency in weighing equally reasonable conclusions. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E. 2d 538 (1977).

[1] First, it is apparent from a review of the whole record that the violation was "serious" within the meaning of G.S. 95-127(18). The evidence showed that petitioner's employee would walk along ten-inch-wide steel beams at a height of 40 to 60 feet above the ground. The employee would also perform work tasks while balanced on those beams. At no time was he secured by a safety rope. Clearly, such a condition presents the possibility of an accident which would carry a substantial probability of death or serious injury. *See Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E. 2d 24 (1981).

The evidence supporting the finding and conclusion that the violation was willful is that petitioner had been cited at least four previous times for similar violations; that the employee stated to the inspectors that his supervisor knew he was not using his safety belt; that the employee testified that he could "get away with" not using his belt; and that the supervisor was present at this job site at times when the employee was not using his belt. Evidence to the contrary presented by petitioner was that the employer believed the employee was not required to use his safety belt during the time when Mr. Ostendorf observed him on the day of the citation because the worker was "connecting," and that it was only when he left the job site, after specifically instructing his employee to tie-off the safety belt, that the worker went on to do tasks requiring a belt without tying off. However, the inspector

testified that OSHA regulations made no exceptions to the rule requiring safety belts while workers are "connecting." Further, one of the previous citations issued to petitioner had been for failure of his workers to tie-off with safety belts while "connecting." Thus, substantial evidence supports the conclusion that the violation was "willful." That is, that it was a deliberate disregard of a duty, imposed by statute, regulation or contract, necessary to the safety of a person or property. *See Brewer v. Harris, supra.*

[2] Petitioner next contends that the superior court erred in upholding the finding of the Review Board that petitioner failed to establish the defense of isolated employee misconduct. In order to show that the safety violation was the result of isolated employee misconduct, the employer must show that it had taken all feasible steps to prevent an accident from occurring; that the employee action was contrary to an effectively communicated and enforced work rule; and that the employer had neither actual nor constructive knowledge of the violation. *See Daniel International Corp. v. Occupational Safety and Health Comm.*, 683 F. 2d 361 (11th Cir. 1982). The evidence showed that the supervisor had observed the employee working on the third and fourth floors without tying off, giving the employer actual knowledge of the violation. The evidence further showed that the employer had no "effectively communicated and enforced" work rule on safety belts. No disciplinary action had been taken against the employees involved in the previous citations, one of which involved this same employee. The employer had no specific written or stated policy or rules on the use of safety equipment. The conclusion of the Review Board that the employer had failed to show that the violation was isolated employee misconduct is supported by the evidence in the whole record.

[3] Petitioner next assigns as error the finding of fact by the superior court that the Review Board acted within its discretion in enlarging the time available to respondent to file its complaint. Petitioner argues that the complaint was not timely filed and should have been dismissed. The statute governing the Safety and Health Review Board requires a cited employer to give a notice of contest within 15 working days in order to be entitled to an evidentiary hearing. G.S. 95-137(b)(1). The Commissioner of Labor is then given 20 days from the receipt of the notice of contest to file a complaint against the employer. In this case, the

citation was issued on 1 September 1978. On 11 September, the Review Board received a letter from petitioner's attorney which it treated as a letter of contest and ordered a hearing set. The Commissioner of Labor filed his complaint on 28 September. On 2 October, petitioner filed an answer denying that the letter of 11 September was intended as a letter of contest. Upon stipulation of the Commissioner of Labor, the case was dismissed by the Board on 13 October.

In the meantime, petitioner had sent a letter dated either 19 September (within the permissible time limits) or 25 September (outside the permissible time limits) to the Review Board announcing its intention to contest the citation. The discrepancy arose from a motion to dismiss filed by petitioner on 31 October, alleging that the Commissioner had not filed a timely response to its 19 September letter of contest. A letter dated 19 September was attached to the motion. However, the copy of the letter received by the Commissioner was dated 25 September, and a copy of it was attached to a reply to petitioner's motion to dismiss. Petitioner then filed a "Motion to Amend Erroneous Pleading," acknowledging that the notice of contest had been dated 25 September, not 19 September. Under the statute, then, the citations could have been treated as binding on petitioner for failure to file a timely notice of contest, G.S. 95-137(b)(1), for the record shows that the 25 September notice of contest was filed more than 15 working days after the issuance of the citation.

However, respondent then filed a motion with the Review Board to overrule its previous order dismissing the action and to set a hearing on the merits as being in the best interests of all the parties. The motion was granted and the matter set for hearing. Petitioner now attempts to argue that the matter should have been dismissed for failure of the Commissioner to timely respond to its 25 September notice of contest. What this argument ignores is that the 25 September notice of contest was not timely itself and that, had the Board not exercised its discretion to reopen the case, the citations would not have been reviewable at all. Clearly, then, no prejudice to petitioner resulted from the Review Board's discretionary reopening of the case. The assignment of error is overruled.

Petitioner's final assignment of error is that the superior court erred in upholding the $1800 fine imposed upon it as a re-

sult of the citation. However, petitioner's arguments in support of this assignment are largely repetitious in that petitioner argues that it was an abuse of discretion for the Review Board to impose a fine of $1800 where there was no substantial evidence that the violation was "willful-serious." As we have earlier disposed of these arguments adversely to petitioner, and as it appears that the fine is well within the established guidelines for a violation of this nature, the assignment of error is overruled.

Having carefully reviewed the evidence contained in the entire record before us, we conclude that the order of the Review Board finding petitioner guilty of a "willful-serious" violation of a safety regulation is supported by substantial evidence and is not an abuse of discretion. Therefore, the order appealed from must be and is hereby

Affirmed.

Judges WELLS and MARTIN concur.

STATE OF NORTH CAROLINA v. LEROY LOCKLEAR

No. 8612SC813

(Filed 17 March 1987)

1. **Searches and Seizures §§ 24, 45— confidential informant—evidentiary hearing not required**

In a prosecution of defendant for controlled substance violations, the trial court did not err in summarily denying defendant's motion to suppress the evidence seized pursuant to a search warrant and in denying defendant's request for an evidentiary hearing as to the good faith of an officer's affidavit in support of the warrant, since defendant's mere denial of the existence of the State's confidential informant failed to rebut the presumed validity of the search warrant. N.C.G.S. § 15A-978.

2. **Searches and Seizures § 45— confidential informant—in-camera hearing with defendant not required**

Defendant who was charged with controlled substance violations was not entitled to an in-camera hearing with the State's confidential informant, and the Court declines to adopt a rule requiring a trial judge, upon a defendant's

motion, to conduct an in-camera hearing with the informant when a defendant challenges the good faith of an affiant to a search warrant.

3. **Criminal Law § 34— outstanding arrest warrants against defendant—any error cured by cautionary instruction**

Any prejudicial effect of testimony as to outstanding arrest warrants against defendant on unrelated matters was cured by the trial court's cautionary instruction to the jury to disregard the testimony in their deliberations, and the court's further limiting instruction at the close of the evidence was not confusing or misleading but served to emphasize that the other arrest warrants should not be considered on the issue of defendant's guilt of the crimes charged.

4. **Narcotics § 4.7— feloniously maintaining dwelling and vehicle for selling controlled substances—instructions on misdemeanors not required**

In a prosecution for the felonies of knowingly and intentionally keeping and maintaining a dwelling house and a vehicle for keeping or selling controlled substances, evidence that the dwelling was not owned by defendant and that the vehicle was not titled in defendant's name did not require the trial court to charge the jury on the misdemeanor offenses of knowingly keeping or maintaining a dwelling house and a vehicle for keeping or selling controlled substances. N.C.G.S. § 90-108(a)(7) and (b).

5. **Narcotics § 1.3— "knowing" and "intentional" keeping of house or vehicle for selling controlled substance—no unconstitutional vagueness**

There was no merit to defendant's contention that the distinction between "knowing" and "intentional" in N.C.G.S. § 90-108 was unconstitutionally vague in that it provided insufficiently clear standards of conduct and therefore violated due process.

APPEAL by defendant from *Johnson (E. Lynn), Judge.* Judgment entered 11 March 1986 in Superior Court, HOKE County. Heard in the Court of Appeals 6 January 1987.

Defendant was charged with four counts of controlled substance violations: felonious possession with intent to sell or deliver cocaine; felonious possession with intent to sell or deliver marijuana; felonious keeping and maintaining of a dwelling house for keeping or selling controlled substances; and felonious keeping and maintaining of a vehicle for keeping or selling controlled substances. At trial defendant presented no evidence. The jury returned a verdict of guilty as to each count, and the court sentenced defendant to ten years imprisonment. Defendant appealed.

Attorney General Lacy H. Thornburg by Assistant Attorney General Lucien Capone, III, for the State.

Michael O'Foghludha for defendant-appellant.

PARKER, Judge.

In this appeal, defendant raises six assignments of error: (i) the trial court's failure to hold an evidentiary hearing as to the truthfulness of the information used to establish probable cause for the search warrant; (ii) the trial court's failure to hold an in-camera hearing with the State's confidential informant whose information furnished, in part, probable cause for the search warrant; (iii) the trial court's denial of a motion for mistrial when the jury discovered there were warrants for defendant's arrest outstanding at the time of the search; (iv) the trial court's instruction to the jurors that they could consider for a limited purpose the outstanding warrants for defendant's arrest; (v) the trial court's failure to charge the jury on the misdemeanor offenses of knowingly keeping or maintaining a vehicle and a dwelling house for keeping or selling controlled substances; and (vi) the trial court's instruction to the jury on the felonies of intentionally keeping or maintaining a vehicle and a dwelling house for keeping or selling controlled substances on the grounds that the statute on which the charge was based is unconstitutionally vague. We will address these issues seriatim.

[1] Defendant first argues that G.S. 15A-978 requires an evidentiary hearing on his pretrial motion to suppress evidence so that defendant can contest the search warrant used to discover that evidence. Defendant concedes in his brief to this Court that he fails to meet the threshold requirement for a constitutionally mandated evidentiary hearing as set forth in *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978).

General Statute 15A-978(a) permits a defendant to challenge the validity of a search warrant by attacking the good faith of the affiant in providing information used to establish probable cause. *State v. Winfrey*, 40 N.C. App. 266, 268-269, 252 S.E. 2d 248, 249, *disc. rev. denied*, 297 N.C. 304, 254 S.E. 2d 922 (1979). The affidavit supporting the warrant in this case stated that a confidential informant told affiant C. E. Harris, a detective with the Hoke County Sheriff's Department, that informant had been in defendant's residence within the preceding 48 hours, that informant had observed a large quantity of cocaine and marijuana in defendant's possession, and that informant had seen defendant selling cocaine to at least two persons. In support of his motion to suppress evi-

dence seized pursuant to the warrant, defendant submitted an affidavit in which he stated that he did not sell cocaine to any person within the 48 hours preceding the issuance of the warrant, that no person observed him with cocaine or marijuana during that time, and that, in his belief, no confidential informant existed.

In *State v. Walker*, 70 N.C. App. 403, 320 S.E. 2d 31 (1984), a defendant similarly challenged the good faith of an affiant to the application for a search warrant. This Court concluded:

> A search warrant is presumed to be valid unless irregularity appears on its face . . . . If defendant had evidence to rebut the presumption of validity of the warrant, it was his obligation to go forward with his evidence . . . . Defendant's evidence is simply a denial that any male had been in his home for 48 hours prior to the search . . . . Such testimony is insufficient to rebut the presumption of validity of the search warrant.

Walker, 70 N.C. App. at 405-406, 320 S.E. 2d at 33 (citations omitted).

A motion to suppress evidence in superior court is governed by G.S. 15A-977, which requires that such a motion be "accompanied by an affidavit containing facts supporting the motion." G.S. 15A-977(a). The trial judge may summarily deny such a motion if it alleges no legal basis for the motion, or if the affidavit does not, as a matter of law, support the ground alleged. G.S. 15A-977(c). If the motion is not summarily determined, the judge is required to hold a hearing and make findings of fact. G.S. 15A-977(d).

As in *Walker*, defendant's mere denial of the existence of the State's confidential informant fails to rebut the presumed validity of the search warrant. Therefore, the trial judge was correct in summarily denying defendant's motion to suppress the evidence seized pursuant to the warrant and in denying defendant's request for an evidentiary hearing as to the good faith of the officer's affidavit in support of the warrant.

[2] Defendant's second argument is that the trial court erred in denying defendant's motion for an in-camera hearing with the

State's confidential informant. Defendant acknowledges that this Court has previously held, in *State v. Creason*, 68 N.C. App. 599, 315 S.E. 2d 540 (1984), *aff'd in part, rev'd in part on other grounds*, 313 N.C. 122, 326 S.E. 2d 24 (1985), that the trial court is not required to compel the State to disclose the identity of a non-transactional confidential informant. However, defendant argues that without information concerning the State's informant, he cannot make a showing that the search warrant was without support and therefore void. The defendant urges this Court to adopt a rule requiring a trial judge, upon a defendant's motion, to conduct an in-camera hearing with the informant when a defendant challenges the good faith of an affiant to a search warrant. We decline to make such a rule. As we stated in *State v. Walker*, 70 N.C. App. at 407, 320 S.E. 2d at 34, a rule as to whether criminal defendants should be granted in-camera hearings with confidential informants "must be addressed to the sound judgment of the Legislature or the Supreme Court for exercise under their rule making powers."

[3] Defendant's third and fourth assignments of error involve testimony elicited on direct examination of Alcohol Law Enforcement Agent Richard Thornell. When asked by the State why he was in Hoke County at the time of the search, Mr. Thornell stated that he was there for the purpose of serving arrest warrants on defendant. At that point, the court sustained defense counsel's objection and issued a cautionary instruction directing the jurors to disregard this testimony in their deliberations. The court denied defendant's motion for a mistrial.

The trial court correctly denied defendant's motion for a mistrial. Any prejudicial effect of the testimony as to outstanding arrest warrants on unrelated matters was cured by the court's cautionary instruction. *See State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

At the close of the evidence, the trial judge instructed the jury that any evidence concerning process papers or arrest warrants was received for the limited purpose of explaining the conduct and presence of the law enforcement officers at the scene of the search and arrest and that this evidence should play no part in the jury's consideration of issues in the case. Defendant contends that this instruction, in light of the earlier cautionary in-

struction on the testimony, was confusing and misleading. We disagree. Although the earlier cautionary instruction and the later limiting jury charge could be construed as contradictory, when viewed in context, the charge is not confusing or misleading, but serves to emphasize that the other arrest warrants should not be considered on the issue of defendant's guilt in the crimes charged.

[4] Defendant's final two assignments of error involve the trial judge's charge to the jury on the offenses of (i) knowingly and intentionally keeping and maintaining a building used for the unlawful keeping or selling of controlled substances and (ii) knowingly and intentionally keeping and maintaining a vehicle used for the unlawful keeping or selling of controlled substances. At the charge conference, counsel for the defendant requested that the court instruct the jury only on the misdemeanors of "knowingly" keeping and maintaining a building and a vehicle for the unlawful keeping or selling of controlled substances. Defendant's counsel argued that the distinction between "intentional" and "knowing" commission of these offenses is ambiguous and should be interpreted in favor of defendant as requiring only a charge on the misdemeanor. When asked whether "knowing" commission of the offense was a lesser-included offense as to "intentional" commission of the offense, defendant's counsel stated he had no request regarding that issue. Thereafter, the court instructed the jurors that in order to find the defendant guilty they must find that he kept and maintained the building and the vehicle for the purpose of keeping or selling controlled substances *both* "knowingly and intentionally."

General Statute 90-108(a)(7) makes it unlawful "[t]o knowingly keep or maintain any . . . dwelling house, building, vehicle . . . or any place whatever . . . which is used for the keeping or selling of [controlled substances]." Section (b) of the statute makes violation of the above section a misdemeanor; however, if an intentional violation is pleaded and proved, the defendant is guilty of a Class I felony. This Court interpreted G.S. 90-108 in *State v. Bright*, 78 N.C. App. 239, 337 S.E. 2d 87 (1985), *disc. rev. denied*, 315 N.C. 591, 341 S.E. 2d 31 (1986), and concluded that "[a] person knows of an activity if he is aware of a high probability of its existence," but "[a] person acts intentionally if he desires to *cause* the consequences of his act or [if] he believes the consequences

are substantially certain to result." *Bright*, 78 N.C. App. at 243, 337 S.E. 2d at 89 (citation omitted).

Defendant contends that the trial court erred in failing to instruct on the misdemeanor offenses because there was evidence at trial pointing to the lesser *mens rea* on the part of defendant. Specifically, defendant points to the lack of proof presented by the State that the trailer, which was the building or dwelling referred to by the charge, was owned by or in any way connected to the defendant. Defendant also points out that title to the vehicle referred to by the charge was not in defendant's name, although the State presented evidence that defendant permitted the truck to be registered in the name of another for the sole purpose of obtaining insurance.

The trial court must instruct the jury on a lesser-included offense when there is evidence from which the jury can infer that defendant committed the lesser offense. *State v. Morris*, 318 N.C. 643, 350 S.E. 2d 91 (1986). However, even assuming that knowing commission of these offenses is a lesser-included offense and that defendant properly preserved this issue for appeal, defendant's argument is still without merit.

The question of defendant's possession and control of the trailer and the vehicle has little relevance to the *mens rea* of the defendant in light of the distinction between knowing and intentional commission of the acts charged. Rather, whether or not defendant lived in or owned the trailer is relevant to the element of the crime that defendant "keep or maintain" the dwelling for unlawful purposes, not that it was done "knowingly" or "intentionally." Likewise, the evidence as to title and ownership of the vehicle would help to establish whether or not defendant "kept or maintained" the vehicle for unlawful use, not whether defendant did so "knowingly" or "intentionally."

The evidence defendant relies on in his brief goes to the issue of defendant's guilt or innocence; this evidence does not, however, tend to show commission of the arguably lesser-included offenses. Since the trial judge's instructions gave the jury the option of finding defendant guilty or not guilty on these separate felony offenses, defendant's argument is without merit.

[5] Defendant's final assignment of error is that the distinction between "knowing" and "intentional" in G.S. 90-108 is unconstitu-

tionally vague in that it provides insufficiently clear standards of conduct and therefore violates due process. We disagree.

This Court examined G.S. 90-108 in *State v. Bright, supra*, and found that there is a distinction to be drawn between "knowing" and "intentional" conduct. Furthermore, the distinction between these states of mind determines not whether the activity is criminal, but whether the criminal act is a felony or a misdemeanor. The "void for vagueness" doctrine argued by defendant "is designed to require that statutes adequately warn people of conduct required of them." *Ellis v. Ellis*, 68 N.C. App. 634, 635, 315 S.E. 2d 526, 527 (1984). Even if this doctrine is applied to statutory language which merely distinguishes degree of culpability rather than criminal from non-criminal behavior, G.S. 90-108 is not unconstitutionally vague because it not only provides adequate warnings as to the conduct it prohibits, but it also gives sufficiently clear guidelines and definitions for judges and juries to interpret and administer it uniformly. *See In re Burrus*, 275 N.C. 517, 169 S.E. 2d 879 (1969), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed. 2d 647 (1971).

Therefore, for the reasons herein stated, we find

No error.

Judges WELLS and MARTIN concur.

ROY HILL, JR. AND WIFE, DANNIE HILL v. BOBBY GENE PERKINS

No. 8616SC491

(Filed 17 March 1987)

Nuisance § 7— maintenance of business—nuisance alleged—no allegations as to defendant's conduct—failure of complaint to state a claim

Plaintiffs' complaint failed to state a claim upon which relief could be granted where plaintiffs sought to include a statement of the substantive elements of a nuisance and made a broad assertion to the effect that the location and operation of defendant's business was a nuisance to them so that they should be granted injunctive relief and damages, but there were no allegations as to defendant's conduct upon which to base liability, and there was no assertion that plaintiffs' remedy at law was inadequate so that they would be entitled to the equitable remedy of a permanent injunction.

Hill v. Perkins

APPEAL by defendant from *McKinnon, Judge*. Judgment entered 2 December 1985 in Superior Court, SCOTLAND County. Heard in the Court of Appeals on 17 November 1986.

This is a civil action instituted by plaintiffs, Roy Hill, Jr., and his wife Dannie Hill. On 29 August 1984, plaintiffs filed their complaint against defendant Bobby Gene Perkins as follows:

Complaint (filed Aug. 29, 1984, 1:13 P.M.)

The Plaintiffs, complaining of the Defendant, allege and say:

1. The Plaintiffs are citizens and residents of Scotland County, North Carolina.

2. The Defendant is a citizen and resident of Scotland County, North Carolina.

3. The Defendant owns and operates a diesel repair business, hereinafter referred to as the "Business," known as Perkins Diesel Service, located at Highway 401 By-Pass and State Road #1323 (Highland Road).

4. The Plaintiffs' home is located on land adjacent to the Business.

5. The Business is located on a one acre tract of land, one-half of which is zoned R-A and one-half of which is zoned H-I, the definitions of which are found in the 1976 Scotland County Zoning Ordinance, hereby incorporated by reference.

6. The Business is a lawful enterprise, insofar as it operates solely on the one-half acre zoned H-I.

7. The location, operation, maintenance and structures of the business constitute a nontrespassory invasion of Plaintiffs' land, and have caused and continue to cause substantial injury and damage to the Plaintiffs' health, comfort, and private use and enjoyment of their land.

8. The injury caused by the conduct of the Defendant is continuous, recurrent, and irreparable.

9. The Defendant's conduct is intentional and unreasonable.

WHEREFORE, the Plaintiffs pray and ask of the Court the following:

1. An injunction permanently restraining the operation of the Business, and damages up to the date of the injunction in the sum of THIRTY THOUSAND DOLLARS ($30,000); or in the alternative,

2. Permanent damages in the sum of EIGHTY THOUSAND DOLLARS ($80,000).

3. Any other remedy that the Court finds just and proper.

On 24 September 1984, defendant filed an answer denying the general allegations made in plaintiffs' complaint. Defendant also filed (1) a motion to dismiss for failure to state a claim upon which relief may be granted, Rule 12(b)(6), N.C. Rules Civ. P.; (2) a motion for a judgment on the pleadings, Rule 12(c), N.C. Rules Civ. P.; and (3) a motion for summary judgment, Rule 56, N.C. Rules Civ. P. The trial court did not grant any of defendant's motions.

The parties waived a trial by jury and the case was heard by the trial court sitting as the trier of fact. After hearing the evidence presented by the parties the trial court made findings of fact and conclusions of law. The trial court concluded as a matter of law, *inter alia*, that "[t]he intentional conduct and activities of the defendant in the use of his property as herein found constitute a private nuisance per accidens to the Plaintiffs, as a result of which they have suffered damage, and they are entitled to an abatement of the nuisance." It was ordered by the trial court that plaintiffs recover the sum of $10,000.00 from defendant. The trial court further ordered that defendant be permanently enjoined from operating his business and making use of his premises except in compliance with the extensive restrictions set forth in the trial court's order. Defendant appeals.

Max D. Ballinger, for defendant appellant.

David Ray Martin, for plaintiff appellees.

JOHNSON, Judge.

Defendant first assigns as error the trial court's denial of his Rule 12(b)(6), N.C. Rules Civ. P. motion to dismiss plaintiffs' complaint for failure to state a claim upon which relief may be granted. We find error in the trial court's denial of defendant's motion to dismiss.

The test on a motion to dismiss for failure to state a claim upon which relief may be granted is whether the pleading, when liberally construed, is legally sufficient. *E.g., Fowler v. Williamson*, 39 N.C. App. 715, 251 S.E. 2d 889 (1979). In order for plaintiffs' complaint to have withstood defendant's motion to dismiss, the complaint must (1) provide defendant sufficient notice of the conduct on which the claim is based to enable defendant to respond and prepare for trial and (2) plaintiffs must have stated enough in their complaint to satisfy the substantive elements of at least some legally recognized claim. *See, e.g., Hewes v. Johnston*, 61 N.C. App. 603, 301 S.E. 2d 120 (1983). For the purpose of ruling on a motion to dismiss the allegations of the complaint are treated as true. *E.g., Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). However, conclusions of law or unwarranted deductions of fact are not admitted. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). Under the notice theory of pleadings, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of *res judicata*, and to show the type of case brought. *Redevelopment Commission v. Grimes*, 277 N.C. 634, 178 S.E. 2d 345 (1971).

In the case *sub judice*, plaintiff's complaint does not set forth any facts that apprised defendant or the court of the basis for its claim or allows for the application of *res judicata*. The inherent difficulties with the definition of a nuisance have been described by this Court as follows:

> In the whole field of law there is nothing more difficult to capture within the confines of a workable definition than the concept of nuisance, *nothing more dependent on the peculiar facts of the given case.* Like the legendary and elusive gadfly Tyll Eulenspiegel it scoffs at the conventionalities of the law.

Dorsett v. Group Development Corp., 2 N.C. App. 120, 124, 162 S.E. 2d 653, 656 (1968) (quoting with approval *Louisville Refining Co. v. Mudd., Ky.*, 334 S.W. 2d 181 (emphasis supplied)). Plaintiffs, in their complaint, sought to include a statement of the substantive elements of a nuisance. Count 7 of plaintiffs' complaint contains an incomplete quotation of language used by the Court in *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E. 2d 682,

689 (1953), which plaintiffs contend to be the definition of a private nuisance. Plaintiffs, in their brief, state the following:

> In North Carolina, a private nuisance has been defined as being 'any substantial and trespassory invasion of another's interest in the private use and enjoyment of land by any liability forming conduct.' *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E. 2d 682, 689 (1953). Plaintiff incorporated practically the very same definition in paragraph seven of his complaint. (R. P. 3-5). A lawful enterprise or business is not regarded as a nuisance per se but may be a nuisance in fact 'by reason of its location, or the manner in which it is construed or maintained or operated.' *Andrews v. Andrews*, 242 N.C. 382, 389, 88 S.E. 2d 88, 93 (1955).

The fallacy with plaintiffs' argument, and with their complaint, is that statements of law written by this State's highest appellate court were not intended for use as a ritualistic recitation in the form of a partial quotation in a complaint as a substitute for alleging sufficient facts from which it may be determined what liability forming conduct is being complained of and what injury plaintiffs have suffered. Neither *Morgan*, nor *Andrews v. Andrews*, 242 N.C. 382, 88 S.E. 2d 88 (1955) support plaintiffs in their contention that their complaint was sufficient. Plaintiffs only included a partial statement of the explanation of nuisance contained in *Morgan. See Morgan, supra*, at 193, 77 S.E. 2d at 689. Moreover, the allegations of the complaints in *Morgan* and *Andrews* are set forth in those opinions. There is no comparison between those complaints and plaintiffs' complaint in the case *sub judice*.

Plaintiffs failed to point out that *Morgan, supra*, was heard in the Supreme Court on a prior appeal from a denial of a demurrer *ore tenus* on the theory that the complaint did not state facts sufficient to constitute a cause of action. *See, Morgan v. High Penn Oil Co.*, 236 N.C. 615, 73 S.E. 2d 477 (1952) (an order overruling a demurrer *ore tenus* was not appealable). The Court in *Morgan*, noted that the complaint alleged in detail "that the oil refinery and the oil distribution center are so constructed and so operated by the defendants as to cast large quantities of noxious fumes and gases onto the neighboring land of the plaintiffs, causing them to suffer great annoyance and discomfort in the enjoyment of their property. . . ." *Id.* at 615-16, 73 S.E. 2d at 478.

The Court in *Andrews, supra*, set out in full the complaint and the demurrer filed in that action. The complaint in *Andrews* like the complaint in *Morgan* sets forth the particular harm plaintiffs in those actions complained of. For example, plaintiffs in *Andrews* alleged, *inter alia*, the following:

> 6. That during the winter of 1951-1952 the defendant placed lame wild geese on the said pond, and placed food and bait on the pond and on the banks thereof, at regular intervals, for the purpose of attracting wild geese to the pond and the surrounding area. That as a direct result of the defendant's building and maintaining the pond near the plaintiffs' lands, placing food and lame wild geese thereon for the purpose of attracting wild geese, wild geese in large numbers came to the pond, but instead of staying on the pond, used the pond as a base from which to set upon and destroy plaintiffs' crops and fields as hereinafter alleged.

Andrews, supra, at 384, 88 S.E. 2d at 89. Plaintiffs' complaint in *Andrews, supra*, goes on to allege defendant's conduct and the injury resulting to them. Plaintiffs' complaint in the case *sub judice* does not allege any conduct by defendant from which the conclusory statements made in plaintiffs' complaint may be inferred.

Our research reveals a plethora of reported opinions wherein allegations of the defendant's *particular* conduct are set forth and contained in complaints filed by plaintiffs seeking the abatement of a nuisance. *Hooks v. International Speedways, Inc.*, 263 N.C. 686, 140 S.E. 2d 387 (1965); *Pharr v. Garibald*, 252 N.C. 803, 115 S.E. 2d 18 (1960); *Causby v. High Penn Oil Co.*, 244 N.C. 235, 93 S.E. 2d 79 (1956); *Andrews, supra; Morgan, supra; Pake v. Morris*, 230 N.C. 424, 53 S.E. 2d 300 (1949); *Clinard v. Town of Kernersville*, 215 N.C. 745, 3 S.E. 2d 267 (1939); *Aydlett v. Carolina By-Products, Inc.*, 215 N.C. 700, 2 S.E. 2d 881 (1939); *Dorsett, supra*. There is a reason for the necessity of setting forth allegations of defendants "intentional" conduct in order to state a claim upon which relief may be granted. As the Court in *Morgan, supra*, stated: "a person is subject to liability for an intentional invasion *when his conduct is unreasonable under the circumstances of the particular case.*" *Morgan, supra*, 238 N.C. at 193, 77 S.E. 2d at 689 (emphasis supplied). There are no allegations of defendant's conduct in plaintiffs' complaint in the case *sub judice*. Plaintiffs' com-

plaint merely contains a broad assertion to the effect that the location and operation of defendant's business is a nuisance to them and the court should, therefore, grant them injunctive relief and damages. Moreover, plaintiffs' complaint does not even assert that their remedy at law is inadequate so that they would be entitled to the equitable remedy of a permanent injunction, *City of Durham v. Public Service Co. of North Carolina, Inc.*, 257 N.C. 546, 126 S.E. 2d 315 (1962).

For the aforementioned reasons we hold that plaintiffs' complaint fails to state a claim upon which relief may be granted. Therefore, the trial court should have granted defendant's Rule 12(b)(6), N.C. Rules Civ. P., motion to dismiss. In light of our holding we need not address defendant's remaining Assignments of Error.

Judgment is reversed.

Judges ARNOLD and EAGLES concur.

C. THOMAS GUALTIERI v. WILLIAM A. BURLESON

No. 8615DC722

(Filed 17 March 1987)

1. **Contracts § 27— attorney's contract with expert witness—sufficiency of evidence—no contract between client and expert witness**

In an action by an expert witness to recover for services rendered in connection with a lawsuit which was handled by defendant lawyer in the District of Columbia, evidence was sufficient to support the judgment against defendant where it tended to show that defendant personally contacted plaintiff at his office and requested that plaintiff render expert medical services, including testifying at trial if necessary; plaintiff agreed to and did perform the requested services; and defendant personally contracted to pay plaintiff for the services rendered. Moreover, the fact that defendant identified himself as a lawyer with a disabled client was insufficient to establish that the client and not defendant was the one contracting to pay for plaintiff's services.

2. **Appeal and Error § 6.3; Process § 9.1— nonresident defendant—in personam jurisdiction—minimum contacts—failure to appeal from court's order determining jurisdiction**

Defendant could not properly raise the issue as to whether the trial court had jurisdiction over his person where defendant did not appeal from the trial

judge's order denying his motion to dismiss on the ground of lack of *in personam* jurisdiction; nevertheless, the court did properly exercise jurisdiction over defendant where the most significant services rendered by plaintiff pursuant to his contract with defendant took place in plaintiff's Chapel Hill office, and defendant's contacts with this state, including contacting plaintiff in North Carolina, soliciting him to perform professional services in North Carolina, carrying the name of a North Carolina lawyer on his letterhead, and filing a counterclaim in this case, were sufficient so that requiring him to defend the case here was not in violation of due process. N.C.G.S. § 1-75.4(5)(a) and (b); N.C.G.S. §§ 1-277(b), 1-278, 1-279.

APPEAL by defendant from *Hunt, Judge*. Order entered 18 February 1986 in District Court, CHATHAM County. Heard in the Court of Appeals 11 December 1986.

Defendant, a Washington, D. C. lawyer and resident, appeals from a verdict and judgment in favor of the plaintiff, a Chapel Hill, N. C. neuropsychiatrist, for services rendered in connection with a lawsuit that defendant handled in the District of Columbia. That suit, upon behalf of Shirley and Calvin Kirby, was against the United States and its purpose was to recover damages that allegedly resulted from Shirley Kirby being vaccinated for swine flu. In this case, begun in February 1984, plaintiff alleged that defendant hired him to render expert services in connection with the Washington case and owed him $2,825 for the services so rendered. Defendant moved to dismiss on the ground that he was not subject to the court's jurisdiction; and in answering the complaint he denied plaintiff's principal allegations and filed a purported counterclaim against Calvin and Shirley Kirby that was later dismissed in which he alleged that plaintiff was hired by the Kirbys, rather than him. The jurisdictional motion, heard on 25 September 1985, was dismissed by Judge Peele upon findings that a substantial part of the services defendant hired plaintiff to perform were performed in North Carolina. In January 1986 the case was tried without a jury by Judge Hunt, who rendered verdict and judgment for the plaintiff in the amount sued for. Defendant presented no evidence and his appeal from the judgment questions only the sufficiency of the evidence, which in pertinent part was as follows:

In 1981 defendant was representing Shirley Kirby and her husband in a case that was pending in the courts of the District of Columbia. Five years earlier Mrs. Kirby, suffering what apparent-

ly was a temporary psychotic disorder, was vaccinated for swine flu and in the months that followed her mental condition worsened, rather than improved, and the nerves serving her lower body became inflamed and lost their utility, and she has been paralyzed from the waist down ever since. The major issue in that case was whether Mrs. Kirby's paralysis and worsened mental condition were caused by the swine flu vaccine. Dr. Gualtieri is a recognized authority on the conditions that Mrs. Kirby had and in March 1981 defendant telephoned him from Washington, told him generally about Mrs. Kirby's case and condition and stated that he needed an expert opinion and witness as to the relationship, if any, between the swine flu vaccination and Mrs. Kirby's declining mental and neurological condition. Plaintiff told defendant he usually charged $100 per hour and $1,500 per day for work of that kind and that before he could form an opinion about Mrs. Kirby's situation he would have to examine her and analyze her medical records. Defendant asked him if payment of his charges could be delayed until the case was over, and plaintiff said it could if his expenses were paid as incurred. Defendant told plaintiff that he wanted him to examine Mrs. Kirby, evaluate her medical records and condition, report whether her neurological or mental condition had been contributed to or aggravated by the swine flu vaccination, and testify at the trial if appropriate and necessary; and plaintiff said that he would do the work requested. During this initial telephone conversation between plaintiff and defendant nothing was said about plaintiff being hired upon behalf of the Kirbys instead of by defendant personally; or about plaintiff's charges being paid by the Kirbys; or about the defendant not being personally responsible for plaintiff's charges; or about plaintiff's payment being contingent upon the case being won; and at no time has plaintiff ever conversed or corresponded with the Kirbys either about them hiring him to work on their case or about paying him for it. Shortly after the telephone conversation defendant sent Mrs. Kirby's medical and hospital records to plaintiff, who analyzed them in his office at Chapel Hill. In April 1981, at defendant's request, plaintiff flew to Washington, talked with defendant at his law office, visited Mrs. Kirby in a District of Columbia hospital and gave her a physical and neurological examination, after which he went back to defendant's office and received defendant's check in payment of his travel expense. When plaintiff got back to his office in Chapel Hill he

spent several hours preparing a report about Mrs. Kirby's disabled condition, a report that expressed and supported the opinion that her condition was causally related to the swine flu vaccination. When the report was completed on 28 April 1981 plaintiff mailed it to defendant, along with a bill for $2,000. In December 1981 at defendant's request plaintiff went back to Washington, re-examined Mrs. Kirby, and testified in the case by deposition. After the deposition transcript was sent to plaintiff some weeks later he reviewed and corrected it in his Chapel Hill office and mailed it to defendant, along with an additional bill for $1,700. The Kirby case, tried in July 1982, ended with a judgment for the United States, but incident thereto $875 of plaintiff's charges were paid by the government. Plaintiff wrote letters to defendant in August, November and December 1982 and May 1983 requesting payment of the $2,825 balance that he claimed; but defendant made no payment and mailed only one letter in response on 1 December 1982 in which he first claimed that he was not responsible for plaintiff's charges.

James T. Bryan, III and Chris Kremer for plaintiff appellee.

Northen, Blue, Little, Rooks, Thibaut & Anderson, by David M. Rooks, III, for defendant appellant.

PHILLIPS, Judge.

[1] Defendant's assignments of error contending that the evidence is insufficient to support the judgment against him are without merit and we overrule them. The court's decisive findings of fact—to the effect that plaintiff *agreed with defendant* to provide the services involved and that plaintiff told defendant he would charge *him* the per diem and hourly fees above stated—are amply supported by evidence, and clearly support the court's conclusion that defendant personally contracted to pay plaintiff for the services admittedly rendered in the Kirby case. Defendant's argument is not that the court's findings have no evidentiary foundation; it is, instead, that he is not liable because he "identified himself as an attorney representing Mrs. Kirby," thereby making "it clear that he acted in a representative capacity for a disclosed principal." This argument is rejected. Trial lawyers are always making contracts with court reporters, investigators, and experts of various kinds and the evidence clearly indicates de-

fendant so contracted in this instance. Contrary to defendant's argument, there is no inhibition in the law against a lawyer contracting to pay for services needed in a case he is handling. Rule 5.3 of the Rules of Professional Conduct of The North Carolina State Bar authorizes a lawyer to advance or guarantee litigation expenses for his clients, provided the client remains ultimately liable to him for such expenses. This proviso was adopted, no doubt, because litigation is usually conducted, managed and prepared by lawyers, not clients; knowing when court reporters, investigators and expert witnesses are needed and obtaining them is part of a trial lawyer's job; and lawyers, not clients, usually select, contact, negotiate with, engage and pay such persons. Whether payment is made with the lawyer's money or the client's, or whether the client has agreed to reimburse the lawyer, is of no concern to the recipient; but rare, indeed, is the expert, medical or otherwise, who helps in the preparation or trial of a lawsuit without being assured by someone apparently capable of paying that he will be paid. All these things are known by trial lawyers, which is why they usually assure experts vital to their cases that they will be paid and make the best arrangements they can with the clients to repay them. Furthermore, nothing in the evidence suggests that Mrs. Kirby was known to plaintiff or anyone else as a hirer of expert services; or indeed that she had ever hired any such services or authorized defendant to do so upon her credit. Thus, identifying himself as a lawyer with a disabled client, all that defendant did according to the evidence, was not sufficient in our opinion to establish that he was not the one contracting to pay for plaintiff's services. For when a lawyer hiring an expert to help on a case says or does nothing to indicate that the obligation to pay is not his, the expert can reasonably assume, it seems to us, that the lawyer is acting openly and in good faith, rather than evasively, and that he is the contracting party, rather than a stranger he has had no contact with.

[2] Defendant also assigns as error Judge Peele's order denying his motion to dismiss the action on the ground that the court has no jurisdiction over his person. Though not mentioned in the brief of either party, defendant has no right to present this contention because he did not appeal from Judge Peele's order; he only appealed from the judgment that was entered several months later.

The first indispensable step in appealing from a judgment or order, as G.S. 1-279 makes plain, is to give notice of appeal in the manner provided and within the time stated therein. Defendant did not take that first step and thus lost his right to contest the validity of that order because the statutory requirements are jurisdictional. *Booth v. Utica Mutual Insurance Co.*, 308 N.C. 187, 301 S.E. 2d 98 (1983). Nor is the order's validity reviewable under G.S. 1-278 because he did appeal from the judgment. While G.S. 1-278 does provide that interlocutory orders affecting a judgment appealed from can be reviewed with the judgment, that statute applies only to interlocutory orders that are not appealable, *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E. 2d 377 (1950); and the order upholding the court's jurisdiction over defendant's person was immediately appealable under the express provisions of G.S. 1-277(b). *Holt v. Holt*, 41 N.C. App. 344, 255 S.E. 2d 407 (1979). This does not mean, of course, that defendant had to pursue an appeal from the order at that time; he could have preserved his exception for determination later as G.S. 1-277(b) permits. But it does mean that having the right to appeal he was obliged to exercise that right, if at all, by first giving timely notice of appeal in accord with the provisions of G.S. 1-279.

Even so, it is quite clear that under the two-step determination that must be made when the exercise of *in personam* jurisdiction over a non-resident defendant is challenged, *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977), that the trial court had jurisdiction over defendant's person, and his contention to the contrary is overruled. First, we determine that there is statutory authority for exercising *in personam* jurisdiction over defendant in this case. Subparagraphs (a) and (b) of G.S. 1-75.4(5) give the courts of this state personal jurisdiction over a foreign defendant who contracts to pay for services, any substantial part of which are performed in this state; and the most significant services that plaintiff performed for the defendant in Mrs. Kirby's case were to analyze her medical records, arrive at an opinion concerning her condition, and report his findings and opinion to defendant, all of which were done in his office at Chapel Hill. Second, we determine that defendant's contacts with this state have been enough that requiring him to defend the case here is not incompatible with traditional notions of fairness inherent in the concept of due process under *International Shoe*

Co. v. Washington, 326 U.S. 310, 90 L.Ed. 2d 95, 66 S.Ct. 154 (1945). In addition to defendant contacting plaintiff in this state and soliciting him to perform professional services here, defendant also carried the name and address of a North Carolina lawyer on his letterhead, thereby indicating an ability and willingness to do business in this state through that lawyer; he asked the court, through the counterclaim filed in this case, to exercise its jurisdiction over the non-resident Kirbys; he owned land in this state when the suit was filed and had for several years prior thereto. Under all the circumstances recorded there is nothing unfair about requiring defendant to defend the case in our courts; for the unfairness would be in requiring plaintiff to sue defendant in Washington.

Affirmed.

Judges ARNOLD and ORR concur.

DANIEL L. RIDDLE AND WIFE, JUDY J. RIDDLE; FIRST TITLE INSURANCE COMPANY, PLAINTIFFS v. SARAH BETH BURNETT NELSON, DEFENDANT AND THIRD-PARTY PLAINTIFF v. J. WATTS COPLEY, ROBERT W. YOUNG, GELBERT POOLE AND ASSOCIATES, P.A. AND LARRY W. POOLE, THIRD-PARTY DEFENDANTS

No. 8610SC654

(Filed 17 March 1987)

Deeds § 22— covenant of seisin—action for breach—summary judgment improper

In an action for breach of a covenant of seisin, a genuine issue of fact existed as to whether defendant, contrary to plaintiffs' allegation, owned the segment of land in question when she delivered the deed, and the trial court therefore erred in entering summary judgment for defendant.

Judge ARNOLD concurs only in the result.

APPEAL by plaintiffs from *Read, Judge*. Order entered 7 January 1986 in Superior Court, WAKE County. Heard in the Court of Appeals 9 December 1986.

Plaintiffs' appeal is from an order of summary judgment dismissing their suit for damages allegedly caused by defendant

Sarah Beth Burnett Nelson not owning a certain parcel of land that she sold to the plaintiffs Riddle. The order, holding that no genuine issue exists as to any material fact and giving defendant judgment as a matter of law, was entered following the presentation of affidavits, deeds, maps and other evidence which when viewed in the most favorable light for the non-movant plaintiffs was largely to the following effect:

In 1973 defendant and her late husband acquired title to an 88.58 acre tract of Durham County land situated on Olive Branch Road, which generally runs north to south at that place, and they thereafter conveyed portions of the tract to the Rays, the Murphys, the Boisseaus, Rocking Horse Estates, Inc., and others. On 27 October 1983 the defendant widow conveyed the remnant of the tract to the plaintiffs Riddle by a warranty deed containing the usual covenants, including a covenant of *seisin*. The deed describes the property conveyed as containing 10 acres more or less and being somewhat U shaped with two different 120 foot wide prong-like segments fronting on Olive Branch Road; and the deed, along with other evidence, indicates that the wedge of land between the two prong-like segments is several hundred feet wide, the northern part of which belongs to the Murphys and the southern to the Riddles by an earlier purchase from the Nelsons. The defendant's deed describes the southernmost segment, the existence of which is not disputed, as being bordered on the south by land of the Boisseaus and on the north by the earlier tract acquired by the Riddles; and it describes the northern segment, the one at issue here, as being bordered on the north by the land of E. C. Ray, Jr. and on the south by the land of James Murphy and wife. Some months later a survey was done, which indicated that the northernmost 120 foot road frontage segment could not be located on the ground and was included in lands that the Nelsons deeded to the Murphys earlier, but that the land received by the Riddles still amounted to about 10 acres. Upon further inquiry the Riddles learned that the Murphys claimed to own and were occupying the disputed segment and were unwilling to sell it. Because of the shape of the tract and the Riddles' plans for it, more road access was needed and they bought a 90 foot wide segment of land fronting on Olive Branch Road from the Rays for $12,000 and they incurred other expenses in the transaction amounting to several more thousand dollars. The plaintiff insurance company,

which had insured the title to the land purchased by the Riddles, investigated these developments, though to what extent the record does not show, and paid the Riddles $14,039.25 by two checks —one for $12,000.00 marked as partial settlement of their claim under the policy, the other for $2,039.25 marked as the cost of surveying under the policy. Both plaintiffs thereafter demanded certain payments of the defendant and when she refused to pay this suit was brought on 2 May 1985.

Plaintiffs' complaint alleges in substance that: Defendant had breached the covenants of *seisin*, right to convey, and freedom from incumbrances, in that the defendant did not convey to the Riddles the 120 foot road frontage segment described in the deed; that because of the segment's absence the Riddles had to buy other road frontage at a total cost, including attorneys' fees, survey costs and other expenses, of approximately $18,000 and were damaged beyond that sum in an unspecified amount; that the plaintiff insurance company had paid some money to the Riddles under their title policy and both plaintiffs are entitled to recover damages of defendant. The defendant by her answer admitted the land sale and conveyance, but denied the other principal allegations of the complaint and asserted the following defenses *inter alia*: That the Riddles received the quantity of land stated in the deed; that the Riddles had suffered no damage because their losses, if any, had been paid by the insurance company; and that the insurance company's payment was not recoverable because its policy did not cover survey errors.

Boxley, Bolton & Garber, by Ronald H. Garber, for plaintiff appellants.

Glenn and Bentley, by Robert B. Glenn, Jr. and Stewart W. Fisher, for defendant and third-party plaintiff appellee Sarah Beth Burnett Nelson.

No briefs filed by third-party defendant appellees.

PHILLIPS, Judge.

The order appealed from has no foundation and in entering it the court apparently misperceived both the nature of plaintiffs' action and the office of summary judgment. A covenant of *seisin* in a general warranty deed is a covenant that the grantor has ti-

tle to the land conveyed at the time the deed is delivered and the covenant is breached upon delivery if the grantor does not then have title. *Newbern v. Hinton*, 190 N.C. 108, 129 S.E. 181 (1925); *Price v. Deal*, 90 N.C. 290 (1884). Plaintiffs' allegation that one of the 120 foot road frontage segments defendant Nelson deeded to them cannot be located on the ground and that her covenant of *seisin* was thereby breached is in effect an allegation that defendant convenanted that she owned the parcel of land referred to, but in fact did not do so. 5 Strong's N.C. Index 3d, *Deeds* Sec. 22 (1977). Having asked the court by her motion to dismiss plaintiffs' action as a matter of law pursuant to Rule 56, N.C. Rules of Civil Procedure, defendant had the burden of showing by affidavits, discovery, or other evidence that she is entitled to the order sought. *First Federal Savings & Loan Association v. Branch Banking & Trust Company*, 282 N.C. 44, 191 S.E. 2d 683 (1982). In sustaining that burden defendant was obliged to show by uncontradicted evidence either that plaintiffs cannot prove some essential element of their case, or that defendant has an insurmountable defense to it, or that plaintiffs' action is legally deficient in some other respect. In the absence of such proof plaintiff was not required to show anything at the hearing; for in a hearing on a motion for summary judgment the non-movant, unlike a plaintiff at trial, does not have to automatically make out a *prima facie* case, but only has to refute any showing made that his case is fatally deficient. *Hall v. Funderburk*, 23 N.C. App. 214, 208 S.E. 2d 402 (1974). Yet the recorded evidence in this case contains no indication either that plaintiffs cannot prove their case or that defendant has an insurmountable defense to it, or that plaintiffs' claim is otherwise fatally deficient. The making of the covenant of *seisin* being established by defendant's admission that she executed and delivered the deed involved, and it being obvious from the record that none of the defenses asserted in the answer has any legal or evidentiary support, *the only real issue before the trial court was whether the evidence presented showed that defendant did not breach the covenant in that, contrary to plaintiffs' allegation, she owned the segment of land when the deed was delivered.* Yet the record herein contains no indication whatever that defendant had clear title to the segment when the deed was delivered, and there is no argument in defendant's brief that she did. What defendant did argue as dispositive of the case, and apparently the trial court agreed based upon irrelevant decisions in-

volving eviction, ouster and the wrongful claims of strangers, is that the record does not show that the Murphys have superior title to the segment they refused to let the Riddles occupy. But though the Murphy's title is an incidental issue in the case it was not the determinative issue before the court; and contrary to defendant's argument the record does not establish that the Murphys do not have superior title to the disputed segment. For, as is usually the case in disputes about the boundaries of land, the many deeds, maps, surveys and other evidence presented at the hearing do not necessarily lead to just one conclusion; they contain differently phrased descriptions, and in comparing and attempting to reconcile them, different deductions can be made. Which is why the location of boundaries in disupted land title cases is usually a question of fact for the jury. *Cutts v. Casey,* 271 N.C. 165, 155 S.E. 2d 519 (1967).

The other grounds that possibly could sustain the judgment require little discussion. The action is not barred by the statute of limitations since it was filed within twenty months after the deed was delivered and the claim for breach of *seisin* accrued, and according to *Shankle v. Ingram,* 133 N.C. 255, 45 S.E. 578 (1903), the ten-year statute applies to actions based upon covenants in a deed. Defendant's claim that the Riddles have no right to redress since they received as much land, 10 acres more or less, as the deed called for has no legal foundation, because a purchaser of real estate by warranty deed in this state, nothing else appearing, is entitled to receive title to the specific land described in the deed. *Wilson v. Forbes,* 13 N.C. 30 (1828-30). And defendant's claim that plaintiffs Riddle cannot recover because all their damages, if they suffered any, had been fully paid by the insurance company is unsupported by evidence, as is the allegation that the title insurance company has no standing in the case to enforce its subrogation rights because the policy involved does not cover matters of survey. And, finally, though the record contains some indication, though not with the clarity and certainty that summary judgment requires, that the call for the disputed 120 foot segment may have been included in the deed description because of an earlier surveyor's or scrivener's error, that is no defense to plaintiffs' suit unless the mistake was mutual, *Walls v. Merchants Fire Assurance Corp.,* 206 N.C. 903, 173 S.E. 23 (1934); and mutual mistake is neither alleged nor indicated by the evidence.

The order of summary judgment is vacated and the matter remanded to the Superior Court for a trial on the issues raised by the pleadings.

Vacated and remanded.

Judge ORR concurs.

Judge ARNOLD concurs only in the result.

HARRY S. MITCHELL, EMPLOYEE v. FIELDCREST MILLS, INC., EMPLOYER, SELF-INSURED

No. 8610IC667

(Filed 17 March 1987)

Master and Servant § 67.3— workers' compensation—injury aggravating preexisting condition—claimant totally and permanently disabled

Evidence was sufficient to support the Industrial Commission's findings of fact and conclusions of law that claimant was totally and permanently disabled as a result of his job-related injury where the evidence tended to show that the work-related injury aggravated or accelerated claimant's preexisting, nondisabling, non-job-related condition. N.C.G.S. § 97-29.

APPEAL by defendant from Opinion and Award of the Industrial Commission filed 5 March 1986. Heard in the Court of Appeals 10 December 1986.

Claimant suffered a compensable injury to his back on 19 November 1977 while working in the slasher room of defendant's Greensboro mill. He underwent a laminectomy and a discectomy for removal of a ruptured disc. On 3 November 1978, defendant was ordered to pay temporary total workers' compensation to claimant at the rate of $148.78 per week until the end of the healing period. Then, on 4 May 1981, a Supplemental Opinion and Award was entered, finding claimant was permanently partially disabled, and ordered payment to continue until claimant reached maximum medical improvement or returned to work.

Upon petition by claimant, an amended Opinion and Award was entered on 22 June 1984, in which the deputy commissioner

concluded that the claimant had sustained a change of condition, justifying reinstatement of temporary total disability payments. The temporary total disability payments were to begin retroactively on 4 February 1984, the date claimant underwent a second surgery to relieve nerve root compression. Upon further petition by claimant, the temporary total disability was changed to permanent total disability under G.S. 97-29. The Opinion and Award by Deputy Commissioner Angela Bryant was entered on 8 November 1985 and was unanimously affirmed by the Full Commission 24 March 1986. Defendant appeals.

Smith, Patterson, Follin, Curtis, James and Harkavy by Henry N. Patterson, Jr., and Jonathan R. Harkavy for plaintiff-appellee.

Smith Helms Mulliss and Moore by J. Donald Cowan, Jr., and Caroline Hudson for defendant-appellant.

PARKER, Judge.

The sole question presented by defendant's appeal is whether the evidence presented to the deputy commissioner was sufficient to support her finding that claimant is totally and permanently disabled. Defendant's brief states that the primary basis for its argument is that claimant should be limited to the schedule for compensation provided in G.S. 97-31(23) for the total loss of use of the back. The statute states that this scheduled compensation "shall be in lieu of all other compensation."

However, in *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 348 S.E. 2d 336 (1986), the Supreme Court held that if a claimant is totally and permanently disabled within the meaning of G.S. 97-29, then that claimant is not limited to a recovery under the schedule of compensation of G.S. 97-31. The Supreme Court stated that "Section 29 is an *alternate* source of compensation for an employee who suffers an injury which is also included in the schedule." *Id.* at 96, 348 S.E. 2d at 340 (emphasis added). Under this interpretation, the "in lieu of" clause of G.S. 97-31 acts to prevent double recovery of benefits under different sections of the Workers' Compensation Act, but it does not provide for an exclusive remedy. *Id.* at 98, 348 S.E. 2d at 341.

Therefore, defendant is left with the argument that the evidence was insufficient to support the Commission's findings of

fact and conclusions of law that claimant is totally and permanently disabled as a result of his job-related injury. The Commission, in adopting the findings and conclusions of the deputy commissioner, found the following facts:

> 6. Plaintiff has a residual 60 percent permanent partial impairment of the back . . . . While 20 percent impairment . . . pre-existed plaintiff's 1977 injury, the effects . . . were aggravated by the compensable injury to result in a total 60 percent permanent partial impairment of the spine.
>
> 7. Plaintiff is totally and permanently disabled from working as a result of the residual impairment from his back injury and surgery, the sensory and motor neuropathy from his diabetes and impairment to peripheral circulation which were not caused or aggravated by his injury or surgery. In addition, plaintiff has a post-operative spinal stenosis with nerve root fibrosis, [and] arachnoiditis . . . as a result of his injury. The diabetes aggravates his nerve root fibrosis to make his neuropathy worse than it would have been without the back injury. These residuals from the back injury and surgery have caused referred pain to and impairment of the use of the legs which is contributing to plaintiff's disability.

From these factual findings, the Commission concluded that claimant was totally and permanently disabled as the result of the work-related injury and awarded compensation at the rate of $148.78 per week for "so long as he remains totally and permanently incapable of earning wages as a result of the injury . . . ." These findings are binding on this Court if there is competent evidence in the record to support them, even if there is evidence to the contrary. *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 296 S.E. 2d 456 (1982).

The evidence presented at the hearing consisted of the deposition of Dr. J. Leonard Goldner, an orthopedic surgeon from the Duke University Medical Center, who performed the second surgery on claimant in February of 1984 and has continued to treat claimant. Also presented at the hearing were a number of exhibits related to claimant's several hospital stays at Duke between 1982 and 1985. Dr. Goldner testified at the deposition that the claimant's condition had worsened between May of 1984 and May of 1985 when he was admitted to Duke for reassessment. By

May 1985, claimant could walk only about a block, frequently had no control over his legs and was complaining of increased pain.

Claimant was 47 years old at the time of his injury and had been employed at defendant's mill for 21 years. Claimant can neither read nor write except to sign his name. Dr. Goldner testified that claimant had a 60 percent impairment to his back. This impairment, when considered in light of claimant's education, age, work experience and other infirmities, was enough, in Dr. Goldner's opinion, to prevent claimant from earning wages at any job. Claimant's other infirmities, which preexisted the compensable injury, were diabetes, osteoarthritis and arteriosclerosis.

The medical testimony in this case was that the work-related injury and claimant's preexisting condition had the combined effect of rendering claimant totally and permanently disabled. In *Kendrick v. City of Greensboro*, 80 N.C. App. 183, 187, 341 S.E. 2d 122, 124 (1986), this Court, citing *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951), stated: "[I]f plaintiff's work-related accident contributed in 'some reasonable degree' to his disability he is entitled to compensation." Claimant in this case worked at his regular job notwithstanding his nonoccupational infirmities until his job-related accident. After his accidental injury, plaintiff was unable to return to gainful employment.

Defendant does not dispute that claimant is totally disabled, but argues that only a portion of the total disability is compensable. The requirement stated in *Morrison v. Burlington Industries*, 304 N.C. 1, 282 S.E. 2d 458 (1981), that the work-related injury aggravate or accelerate the preexisting, nondisabling, non-job-related condition for claimant to obtain total disability benefits, is in our view satisfied by the Commission's findings, based on competent evidence.

The Commission, in Finding of Fact #6, found that the effects of claimant's preexisting conditions were aggravated by the compensable injury. Then, in the following factual finding, the Commission found that claimant's "diabetes aggravates his nerve root fibrosis to make his neuropathy worse than it would have been without the back injury." These findings find support in the evidence in the deposition of Dr. Goldner, who stated that it was his opinion "that [claimant's] alleged injury did aggravate his preexisting condition." Even though there is evidence which could

support contrary findings, the findings made by the Commission are supported by competent evidence and are, thus, binding on this appeal. *McLean, supra.*

The Commission also found that the compensable back injury and resulting surgery was causing referred pain into claimant's legs, further contributing to the total disability. The Supreme Court held in *Fleming v. K-Mart Corp.*, 312 N.C. 538, 546, 324 S.E. 2d 214, 218-219 (1985), that "when . . . an injury to the back causes referred pain to the extremities of the body and this pain impairs the use of the extremities, then the award of workers' compensation must take into account such impairment." Claimant had complained of increasing pain in his legs, such that he could walk no more than one block at a time. During his deposition, Dr. Goldner testified that this referred pain was caused, at least in part, by the compensable injury. The doctor also believed that claimant's diabetes could be a cause of this referred pain, but he was unable to differentiate between the two. This evidence further supports the findings by the Commission that the compensable injury aggravated or accelerated claimant's preexisting conditions so that, acting together, they cause claimant's total disability.

The evidence in this case was confusing and at times ambiguous. The Commission as trier of fact found that claimant is totally and permanently disabled as a result of his compensable injury. The facts as found by the Industrial Commission are supported by competent evidence in the record. These findings are sufficient to justify the award of total disability under G.S. 97-29. The Opinion and Award of the Commission in this case is

Affirmed.

Judges WELLS and MARTIN concur.

RICKEY HARRIS v. JOAN E. PEMBAUR

No. 8620SC784

(Filed 17 March 1987)

1. **Courts § 2.1 — contract for sale of horse disputed — subject matter jurisdiction established**

A contract dispute with regard to the sale of a horse constituted a "justiciable matter" which was "cognizable" in N. C. trial courts so that the trial judge's determination that there was no subject matter jurisdiction was in error. N.C.G.S. § 7A-240.

2. **Process § 9.1 — nonresident individual — minimum contacts with North Carolina — finding of no personal jurisdiction improper**

The trial court erred in determining that there was no *in personam* jurisdiction over the Ohio defendant where the action arose out of defendant's failure to honor her promise to deliver cash due under the parties' contract to "Ronnie Beard Training Stables," which was located in North Carolina; defendant failed to raise the defense of lack of jurisdiction over the person; defendant made a voluntary appearance in North Carolina to defend the case and filed a counterclaim against plaintiff along with her answer, thus submitting herself to the jurisdiction of the court; and defendant admitted to the existence of jurisdiction in her answer. N.C.G.S. § 1-75.4(5)(c); N.C.G.S. 1A-1, Rule 12.

APPEAL by plaintiff from *Walker, Judge*. Judgment entered 12 June 1986 in Superior Court, MOORE County. Heard in the Court of Appeals 7 January 1987.

In March 1982, Ronnie Beard, a horse trainer from North Carolina, visited Illinois to inspect plaintiff's horse, Bold Seeker. Beard was interested in purchasing the horse for his client, defendant Joan Pembaur, who wanted the horse for her daughter.

Beard returned to North Carolina where defendant authorized him to call plaintiff to negotiate the sale. Plaintiff agreed to sell Bold Seeker for $65,000.00, which included a commission of $5,000.00 for Beard. Plaintiff also agreed to accept defendant's horse, Romney, as a $25,000.00 credit toward the purchase price and to take a $35,000.00 note stating that defendant would pay the balance to Ronnie Beard Training Stables by 1 May 1982. Beard would then pay the balance to plaintiff.

After the terms of the sale were agreed upon, plaintiff delivered Bold Seeker to the Pembaur's farm in Ohio. The next day defendant transported the horse to Beard's stables in North

Carolina where Bold Seeker was shown in several horse shows before being returned to the Pembaur farm in Ohio.

Defendant wrote two checks, one for $5,000.00 and one for $26,000.00, payable to Ronnie Beard Training Stables, towards payment of the balance due on Bold Seeker. She subsequently stopped payment on both of these checks. Plaintiff then filed this action against defendant for failure to pay the balance due on the sale of the horse. Defendant filed an answer and counterclaim, both of which alleged that Bold Seeker was defective and in poor physical condition.

At trial, at the close of plaintiff's evidence, defendant moved for a directed verdict, on the grounds of lack of jurisdiction. From the judgment entered on that motion, plaintiff appeals.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., attorney for plaintiff appellant.

West, Crawford & James, by Randolph M. James, attorney for defendant appellee.

ORR, Judge.

The issue for consideration is whether the trial court properly dismissed plaintiff's case for lack of subject matter jurisdiction and lack of personal jurisdiction.

[1] We first address the question of subject matter jurisdiction. Jurisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act. Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question. W. Shuford, *N.C. Civil Practice and Procedure* § 12-6 (1981).

Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute. Article I, § 18 of the North Carolina Constitution states: "All courts shall be open; every person for an injury done him in his lands, goods, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

Subject matter jurisdiction is statutorily conferred on the trial divisions of the General Court of Justice in this state under N.C.G.S. § 7A-240 which states:

Original civil jurisdiction generally.

Except for the original jurisdiction in respect of claims against the State which is vested in the Supreme Court, original general jurisdiction of all justiciable matters of a civil nature cognizable in the General Court of Justice is vested in the aggregate in the superior court division and the district court division as the trial divisions of the General Court of Justice. Except in respect of proceedings in probate and the administration of decedents' estates, the original civil jurisdiction so vested in the trial divisions is vested concurrently in each division.

It is, therefore, evident that except for areas specifically placing jurisdiction elsewhere (such as claims under the Workers' Compensation Act) the trial courts of North Carolina have subject matter jurisdiction over "all justiciable matters of a civil nature."

The contract dispute between the parties in this case constitutes a "justiciable matter" that is "cognizable" in our trial courts. Therefore, the trial judge's determination that there was no subject matter jurisdiction was in error.

[2] We now turn to the question of whether the trial court correctly determined that there was no *in personam* jurisdiction over the defendant.

A court can render judgment against a party "only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 . . . ." N.C.G.S. § 1-75.3 (1983). The first question to be answered then is whether defendant meets one of the twelve categories of circumstances set forth in N.C.G.S. § 1-75.4.

Plaintiff contends that the applicable statutory grounds are set forth in N.C.G.S. § 1-75.4(5)(c) which states that there is jurisdiction in an action which "[a]rises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value."

In reviewing the evidence, the contract required that the balance of the purchase price was to be paid to Ronnie Beard Training Stables which was located in North Carolina. Therefore,

the action arose out of defendant's failure to honor the promise to deliver the cash due under the contract to Ronnie Beard Training Stables. N.C.G.S. § 1-75.4(5)(c) would therefore apply and our "long-arm statute" allows jurisdiction.

The next step in the process would normally be to determine if the requirements of due process have been sufficiently met to impose *in personam* jurisdiction over defendant.

As to this question, defendant's failure to timely raise the defense and her admission of jurisdiction in her answer, precludes her from prevailing on this point.

The manner of presenting the defense of lack of jurisdiction over the person is governed by Rule 12 of the North Carolina Rules of Civil Procedure. The pertinent provisions of that rule are as follows:

> (b) How Presented. Every defense, . . . to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto . . ., except that the following [defense] may at the option of the pleader be made by motion:
>
> . . .
>
> (2) Lack of jurisdiction over the person,
>
> . . .
>
> (g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted . . . .
>
> (h) Waiver or Preservation of Certain Defenses.
>
> (1) A defense of lack of jurisdiction over the person . . . is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof . . . .

Rule 12 provides that a defendant may raise the defense of lack of jurisdiction over his person by a pre-answer motion or by

a responsive pleading. If the defendant fails to proceed in this manner, the defense of lack of jurisdiction is waived. *Simms v. Stores, Inc.*, 285 N.C. 145, 203 S.E. 2d 769 (1974).

In the case at hand, defendant never raised the defense of lack of jurisdiction over the person either by way of a pre-answer motion or by including the defense in her answer. In fact, there was never a jurisdictional motion before the court. Defendant raised the defense at the close of plaintiff's evidence by moving for a directed verdict. According to Rule 12, a motion for a directed verdict is not an appropriate method of presenting the defense of lack of jurisdiction over the person. Since defendant neither made an appropriate pre-answer motion, nor raised the defense in her answer, the defense is waived.

In addition, defendant made a voluntary appearance in North Carolina to defend this case. She also filed a counterclaim against plaintiff along with her answer. Once defendant submitted herself to the jurisdiction of the court, then the defense of lack of jurisdiction over the person was no longer available to her. A defendant submits to the jurisdiction of the court by formally entering a voluntary appearance, by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some manner inconsistent with the defense that the court has no jurisdiction over her. *Simms v. Stores, Inc.*, 285 N.C. at 156, 203 S.E. 2d at 776.

Finally, defendant admitted to the existence of jurisdiction in her answer. Plaintiff, in his complaint, alleged the following:

> 2. The Defendant is a citizen and resident of Cincinnati, Ohio. Jurisdiction . . . is obtained under North Carolina General Statutes 1-75.4.

In her answer, defendant responded as follows:

> II. That the allegations contained in paragraph two of the plaintiff's complaint are admitted.

Facts alleged in the complaint and admitted in the answer are conclusively established by the admission. *Champion v. Waller*, 268 N.C. 426, 150 S.E. 2d 783 (1966). Defendant admitted the existence of jurisdiction in her answer. That fact is now conclusively established and cannot be disputed.

Based on the above circumstances, we hold that the trial court's dismissal of plaintiff's complaint for lack of jurisdiction was error.

Reversed.

Judges ARNOLD and PHILLIPS concur.

STATE OF NORTH CAROLINA v. RICKY LEE GRIFFIN

No. 861SC702

(Filed 17 March 1987)

Assault and Battery § 14.4; Robbery § 4.7— assault with deadly weapon—robbery with dangerous weapon—defendant not at crime scene—no aider or abettor—insufficiency of evidence

In a prosecution for robbery with a dangerous weapon and assault with a deadly weapon inflicting serious bodily injury, evidence was insufficient to be submitted to the jury where it did not place defendant at or near the crime scene when the crimes were committed; it did not show that defendant encouraged or counseled the perpetrator and thus was constructively present at the crime scene, nor did it show that he aided and abetted the commission of the offenses; and the evidence did not show that defendant ever possessed, received, controlled or used any of the money stolen from the victim.

APPEAL by defendant from *Brown, Frank R., Judge.* Judgments entered 10 April 1986 in Superior Court, PASQUOTANK County. Heard in the Court of Appeals 9 December 1986.

Defendant and his codefendant, Ron Johnson, were convicted of robbery with a dangerous weapon in violation of G.S. 14-87 and assault with a deadly weapon inflicting serious bodily injury in violation of G.S. 14-32(b). The crimes arose out of one incident and the victim of both was Logan Sharber, who owned and operated a small grocery store in rural Pasquotank County. This appeal concerns only the convictions of defendant Griffin and the sufficiency of the State's evidence against him, as he offered none of his own. In pertinent part the State's evidence was as follows:

Logan Sharber testified that: During the afternoon of 24 January 1986 a person came to his store, ordered a Coke and paid

for it, and when he put the money in the cash drawer and looked up there was a gun barrel poking at his head. He grabbed the gun barrel and somebody or something hit him over the head and he passed out. The cash drawer contained a little paper money and some change, but his billfold contained between three and four hundred dollars in twenties, tens, fives and ones. When he regained consciousness his head was lacerated and bleeding and his money was gone. Defendant was raised across the field from his store and he had known him ever since he was able to walk. He did not see defendant come into his store that day or point a gun at him.

Deputy Sheriff A. B. Twiford testified that: On 24 January 1986 he went to Sharber's store where he saw blood and a metal rack on the floor and blood was dripping from the back of Sharber's head. Four days later when he talked with Sharber again, Sharber said he could not remember everything that happened but that some things were coming back to him. Sharber told him that a black male he did not recognize came into the store the afternoon of the robbery and bought a Coke and candy. On 13 February 1986 Ron Johnson told him that: On 24 January 1986 while visiting Delean Griffin, he went to Sharber's store, pushed Sharber down behind the counter, removed his wallet, and took the money, which he estimated amounted to $400; he tied Sharber's hands and feet with a belt and an electrical cord and then went back to the Griffin house; he offered Delean Griffin some of the money but she told him that she did not want any money and that he should leave, and he left.

Delean Griffin testified that: On 24 January 1986 Ricky Lee Griffin, her brother, came to her house with Ron Johnson; and that morning she, Johnson and defendant smoked marijuana, drank beer, and watched a Rambo movie. While she was in the kitchen washing dishes she heard some talk about needing money and heard Logan Sharber's name mentioned. About noon at their request she drove them to Sharber's store; when they got there Johnson got out of the car and returned to it about 15 minutes later. After she drove back home Johnson and defendant went to sleep. When they awakened about three hours later they smoked a joint of marijuana and about 15 or 20 minutes after Johnson and defendant started smoking marijuana she came out of her bedroom and they were gone. A shotgun, identified as State's Ex-

hibit Number 6, is her boyfriend's shotgun, and on 24 January 1986 it was in her bedroom. She did not know whether the gun was with defendant and Johnson when they left her house after 3:30 p.m. She next saw Ron Johnson about 15 minutes later on her porch and he had a lot of paper money in his hand. Defendant returned to her house sometime later and had the shotgun. She told her boyfriend to hide the gun, but she got it when Deputy Twiford and SBI Agent Ransome interviewed her on 12 February 1986. The gun had not been fired in two years and she did not know if it worked or not. She did not know whether Johnson and defendant left her house together on 24 January 1986. After they came back Johnson offered her money; defendant did not offer her any money. She did not know what, if anything, happened while defendant and Johnson were gone.

Dwight Ransome, an SBI agent, testified that: Logan Sharber told him that: On Friday, 24 January 1986, a black male entered the store and requested a Coke; after giving the Coke to him and turning around and walking to the other side of the counter he was struck on the head with what he thought was an iron or metal pipe; he did not know how many times he was hit nor with what, and only remembered being on the floor with blood on the floor near the front counter; he could not identify the black male that came into his store. On 12 February 1986 Delean Griffin showed him and Twiford where the gun was hidden; it was a .410 shotgun broken down in three pieces, which he bagged and turned over to Deputy Twiford. And in *corroboration* of Delean Griffin he testified that she told him that defendant and Johnson came to her house during the morning of 24 January 1986 at about 10 o'clock and started watching the movie Rambo; that they talked about needing some money and were laughing about robbing Sharber; and that she told them that they should not rob him.

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

William T. Davis for defendant appellant.

PHILLIPS, Judge.

The defendant rightly contends, in our opinion, that the evidence presented against him was insufficient to support his conviction. While the evidence is sufficient to establish that the

crimes charged were committed and that Ronald Johnson committed them, it does not tend to show that defendant either committed or participated in them; it only raises a suspicion that defendant participated in the crimes in some unspecified and speculative way, which is not enough to support a criminal conviction under our law. *State v. Earnhardt*, 307 N.C. 62, 296 S.E. 2d 649 (1982). The deficiencies in the State's evidence are numerous. Though the crimes defendant was convicted of were committed in Sharber's store, no evidence places him at or near the store when the crimes were committed; all that the evidence shows is that he was away from his sister's house at that critical time, which is not enough to justify the inference that he was then at or near the store helping Johnson in the robbery. The evidence does not show that defendant encouraged, counseled or arranged for Johnson to commit the offenses, and thus was constructively present at the criminal scene, or that he aided and abetted the commission of the offenses by serving as Johnson's lookout, or by doing anything else to facilitate the commission of the crimes. Nor does the evidence show that defendant ever possessed, received, controlled, or used any of the stolen money. The evidence that defendant returned to his sister's house carrying her boyfriend's shotgun some time after Johnson returned from robbing Sharber is no indication either that *that gun* was used by Johnson in robbing or beating Sharber, or that defendant gave the gun to him. The only evidence that a gun was used in committing the crimes came from Mr. Sharber, who said that a gun was pointed at him and he grabbed it; but he did not describe the gun and there is no evidence that either Johnson's or Sharber's fingerprints were on the shotgun that defendant was carrying. Thus, whether the gun used in robbing Sharber's store was a handgun, or a shotgun, or a rifle, we have no way of knowing; and that defendant's sister, who was not acting for the defendant so far as the evidence shows, told her boyfriend to hide his shotgun only adds to the suspicion. Finally, even if the testimony of the SBI agent that Delean Griffin told him that defendant and Johnson were laughing about needing money and robbing Sharber had not been received for the limited purpose of corroborating Delean Griffin, which it did not do since she did not testify that she heard anything said about robbing Sharber, it is not enough under the circumstances of this case to support the inference that defendant agreed to rob Sharber and

kept the agreement by taking some step to accomplish the robbery.

Thus, the judgments against defendant Ricky Lee Griffin are herewith vacated.

Vacated.

Judges ARNOLD and ORR concur.

FELIX DIXON ANDREWS, EDNA ANDREWS ROWE, LEO GREEN AND WIFE, ELIZABETH H. GREEN v. ROBERT H. DAVENPORT AND WIFE, LOUISE S. DAVENPORT, WEYERHAEUSER COMPANY, ALLEN GOODSON, MARVIN L. GOODSON COMPANY AND BOBBY GOODSON

No. 864SC400

(Filed 17 March 1987)

Trespass § 7— wrongful cutting of timber—summary judgment improper

Genuine issues of material fact existed and the trial court therefore erred in entering summary judgment for defendants in plaintiffs' action for the wrongful cutting and removal of timber from lands owned by plaintiffs.

APPEAL by plaintiffs from *Strickland, Judge.* Order entered 9 September 1985 in Superior Court, JONES County. Heard in the Court of Appeals 18 September 1986.

The complaint in this action, filed in February, 1984, states two claims for wrongfully cutting and removing timber from two adjacent tracts of Jones County land owned by plaintiffs; it describes one tract as being 31.37 acres, the other 36.87 acres, and alleges that one cutting occurred in December, 1980 when the land was owned by plaintiffs Felix Dixon Andrews and Edna Andrews Rowe, and the other in November, 1983 after they sold the land to the plaintiffs Green. A claim for the December, 1980 cutting was also asserted in an earlier action against the defendants that plaintiffs voluntarily dismissed without prejudice in August, 1983. In the present case only the defendants Davenport, who deeded the timber on the land to defendant Weyerhaeuser, answered the complaint; and in doing so they denied the allegations of ownership and of trespass and pleaded the statute of

limitations as a bar to the first claim and judicial estoppel to the second. After much discovery was done the defendants Davenport moved for summary judgment, and following a hearing thereon the motion was granted and the action was dismissed without prejudice as to all the defendants. The evidence and exhibits presented at the hearing included the following: The pleadings and other court papers filed in the prior action; a number of deeds and survey maps; the affidavit of Ronald Davenport, a licensed civil engineer and surveyor, who surveyed the lands in question for the plaintiffs; the discovery depositions of the plaintiff Leo Green and defendant Robert H. Davenport; and the discovery depositions and in-court testimony of the plaintiff Felix Dixon Andrews and Ronald Davenport. When viewed in its most favorable light for the plaintiff non-movants the evidence indicates the following:

When the 1980 cutting occurred the two tracts of land referred to were owned by the plaintiffs Andrews and Rowe, and when the second cutting occurred they were owned by the plaintiffs Green. The defendants Davenport without authority deeded the timber on the land to the defendant Weyerhaeuser Company, and that company's agents wrongfully cut and removed the timber. The plaintiffs' land and the lands of the defendants Davenport, which partially surround it, all came from a "parent" tract of 121 acres that Jeremiah Nobles deeded to J. G. Andrews, the grandfather of the plaintiffs Andrews and Rowe, in 1905. The chain of conveyances leading to J. G. Andrews acquiring title to the parent tract was testified to, as was the chain of conveyances from the parent tract leading to the defendants Davenport acquiring their property and the plaintiff Edna Andrews Rowe being deeded the 31.37 acre parcel in 1960. No deed out of J. G. Andrews for the 36.67 acre parcel is recorded and that tract passed by inheritance to the plaintiffs Andrews and Rowe, who conveyed both parcels to the plaintiffs Green in 1983. Plaintiff Felix Dixon Andrews, *inter alia*, testified that: Since the 1930's he, his father, and grandfather had all used the land without interference as they saw fit; on it at different times they raised hogs and cattle and cut firewood; in the early 1940's they sold the timber off the land to Wilcox Lumber Company, on which occasion he helped survey the land by pulling a chain for the surveyor; and that on two different occasions in the 1970's defendant Robert Davenport

recognized plaintiffs' ownership and control of the land by obtaining their permission first to cross the land with his bulldozer, and then to cut a ditch on it to aid the drainage of his land.

Henderson, Baxter & Alford, by David S. Henderson, for plaintiff appellants.

Allen, Hooten & Hodges, by John M. Martin, for defendant appellees Robert H. Davenport and Louise S. Davenport.

T. R. Thompson, Jr. for defendant appellees Weyerhaeuser Company, Allen Goodson, Marvin L. Goodson Company and Bobby Goodson.

PHILLIPS, Judge.

The order of summary judgment dismissing plaintiffs' action is not well founded and we vacate it. Before summary judgment is proper the lack of a triable issue of fact must be clearly demonstrated, *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 249 S.E. 2d 375 (1978), and that has not been done in this case. The evidence before the court does not establish any of the following, any one of which would be fatal to plaintiffs' case: That plaintiffs do not own the land in question; that defendants Davenport had a right to deed the timber on it; that the timber on the land was not cut; or that the action is barred by the statute of limitations or by any other legal impediment. The evidence before the court rather tends to show that plaintiffs own the land involved—either by grant, inheritance, or adverse possession—and that the defendant Weyerhaeuser damaged plaintiffs by cutting and removing the timber without authority. The order was apparently entered in the mistaken belief that the evidence establishes that plaintiffs cannot locate the lands described in the complaint on the ground, which is not the case. Furthermore, while locating land described in a deed may be necessary in proving title to disputed land at *trial, Andrews v. Bruton*, 242 N.C. 93, 86 S.E. 2d 786 (1955), such a showing was not required of plaintiffs at the hearing on defendants' motion for summary judgment because defendants made no showing to the contrary. In a hearing on a defendant's motion for summary judgment, unlike at trial, a plaintiff only has the burden to rebut any showing the defendant makes which indicates that his case is fatally deficient. *Moore v. Fieldcrest Mills, Inc.*, 296

N.C. 467, 251 S.E. 2d 419 (1979). In this case defendants presented no proof that plaintiffs were obliged to rebut. They did not prove or even attempt to prove either that they or others own the land or that plaintiffs do not; nor did they show by any clear or positive evidence either that plaintiffs cannot locate the land described in the deeds on the ground or that it is situated within the boundaries of defendants' land. Indeed, the only defendant to testify, Robert H. Davenport, stated he did not know whether he owned the land in dispute or not. All that the defendants did do in an effort to disprove plaintiffs' claim was elicit snatches of testimony from plaintiff Andrews and his surveyor, which were contradicted or explained elsewhere, to the effect that they did not find certain boundary markers described in the complaint. But the testimony excerpts relied upon by defendants are directly refuted by testimony to the contrary; plaintiffs' surveyor categorically testified that he had located the property on the ground, and plaintiff Felix Dixon Andrews testified that he once knew the boundaries of the land and could readily locate them until the defendant Weyerhaeuser bulldozed over the embedded markers of one boundary line and cut down a line of blazed trees that marked another. The evidence that defendants rely upon merely casts doubt on plaintiffs' ability to locate the described lands on the ground, it does not clearly establish that they cannot do so. Thus, all genuine issues of material fact have not been eliminated from the case; and the factual issues that exist are for a jury, rather than the court, to decide. *Zimmerman v. Hogg and Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974). For that matter the location of land boundaries is usually "a factual question for the jury," *Cutts v. Casey*, 271 N.C. 165, 168, 155 S.E. 2d 519, 521 (1967); because deed and survey measurements and descriptions, made by different people at different times under different conditions, often vary and it is a rare case indeed when only one deduction can be made from them.

Vacated and remanded.

Judges PARKER and COZORT concur.

POLLY ANN APPLE v. GUILFORD COUNTY AND INSURANCE COMPANY OF NORTH AMERICA

No. 8610IC874

(Filed 17 March 1987)

Master and Servant § 77.2— workers' compensation—claim for additional award—time for filing

The Industrial Commission erred in concluding that plaintiff's claim for an additional award was barred by the two-year limitation of N.C.G.S. § 97-47, since plaintiff's filing of an I.C. Form 18 before expiration of the two-year period was a valid application for review of her award based on a change in condition, even if she failed specifically to allege any change in condition or any permanent injury; furthermore, N.C.G.S. § 97-47 allows an employee effectively to apply for a review of his award before the date of the last payment of compensation from the award.

APPEAL by plaintiff-employee from the Opinion and Award of the North Carolina Industrial Commission entered 12 March 1986. Heard in the Court of Appeals 2 February 1987.

This is a workers' compensation case. Plaintiff was employed in the Guilford County Sheriff's Department to transport patients from Guilford County to and from John Umstead Hospital in Durham County. On 18 September 1980 plaintiff sustained a compensable injury when the van in which she was riding crashed. Among plaintiff's injuries were lacerations to her head and elbow, stiffness in her neck, and fractures to one finger on each hand. Plaintiff received emergency medical treatment at Duke University Medical Center and follow-up treatment at Moses H. Cone Hospital.

Plaintiff and defendants entered into a compensation agreement on 8 December 1980 by filing with the Industrial Commission a Form 21 ("Agreement for Compensation for Disability"). The agreement stated that plaintiff would be paid disability compensation for one and six-sevenths weeks at the rate of $44.99 per week. Plaintiff received the first of two payments when she signed the agreement form. Subsequently, plaintiff continued treatment, still suffering pain in her right little finger, her arm, and her neck.

On 11 February 1981, plaintiff filed an Industrial Commission Form 18 ("Notice of Accident to Employer and Claim of Employee

. . ."). The form stated that the nature and extent of her injuries were lacerations, broken fingers, and a pinched nerve in her neck. It also listed the date of her return to work or estimated disability as "unknown."

Defendants completed an Industrial Commission Form 28B ("Report of Compensation of Disability") on 27 March 1981 and mailed a copy to both the Industrial Commission and the plaintiff. Plaintiff's copy was enclosed with her last compensation check due from the Form 21 agreement. Although the Industrial Commission received its copy of the Form 28B on 30 March 1981, plaintiff cannot remember the date she received hers. Plaintiff did not cash the enclosed check but, instead, turned it over to her attorney.

Plaintiff, complaining of headaches, dizziness, neck pain, and weakness in her arm, continued to see various doctors about her condition. It was not until 20 August 1983, however, that plaintiff, through her attorney, requested the Commission to assign "this claim" for hearing. The letter stated as the grounds for the hearing the issue of whether plaintiff was entitled to additional compensation for temporary total disability and permanent partial disability.

The case was scheduled for a hearing on 24 January 1985. Defendants claimed that plaintiff's claim was barred by the two year time limitation in G.S. 97-47. By order filed 28 February 1985, the deputy commissioner, rejecting defendants' argument that the claim was time barred, concluded that plaintiff had sustained permanent disfigurement of her right little finger for which she was entitled to compensation in the amount of $450.00. The deputy commissioner, however, denied plaintiff's claim for an additional disability award. Plaintiff appealed to the full Commission, which reversed the decision of the deputy commissioner after concluding that plaintiff's claim was barred by the time limitations in G.S. 97-47. Accordingly, the full Commission did not address the other issues raised by the deputy commissioner's order.

Max D. Ballinger, for the plaintiff-appellant.

Smith, Helms, Mulliss & Moore, by Caroline Hudson Wyatt, for the defendant-appellees.

EAGLES, Judge.

G.S. 97-47 provides that within two years of the "date of the last payment of compensation pursuant to an award under this Article," the Commission may, upon the application of any party in interest, or upon its own motion, review the award on the grounds of a change in condition. A validly executed I.C. Form 21 agreement constitutes an "award" under the North Carolina Workers' Compensation Act. *White v. Boat Corporation*, 261 N.C. 495, 135 S.E. 2d 216 (1964). Moreover, the Commission found, and defendants do not dispute, that plaintiff did apply for a review of her award based on a change in condition. The sole question for review then is whether plaintiff's claim for review was presented within two years of her last payment of compensation.

The Commission found that plaintiff "filed her claim for compensation, based upon an alleged change in condition, on 20 August 1983" and concluded that her claim was barred by the two year limitation set forth in G.S. 97-47. Assuming *arguendo* that plaintiff received her last payment of compensation before 20 August 1981, we nevertheless hold that the Commission erred in finding that the claim for an additional award was not made until plaintiff's letter of 20 August 1983.

Plaintiff sent an I.C. Form 18, dated 11 February 1981, to the Industrial Commission. The Commission acknowledged receipt by letter dated 16 February 1981. The filing of an I.C. Form 18 is sufficient to constitute an application for the Commission to review an award pursuant to G.S. 97-47. *Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 348 S.E. 2d 596 (1986). This is true even if it fails to specifically allege any change in condition or any permanent injury. *Id.* Therefore, plaintiff's filing of the I.C. Form 18 was a valid application for review of her award based on a change in condition. Because the two year limitation does not run against a claim which has already been filed, *see Watkins v. Motor Lines*, 279 N.C. 132, 181 S.E. 2d 588 (1971), plaintiff's claim for review was not barred.

Defendants argue that since the two year period does not begin to run until the date of the last payment of compensation, plaintiff's application for review must come after that date. We disagree. While an I.C. Form 28B, when sent together with the employee's last compensation payment, ordinarily closes the

employee's case, *Chisholm v. Diamond Condominium Constr. Co., supra*, it has no effect on an application for review which has previously been filed with the Commission. The Workers' Compensation Act must be liberally construed so that benefits are not denied based upon a technical, narrow, and strict interpretation of its provisions. *Rorie v. Holly Farms*, 306 N.C. 706, 295 S.E. 2d 458 (1982). Consequently, we hold that G.S. 97-47 allows an employee to effectively apply for a review of his award before the date of the last payment of compensation from the award.

Since the full Commission decided this case by determining only the issue of whether plaintiff's claim was barred by the two year limitation in G.S. 97-47, and we have reversed on that issue, this case must be remanded. The deputy commissioner made numerous findings of fact and conclusions of law from which both plaintiff and defendant appealed. The full Commission, however, is not bound by those findings and conclusions. *Godley v. Hackney & Sons*, 65 N.C. App. 155, 308 S.E. 2d 492 (1983). Therefore, the findings and conclusions of the deputy commissioner cannot reach this court without having first been affirmed, reversed, or modified by the full Commission. *See Brewer v. Trucking Co.*, 256 N.C. 175, 123 S.E. 2d 608 (1962). Accordingly, we remand so that the full Commission may consider the additional issues raised by the opinion and award of the deputy commissioner.

Reversed and remanded.

Judges WELLS and GREENE concur.

IN THE MATTER OF THE ESTATE OF ANGELIKA KATSOS, DECEASED

No. 8620SC814

(Filed 17 March 1987)

Executors and Administrators § 37— refusal of deceased's son to account for assets —attorney's fees—right of administrators to recover from deceased's son

The co-administrators of deceased's estate could properly recover attorney's fees from deceased's son where the co-administrators prepared numerous motions and attended a series of hearings and appeals in order to compel deceased's son to account for certain property of his mother's estate;

the co-administrators would have incurred none of these costs had the son provided an accounting as initially ordered; and the administrators incurred these legal costs in their efforts to protect the estate. Furthermore, the amount awarded was supported by competent evidence where the administrators provided the clerk with an extensive list of legal services performed which were beyond the ordinary duties of co-administrators, and the list included the date each service was provided as well as what that service entailed. N.C.G.S. § 28A-15-12(c).

APPEAL by respondent from *Cornelius, Judge*. Order entered 2 June 1986 in Superior Court, MOORE County. Heard in the Court of Appeals 7 January 1987.

On 3 May 1979, the co-administrators of the Estate of Angelika Katsos filed a petition for discovery of assets. The petition requested that Tim Katsos, the son of the decedent, appear before the Clerk of Superior Court to answer questions concerning the possession of assets from his mother's estate. The order from this petition required Tim Katsos either to account for the assets or to deliver $34,150.00 to the co-administrators within thirty days. If he failed to do so, he would be subject to contempt. Tim Katsos appealed the order to the superior court, which dismissed the appeal. The court found him guilty of civil contempt for failure to comply with the order and remanded the case to the clerk. On remand, the clerk again ordered him to pay the $34,150.00.

As of 30 September 1983, Katsos had still not paid the $34,150.00. On that date, the co-administrators moved for a hearing to enact the previous orders of the court and to determine the costs, including attorney's fees, to be assessed against Tim Katsos. The co-administrators prepared a "Petition for Counsel Fees" to recover the costs of the proceeding as provided in N.C.G.S. § 28A-15-12(c). The petition enumerated the necessary legal services they had rendered on behalf of the estate.

On 18 November 1983, the clerk ordered Katsos jailed until he paid the $34,150.00 as previously ordered. The clerk further ordered that he pay $5,000.00 in costs which included attorney's fees. Katsos appealed to the superior court and moved to deny the petition for attorney's fees. The superior court affirmed the clerk's order and ordered Katsos jailed unless he paid the $5,000.00 immediately. From that order, Katsos appealed.

Max D. Ballinger, attorney for respondent appellant.

Brown, Fox & Deaver, by Bobby G. Deaver and Hoyle & Hoyle, by Kenneth R. Hoyle, attorneys and co-administrators for petitioner appellees.

ORR, Judge.

Katsos asserts that no statutory authority exists under N.C.G.S. § 28A-15-12(c) for the assessment of attorney's fees. We do not agree.

The general rule in North Carolina is that, in the absence of statutory authority, a court may not allow attorney's fees as part of the costs recoverable by a successful party in a civil action. *Hicks v. Albertson*, 284 N.C. 236, 238, 200 S.E. 2d 40, 42 (1973).

N.C.G.S. § 28A-15-12(c) provides that "[t]he party against whom the final judgment is rendered shall be adjudged to pay the costs of the proceedings hereunder."

Tim Katsos is the "party against whom final judgment has been rendered." The "costs of the proceedings" include the necessary legal services provided by the co-administrators. These services involved the preparation of numerous motions and required the co-administrators to attend a series of hearings and appeals. These services were all necessary in order to compel Katsos to account for certain property of his mother's estate. The co-administrators would have incurred none of these costs had Katsos provided an accounting as initially ordered. The administrators incurred these legal costs in their efforts to protect the estate, and therefore such costs should be recoverable.

Katsos further contends that if attorney's fees were recoverable, the amount awarded is not supported by competent evidence and therefore should be set aside. We disagree.

An award of attorney's fees cannot be upheld in the absence of findings by the court upon which a determination of the reasonableness of the fees can be based, such as the nature and scope of the legal services rendered and the skill and time required. *Brown v. Brown*, 47 N.C. App. 323, 327-28, 267 S.E. 2d 345, 348 (1980). The co-administrators provided the clerk with sufficient information upon which she could make a reasonable award. In

their "Petition for Counsel Fees," the co-administrators stated that they had represented the estate not only as co-administrators, but also as attorneys and had rendered services beyond that ordinarily required by co-administrators. The petition included an extensive list of the legal services performed which were beyond the ordinary duties of co-administrators. The list included the date each service was provided, as well as what that service entailed. The following is an excerpt from that list:

> August 14, 1980—No compliance [by Katsos], motion filed to show cause and appoint person to act in Tim Katsos' behalf.
>
> August 29, 1980—Hearing held on motions, Katsos and counsel appeared to contest.

The petition adequately explains the nature and scope of the legal services provided by the co-administrators and is competent evidence on which to base an award.

Katsos asserts that the trial court improperly awarded attorney's fees as a sanction for contempt. This argument has no merit.

Attorney's fees were never awarded as a sanction for contempt as Katsos suggests. Katsos was found in contempt for the nonpayment of the $34,150.00. The clerk ordered him to pay $5,000.00 in costs, including attorney's fees. This award of attorney's fees, however, was entered as a result of the co-administrators' petition, not as a sanction for contempt.

Katsos' contention that the trial court erred in refusing to grant him equitable relief from the award of attorney's fees is also without merit.

The denial of defendant's motion was a proper exercise of the trial judge's discretion. A discretionary order of the trial court is conclusive on appeal in the absence of abuse or arbitrariness. *Highway Commission v. Hemphill*, 269 N.C. 535, 537, 153 S.E. 2d 22, 25 (1967). No abuse of discretion has been shown.

Finally, Katsos argues that the trial court erred in refusing to grant him a stay of execution and in requiring him to pay the $5,000.00 immediately. This too was a matter for the trial court's discretion. As no abuse has been shown, we find that the trial court properly exercised its discretionary power.

The award of attorney's fees was proper and the amount awarded was supported by competent evidence. Therefore, we affirm.

Affirmed.

Judges ARNOLD and PHILLIPS concur.

W. S. CLARK AND SONS, INC., PLAINTIFF v. UNION NATIONAL BANK, DEFENDANT v. VERNON L. STRICKLAND, THIRD PARTY DEFENDANT

No. 869DC699

(Filed 17 March 1987)

Uniform Commercial Code § 36— sale of fertilizer—endorsement and honoring of check—no damage to plaintiff

The trial court properly entered summary judgment for defendant bank in an action to recover the amount of a check which plaintiff contended was endorsed without authorization by third party defendant and was wrongfully honored by defendant bank, since the evidence revealed that, because of a setoff arrangement between plaintiff fertilizer manufacturer and its sales agent, plaintiff suffered no loss because of defendant bank's actions in regard to the check in question.

APPEAL by plaintiff from *Allen (Ben U.), Judge*. Judgment entered 26 February 1986 in District Court, GRANVILLE County. Heard in the Court of Appeals 19 November 1986.

W. S. Clark and Sons, Inc., plaintiff, manufactures and sells fertilizer and other agricultural products. During 1983 and 1984, it marketed its products in Granville County through Granville Supply Company, a commission sales agent. Plaintiff widely advertised that Granville Supply was its sales agent for Granville County.

In 1984 Granville Supply sold plaintiff's products to Donnie Ray Cox. Cox delivered a check to Vernon L. Strickland, one of Granville Supply's general partners, for $9,579.61. The check was made payable to "Clark & Sons, Inc." and was drawn on the defendant, Union National Bank. The check represented payment in

full of Cox's 1984 fertilizer account and repayment of a personal loan Cox owed to Strickland.

Under a commission sales agreement between plaintiff and Granville Supply, Granville Supply had authority to receive payments due plaintiff, but such payments were to be remitted to the plaintiff on the day received. However, since the check included funds owed to Strickland personally, he endorsed the back of the check "Clark & Sons, Inc." and deposited it in defendant bank to the account of Granville Supply. Defendant bank honored the endorsement of plaintiff made by Strickland and paid the face amount of the check.

By July 1984, plaintiff owed Granville Supply more than $23,000.00 in commissions for that year's sales.

On 31 July 1984, Strickland wrote plaintiff and requested that plaintiff apply the $23,488.03 owed Granville Supply to five named accounts. One of the accounts listed was the Donnie Ray Cox account. Plaintiff agreed to the setoff arrangement and accordingly applied the commission owed Granville Supply to the five accounts. The Donnie Ray Cox account was credited with $9,377.80 from Granville Supply's commissions. This credit resulted in a complete satisfaction of the Cox account.

Plaintiff filed suit contending that Strickland's endorsement was unauthorized and that defendant bank wrongfully honored it. Plaintiff sought to recover the amount of the Cox check from defendant bank who joined Strickland as a third party defendant.

At trial defendant moved for summary judgment. From the order granting that motion, plaintiff appeals.

Aycock, Harper & Simmons, by Edward B. Simmons, attorney for plaintiff appellant.

Royster, Royster & Cross, by T. S. Royster, Jr., attorney for defendant appellee.

No brief for third party defendant.

ORR, Judge.

Plaintiff contends that the trial court erred in granting the defendant's motion for summary judgment. We disagree.

On a motion for summary judgment "[t]he movant must show (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E. 2d 379, 381 (1975). "The rule is designed to . . . allow summary disposition for either party when a fatal weakness in the claim or defense is exposed." *Id.* When ruling on a motion for summary judgment, "the court must look at the record in the light most favorable to the party opposing the motion." *Peterson v. Winn-Dixie*, 14 N.C. App. 29, 31, 187 S.E. 2d 487, 488 (1972).

Defendant bank has shown that no genuine issue of material fact exists to be decided. The record, even when viewed in the light most favorable to plaintiff, reveals that plaintiff suffered no loss because of defendant bank's actions in regard to the check in question. Therefore, as a matter of law, plaintiff can recover nothing from defendant bank. In *Godwin v. Vinson*, 254 N.C. 582, 119 S.E. 2d 616 (1961), the Supreme Court of North Carolina held that "[a]ctual loss or injury must have been sustained or no compensatory damages are recoverable." 254 N.C. at 587, 119 S.E. 2d at 620.

The facts clearly show that plaintiff owed Granville Supply over $23,000.00 in commissions. Rather than pay these commissions outright, plaintiff entered into a setoff agreement with Granville Supply. Under the agreement the commissions owed Granville Supply were offset by certain accounts Granville Supply owed to plaintiff. One of these was the Cox account. When plaintiff offset the Cox account against commissions owed Granville Supply, that account was satisfied in full and the underlying obligation represented by the Cox check no longer existed.

The setoff arrangement between plaintiff and Granville Supply had the same effect as if the Cox check had been paid directly to plaintiff. If the check had been paid to plaintiff, plaintiff still would have owed Granville Supply over $23,000.00 in commissions. Instead, plaintiff offset commissions due Granville Supply by the amount of the Cox account, $9,377.80. This reduced the debt owed to Granville Supply by that amount. The net effect of the two transactions is the same.

We hold that plaintiff suffered no damages as a result of the Cox check. Therefore, the issues of whether Strickland's endorse-

ment was unauthorized and whether defendant bank wrongfully honored it, need not be addressed.

Plaintiff, having suffered no loss arising out of the Cox check, cannot recover anything from defendant bank. Since there is no genuine issue as to whether plaintiff suffered any damage, we hold that the motion for summary judgment was properly granted.

Affirmed.

Judges WELLS and BECTON concur.

STATE OF NORTH CAROLINA v. MARY ALICE BENNETT

No. 8617SC1166

(Filed 17 March 1987)

False Pretense § 3.1— sale of insurance by unlicensed agent—insufficient evidence of false pretense

Evidence was insufficient to be submitted to the jury in a prosecution for obtaining property by false pretenses where it tended to show that defendant, who was not licensed to sell insurance for United American Insurance Company, did in fact sell two policies for that company and accept the premiums therefor, and defendant told the purchasers that the policies would be issued within five or six weeks but several months elapsed before they were issued, since this evidence did not raise an inference that defendant intended to cheat or defraud the purchasers in any way. N.C.G.S. § 14-100.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 11 June 1986 in Superior Court, STOKES County. Heard in the Court of Appeals 11 March 1987.

Defendant was charged in proper bills of indictment with two counts of obtaining property by false pretenses in violation of G.S. 14-100. At trial, the State presented evidence tending to show the following: In May 1984, defendant was an employee of the Watson Insurance Agency located in Mount Airy, North Carolina. On 19 May 1984, she went to the home of Minnie Price and her brother, Robert Price, to discuss insurance with them. She told each of them that a policy issued by United American In-

surance Company would be best for them. Defendant was licensed by the State of North Carolina to sell insurance for two insurance companies, but was not licensed to sell insurance for United American Insurance Company. Robert and Minnie Price each filled out and signed an insurance application for United American Insurance Company. Defendant accepted a cash premium payment of $208.00 from Minnie Price and a cash payment of $306.85 from Robert Price. She told them their policies would be issued in five or six weeks.

On that same day, Robert and Minnie Price told their niece, Mary Welch, that they had purchased insurance policies. In September 1984, Mary Welch asked them if they had received their policies. When they told her that they had not received them, she contacted the Watson Insurance Agency and the United American Insurance Company in Dallas, Texas. An employee of the insurance company informed her that they had received the application from her aunt, and that a policy had been issued to her. She then sent a letter to the insurance company requesting a refund of premium payments paid by her aunt and uncle. On or about 27 September 1984, Robert and Minnie Price received full refunds of the payments from United American Insurance Company and Minnie Price's insurance policy was cancelled. On 1 October 1984, the United American Insurance Company received an application for insurance for Robert Price. A policy was issued for him on 4 October 1984.

Defendant presented evidence tending to show that after the Prices filled out the insurance applications, she returned to the Watson Insurance Agency and gave the application and premium payments to another employee of the agency who was licensed to sell insurance for United American Insurance Company. He signed the applications and forwarded them and the payments to the company.

Defendant was found guilty as charged. From a judgment imposing a three-year prison sentence which was suspended and placing defendant on unsupervised probation for five years, defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General D. David Steinbock, for the State.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy and Harold L. Kennedy, III, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant contends the trial court erred in denying her motion to dismiss at the close of all the evidence. She argues that the evidence presented at trial, when taken in the light most favorable to the State, is insufficient to prove all of the elements of the offense of obtaining property by false pretense. We agree.

On a motion to dismiss, all evidence, whether introduced by the State or the defendant, which will support the charges contained in the bill of indictment, is considered in the light most favorable to the State and every reasonable inference, deducible from the evidence, is drawn in favor of the State. *State v. McCoy*, 303 N.C. 1, 277 S.E. 2d 515 (1981). The defendant's evidence may be considered insofar as it explains or clarifies or is not inconsistent with the State's evidence. *Id.*

G.S. 14-100, in pertinent part, provides:

> (a) If any person shall knowingly and designedly by means of any kind of false pretense whatsoever, whether the false pretense is of a past or subsisting fact or of a future fulfillment or event, obtain or attempt to obtain from any person within this State any money, goods, property, services, chose in action, or other thing of value with intent to cheat or defraud any person of such money, goods, property, services, chose in action or other thing of value, such person shall be guilty of a felony, and shall be punished as a Class H felon.

An essential element of the crime described in G.S. 14-100 is that the act be done "knowingly and designedly . . . with intent to cheat or defraud." *Id.* Intent is "seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Hines*, 54 N.C. App. 529, 533, 284 S.E. 2d 164, 167 (1981). (Citations omitted.) In determining the absence or presence of intent, the jury may consider "the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged." *Id.*

The evidence introduced by the State in the present case tends to show that defendant obtained $208.00 from Minnie Price and $306.85 from Robert Price as premiums on insurance policies to be issued by United American Insurance Company. Evidence

tending to show that defendant was not licensed to sell insurance for United American Insurance Company is not sufficient to raise an inference that defendant intended to "cheat or defraud" the Prices, nor does the evidence tending to show that defendant told them that the policies would be issued within five to six weeks raise any such inference, in light of the evidence tending to show that the insurance policies were in fact issued. There is no evidence in the record tending to show that defendant intended to cheat or defraud the Prices in any way. The evidence in the record discloses that defendant intended to sell the Prices insurance policies, and that is precisely what she did. While the evidence may be sufficient for the jury to find that defendant was not licensed to sell insurance for United American Insurance Company, and that she did in fact sell these two policies, she is not charged with such an offense.

The judgment appealed from is reversed.

Reversed.

Judges WELLS and BECTON concur.

RICHARD R. SMITH v. RUSHING CONSTRUCTION CO., A NORTH CAROLINA CORPORATION

No. 8620DC285

(Filed 17 March 1987)

Uniform Commercial Code § 28— terms of note conflicting—words controlling over numbers—issue as to whether note satisfied

Where a promissory note provided that plaintiff would pay $14,000 at an interest rate of 12% per annum on the unpaid balance until paid, and the note also provided that principal and interest were payable in 84 equal monthly installments of $306.67 until paid in full, terms of the note were conflicting; therefore, the words "until paid in full" controlled over the number "84," but a genuine issue of material fact existed as to whether plaintiff had in fact satisfied his obligation to pay $14,000 at an interest rate of 12% per annum on the unpaid balance. N.C.G.S. § 25-3-118.

APPEAL by defendant from *Honeycutt, Judge.* Order entered 9 January 1986 in District Court, UNION County. Heard in the Court of Appeals 23 September 1986.

This is a civil action seeking a declaratory judgment as to whether a promissory note executed by plaintiff in favor of defendant had been satisfied in full.

On 28 January 1980, plaintiff entered into a written "Agreement" with defendant to purchase a lot and mobile home. The agreement stated that defendant would finance the balance of $14,000.00 "for 7 years bearing 12% [i]nterest." The agreement further provided "([i]nterest will be $1,680.00 yearly or total of [$]11,760.00). Can be prepaid anytime without penalty, (84 payments of $306.67)."

On 27 February 1980, plaintiff executed a promissory note and deed of trust in favor of defendant. For both instruments, the standard North Carolina Bar forms were used. In the note, plaintiff promises to pay "the principal sum of FOURTEEN THOUSAND AND NO/100 DOLLARS ($14,000.00), with interest from date, at the rate of twelve (12%) per cent per annum on the unpaid balance until paid or until default . . . ." (Underlining indicates typewritten filled-in blanks on the printed form.) The form further provided that principal and interest were due and payable as follows:

> Payable in 84 equal monthly installments of $306.67 each, beginning the 27th day of March, 1980, and continuing on the 27th day of each month thereafter until paid in full.
>
> This note may be prepaid in whole or in part at any time without penalty.

This provision was typed onto the form.

Subsequent to the execution of these instruments, plaintiff took possession of the lot and mobile home and made sixty-two consecutive payments in accordance with the terms of the written agreement and promissory note. After making the 62nd $306.67 installment which was due 27 April 1985, plaintiff asserted that his obligation under the note was satisfied, that the debt had been paid in full, and that he had made an overpayment of $220.50. Plaintiff demanded that the note and deed of trust be marked paid and satisfied in full and canceled of record. Defendant refused plaintiff's demand.

On 25 September 1985, plaintiff instituted this action seeking a declaratory judgment as to any balance due under the promis-

sory note and discharge and release of record of the deed of trust given in connection with the note. By way of answer and counterclaim, defendant denied that the promissory note was satisfied, asserted that plaintiff was in default under the terms of the promissory note, and sought the balance due under the note, plus attorney's fees.

Both parties filed motions for summary judgment and supporting affidavits. From an order granting summary judgment in favor of plaintiff, defendant appealed.

Dawkins and Lee, P.A., by W. David Lee for plaintiff-appellee.

Smith and Cox by Ronald H. Cox for defendant-appellant.

PARKER, Judge.

In its sole assignment of error, defendant contends the court erred in granting summary judgment in favor of plaintiff. Summary judgment is a procedure whereby judgment is rendered if the pleadings, depositions, interrogatories and admissions on file, together with any 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 Ins. Co.*, 300 N.C. 247, 266 S.E. 2d 610 (1980).

The promissory note involved is a negotiable instrument within the meaning of the Uniform Commercial Code, G.S. 25-3-104, and as such the interpretation of the note is governed by the provisions therein. In order to be a negotiable instrument, the note must be signed and must contain an unconditional promise to pay a sum certain in money to order or to bearer on demand or at a definite time. *Id.* The unconditional promise made by plaintiff in this case was to pay to defendant or to order "the principal sum of FOURTEEN THOUSAND AND NO/100 DOLLARS ($14,000), with interest from date, at the rate of twelve (12%) percent per annum on the unpaid balance . . . ."

Defendant acknowledges that plaintiff's obligation to pay the debt is controlled by the terms of the promissory note, but contends that the 28 January 1980 agreement stating the dollar amount of interest and the promissory note should be interpreted together such that the amount and number of monthly install-

ments would control over plaintiff's promise to pay. Under defendant's interpretation of the note, plaintiff would be paying an interest rate of 19.4981%, as reflected on the amortization schedule forwarded to plaintiff after closing. Nowhere on any document signed by the parties is it disclosed that plaintiff will pay anything other than 12% interest.

The rules governing construction of a negotiable instrument are set forth in G.S. 25-3-118. General Statute 25-3-118(b) provides that the typewritten provisions control over printed provisions in a document. In this note, there is ambiguity within the typewritten material itself. The interest rate of 12% is typewritten and the terms "[p]ayable in 84 equal monthly installments of $306.67 each, beginning the 27th day of March, 1980, and continuing on the 27th day of each month thereafter until paid in full" are typewritten. Because plaintiff promised to pay $14,000 at an interest rate of 12% per annum on the unpaid balance, the words "until paid in full" conflict with the number of payments called for, 84. With monthly payments of $306.67, the indebtedness would be satisfied in full in less than 84 payments. Under G.S. 25-3-118(c), words control figures unless the words themselves are ambiguous. There is no ambiguity in the phrase "until paid in full"; therefore, those words control over the number "84."

Although the trial court correctly interpreted the note, we believe that a genuine issue of material fact remains as to whether plaintiff has, in fact, satisfied his obligation to pay $14,000 at an interest rate of 12% per annum on the unpaid balance. Nothing in the record indicates what the total principal plus interest would have been and that plaintiff has in fact satisfied this obligation. Plaintiff's bare assertions in his unverified complaint, which were denied by defendant, are insufficient to support entry of summary judgment for plaintiff. G.S. 1A-1, Rule 56(e).

Summary judgment for plaintiff must be vacated, and the case remanded to the District Court of Union County for proceedings to determine whether plaintiff has indeed satisfied his obligations under the note as alleged in his pleading.

Vacated and remanded.

Judges PHILLIPS and COZORT concur.

STATE OF NORTH CAROLINA v. WINDELL FLOWERS

No. 8623SC421

(Filed 17 March 1987)

1. **Criminal Law § 138.29— aggravating factor—heinous, atrocious or cruel burglary—course of conduct—reliance on evidence of joined murder**

The trial court erred in finding the especially heinous, atrocious or cruel aggravating factor for first degree burglary where it is apparent that the court improperly considered evidence of defendant's course of conduct in the commission of a joined offense of first degree murder for which defendant was contemporaneously convicted.

2. **Criminal Law § 138.29— aggravating factor—pattern of conduct causing danger to society—reliance on joinable offenses**

The trial court erred in finding as a non-statutory aggravating factor for breaking or entering and larceny that "defendant engaged in a pattern of conduct causing serious danger to society" where the only basis for the court's finding of this factor was evidence of joinable offenses for which defendant was also being sentenced.

3. **Criminal Law § 138.37— mitigating factor—aiding apprehension of another felon—necessity for finding**

The trial court erred in failing to find as a mitigating factor that defendant "aided in the apprehension of another felon" where there was uncontradicted testimony by an SBI agent that defendant's statements led to the apprehension of other felons. N.C.G.S. § 15A-1340.4(a)(2)h.

APPEAL by defendant from *Rousseau, Judge*. Judgment entered 17 December 1985 in Superior Court, WILKES County. Heard in the Court of Appeals 17 November 1986.

At the 21 June 1982 Special Criminal Session of Superior Court, Iredell County, defendant and his codefendants were tried and convicted of first-degree murder, first-degree burglary, second-degree kidnapping, breaking or entering, larceny, and armed robbery. Judgment on defendant and his codefendants' conviction of armed robbery was arrested. Defendant received the following sentences: For the Class A felony of first-degree murder—life imprisonment; for the Class C felony of first-degree burglary—50 years; for the Class E felony of second-degree kidnapping—30 years to begin upon expiration of the sentence for the Class C felony; and for the Class H felonies of breaking or entering and larceny—10 years to begin at the expiration of the sentence imposed for the Class E felony. Defendant along with his code-

fendants appealed. The North Carolina Supreme Court allowed a motion to bypass this Court on the non-Class A felonies. *See State v. Hayes*, 314 N.C. 460, 334 S.E. 2d 741 (1985). For a complete statement of the facts of this case, *see id.* The North Carolina Supreme Court affirmed all the convictions appealed from, but remanded all offenses other than the Class A felony of first-degree murder for resentencing. *See id.* Upon remand the trial court, on 17 December 1985, resentenced defendant Windell Flowers to the same consecutive sentences of fifty years for first-degree burglary, thirty years for second-degree kidnapping, and a consolidated ten year sentence for breaking or entering and larceny. Defendant Flowers appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Charles M. Hensey, for the State.

Dennis R. Joyce, for defendant.

JOHNSON, Judge.

[1] Defendant first argues that the trial court erred by using as an aggravating factor evidence of a joinable offense for which he was being sentenced. Defendant contends that "[b]y aggravating the defendant's sentence for burglary with a finding that the crime was especially heinous, atrocious, and cruel, the court below must have been relying on evidence of other crimes that occurred once the defendant was inside the house." We agree.

Recently, in the case of *State v. Westmoreland*, 314 N.C. 442, 334 S.E. 2d 223 (1985), the Court relying upon *State v. Lattimore*, 310 N.C. 295, 311 S.E. 2d 876 (1984), stated the following:

> In the case before us the trial judge did not explicitly use defendant's convictions as aggravating factors. Rather, he relied on defendant's murderous course of conduct in committing the offenses that support the convictions. The State contends that this does not violate the rule of *Lattimore*. We cannot agree. Whatever name is given to it, the effect of the trial judge's action was to use defendant's contemporaneous convictions of joined offenses as an aggravating factor in violation of the rule of *Lattimore*. Of course, a trial judge is not precluded from finding as an aggravating factor that a defendant has engaged in a criminal course of conduct when such conduct is not the basis of either of the joined offenses.

Westmoreland, supra, at 449-50, 334 S.E. 2d at 228.

In sentencing defendant for first-degree burglary the trial judge found as a statutory aggravating factor that the offense was especially heinous, atrocious, or cruel. From our review of the record on appeal it is apparent that the trial court improperly considered evidence of defendant's course of conduct in the commission of a joinable offense, to wit: first-degree murder. Therefore, based upon *Lattimore, supra*, and *Westmoreland, supra*, we must remand for resentencing on defendant's first-degree burglary conviction.

[2] Upon sentencing defendant for larceny and breaking or entering the trial court found as the only aggravating factor that "[t]he defendant engaged in a pattern of conduct causing serious danger to society." Consistent with our remand of defendant's conviction for first-degree burglary, we likewise remand defendant's convictions of larceny and breaking or entering for resentencing. From a review of the record on appeal the only basis for the trial court's finding of the aforementioned non-statutory aggravating factor was evidence of joinable offenses for which defendant was also being sentenced. The principle established in *Lattimore* and *Westmoreland, supra*, prohibits this result.

[3] Defendant's final Assignment of Error is that the trial court erred by not finding as a mitigating factor that defendant aided in the apprehension of another felon. We agree.

Prior to sentencing a convicted felon to a prison term other than the presumptive a trial court must consider any mitigating or aggravating factors set forth in G.S. 15A-1340.4. *Id.* If a trial court imposes a prison term for a felony that differs from the presumptive term set forth in G.S. 15A-1340.4(f), then the trial court "*must* specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. If he imposes a prison term that exceeds the presumptive term, he must find that the factors in aggravation outweigh the factors in mitigation." G.S. 15A-1340.4(b) (emphasis supplied).

Defendant complains that there was a preponderance of the evidence to establish as a mitigating factor that he "aided in the apprehension of another felon," G.S. 15A-1340.4(a)(2)h. The record on appeal bears out defendant's assertion. There was uncontra-

dicted testimony by an SBI agent that defendant's statements led to the apprehension of other felons. During resentencing, defendant brought this evidence to the court's attention and argued for a finding in mitigation. When the court asked the prosecutor if he wished to be heard with respect to defendant's argument for the court finding the mitigating factors the prosecutor declined to be heard. The State, in its brief, concedes that: "[i]t is undisputed that there was evidence in the record to support such a finding and that the trial judge considered it as to each offense." We fail to see any indication in the record that the trial court found this factor in mitigation, and then exercised his discretion and found that the factors in aggravation outweighed those in mitigation. Therefore, we must remand for resentencing all three sentences from which defendant appeals.

Remand for resentencing.

Judges ARNOLD and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 MARCH 1987

ALLSTATE v. SEALEY No. 8610SC817	Wake (85CVS5865)	Affirmed
AUTUMNFIELD, INC. v. NORTH CAROLINA No. 8610SC252	Wake (85CVS5791)	Affirmed
BURNS v. BURNS No. 8623DC985	Wilkes (86CVD248)	Affirmed
DICK v. DICK No. 8618SC289	Guilford (84SP853)	Affirmed
DURDEN v. DURDEN No. 863SC1051	Carteret (84CVS265)	Affirmed in part and remanded
FOSTER v. BLUE RIDGE No. 8610IC515	Ind. Comm. (603657)	Affirmed
FREEMAN v. FREEMAN No. 8614DC778	Durham (84CVD1995)	Affirmed in part, vacated and remanded in part
GORMAN v. SCHOOLS No. 8610IC1062	Ind. Comm. (554328)	Remanded
HARVEY v. HARVEY No. 8617DC592	Rockingham (83CVD604) (81CVD905)	Vacated
HINSON v. HINSON No. 8619DC1089	Cabarrus (86CVD126)	Affirmed
IN RE COUNTY OF DURHAM v. CUTTING No. 8614SC663	Durham (85CVS3296)	Affirmed
IN RE PRINCE No. 8626DC1079	Mecklenburg (86SPC920)	Affirmed
IN RE ROBERTS v. HIATT No. 8625SC1091	Burke (85CVS1012)	Affirmed
IN RE WADDELL No. 8614DC677	Durham (86J27)	Dismissed in part, affirmed in part
IN RE WHITT No. 8610DC795	Wake (86SC137)	Affirmed
JARRATT v. JARRATT No. 8620DC1005	Moore (79CVD228)	Affirmed

KEEVER v. KRAFT No. 8627SC690	Lincoln (85CVS245)	Affirmed
KENNEDY v. KENNEDY No. 8623DC1061	Wilkes (85CVD704)	Vacated and remanded
LEAK v. EMPLOYMENT SECURITY No. 8621SC922	Forsyth (86CVS1009)	Affirmed
LEAZER v. CANNON MILLS No. 8610IC972	Ind. Comm. (743851)	Vacated and remanded
LOCKERT v. BREEDLOVE No. 8619SC1032	Rowan (86CVS165)	Affirmed
LONG v. TROTTER No. 8619DC395	Randolph (85CVD1018) (Transferred from Guilford County, same as No. 83CVD579, N.C. Court of Appeals No. 8418DC1179)	Reversed
O'NEAL (now Rodgers) v. WILKS No. 8621DC735	Forsyth (85CVD1081)	No error
PARKS v. ORANGE COUNTY No. 8614SC758	Durham (86CVS96)	Affirmed
POWELL v. POWELL No. 8625DC284	Burke (83CVD327)	No error
RIGSBEE v. ARVIN No. 8610SC897	Wake (83CVS5905)	Affirmed
STATE v. ABRAMS No. 8626SC1037	Mecklenburg (85CRS78301) (85CRS78302)	No error
STATE v. ATKINSON No. 868SC1093	Wayne (86CRS548) (86CRS549)	No error
STATE v. BALDWIN No. 8628SC1041	Buncombe (85CRS24562)	No error
STATE v. BARKER No. 8615SC914	Alamance (85CRS11331)	No error
STATE v. BATTLE No. 867SC1146	Nash (86CRS1305) (86CRS1306)	No error

STATE v. BENDER No. 8618SC1097	Guilford (84CRS15385) (84CRS15386) (86CRS25294)	No error
STATE v. BREWINGTON No. 865SC1108	New Hanover (86CRS5442) (86CRS5443)	Affirmed
STATE v. BRYANT No. 8625SC657	Catawba (85CRS14717)	No error
STATE v. CAROLINA No. 8614SC1076	Durham (85CRS7976)	No error
STATE v. CARTER No. 8621SC931	Forsyth (85CRS61906)	No error
STATE v. COFIELD No. 866SC1168	Bertie (86CRS58)	No error
STATE v. DAILEY No. 865SC857	New Hanover (85CRS24489) (85CRS24491)	No error
STATE v. DAWN a/k/a EVANS No. 863SC974	Craven (84CRS14685) (84CRS14686) (84CRS2937) (84CRS2939) (84CRS2940)	No error
STATE v. DOCKERY No. 8619SC1099	Montgomery (86CRS312)	Dismissed
STATE v. EDWARDS No. 867SC1101	Nash (85CRS14352) (85CRS14353)	No error
STATE v. FARIS No. 8624SC1171	Yancey (86CRS347)	Remanded
STATE v. FARRIS No. 8615SC1023	Chatham (85CRS7440) (85CRS7441) (85CRS7442) (85CRS7443)	No error
STATE v. HARRIS No. 869SC900	Granville (85CVS4205) (85CVS4959)	No error
STATE v. HAZELWOOD No. 8617SC802	Stokes (85CRS4222)	No error

STATE v. KIDD No. 8625SC1025	Caldwell (85CRS348)	No error
STATE v. MOORE No. 864SC1049	Jones (85CRS1493) (86CRS100)	Affirmed
STATE v. NEELY No. 8626SC1038	Mecklenburg (84CRS31955)	No error
STATE v. POINTE No. 864SC1024	Onslow (84CRS17755) (84CRS15330)	Affirmed
STATE v. ROWE No. 868SC1070	Wayne (86CRS2186)	No error
STATE v. SOUTHERS No. 865SC1068	New Hanover (85CRS867) (85CRS868) (85CRS1730)	Affirmed
STATE v. SPARROW No. 863SC1065	Craven (82CRS13033)	No error
STATE v. SWEET No. 865SC836	New Hanover (86CRS4338) (86CRS4339) (86CRS4340) (86CRS4341) (86CRS4342)	Affirmed
STATE v. TYREE No. 866SC737	Halifax (85CRS8919)	No error
STATE v. WILKINS No. 861SC1054	Perquimans (86CRS298)	No error
STATE v. WILLARD No. 8623SC1085	Yadkin (84CRS1987)	Appeal dismissed. Petition for Writ of Certiorari denied.
WIGGS v. CHURCH No. 8611DC747	Johnston (84CVD405)	Affirmed
WILLIAMS v. WILLIAMS No. 861DC832	Chowan (83CVD130)	Affirmed and remanded

APPENDIXES

PRESENTATION OF
MORRIS PORTRAIT

HISTORY OF
THE COURT OF APPEALS

Ceremonies

For the Presentation of a Portrait

of

The Late Chief Judge Naomi Elizabeth Morris

To

The Court of Appeals of North Carolina

28 September 1987

Courtroom of the Court of Appeals

Court of Appeals Building

Raleigh

INTRODUCTORY REMARKS

BY

ACTING CHIEF JUDGE GERALD ARNOLD

LADIES AND GENTLEMEN:

The Court is convened this morning for the purpose of receiving the portrait of the Honorable Naomi E. Morris who served on the Court of Appeals from 1967 to 1982, four years of those as Chief Judge.

For the Court and for the Morris family I express to you our gratitude for your attendance.

And now I would like to introduce Reverend Bill Bussey who will give the invocation.

The family has requested that the presentation be made by the Honorable Edward B. Clark, who not only served with Judge Morris but also was a friend of long standing. Judge Clark practiced law for many years, was a member of the North Carolina Senate, and Legislative Counsel for Governor Sanford. He was a Judge in the Superior Court, and served from 1975-1982 as a Judge on the Court of Appeals.

PRESENTATION ADDRESS

BY

THE HONORABLE EDWARD B. CLARK

May it please the Court, it is with great pleasure that I present to the North Carolina Court of Appeals, on behalf of Ruth Morris Shearin, the portrait of her sister, Naomi Elizabeth Morris, who was a judge of the Court from August 1967 to December 31, 1982, and served as Chief Judge for four years.

It is a distinct honor to me to make this presentation to the Court in the presence of Governor Martin, Chief Justice Exum and the Judges of the North Carolina Supreme Court, four of whom served with Judge Morris on the Court of Appeals, and in the presence of these who retired from the Courts and their wives, the widows of the Judges who served with Judge Morris and her family and friends.

Naomi Elizabeth Morris was born in Spring Hope, North Carolina on December 1, 1921 the daughter of Edward E. and Blanche B. Morris. The family, the mother and father and the sisters, Ruth and Naomi, moved to Wilson before Naomi was a year old. And Wilson was to remain her home permanently. There as a young child she acquired the nickname "Peanut." The source of the nickname is shrouded in secrecy. Her sister and childhood friends have conflicting, speculative versions. But "Peanut" was not confined to a few friends; everyone in Wilson called her "Peanut." In March 1983, the Young Democrats of Wilson honored her with a public dinner called the "Peanut Roast," which was attended by hundreds of Wilsonians.

She attended the public schools of Wilson. She was an English major at Atlantic Christian College in Wilson, graduating with highest honors in 1943. The English department of Atlantic Christian College was undoubtedly an excellent one. Many times her colleagues on the Court of Appeals were embarrassed by Peanut's corrective pencil, with references to split infinitives, dangling participles and other grammatical errors. After graduation, she never lost interest in Atlantic Christian College; she was President of the Alumni Association, a member of the Board of Trustees since 1971 and Chairman at the time of her death.

Soon after graduation in 1943, she went to work for the Signal Corps in Washington, but it was not long before her father died and she returned to Wilson to live with her mother. Theirs was a loving and close relationship. They were active together in the First Baptist Church. Upon her mother's death, Peanut established in the church the Blanche B. Morris Scholarship Fund.

She worked in a bank for a short time, and in 1946 she was employed as a secretary for W. A. Lucas, an able and distinguished lawyer. She worked as a secretary for six years. Mr. Lucas, recognizing her intelligence and ability, encouraged her to enter law school. In 1952, she had become the only woman in the class of 1955 at the Law School of the University of North Carolina at Chapel Hill. She became the first woman to serve as Associate Editor of the Law Review, graduated fourth in her class, and was honored by membership in the Order of the Coif. In early 1987 her law school classmates, led by two of North Carolina's most distinguished attorneys, John V. Hunter, III and Robert C. Vaughn, Jr., established a scholarship fund at the Law School in her memory. In their letter announcing the fund they wrote: "For reasons you can well understand, there was no one in our class who was more highly thought of, then and later."

Throughout her life, Judge Morris maintained an interest in the Law School and was active in the UNC Law Alumni Association.

Soon after graduation in 1955, she joined the Lucas firm as an associate. Two years later, she became a partner in the firm of Lucas, Rand, Rose and Morris. Her law practice was varied. She practiced corporate law, tax law, real estate law, municipal law, and almost any other kind of law you can name, and she appeared in both civil and criminal courts.

She practiced law for twelve years. She was an able lawyer, and she had no trouble in holding her own in the male-dominated legal world. She was accused by some of taking too much interest in her clients and becoming involved in their problems. But she found the practice of law to be a means for helping others.

About July 1, 1967, she was asked by Governor Dan Moore to serve as one of the six original members of the newly created Court of Appeals. The decision was a difficult one; she loved Wilson and the practice of law with her firm. She immediately contacted Judge Susie Sharp, then Associate Justice of the Supreme Court whom she greatly admired. Judge Sharp told her to walk across the street to the Governor's office and say to His Excellency, "Yes sir. Thank you, sir. I'll take the job."

So Peanut complied with Judge Sharp's judicial order. The appointment of the six judges was announced by Governor Moore on July 5, 1967. Soon Chief Justice R. Hunt Parker appointed Judge Raymond B. Mallard as Chief Judge. The other four judges were Hugh B. Campbell, James C. Farthing, Walter E. Brock, and David M. Britt. Judge Farthing died suddenly on December 6, 1967. Francis Marion Parker of Asheville was appointed to fill the vacancy.

After devoting several months to organization and rulemaking, the Court of Appeals heard its first appeal in January, 1968. The caseload increased so rapidly that the General Assembly in 1969 increased the number of judges to nine and three more were added in 1977. So in ten years the number of judges on the Court had doubled from six to twelve.

Judge Morris was the third Chief Judge of the Court. She succeeded Walter E. Brock, elected an Associate Justice of the Supreme Court. She was appointed Chief Judge on December 1, 1978 and served until retirement on December 31, 1982.

Her study of English at Atlantic Christian College and her varied practice of law in the town of Wilson, prepared her well for service as a Judge of the Court of Appeals. She had a broad knowledge of the law, the skill of writing with meticulous accuracy and the logic and common sense to apply the law to the facts. All of this gave her opinions the force of persuasion. She believed in judicial restraint, that judges should not legislate, but that they should apply and interpret the law so as to permit it to grow.

It was a pleasure to serve with her on a three-judge panel. It was in the consultation room that her qualities of mind and character were exhibited to her colleagues deliberating with her. The opinions I wrote and submitted to her were often returned with penciled deletions and amendments. I soon learned that when she was on the panel, I had to pay close attention to grammar and often I would write with a copy of E. B. White's "Elements of Style" at my fingertips. I remember once when she admonished me for starting a paragraph with a conjunction, I with great glee contradicted her with a passage from White. She had a great sense of humor. Often I would deliberately insert in my legal jargon a thoroughly ridiculous sentence, which she would invariably recognize and always respond with an amusing comment. This served to relieve the tension of writing opinions at the rate of 100 per annum.

And she was an excellent Chief Judge. Her conduct of the administrative works of the Court in recognizing and solving the problems as they arose revealed her genius for the practical. One of the greatest problems was the caseload, and this she handled with suggestive prodding. In response we called her the Ayatollah, Adolph Hitler, and other names indicating intolerable dictatorship. In a conference of the Court I once told her that I had decided to avidly support the Equal Rights Amendment in the hope that we deprived male judges might get some relief from the oppressive control imposed and punishment inflicted by her while we cowered in the corner seeking to avoid boot kicks and the sting of a bullwhip. There were no tears of compassion, only a smirk.

Upon her resignation from the Court on December 31, 1982, she returned to her former law firm in Wilson with Hardy Rose the senior partner. She did not return to the full practice of law, because she had many other interests that required her time and attention. She served actively on committees of the North Carolina State Bar and Bar Association, Chairman of the North Caro-

lina Board of Ethics, Director of the First Capital Corporation, Chairman of the Board of Trustees of Atlantic Christian College and other organizations too numerous to name. Every week she had breakfast with Mrs. W. A. Lucas, then in her 90's, a Monday afternoon tennis foursome in Raleigh, and regularly attended the lectures in English literature of Dr. Mary Lynch Johnson, professor emeritus of English, Meredith College.

No account of her life would be complete without mentioning her weekends and vacations at her home on Bogue Banks in Morehead City. Those were the happiest times of her full and happy life. Several years ago her beloved sister Ruth and her husband, Frank Shearin, moved into the cottage next door. They shared friends and family. She loved to pilot her 18 foot "Bar Bell" in search of schools of blues or mackerel. A typical day began with the gathering of family and friends in Peanut's cottage where orange juice laced with champagne was served to stimulate the digestion of scrambled eggs, country sausage and biscuits. Then came the hard part. All had to decide whether it was golf, or fishing, or bridge or a picnic on Shackleford Island. These strenuous activities were usually followed by a late afternoon nap and then there was Happy Hour followed by a delicious dinner of the catch of the day, soft-shell crabs, and shrimp prepared with assorted help by Frank Shearin, who was more a brother than a brother-in-law. Then the boats on the inland waterway and the lights across the bay served as a pretty backdrop as we solved the problems of the courts, the state, the nation and the world. It was there that one should have known her for an understanding of how Peanut was in law a gracious giant, and it was there that she lived during her last illness until hospitalization was imperative. She died on September 11, 1986.

It is fitting that the portrait of Naomi Elizabeth Morris hang in this courtroom in recognition of her noble services to this Court. The portrait was painted by Kenneth Fox, a gifted artist who has studios in Jacksonville, Florida and New York.

Cas Shearin, the only niece of Judge Morris, who had a special place in her heart, will unveil the portrait. Frank Dail, the Clerk of this Court, will escort Cas forward for the unveiling.

REMARKS OF ACTING CHIEF JUDGE GERALD ARNOLD IN ACCEPTING THE PORTRAIT OF THE LATE CHIEF JUDGE NAOMI ELIZABETH MORRIS

We are grateful to the family of Judge Morris for this portrait. On behalf of the Court it is accepted in appreciation for her years of service to the Court.

Judge Morris was much admired and highly respected across the State of North Carolina. It is right that her portrait should hang in this courtroom where she served with dignity and distinction. It will hang here as a reminder of Judge Morris's presence with us in spirit and will be no less an honor to her than to this Court, and those of us privileged to follow her example as judges.

A record of these proceedings today will be included in the minutes of this Court and printed in the North Carolina Court of Appeals Reports.

The artist, Kenneth Fox, was recognized by the Court but was not present at the ceremony.

In order that the members of the Court and all of you present may have the opportunity of greeting the members of Judge Morris's family, they will form a receiving line as directed by the Marshal.

When the line is formed, the Court will rise and the judges will leave the bench to greet the family. The audience is invited to proceed down the receiving line after the Court. Following that, Court is adjourned.

HISTORY OF THE COURT OF APPEALS OF NORTH CAROLINA

July 1967 - July 1987

By Retired Justice David M. Britt

Although the Court of Appeals was established by the Legislature in 1967, a history of the Court would not be complete without mentioning certain events that occurred during the ten to fifteen years prior to that date.

As of the early fifties our State's court system was basically the same as it had been since 1868 when a new constitution was adopted following the War Between the States. The greatest change had come in the courts below the Superior Court by the creation of numerous types of local courts. There were county courts, mayor courts, recorder courts and municipal courts in addition to the justice of the peace courts.

Leaders of the North Carolina Bar Association recognized that our court system needed a major updating and they convinced Governor Luther Hodges that this should be done. At the request of Governor Hodges the Committee on Improving and Expediting the Administration of Justice in North Carolina was appointed by the Bar Association in 1955. This Committee consisted of 27 outstanding citizens, approximately one-half of the number being leaders of the Bar and the others being non-lawyers including several newspaper editors. J. Spencer Bell, a Charlotte lawyer and later a state senator, served as chairman, and Shearon Harris, President of Carolina Power & Light Company, served as vice chairman.

The Committee made its final recommendations to the 1958 annual meeting of the North Carolina Bar Association. The recommendations were adopted in principle and the Committee continued its work, making its final report in December 1958.[1]

While the recommendations called for a unified court system, and particularly for a district court system as we now have, they included the following recommendation with respect to an intermediate appellate court: "That the General Assembly be empowered upon recommendation of the Supreme Court to establish an intermediate appellate court in the appellate division; that the structure and organization of such intermediate court be determined by the General Assembly; . . ."

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1. See Report of the Committee on Improving and Expediting the Administration of Justice in North Carolina, dated December 1958, a copy of which is on file in the Supreme Court Library.

Bills that would lead to implementation of the recommendations were introduced in the 1959 General Assembly. Since the major changes proposed involved amendments to the Constitution, a three-fifths vote of the membership of each house was necessary in order for the amendments to be submitted to a vote of the people.

Senator Spencer Bell led the proponents in the Senate and Representative H. P. Taylor, Jr., of Anson County led the proponents in the House. Although the proposals received substantial votes in both houses, they failed to receive the three-fifths majorities required by the Constitution.

The movement for court improvement continued until the 1961 General Assembly convened, and new bills were introduced. However, shortly before the convening date, leaders of the movement learned that members of the Supreme Court felt that North Carolina did not need an intermediate appellate court and that the Supreme Court could handle the appellate work. Consequently, proposed court improvement legislation considered by the 1961 session of the Legislature contained no provision for an additional appellate court.

After a lot of hard work by the proponents, the proposed constitutional amendments received the votes needed in the General Assembly to be submitted to a vote of the people. By far, the most far-reaching amendment was the one mandating the Legislature to provide for a unified district court system.

The proposed amendments were submitted to the voters at the November 1962 general election and they were approved by comfortable margins. Since the 1963 General Assembly convened only three months after the election, there was not sufficient time to make the necessary study and prepare legislation for consideration by the 1963 session.

Consequently, the 1963 General Assembly, by joint resolution, created a Courts Commission and charged it with the duty of "preparing and drafting legislation necessary for the full and complete implementation of Article IV of the Constitution." The Commission was composed of 15 members appointed by a group including the Governor, the President of the Senate and the Speaker of the House.

Senator Lindsay C. Warren, Jr., of Wayne County, was designated chairman of the Commission. In addition to Warren the membership included Senators Jolly of Franklin County and Harrington of Bertie County; Representatives Taylor of Anson Coun-

ty, Britt of Robeson County and Zollicoffer of Vance County; Dean Dickson Phillips of the U.N.C. Law School; and Honorable James B. McMillan of the Charlotte bar. Colonel C. E. Hinsdale of the Institute of Government served as staff person.

Between the 1963 and 1965 sessions of the Legislature, the Courts Commission devoted most of its time to studying and working on proposed legislation for the district court system. At about the time the 1965 General Assembly convened, certain members of the Supreme Court let it be known that the work load of that court had become extremely heavy and that an intermediate appellate court should be considered.

Since the creation of a new appellate court would require a constitutional amendment, members of the Courts Commission concluded that all that could be accomplished by the 1965 General Assembly would be to approve an amendment to be submitted to the voters. Governor Dan Moore was consulted by Commission leaders and he promised his full support of an amendment to the Constitution authorizing an intermediate appellate court. He also suggested that the proposed amendment be submitted at a special election to be held in the fall of 1965 when a popular highway bond referendum would be held.

Although members of the Courts Commission serving in the legislature in 1965 had their hands full with the proposed legislation establishing the district courts, they also took on the task of promoting a constitutional amendment authorizing an intermediate appellate court. Fortunately, the "climate" in the 1965 session was favorable: Lieutenant Governor Bob Scott was supportive and Senators Warren and Harrington were very influential in the Senate. Commission members Pat Taylor, Zollicoffer and Britt were in key positions in the House; Taylor was Speaker, Zollicoffer was Appropriations Committee chairman, and Britt was chairman of the Committee on Courts and had the unanimous support of the Democrats in the House to succeed Taylor as speaker.

Ultimately, not only did the legislation proposed to create the district courts pass by a substantial majority, but the proposed constitutional amendment authorizing the intermediate appellate court also passed overwhelmingly.[2]

The proposed amendment was submitted at the special general election held in November 1965 for the primary purpose of approving a highway bond issue. The proposed bond issue was so

2. Ch. 877, 1965 Session Laws.

popular that it passed by an overwhelming majority, and evidently the strong tide for it caused the constitutional amendment to pass by a substantial majority.

The amendment was very brief, its major provisions being as follows: "The structure, organization, and composition of the Court of Appeals, if established, shall be determined by the General Assembly. The Court shall have not less than five members, and may be authorized to sit in divisions, or other than *en banc*."[3]

Very soon after the amendment was adopted, the Courts Commission gave the Court of Appeals study its top priority. First, it sought guidance from the experience of sixteen other states which had intermediate appellate courts at that time. After considering the systems in all of those states, the Commission was more impressed with that of New Jersey and Michigan.

One of the architects of the Michigan system, a professor in the University of Michigan School of Law, visited the Commission at its request in December 1965 and gave the members valuable insight into the problems involved in creating an intermediate appellate court. Not long thereafter representatives from the Commission went to New Jersey for purpose of obtaining information regarding that state's system. This group included Commission member David M. Britt, J. Frank Huskins, Administrative Officer of the Courts and an *ex officio* member of the Commission, and C. E. Hinsdale, staff member.

While in New Jersey, the group conferred with a member of the New Jersey Supreme Court, a member of the intermediate appellate court[4] and the Administrative Officer of the Courts. It was learned that the New Jersey appellate system had been devised in large part by the late, renowned Chief Justice Vanderbilt. Commission members were so impressed with the New Jersey system that it became sort of a model for the one to be proposed for our state.

During 1966, the membership of the Commission was strengthened when Representative Earl W. Vaughn of Rockingham County became a member. His assistance proved very valuable in the work of the Commission and in getting its recommendations enacted by the Legislature.

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3. *Ibid.*

4. The New Jersey intermediate appellate court is called the Appellate Division of the Superior Court.

Much of the work of the Commission was done by subcommittees. After more than six months of sustained study, the Commission completed its study and preparation of legislation to be proposed to the 1967 General Assembly.

After the assembly convened, Senator Warren was reappointed chairman of the Senate Committee on Courts. At the Speaker's urgent request, Representative Vaughn accepted appointment as chairman of the House Committee on Courts. Very early in the session, Vaughn received pledges from every Democrat in the House to be Speaker in 1969. He was also appointed Speaker *pro tem* for the 1967 session and was elected majority leader for the session. With these credentials he was very effective in getting the Court of Appeals legislation through the House.

The Senate and House committees worked very harmoniously in promoting the proposed legislation. After due consideration the committees overwhelmingly approved the recommendations of the Courts Commission with very little change, and the Senate and House passed the legislation with few if any dissenting votes.[5]

The law creating the Court of Appeals provided that the Court would originally have six members, to be appointed by the Governor in 1967. It also provided that as of 1 July 1969 the membership of the Court would be increased to nine and authorized the Governor serving at that time to appoint the additional three members.

On 5 July 1967, the day before the 1967 Session of the Legislature adjourned, Governor Dan Moore announced his appointments to the Court. They were: Superior Court Judges Raymond B. Mallard of Tabor City, Hugh B. Campbell of Charlotte, James C. Farthing of Lenoir, and Walter E. Brock of Wadesboro; and practicing attorneys Naomi E. Morris of Wilson and David M. Britt of Fairmont. Britt immediately resigned as Speaker of the House and Representative Vaughn was elected to complete the remainder of his term.

Very soon after Governor Moore announced his appointments, Chief Justice R. Hunt Parker announced that he was designating Judge Mallard to serve as Chief Judge of the new court.

The Court held its first conference in late August, 1967. Temporary offices for the Judges were provided in a Fayetteville

5. Ch. 108, 1967 Session Laws.

Street bank building while necessary renovations were being made to the building on the corner of Fayetteville and Morgan Streets theretofore known as the State Library Building.

Prior to 1941 when it moved to the new Justice Building the Supreme Court occupied several floors of the Library Building. After the Supreme Court moved, parts of the building formerly used by the Court were taken over by the Utilities Commission. Members of the Commission then used the offices formerly used by the Justices, and the former Supreme Court Room became the hearing room for the Commission.

After the creation of the Court of Appeals, the State Library moved to its new quarters on Jones Street, the Utilities Commission moved to the second floor and the Court of Appeals was assigned the third floor for offices and a courtroom and the fourth floor for its clerk, library and other purposes. The name of the building was changed to the Ruffin Building, in memory of Chief Justice Ruffin, but in about 1978 it was changed to the Court of Appeals Building. In the mid seventies the Utilities Commission was moved to new quarters and the Court of Appeals took over the second floor of the building.

The new court spent most of the fall months of 1967 working on its rules which, in due time, were approved by the Supreme Court. In 1975 the Rules of Appellate Procedure, governing the Supreme Court and the Court of Appeals were adopted.

On 6 December 1967 Judge James C. Farthing died suddenly. Several weeks thereafter Francis Marion Parker of the Asheville bar was appointed by Governor Moore to fill the vacancy.

In late January 1968, the Court heard its first appeals. Renovations to the courtroom in the Ruffin Building had not been completed, and it became necessary for the Court to make temporary arrangements for a courtroom. Since the Legislature was not in session and did not expect to be during 1968, arrangements were made with the Legislative Building Commission for the Court to use one of the large committee rooms on the ground floor of the Legislature Building for a courtroom. Renovations to the Ruffin Building were completed several months later, and the new Court took up permanent residence in that building.

As provided in the law creating the Court, membership of the Court was increased to nine in July 1969. History repeated itself when House Speaker Earl W. Vaughn resigned to accept Governor Robert W. Scott's appointment to the Court. Others ap-

pointed at the same time were R. A. Hedrick of Statesville and W. E. Graham of Charlotte. The three new members were administered their oaths on 23 July 1969.

By the time the 1977 General Assembly convened, the workload of the court had increased to the point that additional Judges were sorely needed. Consequently, at that session the number of Judges was increased to twelve.[6] On 2 December 1977, Governor James B. Hunt, Jr., appointed the additional Judges, they being Superior Court Judge John Webb of Wilson, District Attorney Burley B. Mitchell, Jr., of Raleigh, and Representative Richard C. Erwin of Winston-Salem.

As of this date (June 1987) thirty-three persons have served as Judges of the Court of Appeals. Their names and brief resumes are as follows:

RAYMOND BOWDEN MALLARD. Judge Mallard was born in Faison, North Carolina, on 20 February 1908. He attended Wake Forest College and its Law School and was admitted to the Bar in 1931. He practiced law in Whiteville and Tabor City from 1931 to 1955 and served in the State House of Representatives in the 1939 Session. He served in the U.S. Army during World War II, being discharged as a Corporal. In July of 1955 he was appointed by Governor Luther H. Hodges to serve as resident Superior Court Judge of the Thirteenth Judicial District, a position which he held until 7 July 1967 when he was appointed to the Court of Appeals by Governor Dan Moore. On 7 July 1967 he was designated by Chief Justice R. Hunt Parker to serve as Chief Judge of the Court of Appeals and on 5 November 1968 he was elected to the Court by the voters. On 1 August 1973 he retired from the Court due to health reasons. He died on 20 July 1979.

HUGH BROWN CAMPBELL. Judge Campbell was born in Waynesville, North Carolina, on 14 March 1907. He attended Amherst College and was awarded an A.B. degree in 1929. He then attended the U.N.C. Law School from which he obtained his law degree in 1932. He was admitted to the Bar in 1931 and after practicing law in Goldsboro for about two years, he moved to Charlotte in 1934 where he practiced law until 1955. In June of 1955 he was appointed a resident Superior Court Judge by Governor Luther Hodges, a position he held until July 1967 when Governor Dan Moore appointed

6. Ch. 1047, 1977 Session Laws.

him to the Court of Appeals. He was duly elected to the Court in November of 1968 and served until his retirement on 31 December 1974.

JAMES COLLY FARTHING. Judge Farthing was born in Lenoir, North Carolina, on 12 January 1913. He attended Lenoir Rhyne College and the U.N.C. Law School. After admission to the Bar in August of 1937, he entered the private practice of law in Lenoir. Thereafter he served as solicitor of the Caldwell County Court. He served as a Lieutenant in the U.S. Navy during World War II. On 1 January 1947 he became solicitor (district attorney) of the Superior Court for the district including Caldwell County. In 1957 he became a resident Judge of the Superior Court and on 1 July 1967 was appointed by Governor Dan Moore to the Court of Appeals. He died in Raleigh on 6 December 1967.

WALTER EDGAR BROCK. Judge Brock was born in Wadesboro, North Carolina, on 21 March 1916. He attended the University of North Carolina at Chapel Hill which awarded him a B.S. degree in 1941. He served in the Army Air Force during World War II, earning the rank of Major. Following the war he entered the U.N.C. Law School which awarded him a law degree in 1947. He was admitted to the Bar in 1947 and entered the private practice of law in Wadesboro. He served as Judge of the Anson County Court and on 1 January 1963 was appointed a special Superior Court Judge by Governor Terry Sanford. On 1 July 1967 he was appointed to the Court of Appeals by Governor Dan K. Moore, was elected to the Court in 1968 and was reelected in 1974. On 1 August 1973 he was designated by Chief Justice William H. Bobbitt to serve as Chief Judge of the Court of Appeals. He served as Chief Judge until 2 January 1979 when he became an Associate Justice of the State Supreme Court. He died on 13 June 1987.

DAVID MAXWELL BRITT. Judge Britt was born in McDonald, Robeson County, North Carolina, on 3 January 1917. He attended Wake Forest College and its law school and was admitted to the Bar in August of 1937. He practiced law in Fairmont and Lumberton from January of 1938 until August of 1967. He served as solicitor of the Fairmont Recorder's Court from 1940 until 1944 except during 1943 when he served in the U.S. Army. He served as chairman of the Fairmont Board of Education from 1954 to 1958 when he was elected to the state House of Representatives. He served five terms in the

House and was its Speaker during the 1967 Session. In July of 1967 he was appointed to the Court of Appeals by Governor Dan K. Moore. He was elected to the Court in November of 1968 and was reelected in November of 1974. On 31 August 1978 he resigned from the Court to become an Associate Justice of the State Supreme Court.

NAOMI ELIZABETH MORRIS. Judge Morris was born in Spring Hope, North Carolina, on 1 December 1921. She attended Atlantic Christian College and was awarded her A.B. degree in 1943. She attended the U.N.C. Law School from which she earned her law degree in 1955. She was admitted to the Bar in 1955 and practiced law in Wilson until July of 1967 when she was appointed to the Court of Appeals by Governor Dan Moore. She was elected to the Court in November of 1968 and reelected in 1974. On 1 December 1978 she was designated by Chief Justice Susie Sharp to serve as Chief Judge of the Court of Appeals. She retired from the Court on 31 December 1982 and died 11 September 1986.

FRANCIS MARION PARKER. Judge Parker was born in Asheville, North Carolina, on 25 August 1912. He earned his A.B. degree at U.N.C. Chapel Hill in 1934 and his law degree from the U.N.C. Law School in 1936. He was admitted to the Bar in 1936 and thereafter practiced law in Asheville until January of 1968. He served in the U.S. Army as a Sergeant from 1944-45, and served in the State Senate during the 1947 and 1949 sessions. On 23 January 1968 he became a member of the Court of Appeals under appointment of Governor Dan Moore to fill the vacancy caused by the death of Judge Farthing. He was elected to the Court in 1968, reelected in 1974 and retired on 31 August 1980.

ROBERT ALFRED HEDRICK. Judge Hedrick was born in Statesville, North Carolina, on 23 August 1922. He attended the Governor Morehead School, and then U.N.C. Chapel Hill which awarded him the A.B. degree in 1946. He attended the U.N.C. Law School which awarded him his law degree in 1949; he was admitted to the Bar the same year. After entering the practice of law in Statesville, he served as solicitor of the Iredell County Court from 1950 to 1958 and as judge of said court from 1958 to 1969. In July of 1969 he was appointed to the Court of Appeals by Governor Robert W. Scott, was elected to the Court in 1970 and reelected in 1976 and 1984. On 3 January 1985 he was designated Chief Judge by Chief Justice Joseph Branch.

EARL WRAY VAUGHN. Judge Vaughn was born in Rockingham County, North Carolina, on 17 June 1928. He attended Pfeiffer College and U.N.C. Chapel Hill which latter institution awarded him the A.B. degree in 1950. Prior to entering U.N.C. Chapel Hill he served two years in the U.S. Army, seeing duty in Korea and being discharged as a Sergeant. He then entered the U.N.C. Law School which awarded him his law degree in 1952. He was admitted to the Bar in 1952 and practiced law in Greensboro until 1953 when he moved to Draper, North Carolina, where he began practicing. He served in the state House of Representatives during the 1961, 1963, 1965, 1967 and 1969 sessions, serving as Speaker from July of 1967 to July 1969. On 1 July 1969 he was appointed to the Court of Appeals by Governor Robert W. Scott, was elected to the Court in 1970 and reelected in 1976 and 1984. On 3 January 1983 he was designated Chief Judge by Chief Justice Joseph Branch and served in that position until 2 January 1985 when he became a member of the state Supreme Court. He retired for health reasons on 1 August 1985 and died on 1 April 1986.

WILLIAM EDGAR GRAHAM, JR. Judge Graham was born in Jackson Springs, North Carolina, on 31 December 1929. He attended U.N.C. at Chapel Hill where he earned his A.B. degree in 1952 and his law degree from the U.N.C. Law School in 1956. He served as a First Lieutenant in the U.S. Air Force from 1952 to 1954. Following his admission to the Bar in 1956 he practiced law in Charlotte. He was appointed to the Court of Appeals by Governor Robert W. Scott on 1 July 1969 and resigned from the Court on 31 March 1973 to enter the legal department of Carolina Power & Light Company.

JAMES M. BALEY, JR. Judge Baley was born in Greensboro, North Carolina, on 23 January 1912. He attended Mars Hill College and then U.N.C. Chapel Hill where he earned his A.B. degree in 1931 and his law degree in 1933. He was admitted to the Bar in 1933 and practiced law in Marshall, North Carolina, from 1933 to 1953 except for the time he spent in service in the U.S. Navy as a Lieutenant Commander from 1942 to 1946. He represented Madison County in the state House of Representatives in the 1937 and 1939 sessions. In 1953 he was appointed by President Eisenhower to the office of United States Attorney for the Western District of North Carolina. He served in that office until 1961 when he entered the private practice of law in Asheville. On

1 May 1973 he was appointed to the Court of Appeals by Governor Holshouser to fill the vacancy caused by the resignation of Judge Graham. He did not file for election to the Court of Appeals in 1974 but filed for election to the state Supreme Court and was defeated. His tenure on the Court of Appeals expired 26 November 1974. In January of 1975 he was appointed a Special Judge of the Superior Court and served in that capacity until he resigned in August of 1978.

JAMES HOLMES CARSON, JR. Judge Carson was born in Charlotte, North Carolina, on 14 February 1935. He attended the Darlington School in Rome, Georgia, 1949-52, after which he attended U.N.C. Chapel Hill from which institution he received his A.B. degree in 1961 and his law degree in 1963. He served as an officer in the U.S. Navy 1955-1959 and 1961-1962. After his admission to the Bar in 1963 he practiced law in Charlotte until 1973. He served in the state House of Representatives during the 1967 and 1969 sessions. He was appointed to the Court of Appeals by Governor Holshouser on 3 December 1973 to succeed Judge Mallard who had resigned. He resigned from the Court on 17 July 1974 to accept appointment by Governor Holshouser as Attorney General. He was not successful in the November 1974 election in retaining the Attorney Generalship and returned to Charlotte to reenter the practice of law.

ROBERT MCKINNEY MARTIN. Judge Martin was born near Conway, in Northampton County, North Carolina, 8 September 1912. He attended Wake Forest College and was admitted to the Bar in 1937. He practiced law in High Point until 1 July 1967 when he was appointed by Governor Moore as a Special Judge of the Superior Court and re-appointed by Governor Scott. In the 1974 Democratic primary he became the nominee for the Court of Appeals to succeed Judge Campbell who was retiring. On 29 July 1974 Judge Martin resigned as Judge of the Superior Court to accept an appointment by Governor Holshouser to fill the vacancy on the Court of Appeals caused by the resignation of Judge Carson. In November 1974 he was elected to the Court for a full eight-year term. He retired 31 December 1982. Since his retirement from the Court he has served as a Special Consultant to the Department of State Treasurer.

STANLEY GERALD ARNOLD. Judge Arnold was born in Harnett County, North Carolina, on 14 November 1940. He attended Oak Ridge Military Institute, received his A.B. de-

gree from East Carolina University in 1963 and his law degree from U.N.C. Chapel Hill in 1966. Following his admission to the Bar in 1966 he entered the practice of law in Lillington where he practiced until 1974. He served in the state House of Representatives from 1970 until 1974. In November 1974 he was elected to the Court of Appeals to fill the place formerly held by Judge Graham and Judge Baley. He was re-elected in 1976 and 1984.

EDWARD BREEDEN CLARK. Judge Clark was born on 29 January 1916 in Abbottsburg, North Carolina. He attended U.N.C. Chapel Hill from which he received his B.S. degree in 1936 and his law degree in 1939. Following his admission to the Bar in 1939, he entered the practice of law in Elizabethtown where he practiced until 1961 except for the time spent in military service during World War II. He served in the Infantry and Judge Advocate General Department from 1942 until 1946, earning the rank of Captain. He served as judge of the Bladen County Court for several years and served in the state Senate during the 1957 and 1961 sessions. He served as a Superior Court judge from 1961 to 1974 when he was elected to the Court of Appeals to fill the place formerly held by Judge Mallard and Judge Carson. He was chairman of the N.C. Judicial Standards Commission from 1980 until 1982. He retired from the Court on 30 June 1982.

BURLEY BAYARD MITCHELL, JR. Judge Mitchell was born in Raleigh, North Carolina, on 15 December 1940. After earning his B.A. degree from N.C. State University in 1967 and his law degree from the U.N.C. Law School in 1969, he was admitted to the Bar in 1969. He served in the U.S. Navy from 1958 to 1962. He served as an Assistant Attorney General of North Carolina from 1969 to 1972 when he was appointed District Attorney for the Tenth District. He was appointed to the Court of Appeals by Governor Hunt on 2 December 1977 as one of the new judges authorized by the 1977 General Assembly. He was elected to the Court in 1978 and resigned on 20 August 1979 to become Secretary of the North Carolina Department of Crime Control and Public Safety. On 3 February 1982 he was appointed by Governor Hunt to the state Supreme Court to succeed Justice J. Frank Huskins.

JOHN WEBB. Judge Webb was born in Rocky Mount, North Carolina, on 18 September 1926. He attended U.N.C. Chapel Hill from 1946 to 1949 and in 1952 earned his law degree from the Columbia University School of Law. He

served in the U.S. Navy 1944-1946. He was admitted to the Bar in New York in 1953 and the North Carolina Bar in 1956 after which he practiced law in Wilson until 1971. He served as a Superior Court judge from 1971 to 1977 when Governor Hunt appointed him to the Court of Appeals as one of the three new judges authorized by the 1977 General Assembly. He was elected to the Court in 1978 and reelected in 1984. On 26 November 1986 he resigned from the Court to become an Associate Justice of the state Supreme Court.

RICHARD CANNON ERWIN. Judge Erwin was born in Marion, North Carolina, on 23 August 1923. He earned his B.A. degree from Johnson C. Smith University in 1947 and his law degree from the Howard University Law School in 1951. He served in the U.S. Army from 1943 until 1946 and was a First Sergeant at the time of his discharge. Following his admission to the Bar, he practiced law in Winston-Salem. He served in the state House of Representatives during the 1975 and 1977 sessions. On 2 December 1977 he was appointed by Governor Hunt to the Court of Appeals as one of the three new judges authorized by the 1977 General Assembly. He was elected in 1978 and resigned from the Court on 30 October 1980 to accept an appointment as judge of the U.S. District Court for the Middle District of North Carolina.

HARRY CORPENING MARTIN. Judge Martin was born in Lenoir, North Carolina, on 13 January 1920. After attending John B. Stetson University in 1937-38, he entered U.N.C. Chapel Hill where he earned his A.B. degree in 1942. He earned his law degree at Harvard University School of Law in 1948 and his LL.M. degree at the University of Virginia Law School in 1982. He served in the U.S. Army Air Corps 1942-45. Following his admission to the Bar in 1948 he entered the practice of law in Asheville. In 1962 he was appointed a Superior Court judge and served in that capacity until 1978. On 1 September 1978 he was appointed to the Court of Appeals by Governor Hunt to succeed Judge Britt who had become a member of the state Supreme Court. He was elected to the Court of Appeals in 1980 and served until August of 1982 when he became a member of the state Supreme Court.

JOHN PHILLIPS CARLTON. Judge Carlton was born on 14 January 1938 in Rocky Mount, North Carolina. He earned his B.S. degree at N.C. State University in 1960 and his law degree at the U.N.C. Law School in 1963. Following his ad-

mission to the Bar in 1963, he practiced law in Tarboro. He served as Chief District Court judge from 1968 until 1977 after which he was appointed and served as Secretary of the Department of Crime Control and Public Safety. On 2 January 1979 he was appointed by Governor Hunt to the Court of Appeals to succeed Judge Brock who had become a member of the state Supreme Court. On 2 August 1979 he resigned from the Court of Appeals to accept appointment to the state Supreme Court.

HUGH ALBERT WELLS. Judge Wells was born in Shelby, North Carolina, on 8 June 1922. After serving in the U.S. Army Air Corps from 1942 until 1945, he entered U.N.C. Chapel Hill where he earned his law degree in June 1952. Following his admission to the Bar in 1952, he practiced law in Shelby from 1952 until 1960, in Atlanta from 1960 until 1963, and in Raleigh from 1963 until 1969. Under appointment by Governor Robert W. Scott, he served on the N.C. Utilities Commission from December of 1969 until May of 1975 when he resigned. He then served as Vice-President and General Counsel for the N.C. Electric Membership Corporation from May of 1975 until June of 1977. He served as counsel to the Utility Review Committee of the N.C. General Assembly during 1976-1977. In June of 1977 he was appointed by Governor Hunt to the position of Executive Director of the Public Staff of the N.C. Utilities Commission. In August of 1979 he was appointed by Governor Hunt to the Court of Appeals to succeed Judge Carlton who had been appointed to the state Supreme Court. Judge Wells was elected to the Court in 1980 and reelected in 1982.

CECIL JAMES HILL. Judge Hill was born in Asheville, North Carolina, on 20 November 1919. After attending Mars Hill College for two years, he entered U.N.C. Chapel Hill where he earned his B.S. degree in 1943 and his law degree in 1945. Following his admission to the Bar in 1945, he practiced law in Brevard and served in the state Senate from 1974 until 1979. On 14 September 1979 he was appointed to the Court of Appeals by Governor Hunt to succeed Judge Mitchell who had resigned. He was elected in 1980 and did not offer for reelection in 1984 when his term expired.

WILLIS PADGETT WHICHARD. Judge Whichard was born in Durham, North Carolina, on 24 May 1940. He earned his A.B. degree at U.N.C. Chapel Hill in 1962 and his law degree from the U.N.C. Law School in 1965. After his admission to

the Bar in 1965 he practiced law in Durham. He served in the state House of Representatives 1970-1974 and in the state Senate 1975-1980. On 2 September 1980 he was appointed by Governor Hunt to the Court of Appeals to succeed Judge Frank M. Parker who had retired. He was elected to the Court in 1980 and reelected in 1982. On 2 September 1986 he resigned from the Court to pursue his candidacy for the office of justice of the Supreme Court. He was elected to the Supreme Court in November of 1986.

CHARLES L. BECTON. Judge Becton was born in Morehead City, North Carolina, on 4 May 1944. After earning his B.A. degree at Howard University in 1966, he entered Duke University Law School where he earned his law degree in 1969. Following his admission to the Bar in 1969, he practiced law in Chapel Hill until 19 January 1981 when he was appointed by Governor Hunt to the Court of Appeals. He succeeded Judge Erwin who had resigned from the Court to accept appointment as a Federal District Court judge. Judge Becton was elected in 1982 to complete the unexpired term of Judge Erwin and was elected to a full term in 1984. In 1986 he earned his LL.M. degree from the University of Virginia.

CLIFTON E. JOHNSON. Judge Johnson was born in Williamston, North Carolina, on 9 December 1941. He earned his B.A. degree from North Carolina Central University in 1965 and his law degree from the law school of that institution in 1967. Following his admission to the Bar in 1967, he entered the practice of law in Durham. During 1969 he served as an assistant District Attorney in Mecklenburg County, then served as a District Court judge from 1969 to 1974, and as Chief District Court Judge 1974-1977. He became a Superior Court judge on 1 December 1977 and served in that capacity until 3 August 1982 when he was appointed to the Court of Appeals by Governor Hunt to succeed Judge Harry C. Martin. He was elected to the Court in November 1982.

EDWIN MAURICE BRASWELL. Judge Braswell was born in Rocky Mount, North Carolina, on 16 December 1922. He attended U.N.C. Chapel Hill undergraduate school and earned his law degree from the U.N.C. Law School in 1950. He served in the U.S. Army Air Corps from 1942 until 1945. Following his admission to the Bar in 1950 he entered the practice of law in Fayetteville. He served as District Attorney for the Twelfth Judicial District 1955-1962 and as Superior Court judge for said district from 1963 until 1982. In November

1982 he was elected to the Court of Appeals to succeed Judge Edward B. Clark who did not offer for reelection. He retired from the Court on 31 December 1984.

EUGENE HAROLD PHILLIPS. Judge Phillips was born in Barnardsville, Buncombe County, North Carolina, on 5 September 1919. He attended Wake Forest College and its law school and earned his law degree at said institution in 1940. He earned his LL.M. degree at Duke University in 1946. He served in the U.S. Army Air Force 1941-1945 where he earned the rank of Major. He entered the practice of law in Winston-Salem in 1946 and continued in that practice until November 1982 when he was elected to the Court of Appeals to succeed Judge Naomi Morris who did not offer for reelection.

SIDNEY SMITH EAGLES, JR. Judge Eagles was born in Asheville, North Carolina, on 5 August 1939. He graduated from Gordon Military College, Barnesville, Georgia, in 1957, received his B.A. degree from Wake Forest College in 1961 and his law degree from the Wake Forest Law School in 1964. He saw active service in the U.S. Air Force from 1964 until 1967, has been in the Reserves since that time and has the rank of Colonel. In 1967 he became Revisor of Statutes. Following that he became an Assistant Attorney General of North Carolina and held that position until 1976 when he entered the private practice of law in Raleigh. On 2 November 1982 he was elected to the Court of Appeals to succeed Judge Robert Martin who did not seek reelection.

JOHN CHARLES MARTIN. Judge Martin was born in Durham, North Carolina, on 9 November 1943. He attended Wake Forest University and its law school where he earned his A.B. degree in 1965 and his law degree in 1967. He was admitted to the Bar in 1967. From 1967 until 1969 he served in the U.S. Army as a First Lieutenant. He entered the practice of law in Durham in 1969 and practiced there until 1977. From 1975 until 1977 he served on the City Council of Durham. In December of 1977 he became a judge of the Superior Court and served in that capacity until he became a judge of the Court of Appeals. He was elected to the Court of Appeals in November 1984 to succeed Judge Hill who did not offer for reelection.

SARAH ELIZABETH PARKER. Judge Parker was born in Charlotte, North Carolina, on 23 August 1942. From 1960 until 1962 she attended Meredith College after which she at-

tended U.N.C. Chapel Hill and its law school where she earned her A.B. degree in 1964 and her law degree in 1969. After being admitted to the Bar in 1969 she was engaged in the practice of law in Charlotte from 1969 until 1985. On 3 January 1985 she became a judge of the Court of Appeals under appointment of Governor Hunt to succeed Judge Braswell who had resigned. She was elected to the Court in November of 1986.

JACK LOWELL COZORT. Judge Cozort was born in Valdese, Burke County, North Carolina, on 9 January 1950. After attending N.C. State University where he earned his B.A. degree in 1972, he attended the Wake Forest University School of Law where he earned his law degree in 1975. He was admitted to the Bar in 1975 and served as an Associate Attorney for the Attorney General of North Carolina from 1975 until 1977. From 1977 until 1985 he served as legal counsel to Governor James B. Hunt, Jr. On 3 January 1985 he was appointed by Governor Hunt to the Court of Appeals to succeed Judge Vaughn who had been appointed to the state Supreme Court. In 1986 he was elected to the Court.

ROBERT FLYNN ORR. Judge Orr was born in Norfolk, Virginia, on 11 October 1946. He attended U.N.C. Chapel Hill and its law school, earning his A.B. degree in 1971 and his law degree in 1975. From 1968 to 1971 he served in the U.S. Army. He was admitted to the Bar in 1975 and entered the practice of law in Asheville. During 1985 and 1986 he served as a member of the state A.B.C. Commission. On 3 September 1986 he was appointed to the Court of Appeals by Governor Martin to succeed Judge Whichard who had resigned. He was not successful in the November 1986 election but on 26 November 1986 he was appointed by Governor Martin to the Court of Appeals to succeed Judge Webb who had been elected to the state Supreme Court.

K. EDWARD GREENE. Judge Greene was born in Biscoe, Montgomery County, North Carolina, on 27 June 1944. After attending East Carolina University where he earned his A.B. degree in 1966, he attended the U.N.C. Law School where he earned his law degree in 1969. He was admitted to the Bar in 1969 and practiced law in Dunn, North Carolina, from 1969 until 1979 when he became a District Court judge. He served in the U.S. Army Reserves from 1969 until 1975. He served as District Court judge until November of 1986 when he was elected to the Court of Appeals to succeed Judge Orr who had been appointed on 3 September 1986 to fill the vacancy caused by the resignation of Judge Whichard.

List of Those Who Have Served As Judges of The Court of Appeals

(*Served as Chief Judge)

*Raymond B. Mallard	1967-1973
Hugh B. Campbell	1967-1974
James C. Farthing	1967-1967
*Walter E. Brock	1967-1979
David M. Britt	1967-1978
*Naomi E. Morris	1967-1982
Francis M. Parker	1968-1980
*Robert A. Hedrick	1969-
*Earl W. Vaughn	1969-1985
William E. Graham, Jr.	1969-1973
James M. Baley, Jr.	1973-1974
James H. Carson, Jr.	1973-1974
Robert M. Martin	1974-1982
S. Gerald Arnold	1974-
Edward B. Clark	1974-1982
Burley B. Mitchell, Jr.	1977-1979
John Webb	1977-1986
Richard C. Erwin	1977-1980
Harry C. Martin	1978-1982
John P. Carlton	1979-1979
Hugh A. Wells	1979-
Cecil J. Hill	1979-1984
Willis P. Whichard	1980-1986
Charles L. Becton	1981-
Clifton E. Johnson	1982-
E. Maurice Braswell	1982-1984
Eugene H. Phillips	1982-
Sidney S. Eagles, Jr.	1982-
John C. Martin	1984-
Sarah E. Parker	1985-
Jack L. Cozort	1985-
Robert F. Orr	1986-
K. Edward Greene	1986-

List of Those Who Have Served As Clerk of The Court of Appeals

Theodore C. Brown, Jr.	1967-1976
Francis E. Dail	1976-

PERSONS WHO HAVE SERVED AS JUDGES OF THE COURT OF APPEALS

1967	Mallard	Campbell	Farthing	Brock	Britt	Morris							
*1968			F. Parker										
1969							Hedrick	Vaughn	Graham				
**1970													
1971													
1972													
1973	Carson								Baley				
*1974	Clark	R. Martin							Arnold				
1975													
**1976													
1977										Mitchell	Webb	Erwin	
***1978					H. Martin								
1979				Carlton						Hill			
				Wells									
1980			Whichard										
1981												Becton	
*1982	Braswell	Eagles			Johnson	Phillips							
1983													
/*1984										J. Martin			
1985	S. Parker							Cozort					
1986			Orr								Orr		
			Greene										
1987													

* Election years for first group
** Election years for second group
*** Election years for third group

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N. C. Index 3d.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

A petition for review of two administrative rulings in cases commenced prior to 1 January 1986 was required to be filed in the Superior Court of Wake County. *Pinewood Manor Mobile Homes, Inc. v. N.C. Manufactured Housing Bd.*, 564.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

A partial summary judgment on the issue of liability is not immediately appealable. *Coleman v. Interstate Casualty Ins. Co.*, 268.

§ 6.3. Appeals Based on Jurisdiction

Defendant could not properly raise the issue as to whether the trial court had jurisdiction over his person where defendant did not appeal from the trial judge's order denying his motion to dismiss on the ground of lack of in personam jurisdiction. *Gualtieri v. Burleson*, 650.

§ 6.9. Appealability of Preliminary Matters

An order compelling discovery which is not enforced by sanctions is not immediately appealable. *Walker v. Liberty Mut. Ins. Co.*, 552.

§ 7. Parties Who May Appeal; "Party Aggrieved"

Where the trial court found that defendant did not breach a provision of a separation agreement requiring him to pay his children's college expenses, defendant did not have a right to appeal based on the trial court's additional conclusion that a subsequent consent judgment was without force and effect as to the terms regarding education contained in the separation agreement. *Lennon v. Wahler*, 141.

§ 55. Review; Orders Relating to Pleadings

Denial of a motion for judgment on the pleadings is not reviewable on appeal from a final judgment in a trial on the merits. *Duke University v. Stainback*, 75.

APPEARANCE

§ 1.1. What Constitutes a General Appearance

By moving for a discretionary change of venue without first or simultaneously asserting his Rule 12(b) defenses relating to jurisdiction and process, defendant made a general appearance and voluntarily submitted himself to the jurisdiction of the court. *Humphrey v. Sinnott*, 263.

ARREST AND BAIL

§ 3.8. Legality of Warrantless Arrest for Drunk Driving

An officer had probable cause for the warrantless arrest of defendant for driving while impaired. *S. v. White*, 111.

§ 7. Right of Person Arrested to Communicate with Friends or Counsel

A defendant arrested for driving with a blood alcohol level of .10 or more was denied his statutory right of access to counsel and friends where the magistrate failed to inform defendant of the general circumstances under which he could secure pretrial release as required by G.S. 15A-511(b) and failed to determine conditions of pretrial release in accordance with G.S. 15A-533(b) and 534(c). *S. v. Knoll*, 228.

AUTOMOBILES AND OTHER VEHICLES

§ 3. Offense of Driving without Valid License Generally

The evidence did not require the trial court to instruct on the defense of necessity in a prosecution for driving while defendant's license was revoked. *S. v. Gainey*, 107.

§ 3.3. Driving without Valid License; Admissibility of Evidence

Defendant was not prejudiced in a prosecution for driving while his license was revoked by the trial court's error in permitting impeachment of defendant by evidence that he had been convicted of offenses which did not provide for punishment in excess of 60 days. *S. v. Gainey*, 107.

§ 5. Sale of Vehicles Generally

A petition for a hearing before the Commissioner of Motor Vehicles to review whether petitioner's trade area could support an additional Saab franchise was timely filed where the evidence tended to show that the petition was received by the Division of Motor Vehicles within the allowed time but was not stamped "filed" until the day after the time for filing had expired. *Star Automobile Co. v. Saab-Scania of America, Inc.*, 531.

§ 6.5. Liability for Fraud in Sale of Motor Vehicles

Parties who were engaged in a short-term business deal for joint profit with contributions of effort from each and risks taken by each were joint venturers rather than seller and purchaser so that plaintiff could not recover under a bond obtained in order to meet the requirements of G.S. 20-288. *Taylor v. Johnson*, 116.

§ 53. Sufficiency of Evidence of Negligence in Operation of Vehicle; Failing to Stay on Right Side of Highway

Although it had been determined in a prior action that deceased was not negligent in an automobile accident, the trial court did not err in admitting evidence that deceased's vehicle crossed the center line where the court specifically instructed the jury that deceased was not negligent and such an issue was not before them. *Lawton v. Yancey Trucking Co.*, 522.

§ 125. Arrest for Operating Vehicle while under the Influence

A defendant arrested for driving with a blood alcohol level of .10 or more was denied his statutory right of access to counsel and friends where the magistrate failed to inform defendant of the general circumstances under which he could secure pretrial release as required by G.S. 15A-511(b) and failed to determine conditions of pretrial release in accordance with G.S. 15A-533(b) and 534(c). *S. v. Knoll*, 228.

§ 126.2. Driving under the Influence; Blood and Breathalyzer Tests Generally

The statute mandating a 12-month license suspension for refusal to submit to a breathalyzer test does not unconstitutionally coerce a defendant to give self-incriminating evidence. *S. v. White*, 111.

§ 126.3. Breathalyzer Test; Manner of Administration of Test

The statute requiring sequential breathalyzer tests was complied with where defendant gave two "puffs" of breath which were insufficient to give a reading between the first and second readings. *S. v. White*, 111.

§ 126.4. Breathalyzer Test; Warnings to Defendant

The evidence in a prosecution for driving while impaired was inconclusive and inadequate to support the trial court's finding that defendant was prejudiced when,

CONSTITUTIONAL LAW — Continued

§ 28. Due Process Generally in Criminal Proceedings

There was no due process violation when the trial judge reversed his prior decision to submit misdemeanor breaking or entering and submitted felonious breaking or entering. *S. v. White*, 299.

§ 50. Speedy Trial Generally

The trial judge did not err in failing to rule on defendant's claim that the State violated her constitutional right to a speedy trial where defendant failed to present evidence on or to argue her constitutional speedy trial claim. *S. v. Lamb*, 569.

§ 76. Nontestimonial Disclosures by Defendant

The statute mandating a 12-month license suspension for refusal to submit to a breathalyzer test does not unconstitutionally coerce a defendant to give self-incriminating evidence. *S. v. White*, 111.

CONTEMPT OF COURT

§ 5.1. Sufficiency of Notice and Show Cause Order

A show cause order was sufficient to give respondent attorney notice that he was charged with soliciting a third person to interrupt court. *In re Paul*, 491.

§ 6.1. Hearings on Orders to Show Cause; Admissibility of Evidence

Evidence that respondent attorney violated a court order by making certain public statements during a rally in Virginia to raise money for his client was relevant to show respondent's motive and intent to make the public aware of his belief that the prosecution of his client was racially motivated. *In re Paul*, 491.

§ 6.2. Hearings on Orders to Show Cause; Sufficiency of Evidence

The evidence was sufficient to support the court's finding that respondent attorney committed willful behavior during the sitting of a court which tended to interrupt its proceedings in violation of G.S. 5A-11(a) by soliciting a third person to disrupt the trial of his client. *In re Paul*, 491.

CONTRACTS

§ 3. Definiteness and Certainty of Agreement

The evidence was insufficient to show that the parties had a contract to settle claims for contaminated fertilizer used on tobacco. *Seawell v. Continental Casualty Co.*, 277.

§ 4.2. Circumstances where there Was no Consideration

The trial court correctly concluded that a letter issued by defendant to plaintiff promising to purchase a construction loan made by plaintiff to a third party was not a promise supported by consideration. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 27.

§ 14.2. Contracts for Benefit of Third Person; Circumstances under which Third Person Is Denied Recovery

The trial court correctly concluded that plaintiff construction lender was not a third party beneficiary of defendant's permanent loan commitment. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 27.

CONTRACTS — Continued

§ 16. Conditions

The trial court correctly found and concluded that an obligation to close and fund a permanent loan was subject to express conditions precedent. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 27.

§ 18.1. Enforceability of Modification, Waiver, or Abandonment; Particular Circumstances

Plaintiffs did not waive their right to sue defendant for breach of a contract for construction of a house by moving into the unfinished house and completing construction on their own although the contract provided that occupancy of the house prior to payment of the final installment to the contractor relieved the contractor of further performance and voided any warranties. *Spear v. Daniel*, 281.

§ 27. Actions on Contracts; Sufficiency of Evidence Generally

The evidence was sufficient to support a judgment against defendant attorney in an action by an expert witness to recover for services rendered in connection with a lawsuit handled by defendant in the District of Columbia. *Gualtieri v. Burleson*, 650.

§ 27.2. Sufficiency of Evidence of Breach of Contract

Plaintiff's evidence was sufficient to support claims for breach of contract, breach of express and implied warranties and negligence by defendant in supplying plaintiff with "sick wheat" instead of sound, wholesome Number 2 milling wheat. *Davis Realty, Inc. v. Wakelon Agri-Products, Inc.*, 97.

CONVICTS AND PRISONERS

§ 2. Discipline and Management

An employer does not owe a duty to protect third persons from the criminal acts of a work release inmate acting outside the scope of his employment, and defendant employer was not liable on the theory of negligent supervision of a work release inmate employee for personal injury and property damage allegedly caused by the inmate's rape and other crimes committed against a third person. *O'Connor v. Corbett Lumber Corp.*, 178.

COSTS

§ 4.2. Attorney's Fees

Plaintiff shareholder's class action to enjoin a "going private" merger does not fall within the equity exception to the rule that attorney fees are not allowable as part of the costs in the absence of statutory authority. *Madden v. Chase*, 289.

COURTS

§ 2.1. Requirements for Jurisdiction

The North Carolina courts had subject matter jurisdiction over a contract dispute with regard to the sale of a horse. *Harris v. Pembaur*, 666.

§ 9.1. Jurisdiction to Review Rulings of Another Superior Court Judge; Rulings Affecting Conduct of Litigation

A superior court judge improperly overruled another superior court judge in finding that plaintiff was competent to proceed without a guardian and did not have to be examined by a psychiatrist. *Sheppard v. Community Fed. Sav. and Loan*, 257.

CRIMINAL LAW

§ 15. Venue

G.S. 14-71 supersedes the general venue provisions of Article 3 of the Criminal Procedure Act for purposes of determining venue for the offense of feloniously receiving stolen property. *S. v. Gardner*, 616.

§ 21. Preliminary Proceedings

The denial of defendant's motion in limine in a homicide case to exclude evidence implicating defendant in three earlier unrelated murders was reviewable on appeal even though defendant did not testify at the trial. *S. v. Lamb*, 569.

§ 23.2. Requirement that Guilty Plea Be Voluntary and Made with Understanding

The evidence and findings did not support the trial court's conclusion that defendant's guilty plea was voluntarily and intelligently entered in a case in which defendant produced evidence tending to show that his plea of guilty was induced by an unkept promise of the district attorney made through his attorney but not shown on the transcript of plea that, if he testified against his drug supplier, any sentence in the case would run concurrently with his previous sentence. *S. v. Mercer*, 623.

§ 26.8. Plea of Former Jeopardy; Mistrial

There was no merit to defendant's contention that a mistrial was intentionally provoked by the State and that any further prosecution of the charges against her was barred by double jeopardy. *S. v. Major*, 421.

§ 34. Evidence of Defendant's Guilt of other Offenses; Inadmissibility

Any prejudicial effect of testimony as to outstanding arrest warrants against defendant on unrelated matters was cured by the trial court's cautionary instructions. *S. v. Locklear*, 637.

§ 34.2. Evidence of Defendant's Guilt of other Offenses; Admission of Inadmissible Evidence as Harmless Error

The trial court erred in allowing the State to cross-examine defendant about his knowledge and participation in "devil worshipping" and about his son's attempt to smuggle marijuana to defendant while he was being held in custody. *S. v. Kimbrell*, 59.

§ 34.3. Evidence of Defendant's Guilt of other Offenses; Admission of Inadmissible Evidence as Harmless Error; Error Cured by Court's Action

The trial court did not err by denying defendant's motion for a new trial after his wife testified on cross-examination that her affair with another man had been while her husband was in prison. *S. v. Strohauer*, 68.

§ 34.7. Admissibility of Evidence of other Offenses to Show Motive

Evidence implicating defendant in three earlier killings was not admissible in a homicide case to show motive, and the court's denial of defendant's motion in limine to exclude such evidence effectively denied defendant her right to testify. *S. v. Lamb*, 569.

§ 50.1. Admissibility of Expert Opinion Testimony

The trial court in a prosecution for taking indecent liberties with a minor did not err in admitting testimony by the victim's pediatrician that a delay between the occurrence of an incidence of child sexual abuse and the child's revelation of the incident was the usual pattern. *S. v. Bowman*, 238.

CRIMINAL LAW — Continued

§ 50.2. Opinion of Nonexpert

The trial court in a prosecution for taking indecent liberties with a minor committed prejudicial error in admitting testimony by a police officer that a child of the victim's age did not have the necessary information about sexuality to fantasize where the officer had not been qualified as an expert. *S. v. Bowman*, 238.

§ 64. Evidence as to Intoxication

The trial court in a prosecution for trafficking in cocaine did not err in allowing an officer to testify that in his opinion defendant was under the influence of narcotics on the night of his arrest. *S. v. Russell*, 383.

§ 75. Admissibility of Confession in General

The trial court did not err in failing to suppress certain statements made by each of three suspects during their detention leading up to the search of an airplane. *S. v. Russell*, 383.

§ 75.8. Confession; Requirement that Defendant Be Warned of Constitutional Rights; Warning before Resumption of Interrogation

An officer's delivery and reading of arrest warrants to defendant after he had invoked his right to counsel did not amount to an initiation of conversation or interrogation so as to require suppression of defendant's subsequent written statement. *S. v. Underwood*, 408.

§ 91. Speedy Trial

The period of time between the prosecutor's dismissal of an indictment under G.S. 15A-931 and the re-indictment was properly excluded from the speedy trial period even though the prosecutor improperly took the dismissal "with leave," the criminal investigation continued, and defendant's bail bond was not discharged as it should have been. *S. v. Lamb*, 569.

§ 98.1. Misconduct of Witnesses

The trial court did not err by failing to take corrective action after the chief prosecution witness's tearful and emotional reading of a letter she had written defendant. *S. v. Strohauer*, 68.

§ 98.2. Sequestration of Witnesses

The trial court did not err in denying defendant's motion to sequester the State's witnesses. *S. v. Russell*, 383.

§ 99.7. Court's Expression of Opinion; Admonitions to Witnesses

The trial court did not commit prejudicial error in admonishing a witness, out of the presence of the jury but in the presence of other witnesses, that she could be subject to perjury and contempt of court because of her testimony. *S. v. Lamb*, 569.

§ 102.6. Particular Comments in Jury Argument

The defendant in a narcotics case was not prejudiced by the prosecutor's characterization of a codefendant as a "dope king." *S. v. Worthington*, 150.

The prosecutor's argument in a narcotics case that defendants could have escaped the mandatory sentencing provisions for trafficking in cocaine by assisting the State in the prosecution of others was improper but constituted harmless error. *Ibid.*

CRIMINAL LAW — Continued

§ 126. Acceptance of Verdict

A verdict of guilty of conspiracy to sell and deliver cocaine was not defective because the verdict sheet referred to the charge of conspiracy with "Dalton Woodrow Worthington, Sr. and/or Patricia Ann Newby." *S. v. Worthington*, 150.

§ 138.4. Severity of Sentence where there are Several Charges

The trial court could properly impose a consolidated sentence for two counts of felonious possession of stolen goods which exceeded the total presumptive terms for the two felonies where the sentence did not exceed the maximum allowable term for the most serious felony consolidated. *S. v. Phillips*, 302.

§ 138.11. Different Punishment on New Trial

In a prosecution for assault, the imposition of a greater sentence following appeal was supported by new matters at the resentencing hearing. *S. v. Oakley*, 273.

§ 138.24. Sentence; Aggravating Factors; Age of Victim

The age of the victim may not be considered as an aggravating factor in sentencing a defendant for first degree rape of a child under the age of thirteen but may be considered as a nonstatutory aggravating factor in sentencing for second degree rape of such a child. *S. v. Vanstory*, 535.

§ 138.29. Sentence; Other Aggravating Factors

The trial court erred in finding as an aggravating factor for assault with a deadly weapon inflicting serious injury that the victim was asleep at the time of the assault. *S. v. Underwood*, 408.

The trial court erred in finding the especially heinous, atrocious or cruel aggravating factor for first degree burglary where the court improperly considered evidence of defendant's course of conduct in the commission of a joined offense of first degree murder for which defendant was contemporaneously convicted. *S. v. Flowers*, 696.

The trial court erred in finding as an aggravating factor for breaking or entering and larceny that defendant engaged in a pattern of conduct causing serious danger to society where the only basis for the court's finding of this factor was evidence of joinable offenses for which defendant was also being sentenced. *Ibid.*

§ 138.35. Sentence; Mitigating Factors; Immaturity

The trial court in a rape case did not err in failing to find as statutory mitigating factors that defendant's immaturity significantly reduced his culpability for the offense, that he aided in the apprehension of another felon, and that he was a minor and had reliable supervision available. *S. v. Vanstory*, 535.

§ 138.37. Sentence; Mitigating Factors; Cooperative Conduct

The trial court erred in failing to find as a mitigating factor that defendant "aided in the apprehension of another felon." *S. v. Flowers*, 696.

§ 143.5. Revocation of Probation; Admissibility, Competency, and Sufficiency of Evidence

The evidentiary standard and the State's burden of proof applied to probation revocation hearings pursuant to G.S. 15A-1345(e) are not unconstitutionally indefinite. *S. v. Tozzi*, 517.

CRIMINAL LAW — Continued

§ 143.9. What Constitutes Violation of Conditions of Probation; Change of Place of Residence

The evidence supported the trial court's findings that defendant had violated valid conditions of his probation by moving permanently from his authorized residence without permission from his probation officer and by failing to appear at required probation meetings which he was otherwise able to attend. *S. v. Tozzi*, 517.

§ 143.13. Appeal from Order of Probation Revocation

An original probationary judgment was not fatally defective under G.S. 15A-1301 because the caption on the original filed judgment misstated the file number in the indictment; moreover, defendant waived objection to the defect by failing to object at the probation revocation hearing. *S. v. Tozzi*, 517.

§ 146.4. Grounds of Appellate Jurisdiction; Constitutional Questions

An order denying a motion to dismiss on the ground of double jeopardy is immediately appealable. *S. v. Major*, 421.

§ 168.1. Harmless Error in Instructions; Correction and Cure of Error

There was no due process violation when the trial judge reversed his prior decision to submit misdemeanor breaking or entering and submitted felonious breaking or entering. *S. v. White*, 299.

§ 169.3. Harmless Error in Exclusion of Evidence; Error Cured by Introduction of other Evidence

Defendant was not prejudiced by the court's refusal to permit him to present entrapment evidence by testifying about the substance of conversations with the State's informant where other evidence of the same import was placed before the jury. *S. v. Worthington*, 150.

§ 178. Law of the Case

Conclusions in a prior appeal regarding double jeopardy and the effect of an accepted plea bargain were the law of the case. *S. v. Oakley*, 273.

DAMAGES

§ 3.4. Pain and Suffering

In an action to recover for personal injuries to the minor plaintiff, the trial court erred in submitting an issue as to plaintiff father's emotional pain and suffering as the minor's parent. *Campbell v. Pitt County Memorial Hosp.*, 314.

§ 10. Credit on Damages; Collateral Source Rule

Evidence that plaintiff received a bonus for taking early retirement and was receiving retirement benefits was properly admitted to impeach plaintiff's testimony that he retired because of the injuries he suffered in the accident in question, and it was not necessary for the appellate court to rule on plaintiff's contention that such evidence violated the collateral source rule. *White v. Lowery*, 433.

§ 16.1. Sufficiency of Evidence; Causation and Extent of Injuries

The trial court did not err in setting aside as excessive a verdict for the minor plaintiff of $4,850,000 for a brain injury suffered during a footling breech birth in defendant hospital. *Campbell v. Pitt County Memorial Hosp.*, 314.

DAMAGES — Continued

§ 16.2. Sufficiency of Evidence of Medical Expenses

The trial court did not abuse its discretion in refusing to set aside the jury's verdict as to the amount plaintiff father was entitled to recover in an action against a hospital to recover damages resulting from a brain injury suffered by plaintiffs' child during a footling breech birth where the parties consented to a remittitur of $1,000,000, which reduced the award to $646,000. *Campbell v. Pitt County Memorial Hosp.*, 314.

DEEDS

§ 22. Covenant of Seisin

In an action for breach of a covenant of seisin, a genuine issue of fact existed as to whether defendant owned the segment of land in question when she delivered the deed. *Riddle v. Nelson*, 656.

DIVORCE AND ALIMONY

§ 13. Grounds for Absolute Divorce; Separation for Statutory Period

Plaintiff's complaint sufficiently alleged that the parties had lived separate and apart for one year to support a judgment of absolute divorce. *Sharp v. Sharp*, 128.

§ 25.9. Child Custody; Modification of Order when Evidence of Changed Circumstances Is Sufficient

The evidence supported the trial court's determination that a joint child custody arrangement should be modified to award primary custody to plaintiff father. *Teague v. Teague*, 545.

§ 30. Equitable Distribution

G.S. 50-21(a) does not require that a hearing for equitable distribution must immediately follow entry of an absolute divorce. *Sharp v. Sharp*, 128.

The trial court's severance of a divorce action from defendant's claim for equitable distribution did not affect a substantial right of defendant. *Ibid.*

The trial court properly considered defendant's earning potential as a factor in its determination that an equal division of marital property would be inequitable. *Harris v. Harris*, 353.

Any error by the court in failing to apportion the respective marital and separate interests in country club stock and by charging the entire value against defendant's distributive share of the marital property was of such limited significance as not to require recomputation of the respective awards to the parties. *Ibid.*

Although the trial court did not err in awarding the marital residence to plaintiff and in making a distributive award to defendant, the court's method of payment of the award based on the age of the parties' youngest child violated the provision of G.S. 50-20(b)(3) that a distributive award shall not include payments that are treated as ordinary income under the Internal Revenue Code. *Ibid.*

The evidence supported the trial court's finding that two loans from defendant husband's parents were legitimate marital debts, and the court had the discretion to assign one-half of the marital debts to each party and then to award defendant additional funds sufficient to pay his parents plaintiff's one-half share of the debts. *Geer v. Geer*, 471.

The evidence supported a finding by the trial court in an equitable distribution action that defendant husband gave up his career so that plaintiff wife could obtain a medical education. *Ibid.*

DIVORCE AND ALIMONY — Continued

In valuing the direct and indirect contributions made by a spouse to help educate or develop the career potential of the other spouse, it is a matter of discretion what weight the court assigns a particular factor in any given case. *Ibid.*

The trial court in an equitable distribution action properly considered moving costs as expenses of plaintiff wife's medical education, but the costs incurred in selling two homes could not be so considered. *Ibid.*

The trial court properly considered extra child care costs as an expense of plaintiff's medical education. *Ibid.*

A party need not be a custodial parent in order to be awarded ownership of the marital residence in an equitable distribution action. *Ibid.*

EASEMENTS

§ 6.1. Creation of Easement by Prescription; Evidence

Plaintiff's evidence was sufficient for the jury in an action to establish an easement by prescription in a roadway to plaintiff's farm. *Perry v. Williams*, 524.

§ 7.1. Action to Establish Easement; Burden of Proof and Evidence

The trial court erred in directing a verdict for plaintiff in an action to establish an appurtenant easement in a 40-foot right-of-way across defendant's land where a latent ambiguity existed in a 1963 easement deed which presented a jury question as to whether the right-of-way was created to benefit the parcel owned by plaintiffs. *Cochran v. Keller*, 205.

ESTOPPEL

§ 4.3. Equitable Estoppel; Conduct of Party Sought to Be Estopped

Defendant was equitably estopped from pleading the statute of limitations as a bar to plaintiff's action to recover costs of medical care rendered to defendant's son. *Duke University v. Stainback*, 75.

EVIDENCE

§ 22.1. Evidence at Former Trial of Another Case Arising from Same Subject Matter

The trial court in a personal injury action against a hospital did not err in prohibiting any references to a physician's participation as a defendant in the case when the case against him had been settled. *Campbell v. Pitt County Memorial Hosp.*, 314.

§ 25. Photographs

The trial court in a personal injury action did not err in admitting a "Day-in-the-Life" videotape of the injured child. *Campbell v. Pitt County Memorial Hosp.*, 314.

§ 50.2. Testimony by Medical Experts; Cause of Injury

A medical expert's testimony on causation was not inadmissible for failure to state that it was based on "reasonable medical probability." *Cherry v. Harrell*, 598.

EXECUTORS AND ADMINISTRATORS

§ 37. Attorney's Fees; Right to Compensation

The administrators of deceased's estate could properly recover attorney fees from deceased's son where they prepared numerous motions and attended a series of hearings and appeals in order to compel deceased's son to account for certain property of deceased's estate. *In re Estate of Katsos*, 682.

FALSE PRETENSE

§ 3.1. Insufficiency of Evidence

Evidence was insufficient to be submitted to the jury in a prosecution for obtaining property by false pretenses where it tended to show only that defendant sold insurance policies for a company for which she was not licensed to sell insurance. *S. v. Bennett*, 689.

FRAUD

§ 9. Pleadings

The trial court erred in dismissing plaintiff's claim for fraud in an action arising out of defendant's agreement to repair plaintiff's car. *Webb v. Triad Appraisal and Adjustment Service, Inc.*, 446.

HIGHWAYS AND CARTWAYS

§ 2.1. Restrictions against Advertisements along Highways

A permit to erect and maintain an outdoor advertising sign near an interstate highway was properly revoked on the ground that persons servicing the sign crossed the controlled access for the highway in violation of an administrative regulation although such persons were not employees of the permittee. *Whiteco Metrocom, Inc. v. Roberson*, 305.

HOMICIDE

§ 8.1. Evidence of Intoxication; Instructions

The evidence did not require the trial court to charge on the defense of voluntary intoxication. *S. v. Underwood*, 408.

§ 31.7. Punishment for Second Degree Murder

The trial court erred in finding as an aggravating factor in sentencing defendant for being an accessory before the fact to second degree murder that defendant dispensed cocaine to the principals, promised to forgive their drug debts, and furnished them with murder weapons. *S. v. Kimbrell*, 59.

HOSPITALS

§ 3.2. Liability of Noncharitable Hospital for Negligence of Employees

The evidence was sufficient to establish corporate negligence by defendant hospital in breaching its duties to insure that plaintiffs' informed consent to a vaginal delivery of a footling breech baby had been obtained prior to delivery and to establish an effective mechanism for prompt reporting of any situation which created a threat to the health of a patient such as the baby involved in this case. *Campbell v. Pitt County Memorial Hosp.*, 314.

HUSBAND AND WIFE

§ 10. Requisites and Validity of Separation Agreement

Summary judgment was correctly granted for defendant in an action to enforce a separation agreement where the original document was not notarized. *Lawson v. Lawson*, 51.

§ 12. Revocation and Rescission of Separation Agreement; Remarriage

Defendant was not entitled to receive payments from plaintiff pursuant to the parties' deed of separation where defendant admitted that she participated in a bigamous marriage ceremony while the parties were still married to each other. *Taylor v. Taylor*, 391.

INDICTMENT AND WARRANT

§ 3. Jurisdiction of Grand Jury

Where a theft took place in Guilford County and receipt of the stolen goods occurred in Davidson County, defendant could be indicted in Guilford County for receiving stolen goods because the thief could also be indicted there. *S. v. Gardner*, 616.

INFANTS

§ 10. Purpose and Construction of Juvenile Court Statutes

Petitions against respondent juveniles should have been dismissed because of unconstitutional selective prosecution where the record disclosed that only eight of seventeen juveniles involved in vandalism were selected for prosecution based on their or their parents' unwillingness or inability to pay $1,000 each to the victim. *In re Register*, 336.

Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must disclose that either the intake counselor or the district attorney has approved the filing of such petition. *Ibid.*

§ 18. Juvenile Delinquency Proceedings; Admissibility and Sufficiency of Evidence

The trial judge in a delinquency proceeding failed to meet the requirements of G.S. 7A-633 with regard to accepting admissions from the juveniles. *In re Register*, 336.

§ 19. Juvenile Delinquency Proceedings; Burden of Proof

The trial judge in a juvenile proceeding erred in failing to find that the allegations of the petition had been proved beyond a reasonable doubt. *In re Register*, 336.

§ 20. Juvenile Delinquency Proceedings; Judgments and Orders

A juvenile court could enter an order directed to a county school board, although the school board was not formally made a party to the proceeding. *In re Jackson*, 167.

When a student has been lawfully suspended from the public school system and the school system has not provided a suitable alternative educational forum, a juvenile court has no authority to order a county school board to place the student in an appropriate school program. *Ibid.*

The juvenile court failed to follow statutory provisions regarding dispositional alternatives where the court entered identical judgments in all cases involving

INSURANCE — Continued

Testimony by plaintiff that he filled out a proof of loss form according to the instructions he received was sufficient to enable the jury to find that plaintiff had good cause for failing properly to file the proof of loss statement. *Ibid.*

§ 137. Actions on Fire Policies; Time Limitations

The phrase "inception of the loss" in an insurance policy means that the policy limitation period runs from the date of the occurrence of the event out of which the claim for recovery arose. *Marshburn v. Associated Indemnity Corp.*, 365.

There was no merit to plaintiffs' contention that under G.S. 1-52(16) their claim against defendant on a fire insurance policy for damages from a 21 July 1979 lightning strike did not accrue until the discovery of additional damages on 2 September 1982. *Ibid.*

Even if G.S. 1-52(16) applied to plaintiffs' action, it was still filed after the limitations period had expired since obvious damage was done to their home at the time of the lightning strike, and the fact that evidence of latent damages was discovered more than three years later did not restart the statutory limitations. *Ibid.*

§ 137.1. Actions on Fire Policies; Waiver of Time Limitations

Defendant insurer was not estopped from invoking any limitation period under a homeowners' insurance policy where the bar of the contractual limitations provision had become complete prior to plaintiffs' discovery of additional damage to their home from lightning, and any conduct on the part of defendant insurer with regard to that damage could not have induced plaintiffs' failure to institute a timely action under the policy. *Marshburn v. Associated Indemnity Corp.*, 365.

§ 149. General Liability Insurance

The trial court correctly granted defendant's Rule 12(b)(6) motion for dismissal of plaintiff's claim for a bad faith refusal to pay benefits and for unfair and deceptive trade practices arising from plaintiff's claim under the Workers' Compensation Act. *Hooper v. Liberty Mut. Ins. Co.*, 549.

JURY

§ 7.13. Number of Peremptory Challenges

The trial court properly refused to enlarge the number of defendant's peremptive challenges after consolidating rape and kidnapping charges for trial. *S. v. Walker*, 540.

KIDNAPPING

§ 1.2. Sufficiency of Evidence

In a prosecution for rape and kidnapping, the restraint of the victim was not an element of the crime of rape and defendant could properly be convicted of both crimes. *S. v. Walker*, 540.

Since rape was used to raise kidnapping to first degree in this case, the conviction of defendant for both second degree rape and first degree kidnapping violated the prohibition against double jeopardy. *Ibid.*

LABORERS' AND MATERIALMEN'S LIENS

§ 3. Lien of Material Furnisher

Plaintiff steel fabricator furnished materials to the site of improvement to real property within the meaning of G.S. 44A-18. *Contract Steel Sales, Inc. v. Freedom Construction Co.*, 460.

§ 4. Lien of Subcontractor; Sufficiency of Notice

Plaintiff subcontractor substantially complied with the requirements of G.S. 44A-19 for giving notice of claim of lien by writing to defendant owner a letter which specifically stated it was a notice of claim of lien and which included all the statutorily required information. *Contract Steel Sales, Inc. v. Freedom Construction Co.*, 460.

LANDLORD AND TENANT

§ 7. Improvements and Fixtures

Under a ground lease permitting defendant to construct and alter a service station on the leased premises, defendant's removal of their existing buildings and pavement on the premises and construction of a larger service station and new pavement did not constitute waste or a breach of the lease. *DeTorre v. Shell Oil Co.*, 501.

LARCENY

§ 10. Judgment and Sentence

Punishment for larceny and safecracking did not violate double jeopardy. *S. v. Strohauer*, 68.

LIBEL AND SLANDER

§ 16. Sufficiency of Evidence

The trial court properly dismissed a defamation action based on a letter to an editor where plaintiffs' complaint did not allege that the letter was susceptible of two meanings, the letter was not defamatory per se, and the letter was not libel per quod. *Tyson v. L'eggs Products, Inc.*, 1.

MALICIOUS PROSECUTION

§ 13. Sufficiency of Evidence

The trial court properly dismissed an action by an executor against his former co-executor alleging that defendant was contemptuous of the court in filing an action for an accounting and that defendant's serving of a request for the production of documents and for interrogatories was an abuse of process. *Bryant v. Short*, 285.

§ 13.2. Sufficiency of Evidence; Probable Cause

Plaintiff's evidence was sufficient for the jury in an action for malicious prosecution arising from the prosecution of plaintiff for the unlawful concealment of two packs of cigarettes while in defendant's store. *Allison v. Food Lion, Inc.*, 251.

MASTER AND SERVANT

§ 10.2. Actions for Wrongful Discharge

An issue as to whether an action for breach of an employment contract was barred by a release signed by plaintiff was properly submitted to the jury. *Travis v. Knob Creek, Inc.*, 561.

MASTER AND SERVANT — Continued

§ 11.1. Covenants not to Compete

A covenant not to compete could not constitute an unfair trade practice. *The American Marble Corp. v. Crawford*, 86.

§ 12. Interference with Employee's Obtaining of Employment after Termination of Employment

The trial court erred in entering summary judgment against defendant on his claim for punitive damages for malicious interference with contractual rights. *The American Marble Corp. v. Crawford*, 86.

§ 13. Interference with Contract of Employment by Third Persons

The trial court erred in granting summary judgment against defendant's claim for malicious interference with contractual rights based on plaintiff's attempt to enforce a covenant not to compete in an employment contract which was legally invalid as an unreasonable restraint of trade. *The American Marble Corp. v. Crawford*, 86.

§ 34.2. Liability of Employer for Injuries to Third Persons; Intentional or Malicious Wrongs by Employee

An employer does not owe a duty to protect third persons from the criminal acts of a work release inmate acting outside the scope of his employment, and defendant employer was not liable on the theory of negligent supervision of a work release inmate employee for personal injury and property damage allegedly caused by the inmate's rape and other crimes committed against a third person. *O'Connor v. Corbett Lumber Corp.*, 178.

§ 59. Workers' Compensation; Negligent or Wilful Act of Fellow Employee

There was ample evidence to support the Industrial Commission's determination that plaintiff's injury resulting from horseplay with a co-worker constituted an injury by accident arising out of and in the course of his employment. *McGraw v. Fieldcrest Mills, Inc.*, 307.

§ 60.4. Workers' Compensation; Injuries Sustained during Employer-Sponsored Trip

Plaintiff sustained an injury arising out of and in the course of her employment while she was running errands for her supervisor on the way to a company gathering. *McBride v. Peony Corp.*, 221.

§ 65.1. Workers' Compensation; Hernia

Plaintiff's testimony that he experienced muscular strain after the appearance of a lump in his groin and that he later began to feel sick to his stomach was insufficient to prove that his hernia was accompanied by "pain" as required by G.S. 97-2(18)(c). *Long v. Morganton Dyeing & Finishing Co.*, 81.

§ 65.2. Workers' Compensation; Back Injuries

The Industrial Commission acted under a misapprehension of the law in determining that it was bound to award benefits for permanent partial disability under G.S. 97-31(23) for plaintiff's back injury and that it could not award benefits under G.S. 97-29 for total disability. *Cockman v. PPG Industries*, 101.

§ 67.3. Workers' Compensation; Pre-existing Condition as Factor

The evidence supported the Industrial Commission's conclusion that claimant was totally and permanently disabled as a result of his job-related injury where the

evidence tended to show that such injury aggravated or accelerated claimant's pre-existing nondisabling, non-job-related condition. *Mitchell v. Fieldcrest Mills, Inc.*, 661.

§ 69. Workers' Compensation; Amount of Recovery Generally

A workers' compensation claimant who had previously had a total knee replacement and who later injured that knee in an on-the-job accident was not limited to recovery for permanent partial disability but could receive compensation for total disability. *Wilder v. Barbour Boat Works*, 188.

The evidence showed plaintiff to be totally and permanently unable to earn the wages he was receiving at the time of his injury although the present injury caused only a 15 percent partial disability of his left leg. *Ibid.*

§ 69.2. Workers' Compensation; Successive Injuries

The entire disability of a workers' compensation plaintiff who had had a previous knee replacement was compensable even though a normal person may not have been disabled to that extent. *Wilder v. Barbour Boat Works*, 188.

§ 69.3. Workers' Compensation; Compromise Settlements

Plaintiff failed to state a claim upon which relief could be granted in an action for a bad faith refusal to pay benefits and for unfair and deceptive trade practices arising from the parties' failure to reach an agreement to conclude plaintiff's claim under the Workers' Compensation Act. *Hooper v. Liberty Mut. Ins. Co.*, 549.

§ 77.2. Workers' Compensation; Modification and Review of Award; Time for Application

Plaintiff's claim for an additional award was not barred by the two-year limitation of G.S. 97-47 since plaintiff's filing of an I.C. Form 18 before expiration of the two-year period was a valid application for review of her award based on a change of condition even if she failed specifically to allege any change of condition or any permanent injury. *Apple v. Guilford Co.*, 679.

§ 114. Occupational Health and Safety Act in General

The evidence was sufficient to support a conclusion that petitioner committed a willful-serious violation of an OSHA regulation by permitting its employee to walk along 10-inch wide steel beams at a height of 40 to 60 feet without being secured by a safety rope, and petitioner failed to establish the defense of isolated employee misconduct. *O. S. Steel Erectors v. Brooks, Com'r. of Labor*, 630.

Petitioner was not prejudiced when the Safety and Health Review Board enlarged the time available to respondent Commissioner of Labor to file his complaint where petitioner's original notice of contest was not timely. *Ibid.*

MUNICIPAL CORPORATIONS

§ 12.3. Liability for Torts; Waiver of Governmental Immunity

A public officers' and employees' professional liability insurance policy issued to a town which employed a police officer who pled guilty to involuntary manslaughter in the shooting death of plaintiff's intestate covered an award of $150,000 in compensatory damages for the death obtained by plaintiff in a civil rights action. *Graham v. James F. Jackson Assoc., Inc.*, 427.

NARCOTICS

§ 1.3. Elements of Statutory Offenses Relating to Narcotics

Defendant's convictions for two separate offenses of trafficking in cocaine by possession and trafficking by transporting did not violate the constitutional guarantee against multiple punishments for the same offense. *S. v. Russell*, 383.

§ 2. Indictment

An indictment alleging that defendant "did possess with intent to sell and deliver a controlled substance, namely more than one (1) ounce of Marijuana" was sufficient to support defendant's conviction of possession of more than one ounce of marijuana. *S. v. Perry*, 309.

An indictment alleging that defendant conspired "to unlawfully, willfully and feloniously did sell and deliver" cocaine charged the offense of conspiracy to sell and deliver cocaine with sufficient clarity to confer subject matter jurisdiction. *S. v. Worthington*, 150.

§ 4. Sufficiency of Evidence

Testimony that white powder weighed 28.15 grams before laboratory analysis was sufficient for the jury to find that the substance weighed 28 grams or more although a small amount was consumed during analysis and the weight of the substance during the trial was less than 28 grams. *S. v. Worthington*, 150.

The evidence presented a jury question as to whether defendant possessed a mixture of cocaine weighing 28 grams or more based on testimony by an SBI chemist that he had combined 3 separate bags of white powder into one bag. *Ibid.*

The evidence was sufficient for the jury to find that two defendants were guilty of conspiracy to traffic in more than 200 grams of cocaine. *Ibid.*

§ 4.2. Sufficiency of Evidence; Defense of Entrapment

Defendant's evidence of entrapment in a prosecution on drug-related charges presented a jury question and did not require dismissal of the charges against defendant. *S. v. Worthington*, 150.

§ 4.7. Instructions as to Lesser Offenses

In a prosecution for the felonies of knowingly and intentionally keeping and maintaining a dwelling house and a vehicle for keeping or selling controlled substances, evidence that the dwelling and the vehicle were not titled in defendant's name did not require the trial court to charge the jury on the misdemeanor offenses of knowingly keeping or maintaining a dwelling house and a vehicle for keeping or selling controlled substances. *S. v. Locklear*, 637.

NEGLIGENCE

§ 35.1. Particular Cases when Evidence Discloses Contributory Negligence as a Matter of Law

Plaintiff's conduct during an altercation with a bar patron constituted contributory negligence which prohibited plaintiff's recovery against the bar owner for negligent operation of the bar in an action to recover for injuries received by plaintiff when he was shot by an unknown assailant immediately after he left the bar following the altercation. *Taylor v. Walker*, 507.

§ 57.4. Sufficiency of Evidence in Actions by Invitees; Falls on Steps

Plaintiff invitee's evidence was sufficient for the jury in an action to recover for injuries sustained when plaintiff fell upon entering defendant's place of business

NEGLIGENCE — Continued

because the concrete block threshold to the building was eight inches higher than the interior floor. *Atwater v. Castlebury*, 512.

§ 57.6. Sufficiency of Evidence in Actions by Invitees; Slippery Floors

Plaintiff's evidence was sufficient for the jury in an action to recover for injuries sustained when plaintiff slipped and fell in some nail polish remover on the floor of defendant's store. *Kennedy v. K-Mart Corp.*, 453.

§ 57.11. Actions by Invitees; Cases Involving Other Injuries when Evidence Is Insufficient

Defendant was not negligent in failing to provide for a crossing guard, warning lights, or other traffic control devices over a city street between its outlet store and a parking lot across the street. *Laumann v. Plakakis*, 131.

§ 59.3. Sufficiency of Evidence in Actions by Licensees

Defendants were not liable for injuries sustained by the minor plaintiff when he was struck by a lawn mower operated by defendants' tenant. *Street v. Moffitt*, 138.

NUISANCE

§ 7. Abatement

Plaintiffs' complaint was insufficient to state a claim for abatement of a nuisance where it merely included a statement of the substantive elements of a nuisance and made a broad assertion to the effect that the location and operation of defendant's business was a nuisance to them. *Hill v. Perkins*, 644.

PARENT AND CHILD

§ 2.2. Child Abuse

Temporary bruisings of a sixteen year old's buttocks caused by whippings with a belt and a switch administered by her father as a means of discipline did not constitute "disfigurement" under G.S. 7A-517(1)a, and a petition alleging that the child was abused was properly dismissed. *In re Mickle*, 559.

PARTNERSHIP

§ 1.1. Formation and Existence of Partnership

An amendment to a limited partnership agreement which removed plaintiff as a co-general partner was invalid where it was neither signed nor sworn to by plaintiff since it was not signed and sworn to by all partnership members. *Wagner v. R, J & S Assoc.*, 555.

PENSIONS

§ 1. Generally

A 1980 amendment to G.S. 143-166(y) which required defendant Board to reduce disability retirement benefits for those retirees who were gainfully employed applied to plaintiff whose retirement became effective 1 September 1981 although plaintiff may have been eligible to retire on disability at an earlier date. *Griffin v. Bd. of Com'rs. of Law Officers' Retirement Fund*, 443.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 15. Malpractice; Competency of Evidence

The trial court in a personal injury action against a hospital did not err in prohibiting any references to a physician's participation as a defendant in the case when the case against him had been settled. *Campbell v. Pitt County Memorial Hosp.*, 314.

PROCESS

§ 3.2. Discontinuance of Action

A summons not served within thirty days and not revived by endorsement or issuance of an alias or pluries summons could not subject defendant to the jurisdiction of the court. *Huggins v. Hallmark Enterprises, Inc.*, 15.

§ 9.1. Personal Service on Nonresident Individuals in another State; Minimum Contacts Test

A nonresident attorney had sufficient contacts with North Carolina to give courts in this state personal jurisdiction over him in an action by an expert witness to recover for services rendered in connection with a lawsuit handled by the lawyer in the District of Columbia. *Gualtieri v. Burleson*, 650.

The trial court had in personam jurisdiction over the Ohio defendant in an action arising out of defendant's failure to honor her promise to deliver cash due under the parties' contract to a horse trainer in North Carolina where defendant failed to raise the defense of lack of personal jurisdiction, made a voluntary appearance in North Carolina to defend the case and filed a counterclaim against plaintiff, and admitted the existence of jurisdiction in her answer. *Harris v. Pembaur*, 666.

§ 12. Service on Domestic Corporations

The court did not obtain jurisdiction over a domestic corporation by substituted service of an alias summons on the Secretary of State where the Secretary of State failed to mail the summons and complaint to the corporation's registered office. *Huggins v. Hallmark Enterprises, Inc.*, 15.

§ 13. Service of Process on Agent of Foreign Corporation

Plaintiffs did not sue the wrong corporation, but merely sought service on the wrong agent, and their complaint was not barred by the statute of limitations by the time an alias and pluries summons issued. *Tyson v. L'eggs Products, Inc.*, 1.

§ 14.3. Service of Process on Foreign Corporation; Sufficiency of Evidence of Minimum Contacts

Defendant nonresident corporation's contacts with North Carolina were insufficient to support the exercise of in personam jurisdiction in an action to recover damages for breach of contract arising out of the sale of office chairs. *Curvcraft, Inc. v. J.C.F. and Assoc., Inc.*, 450.

§ 16. Service on Nonresidents in Actions to Recover for Negligent Operation of Automobile in this State

A summons directed to the Commissioner of Motor Vehicles was sufficient where it was clearly addressed to the Commissioner in his representative capacity as process agent. *Humphrey v. Sinnott*, 263.

Plaintiff sufficiently complied with G.S. 1-105(2) to confer jurisdiction although he used certified rather than registered mail. *Ibid.*

RAPE AND ALLIED OFFENSES

§ 3. Indictment

An indictment drawn in compliance with the requirements of G.S. 15-144.1 was sufficient to support defendant's conviction of second degree rape. *S. v. Walker*, 540.

§ 4.3. Evidence as to Character or Reputation of Prosecutrix; Unchastity

Testimony as to the sexual relationship between the prosecutrix in a rape case and a State's witness was not admissible in order to impeach the prosecutrix or to show bias of the witness. *S. v. Morrison*, 41.

The trial court in a rape case properly refused to allow the prosecutrix's supervisor to testify as to the prosecutrix's reputation in the community for truth and veracity where her opinion was predicated on two incidents involving stealing from retail stores; however, the trial court erred in excluding the witness's personal opinion of the prosecutrix's character for truth and veracity based on personal knowledge gained in the course of her position as the prosecutrix's supervisor. *Ibid.*

§ 5. Sufficiency of Evidence

The evidence was sufficient to support defendant's conviction of attempted second degree rape. *S. v. Morrison*, 41.

In a prosecution for rape and kidnapping, the restraint of the victim was not an element of the crime of rape and defendant could properly be convicted of both crimes. *S. v. Walker*, 540.

Since rape was used to raise kidnapping to first degree in this case, the conviction of defendant for both second degree rape and first degree kidnapping violated the prohibition against double jeopardy. *Ibid.*

§ 7. Sentence and Punishment

The age of the victim may not be considered as an aggravating factor in sentencing a defendant for first degree rape of a child under the age of thirteen but may be considered as a nonstatutory aggravating factor in sentencing for second degree rape of such a child. *S. v. Vanstory*, 535.

§ 19. Taking Indecent Liberties with Child

The evidence was sufficient to warrant the inference that defendant willfully took or attempted to take an indecent liberty with a child for the purpose of arousing or gratifying his sexual desires. *S. v. Bowman*, 238.

The trial court in a prosecution for taking indecent liberties with a minor did not err in admitting testimony by the victim's pediatrician that a delay between the occurrence of an incidence of child sexual abuse and the child's revelation of the incident was the usual pattern. *Ibid.*

The trial court in a prosecution for taking indecent liberties with a minor committed prejudicial error in admitting testimony by a police officer that a child of the victim's age did not have the necessary information about sexuality to fantasize where the officer had not been qualified as an expert. *Ibid.*

RECEIVING STOLEN GOODS

§ 2. Indictment

An indictment charging defendant with receiving stolen goods met the requirements of G.S. 15A-924. *S. v. Gardner*, 616.

RECEIVING STOLEN GOODS — Continued

An indictment was not fatally flawed because it alleged that the receipt of stolen goods took place in Guilford County when the receipt actually occurred in Davidson County. *Ibid.*

ROBBERY

§ 4.7. Insufficiency of Evidence

The evidence was insufficient to support defendant's conviction of armed robbery where it did not place defendant at or near the crime scene when the crime was committed. *S. v. Griffin*, 671.

RULES OF CIVIL PROCEDURE

§ 4. Process

Sara Lee Corporation was adequately served with sufficient legal process under its assumed name, "L'eggs Products, Inc." *Tyson v. L'eggs Products, Inc.*, 1.

A deputy's testimony and two returns of service supported the trial court's finding that defendant resided at a given address with his brother on the dates that process was left there and that the brother was a person of suitable age and discretion to accept service. *Olschesky v. Houston*, 415.

Omission of the "Jr." in defendant's name in the titles of the complaints would not deprive the court of jurisdiction. *Ibid.*

§ 8.1. Complaint

The trial court did not abuse its discretion by dismissing plaintiff's legal malpractice action without prejudice rather than with prejudice because plaintiff's complaint stated specifically the amount of compensatory and punitive damages sought. *Miller v. Ferree*, 135.

§ 10. Form of Pleadings

A separation agreement was for all purposes a part of the complaint, was not a matter outside the pleadings, and did not meet the requirements of G.S. 52-10.2 in that a notarized acknowledgment was not affixed to the agreement. *Lawson v. Lawson*, 51.

§ 12. Defenses

By moving for a discretionary change of venue without first or simultaneously asserting his Rule 12(b) defenses relating to jurisdiction and process, defendant made a general appearance and voluntarily submitted himself to the jurisdiction of the court. *Humphrey v. Sinnott*, 263.

§ 17. Parties Plaintiff and Defendant; Capacity

A superior court judge erred by finding that plaintiff was competent and did not have to be examined by a psychiatrist where another superior court judge had previously found that a substantial question existed as to plaintiff's competency, ordered that plaintiff be examined by a psychiatrist, and ordered that a hearing be held on whether plaintiff was competent to proceed without a guardian. *Sheppard v. Community Fed. Sav. and Loan*, 257.

§ 49. Verdicts

Defendants waived their right to appeal on the ground that an issue submitted to the jury was erroneous where they failed to object at the time it was submitted. *Barnett v. Security Ins. Co. of Hartford*, 376.

RULES OF CIVIL PROCEDURE — Continued

§ 59. New Trials

The trial court erred in granting defendants' conditional motion for a new trial "for errors committed by the court during the course of the trial" where the court did not specify the errors. *Barnett v. Security Ins. Co. of Hartford,* 376.

The trial court did not abuse its discretion in refusing to set aside the jury's verdict as to the amount plaintiff father was entitled to recover in an action against a hospital to recover damages resulting from a brain injury suffered by plaintiffs' child during a footling breech birth where the parties consented to a remittitur of $1,000,000, which reduced the award to $646,000. *Campbell v. Pitt County Memorial Hosp.,* 314.

The trial court did not err in setting aside as excessive a verdict for the minor plaintiff of $4,850,000 for a brain injury suffered during a footling breech birth in defendant hospital. *Ibid.*

§ 60.1. Relief from Judgment or Order; Timeliness of Motion

Defendants were entitled to no relief from default judgments under Rule 60(b)(1) where the motions for relief were filed more than a year after the judgments were entered. *Huggins v. Hallmark Enterprises, Inc.,* 15.

§ 60.2. Grounds for Relief from Judgment

One corporate defendant was entitled to relief from a default judgment under Rule 60(b)(4) on the ground that the judgment was void where service of process over such defendant was defective, but the second corporate defendant was not entitled to such relief. *Huggins v. Hallmark Enterprises, Inc.,* 15.

The trial court did not abuse its discretion in refusing to set aside default judgments against two corporations under Rule 60(b)(6) for "any other reason justifying relief." *Ibid.*

SAFECRACKING

§ 5. Sentencing

Punishment for safecracking and larceny did not violate double jeopardy. *S. v. Strohauer,* 68.

SALES

§ 5. Express Warranties

Plaintiff's evidence was sufficient to support claims for breach of express and implied warranties in defendant's sale of "sick wheat" to plaintiff. *Davis Realty, Inc. v. Wakelon Agri-Products, Inc.,* 97.

SCHOOLS

§ 4. Boards of Education

A juvenile court could enter an order directed to a county school board, although the school board was not formally made a party to the proceeding. *In re Jackson,* 167.

§ 10. Assignment and Supervision of Pupils

The public school system has no obligation to provide an alternative educational program for students suspended for misconduct. *In re Jackson,* 167.

TAXATION — Continued

§ 25.9. Ad Valorem Taxes; Proceedings; County Boards of Equalization and Review

The Property Tax Commission did not err by refusing to impose on the county the burden of proving its legal authority to conduct a reappraisal where there was a clerical error in the original appraisal. *In the Matter of Appeal of Butler*, 213.

A reappraisal of property for ad valorem taxation was lawful where a clerical error in the original appraisal caused an undervaluation. *Ibid.*

TRESPASS

§ 7. Sufficiency of Evidence

The trial court erred in entering summary judgment for defendants in plaintiffs' action for the wrongful cutting and removal of timber from lands owned by plaintiffs. *Andrews v. Davenport*, 675.

TRIAL

§ 3. Motions for Continuance

The trial court did not err in denying defendant's motion to continue a child custody hearing because she had no counsel where defendant had ample notice before the hearing that her counsel was withdrawing. *Teague v. Teague*, 545.

§ 3.2. Motions for Continuance; Particular Grounds

The trial court did not err in failing to grant defendant's motions for continuance to give its counsel time to prepare for trial because plaintiffs first informed defendant one month before trial that 23 people would be expert witnesses for plaintiffs at trial. *Campbell v. Pitt County Memorial Hosp.*, 314.

UNFAIR COMPETITION

§ 1. Unfair Trade Practices in General

A covenant not to compete could not constitute an unfair trade practice. *The American Marble Corp. v. Crawford*, 86.

The trial court erred in dismissing plaintiff's claim for an unfair and deceptive trade practice in an action arising out of defendant's agreement to repair plaintiff's car. *Webb v. Triad Appraisal and Adjustment Service, Inc.*, 446.

Failure to allege more than a single refusal by defendant insurance company to settle a claim is fatal to a cause of action under G.S. 58-54.4(11) for unfair and deceptive trade practices. *Marshburn v. Associated Indemnity Corp.*, 365.

Defendant insurer's investigation and denial of plaintiffs' claim under a homeowners insurance policy did not constitute an unfair trade practice under G.S. 75-1.1. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 28. Commercial Paper; Definitions; Execution

Where a promissory note provided that plaintiff would pay $14,000 at an interest rate of 12% per annum on the unpaid balance until paid, and the note also provided that principal and interest were payable in 84 equal monthly installments of $306.67 until paid in full, the terms of the note were conflicting, and the words "until paid in full" controlled over the number "84." *Smith v. Rushing Construction Co.*, 692.

UNIFORM COMMERCIAL CODE — Continued

§ 36. Collection of Checks

The trial court properly granted summary judgment for defendant savings bank in an action to recover the proceeds of several joint checks written pursuant to a construction loan agreement, delivered to someone other than plaintiff contractor, and paid on allegedly forged endorsements. *Cartwood Construction Co. v. Wachovia Bank and Trust Co.*, 245.

In an action against a depository bank for the conversion of checks paid upon allegedly forged endorsements, the trial court erred in granting summary judgment for the bank where it was undisputed that the checks were made in part to plaintiff, that plaintiff did not endorse the checks, and that the checks were deposited with the bank. *Ibid.*

The trial court erred in granting summary judgment for defendant bank in a conversion action where plaintiff's evidence that the bank paid the checks on forged endorsements established a prima facie case of conversion. *Ibid.*

The trial court properly entered summary judgment for defendant bank in an action to recover the amount of a check which plaintiff contended was endorsed without authorization by a third party defendant and was wrongfully honored by defendant bank where plaintiff suffered no loss because of defendant bank's actions with regard to the check. *W. S. Clark & Sons, Inc. v. Union National Bank*, 686.

UTILITIES COMMISSION

§ 38. Establishment of Rate Base; Current and Operating Expenses

The statute which authorizes the Utilities Commission to consider the actual recovery of fuel costs incurred during the test period does not authorize a "true-up" system and the Utilities Commission exceeded its authority by allowing CP&L to recoup past under-recoveries of fuel costs. *State ex rel. Utilities Comm. v. Thornburg*, 482.

WILLS

§ 9.2. Probate; Conclusiveness of Judgment or Decree; Collateral Attack

Because the trial judge refrained from entering a final judgment regarding decedent's purported 1983 will, no entry upon the page of the will book setting aside the 1983 will could have been made, and the subsequent probate of decedent's purported 1982 will constituted an impermissible collateral attack. *In re Will of Hester*, 585.

§ 16. Caveat; Parties; Contestants

The trial court did not err in failing to dismiss a caveat proceeding due to the caveators' failure to give notice of the proceeding to several first cousins of deceased as required by G.S. 31-33. *In re Will of Hester*, 585.

The trial court did not err in failing to dismiss a caveat proceeding at the close of the first phase of the trial on the ground that the caveators did not prove that they were persons who were interested in the estate. *Ibid.*

§ 22.5. Mental Capacity; Statements by Testator

An executor is not a person interested in the event of a caveat proceeding within the meaning of the dead man's statute so as to require exclusion of his testimony concerning communications with the testator. *In re Will of Hester*, 585.

WILLS — Continued

§ 24. Caveat; Trial; Issues and Verdict

The trial court abused its discretion by failing simultaneously to present issues to the jury on all three scripts purporting to be decedent's will and in conducting a bifurcated trial in which one script was rejected as decedent's will during one phase of the trial before two other scripts were considered in the second phase of the trial. *In re Will of Hester*, 585.

WORD AND PHRASE INDEX

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